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NON-GOVERNMENTAL ORGANISATIONS: REVIEW OF DEVELOPMENTS IN STANDARDS, MECHANISMS AND CASE LAW 2013-2015

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FOREWORD

The Expert Council on NGO Law, a major organ of the Conference of INGOs of the Council of Europe has as a principal mandate to foster and work towards the creation of an enabling environment for NGOs throughout Europe. This enabling environment is integral to, and contributes to, the application of the Rule of Law and a flourishing culture of democracy. In a number of countries these essential practices are under attack by authoritarian regimes, which means that citizens' intrinsic rights are too often under threat.

In these circumstances it becomes ever more important to continue to shed light on significant developments in standards, mechanisms and case law that affect the functioning of non-governmental organizations and that provide channels for remedying or rolling back some of the attacks and threats. The Expert Council on NGO Law thus herewith presents its third Review of such developments. The Review gathers together the material governments and NGOs can use in order to reverse negative trends and to attain ever-higher standards in the writing and implementation of legislation relating to the non-governmental sector.

The wealth of legal citation and analysis brought together in this Review is testimony to the extensive expertise and insights displayed by the lead author, Jeremy McBride, to whom I express deep appreciation. Basic texts and illustrative examples are drawn not only from the European Convention on Human Rights and Fundamental Freedoms and the respective European Court, but from the European Commission on Democracy through Law (the Venice Commission), the Council of Europe Commissioner for Human Rights, the OSCE Office for Democratic Institutions and Human Rights, several United Nations human rights structures and mechanisms, and others.

I recommend the Review to the attention of government officials across many national Ministries. The Review is as well relevant to local authorities, to judicial and academic circles, and not least to NGO activists and human rights defenders whose causes - the protection and promotion of citizens' rights - should be the daily duty of those same government officials.

Cyril Ritchie, President, Expert Council on NGO Law

EXECUTIVE SUMMARY

This review covers many developments of note relating to non-governmental organisations that are relevant to the mandate of the Expert Council between 30 September 2013 and 31 October 2015. It deals with a wide range of issues relating to standards, the work of various mechanisms and case law.

The developments relating to standards involve not only the important rehearsal and elaboration of some basic principles relating to the right to freedom of association but also the reinforcement of those applicable to certain forms of non-governmental organisations, as well as the giving of recognition for the contributions made by civil society and for the need both to secure civil society space and to promote participation.

The issues addressed by the mechanisms are concerned primarily with the implementation of human rights commitments but they have also concerned the contribution of civil society. In addition, they but also include ones relating to the establishment of an enabling environment, the protection of human rights defenders, the relationship with multilateral institutions, the safeguarding of collective bargaining, the position of refugees, prohibiting racist organisations and ones directed to certain countries.

The case law developments have been concerned with the formation of associations and then various issues relating to membership of them, their internal organisation, the according to them of certain privileges and status, the exercise of the rights of collective bargaining and strikes, the subjecting of them to harassment, the imposition on them of various sanctions and the taking of action leading to their dissolution.

The review shows that the situation of non-governmental organisations continues to generate considerable activity in terms of standard-setting, the functioning of various supervisory and other mechanisms and in regional courts and tribunals. This noted to be both an endorsement of the immensely valuable role that non-governmental organisations continue to play but also a reflection of the various pressures to which they continue to be subject. Thus, continued efforts to ensure the effective implementation of all the standards elaborated clearly remains vital.

A. INTRODUCTION

1. There have been many developments of note relating to non-governmental organisations that are relevant to the mandate of the Expert Council on NGO Law between 30 September 2013 and 31 October 2015, the respective cut-off dates for the previous and present reviews. The principal ones – which deal with standards, the work of various mechanisms and case law covering a very wide range of issues - are summarised in the paragraphs that follow.

B. STANDARDS

2. The developments start with the rehearsal and elaboration of some basic principles relating to the right to freedom of association, which is of fundamental importance for the functioning of non-governmental organisations, before focusing on the standards applicable in the case of certain forms of non-governmental organisations and then providing recognition for certain contributions that can be made by them as civil society and underlining the need both to secure civil society space and to promote participation.

Basic principles

3. The European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights adopted in 2014 joint *Guidelines on Freedom of Association*, comprising an introduction, a section that introduces the definition of associations, their importance and fundamental rights and the need for well drafted legislation in this regard, a second section that outlines the guiding principles of the right to freedom of association and a third one that contains interpretative notes with respect to those guiding principles. It is intended that all three sections should be read together, with the interpretative notes constituting an integral part of the guiding principles.

4. There are eleven guiding principles, namely,

1. Presumption in favour of the lawful formation, objectives and activities of associations
2. The state's duty to respect, protect and facilitate the exercise of the right to freedom of association
3. Freedom of establishment and membership
4. Freedom to determine objectives and activities, including the scope of operations
5. Equal treatment and non-discrimination
6. Freedom of expression and opinion
7. Freedom to seek, receive and use resources
8. Good administration of legislation, policies and practices concerning associations
9. Legality and legitimacy of restrictions
10. Proportionality of restrictions
11. Right to an effective remedy for the violation of rights

5. The *Guidelines* are based on existing international standards and practice, including Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe. However, their value is enhanced by having been further informed by a review of international and

domestic practice conducted by experts during the drafting process. Furthermore, the interpretative principles dealing with resources provide much deeper analysis of an issue that has only recently become especially problematic.

6. The primary aim of the *Guidelines* is to ensure that legislation is drafted with the purpose of promoting the establishment and existence of associations, enabling their operation and facilitating their aims and activities. However, they are also intended to serve public authorities, the judiciary, legal practitioners, academics and others concerned with the exercise of the right to freedom of association, including associations, their members, human rights defenders and the general public.

7. As with other Guidelines jointly adopted by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, those on freedom of association are intended to be a living instrument that adapts to changing circumstances and so will be developed in the coming years in the light of input by their users.

Specific forms of associations

8. The *Guidelines on Freedom of Association* are complemented by additional ones adopted in 2014 by both bodies and by just the OSCE Office for Democratic Institutions and Human Rights on, respectively, the *Legal Personality of Religious or Belief Communities*[1] and on the *Protection of Human Rights Defenders*[2]. Both these sets of Guidelines have a similar format and aim to those on *Freedom of Association*[3].

9. In the present context, the most relevant element of the *Guidelines on Legal Personality of Religious or Belief Communities* is Part III, which deals with religious or belief organisations[4]. The key points in this part – which are illustrated by national practice and supporting case law and other relevant material - are the stipulations that:

> - regardless of the method chosen to implement the obligation to ensure voluntary access to legal personality for religious or belief communities, states must ensure that the national legal framework in place for doing so complies with the international human rights instruments to which they are parties and with their other international commitments. States must also ensure that gaining access to legal personality should not be more difficult for religious or belief communities than it is for other types of groups or communities;
> - the right to legal personality status is vital to the full realization of the right to freedom of religion or belief. A number of key aspects of organized community life in this area become impossible or extremely difficult without access to legal personality. These include having bank accounts and ensuring judicial protection of the community, its members and its assets; maintaining the continuity of ownership of religious edifices; the construction of new religious edifices; establishing and operating schools and institutes of higher learning; facilitating larger-scale production of items used in religious customs and rites; the employment of staff; and the establishment and running of media operations;

[1] CDL-AD(2014)023, 16 June 2014.
[2] Warsaw, 2014.
[3] The latter are also complemented by the *Guidelines on Political Party Regulation* (CDL-AD92010)024, 25 October 2010) and the *Guidelines for Review of Legislation Pertaining to Religion or Belief* (CDL-AD(2004)028, 19 July 2004).
[4] The other parts deal with the freedom of religion or belief and permissible restrictions in general; the freedom to manifest religion or belief in community with others; and privileges of religious or belief communities or organizations.

- the choice of whether or not to register with the state may itself be a religious one, and the enjoyment of the right to freedom of religion or belief must not depend on whether a group has sought and acquired legal personality status;
- religious or belief organizations must be able to exercise the full range of religious activities and activities normally exercised by registered non-governmental legal entities;
- considering that a wide variety of legal acts may be performed only by actors recognized as legal persons, access to legal personality for religious or belief communities should be quick, transparent, fair, inclusive and non-discriminatory;
- any procedure that provides religious or belief communities with access to legal personality status should not set burdensome require … Also, religious or belief communities interested in obtaining legal personality status should not be confronted with unnecessary bureaucratic burdens or with lengthy or unpredictable waiting periods. Should the legal system for the acquisition of legal personality require certain registration-related documents, these documents should be issued by the authorities;
- the process of obtaining legal personality status should be open to as many communities as possible, without excluding any community on the grounds that it is not a traditional or recognized religion or through excessively narrow interpretations or definitions of religion or belief;
- legislation should not make obtaining legal personality contingent on a religious or belief community having an excessive minimum number of members;
- legislation should not necessitate a lengthy existence in the country as a requirement for access to legal personality. Such a requirement has the effect of unnecessarily restricting the rights of religious or belief communities that may be new to a particular state;
- legislation should not deny access to legal personality status to religious or belief communities on the grounds that some of the founding members of the community in question are foreign or non-citizens, or that its headquarters are located abroad;
- the legal personality status of any religious or belief community should not be made dependent on the approval or positive advice of other religious or belief communities, as the legal personality status of a particular religious or belief community is not a matter for other religious or belief communities;
- the state must respect the autonomy of religious or belief communities when fulfilling its obligation to provide them with access to legal personality. In the regime that governs access to legal personality, states should observe their obligations by ensuring that national law leaves it to the religious or belief community itself to decide on its leadership, its internal rules, the substantive content of its beliefs, the structure of the community and methods of appointment of the clergy and its name and other symbols. In particular, the state should refrain from a substantive as opposed to a formal review of the statute and character of a religious organization. Considering the wide range of different organizational forms that religious or belief communities may adopt in practice, a high degree of flexibility in national law is required in this area;
- a decision to deny or withdraw the legal personality status of any religious or belief organization must be justified under the strict criteria described in Part I. Decisions to deny access to legal personality to a religious or belief community, or to withdraw it, should state the reasons for doing so. These reasons should be specific and clear. This also facilitates the right to appeal;
- considering the wide-ranging and significant consequences that withdrawing the legal personality status of a religious or belief organization will have on its status, funding and activities, any decision to do so should be a matter of last resort. In case of grave and repeated violations endangering public order, such measures may be appropriate, if no other sanctions can be applied effectively, but only when all the conditions described in Part I of these guidelines are fulfilled. Otherwise the principles of proportionality and subsidiarity as a rule would be violated. In order to be able to comply with these principles, legislation should contain a range of various lighter sanctions, such as a warning, a fine or withdrawal of tax benefits, which – depending on the seriousness of the offence – should be applied before the withdrawal of legal personality is contemplated;
- the withdrawal of legal personality from a religious or belief *organization* should not in any way imply that the religious or belief *community* in question, or its individual members, no longer enjoy the protection of their freedom of religion or belief or other human rights and fundamental freedoms;

> - overall, it should be possible to secure an effective remedy at the national level for a decision not to recognize, or to withdraw, the legal personality of a religious or belief community that has an arguable claim to such a status; and
> in cases where new provisions to the system governing access to legal personality of religious or belief communities are introduced, adequate transition rules should guarantee the rights of existing communities[5].

10. These reflect the general standards applicable to associations but frame them in a manner which takes account of the specificity of ones focused on religion and belief.

11. The *Guidelines on the Protection of Human Rights Defenders* start from the premise that the right to defend human rights is a universally recognised right. This is correct but, as it is not one always respected in practice, the need for these *Guidelines* is clear.

12. Thus, the *Guidelines* proceed to define or elaborate what are such defenders, their vital role in democratic societies, the need for their protection, the nature of State obligations and the importance of a safe and enabling environment to empower human rights work.

13. They then set out certain general principles underpinning the protection of human rights defenders:

> - recognition of the international dimension of the protection of human rights defenders;
> - accountability of non-state actors;
> - equality and non-discrimination;
> - conducive legal, administrative and institutional framework; and
> - legality, necessity and proportionality of limitations on fundamental rights in connection with human rights work

before elaborating on the issues relevant to their physical integrity, liberty and dignity

> A. Protection from threats, attacks and other abuses
> - impunity and effective remedies
> - protection policies, programmes and mechanisms
> B. Protection from judicial harassment, criminalization, arbitrary arrest and detention
> - criminalization and arbitrary and abusive application of legislation
> - arbitrary detention and treatment in detention
> - fair trial
> C. Confronting stigmatization and marginalization

then specifying the requirements for a safe and enabling environment conducive to human rights work

> D. Freedom of opinion and expression and of information
> - access to information of public interest and whistleblowers
> - freedom of the media
> E. Freedom of peaceful assembly
> F. Freedom of association and the right to form, join and participate effectively in NGOs
> - laws, administrative procedures and requirements governing the operation of NGOs
> - access to funding and resources
> G. The right to participate in public affairs
> H. Freedom of movement and human rights work within and across borders
> I. Right to private life
> J. Right to access and communicate with international bodies

[5] Footnotes have been omitted.

and setting out the framework for the implementation of the Guidelines

- national implementation
- protection of human rights defenders in other OSCE participating States and third countries
- international co-operation and human rights mechanisms and
- the OSCE.

14. The elaboration provided in the *Guidelines* on all these issues should facilitate an understanding of how to ensure that human rights defenders can perform their important role without hindrance.

Recognising the contribution of civil society

15. In various resolutions, the Human Rights Council has drawn attention to the particular contribution that civil society can make to advancing important goals. In particular, it:

> *Acknowledges* that the active participation of civil society can reinforce ongoing governmental efforts to protect human rights and fundamental freedoms while countering terrorism[6]

> *Reaffirms* the Social Forum as a unique space for interactive dialogue between the United Nations human rights machinery and various stakeholders, including the contribution of civil society and grass-roots organizations, and stresses the need to ensure greater participation of grass-roots organizations and of those living in poverty, particularly women, especially from developing countries, in the sessions of the Forum[7]

and

> *Recommends* that States integrate into their national policies a human rights perspective aimed at the promotion, protection and full realization of human rights and fundamental freedoms, and take into consideration civil society views in the process[8].

Securing space for civil society

16. The Human Rights Council has continued its focus on the importance of civil society space in its resolution, *Civil society space*, in which it:

> 2. *Reminds* States of their obligation to respect and fully protect the civil, political, economic, social and cultural rights of all individuals, inter alia, the rights to freedom of expression and opinion and to assemble peacefully and associate freely, online as well as offline, including for persons espousing minority or dissenting views or beliefs, and that respect for all such rights, in relation to civil society, contributes to addressing and resolving challenges and issues that are important to society, such as addressing financial and economic crises, responding to public health crises, responding to humanitarian crises, including in the context of armed conflict, promoting the rule of law and accountability, achieving transitional justice goals, protecting the environment, realizing the right to development, empowering persons belonging to minorities and vulnerable groups, combating racism and racial discrimination, supporting crime prevention, countering corruption, promoting corporate social responsibility and accountability, combating human trafficking, empowering women and youth, advancing social justice and consumer protection, and the realization of all human rights;

[6] *Protection of human rights and fundamental freedoms while countering terrorism*, resolution 29/9 of 2 July 2015, para. 11.
[7] *The Social Forum*, resolution 29/19 of 2 July 2015, para. 3.
[8] *National policies and human rights*, resolution 30/24 of 2 October 2015, para. 6.

3. *Urges* States to create and maintain, in law and in practice, a safe and enabling environment in which civil society can operate free from hindrance and insecurity;
4. *Emphasizes* the importance of civil society space for empowering persons belonging to minorities and vulnerable groups, as well as persons espousing minority or dissenting views or beliefs, and in that regard calls upon States to ensure that legislation, policies and practices do not undermine the enjoyment of their human rights or the activities of civil society in defending their rights;
5. *Also emphasizes* the important role of artistic expression and creativity in the development of society and, accordingly, the importance of a safe and enabling environment for civil society in that regard, in line with article 19 of the International Covenant on Civil and Political Rights;
6. *Urges* States to acknowledge publicly the important and legitimate role of civil society in the promotion of human rights, democracy and the rule of law;
7. *Also urges* States to engage with civil society to enable it to participate in the public debate on decisions that would contribute to the promotion and protection of human rights and the rule of law, and of any other relevant decisions;
8. *Stresses in particular* the valuable contribution of civil society in providing input to States on the potential implications of legislation, when such legislation is being developed, debated, implemented or reviewed;
9. *Urges* States to ensure access to justice, accountability and end impunity for human rights violations and abuses against civil society actors, including by putting in place, and where necessary reviewing and amending, relevant laws, policies, institutions and mechanisms to create and maintain a safe and enabling environment in which civil society can operate free from hindrance and insecurity;
10. *Calls upon* States to ensure that provisions on funding to civil society are in compliance with their international human rights obligations and commitments and are not misused to hinder the work or endanger the safety of civil society actors, and underlines the importance of the right and ability to solicit, receive and utilize resources for its work;
11. *Urges* all non-State actors to respect all human rights and not to undermine the capacity of civil society to operate free from hindrance and insecurity;
12. *Emphasizes* the essential role of civil society in subregional, regional and international organizations, including in support of the organizations' work, and in sharing experience and expertise through effective participation in meetings in accordance with relevant rules and modalities, and in this regard reaffirms the right of everyone, individually and in association with others, to unhindered access to and communication with subregional, regional and international bodies, in particular the United Nations, its representatives and mechanisms[9].

Promoting participation

17. Both the Human Rights Council and the OSCE's 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association have addressed the issue of public participation, one of considerable importance for many non-governmental organisations.

18. The Human Rights Council did so in its resolution, *Equal participation in political and public affairs*. In this resolution the Human Rights Council:

> *Urges* all States to ensure the full, effective and equal participation of all citizens in political and public affairs, including by, inter alia:
> (*a*) Complying fully with their international human rights law obligations and commitments with regard to participation in political and public affairs, including by reflecting them in their national legislative framework;
> (*b*) Considering signing and ratifying or acceding to the International Covenant on Civil and Political Rights and other core international human rights treaties;

[9] Resolution 27/31 of 26 September 2014.

(*c*) Taking all necessary measures to eliminate laws, regulations and practices that discriminate, directly or indirectly, against citizens in their right to participate in public affairs on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or on the basis of disability;
(*d*) Taking proactive measures to eliminate all barriers in law and in practice that prevent or hinder citizens, in particular women, persons belonging to marginalized groups or minorities, persons with disabilities and persons in vulnerable situations, from participating fully and effectively in political and public affairs, including, inter alia, reviewing and repealing measures that unreasonably restrict the right to participate in public affairs, and considering adopting, on the basis of reliable data on participation, temporary special measures, including legislative acts, aimed at increasing the participation of underrepresented groups in all aspects of political and public life;
(*e*) Taking appropriate measures to encourage publicly and promote the importance of participation of all citizens in political and public affairs, in particular women, persons belonging to marginalized groups or to minorities, and persons in vulnerable situations, including by engaging them in designing, evaluating and reviewing policies and legislation on participation in political and public affairs;
(*f*) Developing and disseminating information and educational materials on the political process and relevant international human rights law provisions to facilitate equal participation in political and public affairs;
(*g*) Taking steps to promote and protect the voting rights of all those entitled to vote without any discrimination, including facilitation of voter registration and participation and the provision of electoral information and voting papers in a range of accessible formats and languages, as appropriate;
(*h*) Exploring new forms of participation and opportunities brought about by new information and communications technologies and social media as a means to improve and widen, online and offline, the exercise of the right to participate in public affairs, and other rights directly supporting and enabling it;
(i) Ensuring the rights of everyone to freedom of expression, peaceful assembly and freedom of association, education and development, and facilitating equal and effective access to information, media and communication technologies in order to enable pluralistic debates fostering inclusive and effective participation in political and public affairs;
(*j*) Creating a safe and enabling environment for human rights defenders and civil society organizations that, together with other actors, play a key role in the effective promotion and protection of all human rights;
(*k*) Providing full and effective access to justice and redress mechanisms to those citizens whose right to participate in public affairs has been violated, including by developing effective, independent and pluralistic national human rights institutions, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles)[10].

19. The issue of enhancing the participation of non-governmental organisations in public decision-making processes was also addressed in recommendations adopted at the OSCE's 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association[11].

20. These start by setting out the basic conditions that should exist for enhancing the participation of non-governmental organisations in public decision-making processes, which are marked by:

> a. continuous and genuine efforts to create and maintain a true enabling environment for civil society organizations, free from corruption, allowing civil society to operate and participate freely and actively in public decision-making processes, including policy and law-making; such efforts should ensure that civil society enjoys the right to participate in public affairs,

[10] Resolution 30/9 of 1 October 2015.
[11] *Recommendations on enhancing the participation of associations in public decision-making processes from the participants to the civil society forum organized on the margins of the 2015 Supplementary Human Dimension meeting on freedoms of peaceful assembly and association*, Vienna, 15-16 (morning) April 2015.

including debates, to engage in advocacy on behalf of their beneficiaries and to monitor public institutions and offices, including in the context of elections;
b. respect for the rule of law and the fulfilment of other human rights and fundamental freedoms, including civil, political, economic, social and cultural rights, particularly the full and equal guarantee of the rights to freedoms of association and of peaceful assembly, freedom of expression (including freedom, independence and pluralism of the media and the right of access to information), and right to effective remedies;
c. the political will to facilitate and provide opportunities for the participation of associations, irrespective of their legal status, in public decision-making processes at all levels (local, national, regional and international) and at all stages (from the planning and policy stage until the time when decisions are implemented, monitored and evaluated);
d. a positive attitude of public authorities to encourage, support, and value civil society contributions to public debate, including critical voices and dissenting view;
e. a culture of dialogue between decision-makers/public authorities and civil society which could ultimately lead to building mutual trust;
f. the capacity of both the state administration/government and of associations to engage in meaningful debate, with the caveat that lack of capacity of associations should not pose a barrier or be used as an excuse for not opening public decision-making processes to them;
g. a free, independent, and active civil society with the capacity to develop and grow, particularly through the provision of and access to resources (financial, human and technological), including foreign and international resources – subject only to limitations in accordance with relevant international standards; and
h. free access by all associations and individuals to regional and international human rights mechanisms, and ability to freely co-operate and communicate with such mechanisms, without fear of reprisals.

21. This is followed by four particular elements. Firstly, three sets of principles of participation in decision-making processes, including policy and law making, namely, transparency, impartiality, openness and accessibility, accountability and efficiency; non-discrimination, equal treatment and inclusiveness; and independence of associations. Secondly, the requirements for a supportive policy and regulatory framework for public participation. Thirdly, the requirements for enhancing the participation in public decision-making processes, namely, access to information; monitoring; and building a culture of participation. Fourthly, some specific recommendations to OSCE participating states and OSCE institutions[12].

22. Echoing the minimum standards set out in the Council of Europe's Code of Good Practice for Civil Participation in the Decision-Making Process (2009) as well as in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention'), a supportive policy and regulatory framework for public participation was seen as one in which

[12] "34. OSCE participating States should implement the recommendations contained in the "Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes" prepared by the participants to the Civil Society Forum held on 15-16 April 2015 in Vienna; 35. The OSCE should assess and provide an overview of consultation processes in OSCE participating States, including the legal basis/soft laws and legislation on freedom of association, as well as state practices; 36. The OSCE should develop, or contribute to efforts of other international organisations to develop guidelines for the effective participation of associations in public decision-making processes that would highlight what is generally acceptable as good practice in selected OSCE participating States; 37. OSCE/ODIHR should develop an international public participation index/ranking of States and put in place a respective monitoring system; 38. In countries where there are OSCE field offices or where the OSCE implements certain project/programmes directly, the involvement of civil society actors should be a guiding principle and the OSCE should involve such actors at all stages of project/programme, from planning to implementation, followed by monitoring and evaluation; 39. International organizations, including the OSCE, should ensure continuity and consistency in the manner in which they provide support in order to reach sustainable results in the area of public participation in decision-making processes; 40. OSCE participating States should be responsible for ensuring the participation of associations in public decision-making processes."

States developed binding and unified standards on effective public participation/consultation in public-decision making processes that provided for:

Scope: participation/consultation of any public initiative which has a potential impact on third parties, whether it is initiated by government bodies, parliament, individual MPs, or other public entities;
b. Access to information: free and timely access of the public to any document/draft law/legislation under development and related background information; and responsiveness on the side of relevant authorities to any request for additional information (see also Part III.1 on Access to Information);
c. Allocation of appropriate funding by the States to ensure the inclusiveness of public decision-making processes and that participation does not impose an undue financial burden on the participants;
d. Timeliness: setting out a clear and reasonable minimum timeline for public participation/consultation that will involve associations as early as possible in the process and provide associations with sufficient time to prepare, discuss and submit recommendations on draft policies and draft legislative acts;
e. Feedback mechanism: a legal obligation and a mechanism whereby decision-makers shall report back to those involved in consultations, including the public, by providing, in due time, meaningful and qualitative feedback on the outcome of every public consultation, including clear justifications for including or not including certain comments/proposals;
f. Consequences for the failure to comply with laws requiring the organization of public consultations on drafts of policies, legislation, or other decisions (see Recommendation 20);
g. The obligation of public authorities to conduct a self-assessment on compliance with such binding standards on effective public participation/consultation and to report on the results to the public on a regular basis;

23. In addition it was recommended that there should be:

17. Early and inclusive consultations on the regulatory framework on public consultation-related matters should be organized before and during the process of drafting such a framework, to avoid over-regulation in this field;
18. Regulatory frameworks should not be burdensome for the public and associations and should focus on creating opportunities for participation, not restricting them;
19. On the modalities of participation:
- there should be some balance between consultations with experts and wider public consultations;
- where expert working groups are formed, similar (and publicly known) selection criteria and requirements in terms of competence and expertise should be applied to government representatives and civil society representatives, and all members of the working group should be subject to the same working conditions and guaranteed an equal voice;
- the working group should have a clear mandate and publish its results;
- the state body establishing the working group should guarantee associations sufficient representation within the working group;
- a coordinating body should be put in place to ensure that the consultations are carried out in a consistent manner by all state bodies;
- coordinators of public consultations should be appointed in all state bodies in order to ensure that good practices are well understood and harmonized across state bodies and that legal standards for public participation are implemented in practice;
20. In cases where legislation, decisions or other public acts were adopted without complying with binding standards on public participation:
- procedures should be in place whereby such legislation, decisions or public acts can be challenged before judicial bodies or other designated independent bodies, by interested individuals and associations; or, at a minimum, a mechanism for referring back the proposed draft document to the drafters for lack of public consultation should be provided;
- government officials and other representatives of the State shall be held liable for violating legal obligations to ensure participatory processes in public decision-making processes.
21. The law should clearly define and limit the number of instances when "emergency" or "expedited" procedures for the adoption of legislation, decisions or other public acts can be applied, in order not to use such procedures to circumvent the requirement for public

> consultation; a mechanism should be in place to ensure that any legislation, decisions or other public acts adopted through "emergency" or "expedited" procedures is reviewed at some later date to ensure whether it is still necessary and adequate.

C. MECHANISMS

24. A number of the mechanisms concerned with the implementation of human rights commitments have addressed issues relating to the exercise of the right to freedom of association. These issues have concerned the contribution of civil society, establishing an enabling environment, the protection of human rights defenders, the relationship with multilateral institutions, the safeguarding of collective bargaining, the position of refugees and prohibiting racist organisations, as well as issues directed to particular countries.

25. In addition, the Venice Commission has published updated compilations of extracts from its opinions and reports/studies on issues concerning the rights to freedom of association[13] and freedom of religion and belief[14], which are structured in a thematic manner to allow ready access to the particular topics with which it has dealt.

The contribution of civil society

26. The contribution of civil society is generally recognised by the various mechanisms concerned with the implementation of human rights. However, there are two illustrations of the recognition of this contribution and the need to ensure that it is facilitated which are worth noting.

27. Firstly, the Committee on the Elimination of Discrimination against Women has recommended that States parties to the Convention on the Elimination of All Forms of Discrimination against Women:

> Cooperate with civil society and community-based organizations to develop sustainable mechanisms to support women's access to justice and encourage non-governmental organizations and civil society entities to take part in litigation relating to women's rights

and that they

> Develop partnerships with competent non-governmental providers of legal aid and/or train paralegals to provide women with information and assistance in navigating judicial and quasi-judicial processes and traditional justice systems[15].

28. Secondly, the importance of a free and vibrant civil society was also underlined by experts forming part of the Special Procedures of the Human Rights Council in

[13] *Compilation of Venice Commission Opinions concerning Freedom of Association (revised July 2014)*, CDL-PI(2014)004, 3 July 2004.
[14] *Compilation of Venice Commission Opinions concerning Freedom of Religion and Belief (revised July 2014)*, CDL-PI(2014)005, 5 August 2004
[15] *General recommendation No. 33 on women's access to justice*, CEDAW/C/GC/33, 3 August 2015, paras. 15(h) and 37(d).

connection with the launch of the post-2015 development agenda[16]. In their view civil society is integral in helping governments find innovative solutions to complex developmental problems, providing necessary public services and ensuring that the voices of the vulnerable and marginalised are meaningfully included in the development initiatives that will affect their aspirations and well-being. However, they drew attention to the fact that:

> Civic space is shrinking worldwide, and there is therefore, a need to explicitly recognize the importance of a free and vibrant civil society.

29. In particular, they cited a noticeable rise in attacks on civil society actors, a proliferation of laws that limit freedoms of expression, association and peaceful assembly, growing restrictions on associations' ability to access resources, an increase in bureaucratic harassment of civil society, politically motivated prosecutions of human rights defenders, violent dispersal of peaceful demonstrations and a surge in illicit surveillance of activists. The experts also expressed grave concerns at a spike in the number of reports documenting physical assaults and killings of in particular environmental rights defenders, social workers, women's rights activists and other members of civil society promoting the realisation of the Sustainable Development Goals.

30. Noting the shift from the MDGs to a broad-based consultation process leading up to the post-2015 and the support of the UN Secretary-General, who unequivocally stated in his report "The Road to Dignity by 2030" that participatory democracy, free, safe and peaceful societies are both enablers and outcomes of development, it was:

> essential that the principle of partnership with civil society as well as the space for civil society to freely operate are at the heart of the post-2015 framework

31. The experts also noted that a human-rights based approach to the post-2015 goals requires a set of indicators measuring the extent to which enabling environments for civil society exist. They called upon member States to include such indicators as an indivisible component of the post-2015 framework. In this regard, the experts referred to OHCHR's work on human rights indicators, including on developing indicators to measure the right to freedom of expression and the rights to freedom of peaceful assembly and of association. These freedoms are essential to the realisation of the entire new development agenda and are integral to Goal 16, on the promotion of peaceful and inclusive societies for sustainable development and its target 16.10, to ensure public access to information and communication for all. OHCHR's work and the various multi-stakeholder and civil society initiatives to measure civic space and civil society participation should become an integral part of the discussions on indicators. The experts emphasised that civil society organisations can also play a critical role in collecting data on the most vulnerable or marginalised populations groups, often excluded from traditional statistical surveys conducted by national statistical offices. In conformity with international statistical standards, collaborations between national statistical offices and civil society organisations should be strengthened.

[16]http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15970&LangID=E#sthash.0yCFQ63Y.dpuf; 18 May 2015.

32. In addition, the experts took note of the Secretary-General's call that all "financing streams need to be optimized towards sustainable development, and coordinated for the greatest impact", stating that:

> We take this encouraging message to mean that in the post-2015 framework there will no longer be any room for restrictions on civil society or associations to seek, receive and utilize resources so that they too may operate freely to fulfil their work

and adding:

> The shared post-2015 goals also entail and presuppose civil society's ability to freely associate and cooperate worldwide, without any obstacles that hinder financial and material cooperation by and support for civil society across borders.

33. They went on to say that, in particular, people from the most marginalised communities should be able to participate freely in monitoring and review mechanisms. In their view, all civil society organisations, regardless of their status at the national and international level, should be regarded as equal partners and entitled to participate. Moreover, they stated that States should recognise the need to support efforts of developing the capacity of organisations representing the most marginalised groups, to enable them to influence on an equal basis. Furthermore, they considered that the promise that no one be left behind cannot be met without full and free civil society participation throughout the post-2015 process, from negotiation of the goals, targets and indicators to the monitoring and review of measures to achieve them. They concluded by stating that:

> Public participation in development and accountability will remain elusive without an active civil society of empowered women and men, young and old, who can exercise their rights in an enabling, supportive environment.

An enabling environment

34. In his third report to the General Assembly – a comparative study of enabling environments for businesses and associations - the Special Rapporteur on the rights to freedom of peaceful assembly and of association called upon States to:

> (a)To ensure that businesses and associations are treated equitably by laws and practices regulating, inter alia, registration, dissolution, taxes, political activity and contributions, auditing
> and reporting, access to resources, including foreign financial resources, and peaceful assembly;
> (b) To take positive measures to protect and facilitate the right to freedom of association, including by reducing accounting and oversight burdens for smaller associations, offering tax incentives for associations, creating "one-stop shops" and offering diplomatic assistance abroad for those in the civil society sector;
> (c) To take positive measures to protect and facilitate the right to freedom of peaceful assembly, including by requiring at most a prior notification procedure, while allowing spontaneous assemblies, and ensuring access to public space, including public streets, roads and squares, for the holding of peaceful assemblies;
> (d) To take proactive measures to increase civil society's access to power and participation in high-level decision-making processes, including during the consideration of new legislation and treaties, and particularly for social movements and grass-roots associations;

(e) To ensure that trade treaties incorporate respect for fundamental human rights, including the rights to freedom of peaceful assembly and of association, and particularly as these rights apply to trade unions;
(f) To treat the enjoyment of fundamental human rights, including to freedom of peaceful assembly and of association, as a national strategic interest warranting broadly the same attention, efforts and financing as other strategic national interests, such as national defence;
(g) To initiate and welcome regular dialogue and engagement with civil society to discuss issues of concern to them.[17]

35. In addition, the Special Rapporteur called upon the United Nations, other multilateral organisations and donors specifically:

(a) To consider the concept of "sectoral equity" as critical to the enjoyment of the rights to freedom of peaceful assembly and of association, and enshrine that perspective in instruments designed to promote and protect fundamental rights;
(b) For donors to ensure that organizational policies, particularly reporting requirements, do not impose excessive administrative and reporting burdens upon recipient associations, particularly small organizations;
(c) To use bilateral aid as leverage to encourage States to support the rights to freedom of peaceful assembly and of association, and evaluate the health of those rights, in part by examining whether civil society is treated equitably compared to businesses;
(d) To commission further research on the subject of sectoral equity, so that unjustifiable inequitable treatment can continue to be identified, analysed and reduced[18].

36. Furthermore, the Special Rapporteur called upon businesses and civil society:

(a) To recognize the broad convergence of their interests in the areas of government transparency and the rule of law, and elsewhere, and increase partnerships so that both sectors can work together towards those common goals;
(b) For civil society, to consider the principle of sectoral equity when analysing and reporting on violations of the rights to freedom of peaceful assembly and of association[19].

Human rights defenders

37. In her final report to General Assembly of the United Nations as Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya focused primarily on the main elements that were necessary for defenders to be able to operate in a safe and enabling environment. These were summarised in the report's recommendations as follows:

131. Member States should:
(a) Ensure that defenders can conduct their work in a conducive legal, institutional and administrative framework. In this vein, refrain from criminalizing defenders' peaceful and legitimate activities, abolish all administrative and legislative provisions that restrict the rights of defenders, and ensure that domestic legislation respects basic principles relating to international human rights law and standards;
(b) Combat impunity for violations against defenders by ensuring that investigations are promptly and impartially conducted, perpetrators are held accountable, and victims obtain appropriate remedy. In this context, pay particular attention to violations committed by non-State actors;
(c) Raise awareness about the legitimate and vital work of human rights defenders and publicly support their work. In this respect, widely disseminate the Declaration on Human

[17] A/70/266 of 4 August 2015, para. 109.
[18] *Ibid.*, para. 110.
[19] *Ibid.*, para. 111.

Rights Defenders and make sure that human rights educational programmes, especially those addressed to law enforcement and public officials, include modules that recognize the role played by human rights defenders in society;
(d) Provide national institutions with broad and solid mandates, and make sure that they are adequately resourced to be able to operate independently and to be credible and effective. Publicly acknowledge and support the important role of these institutions, including in providing protection to defenders and fighting impunity;
(e) Ensure that violations by State and non-State actors against defenders, particularly women defenders, are promptly and impartially investigated, and ensure that perpetrators are brought to justice. Furthermore, provide material resources to ensure the physical and psychological protection of defenders, including through gender-sensitive polices and mechanisms;
(f) Publicly acknowledge the particular and significant role played by women human rights defenders, and those working on women's rights or gender issues, and make sure that they are able to work in an environment free from violence and discrimination of any sort;
(g) Provide the necessary training to public officials on the role and rights of defenders and the Declaration on Human Rights Defenders, particularly to those who are in direct contact with communities of defenders;
(h) Ensure that public policies, including development policies and projects, are developed and implemented in an open and participatory manner, and that defenders and communities affected are able to actively, freely and meaningfully participate;
(i) Make sure that defenders can actively participate in the universal periodic review process, including by raising awareness about the process, organizing open and meaningful consultations, including a section about the situation of defenders in the national report, and making concrete recommendations towards the improvement of the environment in which they operate;
(j) Ensure that acts of intimidation and reprisals against defenders who engage with the United Nations, its representatives and mechanisms in the field of human rights, and international human rights bodies are firmly and unequivocally condemned. Ensure that these acts are promptly investigated, perpetrators brought to justice and that any legislation criminalizing activities in defence of human rights through cooperation with international mechanisms is repealed.
132. The international community should:
(a) Acknowledge and support the legitimate work of human rights defenders, both through the public recognition of their role and the provision of technical and financial assistance to increase their capabilities or enhance their security if needed;
(b) Ensure safe and open access to international human rights bodies, in particular the United Nations, its representatives and mechanisms in the field of human rights.
133. Non-State actors should:
(a) Respect and recognize the work of defenders in accordance with the Declaration on Human Rights Defenders, and refrain from violating their rights or hindering their activities;
(b) Involve and consult with human rights defenders when carrying out country assessments and develop national human rights policies in cooperation with defenders, including monitoring and accountability mechanisms for violations of the rights of defenders;
(c) Familiarize themselves with the Guiding Principles on Business and Human Rights, and with human rights impact assessment of business operations;
132. Human rights defenders should:
(a) Actively participate in constructive dialogue with the State to encourage it to consolidate a safe an enabling environment for defenders, including by providing inputs on the potential implications of draft legislation;
(b) Familiarize themselves with the Declaration on Human Rights Defenders and disseminate it widely at the local level;
(c) Continue supporting the work of national human rights institutions by cooperating with them, and advocating for their strengthening;
(d) Continue working together through networks including by strengthening support networks outside capital cities to reach out to defenders working in rural areas;
(e) Strive for high standards of professionalism and ethical behaviour when carrying human rights activities;

(f) Continue to make full use of existing international and regional human rights mechanisms, including the United Nations, its mechanisms and representatives in the field of human rights[20].

38. Similar recommendations are found in the second report to the Human Rights Council of her successor as Special Rapporteur, Michel Forst[21]. Thus he recommended that:

124. Member States should:
(a) Ensure that human rights defenders can exercise their functions within a national framework properly supported by the appropriate legislative and regulatory texts, taking into account regional and national specificities, and remove the obstacles that some national laws may place in the path of legitimate activities to promote and protect human rights engaged in by human rights defenders, with a view to providing them with more effective protection;
(b) Combat impunity for threats and violations aimed at human rights defenders by mounting impartial enquiries and ensure that their perpetrators stand trial and that victims obtain compensation;
(c) Respond more satisfactorily to communications received from the Special Rapporteur, by providing him with any information required, thereby facilitating a better understanding of the situations addressed in such communications and putting a stop to threats or rights violations directed at human rights defenders;
(d) Extend an open invitation to the Special Rapporteur, allow him to conduct any visit that he wishes to undertake without restricting its duration or scope, and enable him to move around the country, outside the capital, particularly in countries with extensive territories, so that he can meet human rights defenders who are isolated and cannot travel;
(e) Invite the Special Rapporteur to pay short follow-up visits, either directly or on the occasion of seminars, lectures or panel discussions, in order to enable him to consider the best way of assisting States to implement recommendations;
(f) Pay particular attention to the most exposed groups: those who work for economic, social and cultural rights or minority rights; environmental defenders; defenders of lesbian, gay, bisexual, transgender and intersex rights; women defenders and those who work for women's rights; defenders who work in the area of business and human rights; those who work in an area exposed to internal conflict or a natural disaster; defenders living in isolated regions; and defenders working on past abuses, such as the families of victims of enforced disappearance;
(g) Provide State officials, particularly those who are in direct contact with communities of human rights defenders, with the necessary training on their role and rights and on the Declaration on Human Rights Defenders;
(h) Establish a national human rights institution or reform an existing institution in accordance with the Paris Principles and give it a mandate covering the protection and promotion of human rights defenders;
(i) Ensure that human rights defenders can participate without hindrance in the mechanisms of the United Nations and regional intergovernmental organizations, particularly within the framework of the universal periodic review and reports to the human rights treaty bodies;

[20] A/HRC/25/55, 23 December 2015.

[21] In his first report, to the General Assembly (A/69/259, 5 August 2014) he essentially focused on the manner in which he would approach his mandate and on the vision and priorities that he had established. His intention is to work on a thorough analysis of trends and problems as well as on identification of the challenges to which human rights defenders are the most exposed, notably the issue of the legal framework within which they work, and the hindrances that certain national legislations place in the way of their legitimate activities of promotion and protection of human rights, so as to contribute to a more effective protection for them. In addition, he intends to strengthen his cooperation with other mandate holders and regional mechanisms, to ensure better follow-up to communications and country visits, to contribute to the development and distribution of good practices among States, all stakeholders and the defenders themselves to disseminate the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, to enhance the visibility of the situation of human rights defenders, to work on the issue of the reprisals to which defenders are exposed in their interaction with the United Nations, regional organizations and other stakeholders, and to take part in combating any impunity enjoyed by the perpetrators of such reprisals.

(j) Ensure that acts of intimidation and reprisals against human rights defenders who cooperate with the United Nations, its representatives and mechanisms in the field of human rights and with international human rights bodies are firmly and unequivocally condemned;
(k) Ensure that any legislation criminalizing activities in defence of human rights through cooperation with international mechanisms is repealed;
(l) Undertake to implement and translate into their national language and local languages the Declaration on Human Rights Defenders in order to enable all human rights defenders to obtain access to it;
(m) In the case of countries that have adopted guidelines on the protection of human rights defenders, ensure that their embassies undertake a proper assessment of the effectiveness of their implementation;
(n) Provide embassies with funds earmarked for human rights defenders and facilitate access by defenders to international funding;
(o) Devote a chapter specifically to the question of human rights defenders in their national or international reports on the human rights situation;
(p) Undertake to implement Council resolution 24/24 on reprisals, allowing the designation of a high-level focal point to the United Nations, and, where appropriate, also designate a national focal point responsible for dealing with the question of reprisals at the national and international levels.
125. The United Nations should:
(a) Ensure that all agencies and programmes of the Organization are made more aware of the question of human rights defenders;
(b) Ensure that specific measures relating to human rights defenders are included in its programmes and activities;
(c) Ensure that resident coordinators provide human rights defenders who are subjected to threats with systematic support and protection.
126. National human rights institutions should:
(a) Take effective measures to protect human rights defenders when they are in danger;
(b) Participate in the follow-up to recommendations by the Special Rapporteur on the situation of human rights defenders;
(c) Commit the regional network to which they belong to holding meetings with regional networks of human rights defenders so that together they can plan joint action to protect defenders and promote the Declaration on Human Rights Defenders and guidelines on human rights defenders[22].

Relationship with multilateral institutions

39. In his second report to the General Assembly of the United Nations[23], which concerned the exercise of the rights to freedom of peaceful assembly and of association in the context of multilateral institutions - the Special Rapporteur on the rights to freedom of peaceful assembly and of association called upon those institutions to:

(a)Implement thorough and consistent policies that emphasize the importance of substantive engagement with civil society organizations and recognize that participation at the multilateral level is an inherent component of the right to freedom of association. Such a policy should grant civil society:
(i)Full and effective participation in all activities (including planning, agenda setting, decision-making and policymaking);
(ii)Access to all meetings, processes and bodies (including through the final stages of decision-making) at all levels;
(iii)Speaking rights in all meetings, as a rule, with the same opportunities as Governments and private sector entities to express views and opinions;
(iv)The right to submit documents equivalent to Member States;

[22] A/HRC/2863, 29 December 2014.
[23] A/69/365 of 1 September 2014, para. 87..

(b)Open up the engagement process with smaller, local civil society organizations including grass-roots groups, spontaneous social movements and civil society organizations which deal with marginalized groups;
(c)Encourage diversity of perspectives and geography among civil society organization representatives;
(d)Introduce an independent grant system —similar to the Lifeline concept—to help facilitate the attendance and participation of smaller, local civil society groups at key consultations, meetings and gatherings;
(e)Increase use of information technology, such as videoconferencing and online tools, to encourage greater and more diverse civil society participation in multilateral processes;
(f)Implement a system to continually test how responsive their actions and policies are to peoples' needs on the ground, including regular surveys and consultations with local civil society;
(g)Undertake studies on comparative good practices in civil society engagement, with recommendations on critical areas for improvement in accordance with international standards, and establish accountability mechanisms, such as the World Bank's Inspection Panel. Such a system should also include a means for individuals and organizations to file a complaint if they believe they have been subject to reprisals because of their cooperation with —or action to oppose —the multilateral organization or one of its programmes;
(h)Ensure that heads of multilateral institutions publicly denounce each and every instance of reprisals;
(i)Designate a focal point on reprisals within each multilateral institution;
(j)Make their materials —including websites, reports, press releases, and other written materials —more accessible to non-technical audiences, both online and offline, and in multiple languages;
(k)Ensure that they have comprehensive and fair access to information policies in place, and that these policies include, inter alia, guarantees of timely and easy access to all information and documents, a limited list of specific exemptions, a public interest test, and an independent appeals board. In this regard, the Special Rapporteur recommends The Global Transparency Initiative's Transparency Charter for International Financial Institutions[56] as a model;
(l)Have strict internal guidelines governing the policing of assemblies, rather than simply handing this function over to local authorities. These guidelines should mirror international law and good practices. Moreover, multilateral organizations should not organize major events likely to draw protests in locations where they cannot receive assurances that local authorities have the political will and technical capacity to uphold international standards. The Special Rapporteur also strongly recommends that multilateral institutions require domestic authorities to produce a report detailing how demonstrations, protests and other public gatherings around international events were managed by police, and that such reports be made public.

40. In addition, the Special Rapporteur called upon the United Nations specifically to:

(a)Reform the Committee on Non-Governmental Organizations to prevent Member States from blocking accreditation applications with perpetual questioning and to unilaterally vetoing applications. The reform process should be guided by the principle that the United Nations functions best when it is accessible to the greatest diversity of voices possible;
(b)Continue to support the Secretary-General's recently instituted "Rights Up Front" policy.57 The Special Rapporteur welcomes this policy and hopes it has a positive impact on the United Nations promotion of human rights;
(c)Promote human rights in all United Nations work and to understand that all staff and agency actions, policy and work often has a profound impact on the human rights landscape —even if these staff and agencies are not working directly on human rights;
(d)Select OHCHR, as the United Nations agency with preeminent expertise on human rights issues, to take the leading role in the implementation of human rights issues, including where States put resources in "basket funds" at the national level[24].

[24] *Ibid.*, para. 88. Rights Up Front, May 2014. Available from www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.htm

41. Furthermore, the Special Rapporteur called upon the States members of multilateral institutions to:

> (a)Based on the provisions of Human Rights Council resolution 24/24on cooperation with the United Nations, its representatives and mechanism in the field of human rights:
> (i)Prevent and refrain from all acts of reprisals against those engaging or seeking to engage with multilateral institutions;
> (ii)Adopt and implement specific legislation and policies, and issue appropriate guidance to national authorities to effectively protect those engaging or seeking to engage with multilateral institutions;
> (iii)Ensure accountability for any acts of reprisal through impartial, prompt and thorough investigations of any acts of reprisal, and access to effective remedies for victims;
> (iv)Consider establishing national focal points on reprisals;
> (b)Publicly condemn all acts of reprisal by State and non-State actors against those engaging or seeking to engage with multilateral institutions;
> (c)Refrain from unduly preventing NGOs from obtaining accreditation with multilateral institutions, arbitrarily withdrawing accreditations, or deferring the examination of periodic reports of accredited organizations;
> (d)Refrain from using government-organized NGOs to stifle independent voices in multilateral arenas;
> (e)Refrain from throwing away/destroying leaflets and other documents produced by civil society actors and made available in multilateral arenas;
> (f)Facilitate the issuance of visas for those seeking to engage with multilateral bodies based on their territory;
> (g)Duly inform the population within their territory about forthcoming multilateral events and decisions taken or to be taken in multilateral forums[25].

42. Moreover, the Special Rapporteur call upon civil society actors to:

> (a)Support the participation of fellow actors who are less aware of/proficient in procedures governing the participation within multilateral institutions, in particular local civil society organizations, grass-roots groups, spontaneous social movements and civil society organizations dealing with marginalized groups;
> (b)Continue to report on human rights violations and abuses against those engaging or seeking to engage with multilateral institutions[26].

Safeguarding collective bargaining

43. The Parliamentary Assembly of the Council of Europe, concerned about the threat to the rights to organise, to bargain collectively and to strike in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures and the need for social rights to be protected in order to build and maintain strong and sustainable socio-economic systems in Europe, has therefore called on the member States:

> to take the following measures to uphold the highest standards of democracy and good governance in the socio-economic sphere:
> 7.1. protect and strengthen the rights to organise, to bargain collectively and to strike by:
> 7.1.1. ratifying and implementing the European Social Charter (revised), if this has not yet been done;
> 7.1.2. developing or revising their labour legislation to make it comprehensive and solid with regard to these specific rights;

[25] *Ibid*., para. 90.
[26] *Ibid*., para. 91

> 7.2. make economic stakeholders accountable for upholding the rights to organise, to bargain collectively and to strike by:
> 7.2.1. ratifying and implementing the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158), if this has not yet been done;
> 7.2.2. supporting the enforcement, through labour legislation, of collective instruments such as "collective redress" (in particular for trade unions), aimed at the prevention of unlawful business practices;
> 7.2.3. setting up or maintaining effective labour inspections, supported by sufficient resources;
> 7.3. change the focus of current policies, by ending financial and economic austerity policies and putting emphasis on proactive investment policies, such as co-ordinated minimum levels of investment, stronger involvement of social partners and the promotion of decent work for all;
> 7.4. strive for the utmost coherence between decisions taken in different institutional and judicial contexts, including in the framework of the European Union, at the national level and at Council of Europe level, so as to ensure the effectiveness of existing mechanisms for the protection of social rights[27].

The position of refugees

44. The European Committee of Social Rights has issued a statement emphasising the urgent and unconditional need to treat with solidarity and dignity the men, women and children who arrive on European territory, and who have a right under international law and the relevant national and European laws to the protection of European States as refugees, as described by the 1951 Convention on the Status of Refugees (CSR). In particular, the Committee recalled that:

> The CSR guarantees the right to the most favourable treatment accorded to nationals of a foreign country in respect of the right to belong to trade unions (Article 15 CSR), which is guaranteed by Articles 5 and 19§4 of the [European Social] Charter[28].

Prohibiting racist organisations

45. The European Commission against Racism and Intolerance has drawn attention to the rise of aggressive nationalist, populist xenophobic and neo-Nazi political parties and, in this connection, recalled that its:

> General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination calls on states not only to suppress public financing of organisations which promote racism, but also to provide for the possibility of dissolution of such organisations. ECRI stresses that timely action should be taken against such parties to avoid an escalation of criminal activities and the need for extensive law-enforcement action[29].

46. The Committee on the Elimination of Racial Discrimination has also given some further guidance on the obligation imposed by Article 4(b) of the International Convention on the Elimination of All Forms of Racial Discrimination in stating that:

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[27] Resolution 2033 (2015), *Protection of the right to bargain collectively, including the right to strike*, 28 January 2015.
[28] *Statement of interpretation on the rights of refugees under the European Social Charter (elaborated during the 280th session of the European Committee of Social Rights in Strasbourg, 7-11 September 2015)*, para. 16.
[29] *Annual Report on ECRI's Activities covering the period from 1 January to 31 December 2013*, CRI(2014)32, p. 7.

> 21. The Committee underlines that article 4 (b) requires that racist organizations which promote and incite racial discrimination be declared illegal and prohibited. The Committee understands that the reference to "organized…propaganda activities" implicates improvised forms of organization or networks, and that "all other propaganda activities" may be taken to refer to unorganized or spontaneous promotion and incitement of racial discrimination[30].

Issues relating to particular countries

47. A number of mechanisms have focused their attention on issues relating to the law and practice affecting non-governmental organisations in particular countries, both within and beyond Europe. The principal focus has been on the situation in Azerbaijan, Kazakhstan, the Kyrgyz Republic, Oman, Rwanda and Russia.

Azerbaijan

48. The Venice Commission has adopted an opinion on amendments to the Law on NGOs of the Republic of Azerbaijan and to several other legal acts (Law on Registration, Law on Grants, Code of Administrative Offences) since its opinion on earlier amendments to this legislation in 2011[31]. It found that there some limited positive changes; notably a specific period of up to 30 days within which NGOs could rectify alleged violations brought to their attention by a notification from state authorities and the explicit recognition of the right of NGOs to appeal to administrative bodies or to a court with respect of any measure of liability defined by law. However, its overall conclusion about the amendments was negative. Thus, it stated that:

> 89. Despite these positive changes, the amendments have not addressed many of the recommendations contained in the 2011 Opinion of the Venice Commission. The procedure of registration of NGOs has not been simplified in any substantive way, branches and representations of foreign NGOs are still object of specific, and problematic, regulation, and NGOs can still be dissolved for misgivings which are not serious enough to justify the imposition of the most severe sanction.
> 90. In addition, the amendments have introduced certain new controversial provisions. Branches and representations of foreign NGOs have been put into a yet more disadvantaged position with respect to other NGOs: additional reporting obligations, special penalties, limited validity of the agreements signed with the state and the excessive discretion of the state authorities to intervene in the matters of their internal life (obligatory content of their internal documents etc.).
> 91. Moreover, new obligations are imposed on NGOs with respect to the receipt of grants and donations and to reporting to the state authorities. Again, some of these obligations seem to be intrusive enough to constitute a *prima facie* violation of the right to freedom of association.
> 92. In general, the enhanced state supervision of NGOs seems to reflect a very paternalistic approach towards NGOs and calls again for sound justification. The same holds for new and enhanced penalties that can be imposed upon NGOs even for rather minor offences.
> 93. Globally, the cumulative effect of those stringent requirements, in addition to the wide discretion given to the executive authorities regarding the registration, operation and funding of NGOs, is likely to have a chilling effect on the civil society, especially on those associations that are devoted to key issues such as human rights, democracy and the rule of law. Like the Council of Europe Commissioner on Human Rights has, the Venice Commission

[30] *General recommendation No. 35 Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, para. 21. Its previous guidance was in *General recommendation XV on article 4 of the Convention*, 17 March 1993.
[31] *Opinion on the Compatibility with Human Rights Standards of the Legislation on Non-Govermental Organisations of the Republic of Azerbaijan*, CDL-AD(2011)035), 19 October 2011.

finds that the amendments, in an overall assessment, "*further restrict the operations of NGOs in Azerbaijan*"[32].

49. As a result, the Venice Commission recommended that:

> - The registration process should be simplified and decentralised in order to decrease its excessive length; specific measures should be taken to ensure full respect for the legislative requirements and to prevent *contra legem* practices as the breach of deadlines for registrations, repeated unnecessary demands for correction of registration documents etc. The relevant provisions should be amended to limit the grounds for refusal of registration to serious deficiencies.
> - The requirement for international NGOs to create local branches and representations and have them registered should be reconsidered. Blanket restrictions on the registration and operation of branches and representations of foreign NGOs, such as the absolute limitation of the number of branches and representations of foreign NGOs in Azerbaijan, should be eliminated.
> - The amendment preventing foreign funding of NGOs should be revised as to authorize foreign funding unless there are clear and specific reasons not to do so. The procedure for obtaining the right to give a grant, if maintained, should be associated with clear criteria and procedural indications clearly laid down in the legislation.
> - Provisions allowing unwarranted interferences into the internal autonomy of NGOs, i.e. reporting obligations and state supervision on NGOs internal organisation and functioning, should be removed[33].

Kazakhstan

50. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has made recommendations following his country visit to Kazakhstan, which elaborate on the requirements for the effective enjoyment of the right to freedom of association, namely, that the relevant authorities

> (a) To strictly and narrowly define the offence of incitement to discord (art. 174 of the new Criminal Code) to bring it in line with international human rights law and avoid any adverse effects on the rights to freedom of peaceful assembly and of association;
> (b) To amend the Law on Political Parties so as to increase citizens' opportunities to create political parties, including by decreasing the number of required individuals to form a political party and by specifying a limited time frame for registration to be examined by an independent body;
> (c) To ensure individuals can form and join trade unions of their choice, including by eliminating compulsory state registration;
> (d) To ensure that the Law on Public Association allows for the free operation of unregistered associations, and that any amendments concerning access to funding do not jeopardize the independence of associations, including by limiting the proposed new grant mechanism to State funds only;
> (e) To repeal the offence of "illegal interference of members of public associations with activities of State bodies" (art. 403 of the new Criminal Code)[34].

Kyrgyz Republic

51. The Venice Commission and the OSCE Office for Democratic Institutions and Human Rights have adopted a joint interim opinion in respect of a draft law of the Kyrgyz Republic which aimed at amending laws on non-commercial organisations, and the state registration of legal entities, as well as the Criminal Code and would thereby have

[32] *Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, CDL-AD(2014)043, 15 December 2014.
[33] *Ibid*. para. 94. See also the Expert Council on NGO Law's *Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application*, OING Conf/Exp (2014) 1, at http://www.coe.int/web/ingo/t-council-on-ngo-law-country-study-on-ngo-legislation-in-azerbaijan.
[34] *Mission to Kazakhstan*, A/HRC/29/25/Add.2, 16 June 2015, para. 96.

established additional obligations of non-commercial organisations and have created a special legal regime for structural units of foreign non-commercial organisations and for non-commercial organisations exercising the function of a foreign agent. This draft law would also have increased the powers of public authorities to monitor such non-commercial organisations and have provided various sanctions (administrative or criminal) for those non-commercial organisations which failed to comply with legal obligations, as well as for their representatives and members. In its opinion it was concluded that:

> 10. The Draft Law fails to clearly define the term "political activities" which is crucial for determining the newly introduced status of non-commercial organizations exercising the function of a foreign agent. It is also rather vague in defining the new criminal offence of the creation of a non-commercial organization, infringing upon the liberties and rights of individuals. In these parts, the Draft Law appears not to fulfill the criterion of legality and therefore to be incompatible with relevant human rights standards.
> 11. The Draft Law establishes new legal statuses of and legal regimes for structural units of foreign non-commercial organizations and of non-commercial organizations exercising the function of a foreign agent. It is not clear whether the establishment of these statuses/ regimes is truly necessary in a democratic society and proportional to the legitimate aims pursued by the regulation. Should the special statuses/regimes be maintained, the extent and content of the additional obligations imposed on non-commercial organizations need to be carefully reconsidered to avoid that these obligations are disproportionately more cumbersome than those foreseen for non-commercial organizations in general. Advocacy work on issues of public concern, regardless of whether or not it is in accordance with governmental policy, should not be affected, or limited.
> 12. In the light of the analysis contained in greater detail hereinafter, the relevant stakeholders in the Kyrgyz Republic are recommended to reconsider this Draft Law in its entirety and to not pursue its adoption by the *Jogorku Kenesh*[35].

Oman

52. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has made these recommendations following his country visit to Oman:

> 72. Concerning the right to freedom of association, the Special Rapporteur calls on the relevant authorities to:
> (a) Adopt without delay a new law on associations that complies with international human rights standards, including the right to freedom of association;
> (b) Amend article 134 of the Penal Code of Oman and any other legislation that disproportionately restricts the right to freedom of association;
> (c) Amend Royal Decree 38/2014[36] in full consultation with civil society and other relevant stakeholders to ensure that it complies with international human rights standards, including the right to freedom of association;
> (d) Offer all citizens, including political opponents, the right and opportunity, without any distinctions and without unreasonable restrictions, to freely form and register a political party and operate in a pluralistic political sphere;
> (e) Promote the rights of women to freely associate and enable them to participate more effectively in public life;
> (f) Ratify core labour standards protecting the right to freedom of association, including International Labour Organization conventions No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise and No. 98 (1949) concerning the Right to Organise and to Bargain Collectively;
> (g) Refrain from interfering with the work of the General Labour Union;

[35] *Joint Interim Opinion on the Draft Law amending the Law on Non-Commercial Organisations and Other Legislative Acts of the Kyrgyz Republic*, CDL-AD(2013)030, 16 October 2013. See also paras. 54-56 below.
[36] The Decree provides that an Omani-born citizen will lose his/her citizenship if he or she belongs to a group, party or organisation that embraces principles or doctrine harming Oman's interests, or either works for a foreign country in any capacity in or outside Oman and does not resign before the imposed deadline or works in favour of a hostile State.

(h) Endorse a regime of notification whereby an association is considered a legal entity as soon as it has notified its existence to the relevant authorities;
(i) Allow unregistered associations to operate;
(j) Avoid interference with the operations of associations, including funding and private meetings;
(k) Ensure that any partnerships between Government and civil society are voluntary.
73. In addition, the Special Rapporteur calls upon the National Human Rights Commission to:
(a) Apply the recommendations of the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights without further delay to gain credibility and enhance its protection and advocacy roles;
(b) Enquire proactively and take a public critical stand on violations of the rights to freedom of peaceful assembly and of association;
(c) Clearly and publicly articulate and disseminate international human rights norms and standards governing the rights to freedom of peaceful assembly and of association;
(d) Engage further with civil society to address its concerns in relation to the exercise of the rights to freedom of peaceful assembly and of association;
(e) Offer training activities to government officials and members of civil society on international human rights norms and standards, including those governing the right to freedom of peaceful assembly and of association;
(f) Follow up and monitor the implementation of the recommendations contained in the present report.
74. The Special Rapporteur also calls upon civil society organizations to:
(a) Use every opportunity to participate in decision-making processes;
(b) Seize all opportunities for training offered to its members;
(c) Engage with various stakeholders, including the international community;
(d) Follow up and monitor the implementation of the recommendations contained in the present report[37].

Rwanda

53. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has made these recommendations following his country visit to Rwanda:

90. Concerning NGOs, the Special Rapporteur calls on the relevant authorities to: (a) Amend Law 04/2012 and Law 05/2012 in full consultation with civil society and other relevant stakeholders. In particular to:
- Adopt a regime of declaration or notification whereby an organization is considered a legal entity as soon as it has notified its existence to the relevant authorities;
- Ensure that the registration procedure for national and international NGOs is much simpler and faster, as for private companies;
Abolish the requirement of renewal of registration certificates for international NGOs;
Allow unregistered organizations to operate;
Abolish the 20 per cent limit on overhead costs in programmes of international NGOs that are not in the interests of its beneficiaries;
Alleviate the reporting requirements on international NGOs;
(b) Not interfere with the functioning of NGOs, particularly in relation to the appointment of the leadership of NGOs through the Rwandan Governance Board, whose role should be purely regulatory;
(c) Investigate alleged threats against the former president of LIPRODHOR, and bring the perpetrators to justice;
(d) Ensure that prior notification or authorization is not required for associations to hold private meetings, and that they can hold such meetings without the presence of any government or Rwandan Governance Board officials;
(e) Ensure that any partnerships between Government and civil society are voluntary rather than compulsory;
(f) Make public statements in support of the legitimate work of NGOs, in particular genuinely independent ones;
(g) Complete thorough investigations into the killing of Gustave Sharangabo Makonene, bring the perpetrators to justice, and provide reparation to his relatives.

[37] *Mission to Oman*, A /HRC/29/25/Add.1, 27 April 2015.

> 91. The Special Rapporteur calls upon the National Human Rights Commission of Rwanda to:
> (a) Become a more robust, highly visible and well-respected institution by:
> - Engaging more with the Government on its responses to legitimate dissent;
> - Enquiring proactively, and taking public critical stands, on violations of the rights to freedom of peaceful assembly and of association;
> - Clearly and publicly articulating and disseminating international human rights norms and standards governing the rights to freedom of peaceful assembly and of association;
> - Engaging further with civil society with a view to addressing their concerns in relation to the exercise of the rights to freedom of peaceful assembly and of association;
> Offer training activities to government officials and members of civil society on international human rights norms and standards, including those governing the rights to freedom of peaceful assembly and of association;
> (b) Seize all opportunities for training offered to its members;
> (c) Follow up on and monitor the implementation of the recommendations contained in the present report.
> 92. The Special Rapporteur calls upon civil society organizations to:
> (a) Use every opportunity to participate in decision-making processes;
> (b) Seize all opportunities for training offered to its members;
> (c) Become more cohesive and strategic in engaging with various stakeholders;
> (d) Follow up and monitor the implementation of the recommendations contained in the present report.
> 92. The Special Rapporteur calls upon the United Nations, international organizations, donors and other stakeholders to:
> (a) Undertake or continue to undertake advocacy work with relevant authorities concerning respect of the rights to freedom of peaceful assembly and of association;
> (b) Further support capacity-building of the relevant authorities, the National Human Rights Commission and civil society organizations;
> (c) Follow up on, and monitor, the implementation of the recommendations contained in the present report[38].

Russia

54. Similar concerns to those expressed by the Venice Commission in respect of proposed changes to legislation in the Kyrgyz Republic[39] have been expressed by both the Venice Commission and the Council of Europe Commissioner for Human Rights in an opinion with respect to actual changes made in Russia that were seen as being capable of further restricting the legitimate activity of human rights defenders and non-commercial organisations[40].

55. The Venice Commission's opinion concerned two laws, one on non-commercial organisations, otherwise referred to as the law on foreign agents, and the other on the law of treason. Its conclusions in respect of the changes effected by them were as follows:

> 132. The "Law on Foreign Agents" (Law N. 121-FZ) of 13 July 2012, as well as Laws N. 18-FZ of 21 February 2014 and N. 147-FZ of 4 June 2014 raise several serious issues. The use of the term ***"foreign agent"*** is highly controversial. By bringing back the rhetoric used during the communist period, this term stigmatises the NCOs to which it is applied, tarnishing their reputation and seriously hampering their activities. The Venice Commission therefore recommends that the term be abandoned.
> 133. The Venice Commission further considers that the legitimate aim of ensuring transparency of NCOs receiving funding from abroad cannot justify measures which hamper the activities of NCOs operating in the field of human rights, democracy and the rule of law. It

[38] *Mission to Rwanda*, A/HRC/26/29/Add.2, 16 September 2014.
[39] See para. 51 above.
[40] *Legislation and Practice in the Russian Federation on Non-Commercial Organisations in light of Council of Europe standards: an update*, CommDH(2015)17, 9 July 2015.

> therefore recommends reconsidering the creation of a special regime with autonomous registration, special register and a host of additional legal obligations.
> 134. If this specific legal regime is maintained, the power of the authorities to proceed with the registration of a NCO as "foreign agent" (or other term) without that NCO's consent should be removed. The extent and content of the obligations linked with the special status need to be carefully scrutinized to avoid that they be disproportionally more cumbersome than those to which other NCOs are subject. Finally, legal sanctions should only be applied to NCOs in case of serious wrongdoing on their side and, as ruled by the Constitutional Court of the Russian Federation, shall be always proportional to this wrongdoing. The liquidation of a NCO and the imposition of criminal sanctions may only be resorted to in exceptional cases of extreme misconduct on the part of a NCO and should always be proportional to this wrongdoing. Enforced dissolution of a NGO may only be pronounced by an impartial and independent tribunal in a procedure offering all guarantees of due process, openness and a fair trial. The effects of the decision on dissolution should be suspended pending the outcome of judicial review.
> 135. Pursuant to the law under examination, the legal status of a "foreign agent" presupposes not only that a NCO receives foreign funding but also that it participates in ***"political activities"***. This expression is however quite broad and vague and the practice of its interpretation by public authorities has been so far rather disparate, adding to the uncertainties surrounding the meaning of the term. The Venice Commission therefore calls upon the Russian authorities to work towards a clear definition of "political activities". It also urges the Russian Federation to ensure that the term is not used to specifically target human rights defenders or that it applies to NCOs based on their political opinions.
> 136. In addition to its text, the practical ***implementation*** of the *Law on Non-Commercial Organizations* also gives rise to concerns. Reports indicate that NCOs have been subject to numerous extraordinary inspections, with the legal ground of these inspections remaining unclear and the extent of documents required during them differing quite substantively. The Venice Commission calls upon the Russian authorities to ensure that no inaccuracies or excesses take place in the implementation of the Law.
> 137. The Venice Commission calls upon the Russian authorities to revise the "Law on Foreign Agents" in light of these principles.
> 138. The new provisions brought in by the "Law on Treason" (Law No 190-FZ) are overly broad and vague and may confer unfettered discretion for limiting freedom of expression on those charged with its execution. While the prosecution of high treason and disclosure of state secrets is legitimate, the Venice Commission considers as imperative that the relevant criminal provisions should be formulated as exactly as possible. It therefore calls upon the Russian authorities to revise the "Law on Treason" accordingly. 139. The Venice Commission finds that Federal Laws N.121-FZ of 13 July 2012, N.18-FZ of 21 February 2014 and N. 147-FZ of 4 June 2014 and Federal Law N. 190-FZ seen in context mutually reinforce the chilling effect on the exercise on freedom of expression along with freedom of association – crucial rights for the viability of an effective political democracy[41].

56. The measures of particular concern to the Commissioner were the law on non-commercial organisations and a series of other amendments that had widened the scope of potential state interference in the enjoyment of freedom of expression, as well as additional legislative initiatives which were being tabled in the State Duma. In the Commissioner's view,

> attempts to impede NCOs and human rights defenders from working in key areas of public interest render their enjoyment of freedoms of association and expression virtually meaningless or illusory[42].

[41] Opinion on Federal Law n. 121-fz on non-commercial organisations ("law on foreign agents"), on Federal Laws n. 18-fz and n. 147-fz and on Federal Law n. 190-fz on making amendments to the criminal code ("law on treason") of the Russian Federation, CDL-AD(2014)025, 27 June 2014.
[42] *Ibid*., para. 72.

57. In light of his observations and conclusions and of an earlier opinion[43] which the present one updated, the Commissioner makes the following recommendations to the authorities of the Russian Federation

> The Commissioner calls on the Russian authorities to revise the legislation on non-commercial organisations in order to establish a clear, coherent and consistent framework in line with applicable European and international standards. While revising the current legal framework, specific attention must be paid to the revealed shortcomings and the respect for the principles of the rule of law, legal certainty, the prohibition of arbitrariness, proportionality, non-discrimination, access to justice before an independent and impartial tribunal and the availability of an effective domestic remedy. In particular, the legislative revision should entail:
> - the use of clear definitions in the legislation allowing to foresee the legal consequences of its implementation;
> - avoiding the use of stigmatising language such as "foreign agent" towards NCOs;
> - non-discriminatory legal provisions, including in the field of reporting and sanctioning of NCOs, irrespective of the sources of their funding;
> - application of the "pressing social need" criteria for any state interference with the freedoms of association and expression, including the imposition of sanctions;
> - limiting state interference in NCO activities to setting up clear and non-biased standards of transparency and reporting;
> - application of sanctions only as measures of the last resort in full compliance with the principle of proportionality;
> - revocation of provisions establishing criminal prosecution of NCO staff in cases which normally fall under administrative procedures[44].

D. CASE LAW

58. The case law developments have essentially been those arising from the judgments and decisions delivered by the European Court of Human Rights ('the European Court') in relation to Article 11 of the European Convention on Human Rights ('the European Convention')[45], sometimes together with other provisions in that instrument, but there are also a set of views adopted by the United Nations Human Rights Committee in relation to Article 22 of the International Covenant on Civil and Political Rights ('the International Covenant')[46], a judgment of the General Court of

[43] CommDH(2013)15, 15 July 2013.

[44] CommDH(2015)17, para. 75. See also the Expert Council on NGO Law's *Opinion on the Draft Federal Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation #662902-6*, OING Conf/Exp (2014) 3, at http://www.coe.int/en/web/ingo/expert-council-on-ngo-law-country-study-on-ngo-legislation-in-the-russian-federation.

[45] 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[46] 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. 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of

the European Union and a ruling of the African Commission on Human and Peoples' Rights that are of interest.

59. The developments considered below concern firstly the formation of association and then various issues relating to membership of them, their internal organisation, the according to them of certain privileges and status, the exercise of the rights of collective bargaining and strikes, the subjecting of them to harassment, the imposition on them of various sanctions and the taking of action leading to their dissolution. There are a significant number of rulings that relate to trade unions and, although these are a very specific form of association, the approach taken towards them in the case law can also point to the way in which the protection of the interests of other non-governmental organisations will develop.

Formation

60. It is now well-established that the ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the freedom of association and that a refusal to grant legal-entity status to an association of legal or natural persons will be an interference with the exercise of the right to freedom of association that must be justified. Nonetheless, such interferences continue to be established, sometimes without any attempt at substantiation and in others where the reasons given are inconsistent with the right to freedom of association.

61. Thus, the Human Rights Committee has – unsurprisingly in the light of previous rulings[47] - found a violation of Article 22(2) of the International Covenant as a result of the refusal to register a human rights association, "For Fair Elections" on the grounds that the application was not in compliance with the requirements of the Law on Public Associations, in particular because the Ministry of Justice had not been provided with a list of its founders, the record of its constituent assembly had not been signed by the chair and some concerns with regard to a letter of guarantee confirming the allocation of office space to the association. Although such reasons were prescribed by the relevant law, the Committee underlined the absence of any attempt by the State party to advance any argument as to why they are necessary in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Thus, it considered that:

> In the absence of any other pertinent explanations from the State party, the Committee gives due weight to the author's argumentation, which is confirmed by the decisions of the domestic authorities made available to it, that no explanation was provided by the domestic authorities, particularly the Supreme Court, as to the necessity to restrict the right to freedom of association of the author and the alleged victims, in line with article 22, paragraph 2, of the Covenant[48].

62. Furthermore, the Committee also based its finding of a violation on the fact that:

Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

[47] E.g., *Zvozskov et al.* v. *Belarus*, communication No. 1039/2001, Views adopted on 17 October 2006, para. 7.2 and *Katsora, Sudalenko and Nemkovich* v. *Belarus*, communication No. 1383/2005, Views adopted on 25 October 2010, para. 8.2.

[48] *Korneenko et al. v. Belarus*, communication No. 2153/2012, Views adopted on 10 October 2014.

> the denial of registration led directly to the operation of the association on the territory of the State party being unlawful and directly precluded the author and the alleged victims from enjoying their freedom of association. Accordingly, the Committee concludes that the denial of registration does not meet the requirements of article 22, paragraph 2, in relation to the author and the alleged victims[49].

63. Where reasons for a refusal of registration are actually given, they must be shown to be compatible with the permissible limitations on freedom of association and there are several cases in which this was not found to be so, either because there was no legal basis for them or they were substantively unacceptable.

64. The former was the position in the case of the repeated refusal of registration as a legal entity for a Scientology group[50]. Six applications had been submitted and each rejection had cited some new grounds that it had not previously relied upon, the most recent being for the absence of confirmation of the group's fifteen-year existence[51]. This conclusion was based upon findings that the document that had been submitted for this purpose was to be rejected for defects of form in that the municipal council concerned was not authorised to issue such documents[52] and that the available evidence did not permit the conclusion that the group had been in existence for at least fifteen years. However, both findings were found by the European Court not to be prescribed by law as the former one disregarded the provisions of the applicable federal legislation and the latter one involved a requirement for which no legal basis was cited. Although it was sufficient to establish a violation of Article 11 of the European Convention by finding that the interference was not in accordance with the law, the European Court considered it important to reaffirm its position that the lengthy waiting period which a religious organisation has to endure prior to obtaining legal personality could not be considered "necessary in a democratic society". In its view, there was no justification for requiring only newly emerging religious groups that did not form part of a hierarchical church structure to be subject to a fifteen-year waiting period before obtaining legal entity status[53].

65. On the other hand, it was the substance of the reasons that was problematic where objection had been taken to the proposed association of 'victims' of judges – i.e., those who had had their cases brought before the judicial authorities – seeking to promote their interests, notably by using any legal means for publicising any alleged injustice, irregularity or illegality, and also by lawfully protesting against all of these aspects[54]. Such an objective, which was also considered to be implicit in the association's name was characterised by the Romanian authorities as "profoundly unconstitutional" and illegal in that it was seen as a group of individuals stating proprio motu that a judgment could be unfair or irregular or an expression of illegality. In particular, it was considered that this would encourage non-compliance

[49] *Ibid*, para. 9.4.
[50] *Church of Scientology of St Petersburg and Others v. Russia*, no. 47191/06, 2 October 2014.
[51] Additional grounds of rejection - the allegedly non-religious nature of the group, and some technical defects in its articles of association – had not been relied upon in upholding the initial decision on appeal.
[52] The present case thus differed from *Kimlya and Others v. Russia*, no. 76836/01, 1 October 2009 as a document had been produced; in *Kimlya*, the absence of a showing the group's existence in a given territory for at least fifteen years entailed ipso facto a refusal of registration
[53] The Court cited its judgments in *Kimlya* and in *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, 31 July 2008.
[54] *Association of Victims of Romanian Judges and Others v. Romania*, no. 47732/06, 14 January 2014.

with courts' judgments and represent a form of attack on one of the State's powers, namely the judiciary. However, although the European Court strongly agreed that public trust in the judiciary was a very valuable consideration, it was not convinced that the imputed aims of the association emanated from its founding document. Indeed, it considered that the objections raised had been based on mere suspicions regarding the true intentions of the association's founders. The European Court underlined that the founding document did not give any indication of setting up similar organisations or parallel structures that were designed to encroach on existing State institutions[55], pointing out that the relevant clauses actually referred to the objective of promoting cooperation between the association's members and those "authorised by law to protect their rights and interests" or with "the legislative bodies". It also underlined the fact that the law actually allowed for the possibility of dissolving an association should it be demonstrated that it had goals which were contrary to public order or that its acts were contrary to the provisions of its founding document. In the circumstances, the reasons for the refusal of registration could not be regarded as being determined by any "pressing social need" or as convincing and compelling. As in a number of cases, the European Court emphasised that such a radical measure as the refusal of registration, taken even before the association started operating, appeared disproportionate to the aim and so it found the interference with the right to freedom of association not to be necessary in a democratic society.

66. Similarly, a violation of Article 11 of the European Convention was found as a result of the refusal to register the existence of the association "Home of Macedonian Civilisation", whose primary purpose is to promote and develop Macedonian civilisation and its traditions, on the basis that this was disproportionate to the aim being pursued[56]. This finding was not at all surprising since an earlier refusal to register this association had led to the European Court's judgment in one of the leading cases on this issue, namely, *Sidiropoulos and Others v. Greece*[57], in which it had rejected the notion that the use of the term "Macedonian" undermined Greece's territorial integrity and that claims about the association's objectives were based on mere suspicions since it had had no time to carry out any activities. The renewed application for registration was refused on the grounds that the use of the word "Macedonian" and the purpose proclaimed in the association's statutes were at variance with public order and jeopardised the harmonious coexistence of the population of the region in which the association would be established and public law and order in Greece. Once again the European Court considered that the association's aims could not disrupt public order since Greece had accepted OSCE commitments to allow the formation of associations to protect the cultural and spiritual heritage of minorities. Furthermore, the reliance on certain actions of some of the founders as regards promoting the idea of a Macedonian minority in Greece to justify the refusal were not relevant since they predated significantly the period to which the application for registration related. Moreover, the European Court attached significance to the fact that the Greek Constitution itself provided that the establishment of associations could not be subject to prior authorization. Finally, it emphasised that it was possible

[55] In this regard it compared the applicant association with that in the case of *Bota v. Romania* (dec.), no. 24057/03, 12 October 2004, where the association concerned had the stated aim of setting up bar associations and whose members effectively performed activities within the exclusive competence of the Romanian bar association.

[56] *House of Macedonian Civilization and Others v. Greece*, no. 1295/10, 9 July 2015.

[57] No. 26695/95, 10 July 1998.

under Greek law to dissolve the association should it, in fact, carry out activities contrary to public order.

67. A finding of a violation of the European Convention was avoided in a case involving two entities – one whose aims included importing, stocking, diffusing and distributing bibles and religious publications; organising religious gatherings, seminars and meetings, acquiring, constructing and renting equipment and buildings for those purposes and the other, a branch of an American entity which promoted the beliefs of the Jehovah's Witnesses – following a unilateral declaration by the respondent State in respect of their treatment[58]. The two entities had initially been registered by a court as associations but an appellate court had considered that (a) the activities of first entity were, given its objectives, of a public nature and so it could not be classified as a private-law entity but should be a public-law one and (b) the second one should have been registered by the Ministry of Justice on account of its branch status. This led the appellate court to conclude that, in contrast to private-law entities, the existence of public-law entities, such as the two that had been registered as associations, did not arise from an act of registration but had to be based on a specific law pertaining to the activities they carried out. However, as there was no such law governing the activities of the various religious groups in Georgia, it had held that the registration of the two entities had to be annulled. A complaint to the European Court about the annulment was, however, resolved by a unilateral declaration in which it was accepted that the interference with the applicants' right to freedom of religion and association via the annulment was not justified and that the lack of respective provisions regulating the creation, organisation and activity of religious organisations deprived them of the possibility to be registered as legal entities of private law. In addition, legislative amendments in 2003 and 2005 respectively had allowed the second entity to be registered as a branch of foreign legal entity and the first one was now entitled to be registered as a legal entity of private law. Moreover, a further amendment meant that religious associations were now entitled to be registered, as a matter of their choice, either as a legal entity of public law or as a non-commercial legal entity, or unregistered unions. Having regard to the acceptance of the annulment of the registrations as being in breach of Articles 9 and 11 of the European Convention, the amount of compensation proposed[59] and its clear and extensive case law on the issues raised, the European Court considered that the continued application was not required and it could be struck out pursuant to Article 37(1)(c).

68. However, a refusal to register a trade union-type association established by self-employed farmers because the law only permitted employees and public servants to set up trade union organisations was found not to be a disproportionate restriction and thus not a violation of Article 11 of the European Convention[60]. The European Court considered that this restriction had the legitimate aim of safeguarding the economic and social order by maintaining a legal distinction between trade unions and other kinds of associations. Although parties to ILO Convention No. 11 on the right of association (agriculture), which included Romania, undertook to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of agricultural workers, the European Court considered that the sensitive social

[58] *Union of Jehovah's Witnesses of Georgia and Others v. Georgia* (dec.), no. 72874/01, 21 April 2015.
[59] 1500 Euros to cover any pecuniary and non-pecuniary damages as well as costs and expenses.
[60] *Manole and "Romanian Farmers Direct" v. Romania*, no. 46551/06, 16 June 2015.

and political issues linked to rural employment and the high degree of divergence between national systems in that regard meant that the Contracting States should be afforded a wide margin of appreciation as to the manner in which they secured the right of freedom of association to self-employed farmers. Furthermore, it noted that under the current legislation farm employees and the members of cooperatives had the right to form trade unions and belong to them. Moreover, in the light of the general comments of the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) concerning the application by Romania of Convention no. 87 on Freedom of Association and Protection of the Right to Organise2, the European Court found no sufficient grounds to infer that the exclusion of self-employed farmers from the right to form trade unions constituted a breach of Article 11. Finally, the European Court observed that the legislation in force at the time of the events, like that currently in force, in no way restricted the applicants' right to form professional associations with the essential prerogatives enabling them to defend the collective interests of their members in dealings with the public authorities.

Membership

69. In two cases the European Court found that a blanket ban on trade unions within the French armed forces encroached on the very essence of freedom of association, could not be considered proportionate and had not therefore been "necessary in a democratic society".

70. The first case[61] concerned an order to an officer in the gendarmerie to resign from his membership of an association "Forum for Gendarmes and Citizens", which he had formed with others to provide a legal framework for an internet forum intended to enable gendarmes and citizens to express themselves and exchange views. This order was given because the association was considered to resemble a trade-union-like occupational group because of the reference in the definition of its objectives to "defending the pecuniary and non-pecuniary situation of gendarmes" and membership of such groups, as opposed to that of ordinary associations, was prohibited by law. The European Court emphasised that no occupation or office was excluded from the scope of the provisions in Article 11 of the European Convention. Moreover, the "lawful restrictions" that could be imposed in respect of members of the armed forces had to be construed strictly and to be confined to the "exercise" of the rights in question, and must not impair the very essence of the right to organise. Furthermore the European Court pointed out that the right to form and join a trade union was one of the essential elements of the freedom guaranteed. While accepting that the prohibition pursued the legitimate aim of preserving the order and discipline necessary in the armed forces and that there were special bodies and procedures to take into account the concerns of military personnel, the European Court nonetheless considered that the latter did not replace the granting of freedom of association to military personnel, a freedom which included the right to form and join trade unions. The special nature of the armed forces' mission was recognised by the European Court as requiring that trade-union activity be adapted to those particular circumstances and it therefore emphasised that significant restrictions could be imposed on the forms of action and expression of an occupational association and of the military personnel who joined it. However, it also emphasised that such

[61] *Matelly v. France*, no. 10609/10, 2 October 2014.

restrictions should not deprive them of the general right of association in defence of their occupational and non-pecuniary interests. In the present case, the order of resignation had been based solely on the association's memorandum and the possible existence, in a relatively wide interpretation of its purpose, of a trade-union dimension. Moreover, the European Court noted that the authorities had not had regard to the officer's attitude and his willingness to comply with his obligations by amending the memorandum. As a result, the European Court considered that the grounds put forward by the authorities to justify the interference in the officer's rights had been neither relevant nor sufficient, given that their decision amounted to an absolute prohibition on military personnel joining a trade-union-like occupational group which had been set up to defend their occupational and non-pecuniary interests[62].

71. In the second case[63], the effect of the blanket ban on military personnel from forming or joining a trade union was manifested in the dismissal of several applications for judicial review of decisions considered to have an adverse effect on the pecuniary and non-pecuniary situation of military personnel brought by an association for the protection of the rights of military personnel that had been established by two servicemen. The applications had been dismissed solely on the basis that the association concerned had been formed in breach of the prohibition previously cited and so they did not have standing to request that the decisions in question be set aside[64]. This ruling also reaffirms, implicitly, the importance of the ability to bring legal proceedings to protect the interests for which an association has been established[65].

Internal organisation

72. In concluding that a decision – by reference to the notion of "scandal" – by a bishop not to renew the contract of a teacher of Catholic religion and ethics who was a married priest did not constitute a violation of the right to respect for private life, the European Court considered that the interference with that right in order to protect the right of religious organisations to autonomy had not been disproportionate[66]. In doing so it emphasised that, where the organisation of the religious community is at issue, Article 9 of the European Convention must be interpreted in the light of Article 11, "which safeguards associative life against unjustified State interference". Recalling its established case law, it reaffirmed that Article 9 of the European Convention does not afford a right of dissent so that, in the event of any doctrinal or organisational disagreement, the individual's freedom of religion is exercised by the option of freely leaving the community and the religious communities should be generally free to react to such dissent in accordance with their own rules and interests. Having regard

[62] In a separate opinion Judge De Gaetano, joined by Judge Power-Forde, emphasised that the support for the finding of a violation was based on the specific facts of the case and not for the view that there was a right to undertake industrial action, which is widely linked to the use of the word "union".
[63] *Adefdromil v. France*, no. 32191/09, 2 October 2014.
[64] Judge De Gaetano, joined by Judge Power-Forde, reaffirmed the separate opinion in *Matelly*.
[65] See paragraphs 7, 10 and 52 of Recommendation CM/Rec(2007) 14 of the Committee of Ministers to member states on the legal status of NGOs in Europe, *The Holy Monasteries v. Greece*, no. 13092/87, 9 December 1994 and *Sidiropoulos v. Greece*, no. 26695/95, 10 July 1998. *Cf. Federation Nationale des Familles de France v. France* (dec.), no. 63026/00, 14 February 2006.
[66] *Fernández Martínez v. Spain* [GC], no. 56030/07, 12 June 2014.

to the review exercised by the national courts, the European Court did not consider that the bishop's decision not to propose the renewal of the contract could be said to have contained insufficient reasoning, to have been arbitrary, or to have been taken for a purpose that was unrelated to the exercise of the Catholic Church's autonomy.

Privileges and status

73. The removal from certain religious communities of their status as registered churches - under which they had previously been entitled to certain monetary and fiscal advantages for their faith-related activities – was held to be a violation of Article 11 read in the light of the right to freedom of thought, conscience and religion under Article 9 as not necessary in a democratic society[67]. The removal was designed to address problems relating to the exploitation of State funds by certain churches but did not prevent the communities concerned from continuing their religious activities as associations. Furthermore, after a constitutional challenge to the measure, it became possible for the communities to again refer to themselves as churches but they could only regain access to the monetary and fiscal advantages to which they had previously been entitled through applying to Parliament to be registered as incorporated churches.

74. Although the European Court accepted that the measure served the legitimate aim of preventing disorder and crime by attempting to combat fraudulent activities by certain churches, and that there was no right for religious organisations to have a specific legal status, it underlined that distinctions in the legal status granted to religious communities must not portray some of them in an unfavourable light in public opinion. It saw a risk that that the adherent of a religion might feel no more than tolerated – but not welcome – if the State refused to grant recognition and support his or her religious organisation, which it had previously enjoyed, whilst extending such recognition and support to other denominations. In the European Court's view, it was important that the communities concerned had been recognised as churches at the time when Hungary adhered to the European Convention and they had remained so until 2011. While recognising the problem of a large number of churches abusing State subsidies without conducting any genuine religious activities, the European Court considered that it had not been demonstrated that this could not be tackled with less drastic solutions, such as judicial control or the dissolution of churches proven to be of abusive character. Moreover, the fact that the decision whether or not to grant recognition as fully incorporated churches now lay with Parliament, an eminently political body, meant that religious communities were reduced to courting political parties for their favourable votes and this was irreconcilable with the State's duty of neutrality in this field. The European Court attached significance to the absence of reasons as to why it was necessary to scrutinise afresh already active churches from the perspective of dangerousness for society and the failure to demonstrate any element of actual danger emanating from the applicant communities. Although Article 9 of the European Convention did not confer on the applicant communities or their members an entitlement to secure additional funding from the State budget, the fact that subsidies were granted in a different manner to various religions called for the strictest scrutiny. The European Court agreed with the Venice Commission's view that, in this connection, it was an excessive requirement for a religious entity to have

[67] *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, no. 7094/11, 8 April 2014.

existed as an association internationally for at least 100 years or in Hungary for at least 20 years[68].

75. The European Court underlined that the State's neutrality required that distinctions in recognition, partnership – for example for outsourcing public-interest tasks – and subsidies be based on ascertainable criteria, such as a community's material capacity. However, there were no objective grounds for the difference in treatment as regards the income-tax-based donations of one percent, which were intended to support faith-based activities and to which only incorporated churches were entitled. The European Court concludes that, in removing the applicants' church status altogether rather than applying less stringent measures, in establishing a politically tainted re-registration procedure whose justification as such is open to doubt, and finally, in treating the applicants differently from the incorporated churches not only with regard to the possibilities for cooperation but also with regard to entitlement to benefits for the purposes of faith-related activities, the authorities disregarded their duty of neutrality vis-à-vis the applicant communities[69].

Collective bargaining and strikes

76. It has long been established that Article 11 of the European Convention safeguards the freedom to protect the occupational interests of trade-union members by the union's collective action, the conduct and development of which the Contracting States must both permit and make possible. Moreover, the European Court has recognised for some time that the right to bargain collectively with an employer is one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11[70].

77. Thus, the annulment by the audit court of collective agreements concluded by a trade union formed by civil servants working for a number of local authorities on the basis that civil servants could not directly enter into collective agreements with the authorities, as trade unions of ordinary contractual employees could with their employers - was understandably held to constitute an unjustified interference with its right under Article 11 of the European Convention[71]. Indeed, the European Court considered the situation in this case to be no different from the annulment of a

[68] *Opinion on Act CCVI of 2011on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary*, CDL-AD(2012)004, 19 March 2012, para. 64.

[69] It should be noted that Judge Sajo, joined by Judge Raimondi, dissented in the following terms: "It is important to highlight that the Court has never held before today that the decision of the State to withhold previously afforded material benefits from religious entities which are duly registered and afforded legal personality status constitutes, as such, interference with the freedom to manifest a religion or a belief under Article 9, interpreted in the light of Article 11. As is clear from the case-law of the Court, cited above in paragraph 9, an arguable issue under the Convention only arises in this regard if an applicant can demonstrate on the facts that in the exercise of its regulatory powers the State has withheld material benefits from a religious entity whilst providing benefits to others, and that this difference in treatment is not justified on objective and reasonable grounds. By its nature, an assessment of this kind under Article 14 of the Convention necessitates an individual examination of whether discrimination occurred. Therefore, the Court should have examined the applicants' complaint on the basis of Article 14 taken in conjunction with Articles 9 and 11 of the Convention". The majority had declined to examine the part of the complaint based on Article 14 taken in conjunction with Articles 9 and 11 separately.

[70] *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008.

[71] *Tüm Bel-Sen v. T*urkey, no. 38927/10, 18 February 2014.

collective agreement previously found by its Grand Chamber to breach the right of municipal civil servants, inherent in their trade-union freedom, to bargain collectively[72].

78. However, no violation of Article 11 of the European Convention was found where an amendment to a collective agreement had been registered after its adoption at the second part of a meeting which the applicant federation of unions had not attended[73]. This conclusion was founded on the absence of any conclusive proof regarding its non-attendance after the first part of the meeting had been suspended to allow the applicant federation and another one attending the meeting to agree a common strategy. There was certainly no evidence that the applicant federation was unaware of the date and location of the second part of the meeting, which was held on the same date. In these circumstance, the European Court could not presume the reasons for its non-attendance and it was significant that it had not apparently attempted to inform itself of the date, time or location of the second part of the meeting and that it had not argued that the reason for its failure to return to the negotiating table had been its inability to agree on a common strategy with the other federation on account of the latter's refusal to cooperate with it. Furthermore, the European Court did not consider the registration of the amendment to be arbitrary, having regard to the fact that the applicant federation had not been party to the negotiation and its signature was therefore not required on the document.

79. It is now well-established that strike action is protected by Article 11 of the European Convention[74] but it is not regarded as one of the essential elements of trade union freedom and so restrictions on it can be upheld. Nonetheless, the European Court has now potentially widened the scope of the right by finding that secondary action – i.e., action against one employer in order to further a dispute in which a union's members are engaged with another employer – does come within the scope of Article 11[75]. This novel ruling involved a refusal to take a literal reading of the second clause of the first paragraph of Article 11 and was consistent with the European Court's approach of not interpreting the scope of freedom of association of trade unions in a manner much narrower than that which prevails in international law. In this context it was significant that that secondary action is recognised and protected as part of trade union freedom under ILO Convention No. 87 and the European Social Charter[76].

80. Any interference with the right to strike must be prescribed by law, which necessitates not only that it has a formal basis in domestic law but that the law concerned is both accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The second of the two elements relating to the quality of the law were found to be absent in the case of a ban on proposed strike action by employees of an air passenger carrier[77]. Although the right to strike was enshrined in the constitution, the procedures for exercising that right or the grounds for prohibiting a strike were regulated by two laws. One of them – applicable to all sectors - only prohibited strikes where human

[72] *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008.
[73] *Familia General Federation of Trade Unions v. Romania* (dec.), no. 10684/04, 8 October 2013.
[74] *Enerji Yapi-Yol Sen v. Turkey*, no. 68959/01, 21 April 2009.
[75] *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, no. 3104/10, 8 April 2014.
[76] But see para. 84 below
[77] *Veniamin Tymoshenko and Others v. Ukraine*, no. 48408/12, 2 October 2014.

life, health or the environment would be endangered or the prevention of a natural disaster, an accident, a catastrophe, an epidemic or an epizootic outbreak would be hindered or the rectification of their consequences would be hampered. The other, adopted four years earlier and concerned only with the transport sector, additionally prohibited strikes where passenger transportation or the maintenance of a continuous production cycle was concerned. The European Court found it remarkable that the earlier law continued to apply without amendment notwithstanding that the later one had provided that other laws and regulations should be applicable only in the part which does not contradict it and that they should be brought into compliance with it. This state of affairs was regarded by the European Court as sufficient for it to conclude that the interference with the employees' rights under Article 11 of the European Convention was not based on sufficiently clear and foreseeable legislation.

81. Moreover, a ban on a union holding a strike for a period of three years and eight months was found to be disproportionate to the aim of upholding the principle of parity in collective bargaining[78]. Such a ban was imposed because an annex containing a collective agreement for the medical and dentistry sector was null and void because it had not been entered into by all the trade unions that had concluded the main collective agreement for the health and health insurance sector and so the aim was to protect the rights of those trade unions. In addressing the issue of proportionality, the European Court noted that there had been a failure to examine whether the union was allowed to strike to demand the conclusion of a (new) collective agreement for the medical and dentistry sector, which had been a subsidiary ground for calling the strike and that the ban had lasted until the date on which the judgment declaring the annex null and void had become final. In the European Court's view, it was difficult to accept that upholding the principle of parity in collective bargaining could justify depriving a trade union for so long of the most powerful instrument to protect occupational interests of its members, especially as it could not strike to pressure the government to grant doctors and dentists the same level of employment-related rights to which it had already agreed in the annex that had been invalidated on formal grounds only.

82. However, a court order declaring a strike unlawful on the basis that negotiations had still been pending between the union and the employer and the failure to comply with the statutory requirement that out-of-court settlement of labour disputes – a form of cooling-off procedure - be first exhausted was not considered by the European Court to be a disproportionate interference with the union's right under Article 11 of the European Convention[79]. In its view, a system of prior compulsory conciliation aimed to ensure friendly settlement of labour disputes before resorting to a strike, which it saw as the most powerful but at the same time the most radical, instrument available to trade unions to protect the occupational interests of its members. Moreover, it was significant that the out-of-court settlement proceedings were detailed in the general business collective agreement and their length was limited to a maximum of fifteen days. Furthermore, the court order – which was issued after the union's members had exercised their right to strike for approximately six months - had not prohibited right to strike as such but had acknowledged that the union had gone on strike contrary to the rules.

[78] *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, 27 November 2014.
[79] *Trade Union in the Factory '4th November' v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 15557/10, 8 September 2015.

83. In addition, a refusal to grant an authorisation for a strike following the collapse of negotiations on police officers' working conditions on the grounds that the law barred members of the State security forces – which covered law enforcement agents - from exercising the right to strike in any circumstances was held not to constitute neither a violation of Article 11 of the European Convention taken alone nor in conjunction with Article 14[80]. In the European Court's view, given the specific duties assigned to the police force and the potential consequences of any interruption of its activities, the ban pursued the legitimate aim of preventing disorder. It considered that the need for "law-enforcement agents" to provide an uninterrupted service and the fact that they were armed distinguished them from other civil servants such as judges or doctors, and justified the restriction of their right to organise. Moreover, the European Court regarded the more stringent requirements imposed on them as not having exceeded what was necessary in a democratic society, in so far as those requirements served to protect the State's general interests and, in particular, to ensure national security, public safety and the prevention of disorder. Furthermore, the specific nature of the activities in question warranted granting the State sufficient room for manoeuvre ("a wide margin of appreciation") to implement its legislative policy and regulate certain aspects of the trade union's activities in the public interest, without however depriving the union of the core content of its rights under Article 11. In this connection, the European Court saw no reason to depart from the finding of the Committee of Ministers which had taken the view that a complete ban on the right to strike for police was not contradictory to the European Social Charter and its case-law[81]. The suggestion of discrimination failed since the European Court considered that the explanations provided by the government as to the specific nature of the duties attributed by law to the State security forces were reasonable and did not disclose any arbitrariness suggestive of discrimination.

84. Furthermore, although finding that secondary action came within the scope of Article 11 of the European Convention[82], the European Court was satisfied that a ban on such action pursued the legitimate aim of protecting the rights and freedoms of others, not limited to the employer side in an industrial dispute, the crucial issue became whether or not, in the particular circumstances of the case, the ban was necessary in a democratic society. Although the European Court has previously found restrictions on industrial action to violate Article 11 and that strike action is clearly protected by that provision, it did not consider it necessary to determine whether the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee. Nonetheless, it did see the circumstances of the cases as involving the exercise by the applicant union of two essential elements of freedom of association, namely the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members and the right to engage in collective bargaining. At the same time, it emphasised that the latter right did not include a "right" to a collective agreement and so the fact that the outcome desired by the applicant union and its members had not been achieved did not mean that the exercise of their Article 11 rights was illusory. Furthermore, in the European Court's view, the present restriction was not one on "primary" or direct industrial action – essentially adopting

[80] *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, no. 45892/09, 21 April 2015.
[81] In Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, 19 September 2001.
[82] See para. 79 above.

the view that secondary industrial action probably constituted an accessory rather than a core aspect of trade union freedom - and that a wider margin of appreciation in respect of regulation in the public interest should thus be recognised to the national authorities. The European Court recognised that the applicant union had adduced cogent arguments of trade union solidarity and efficacy in support of undertaking secondary action but it found sufficient policy and factual reasons for the impugned ban, notably the capacity in the past for such action to spread far and fast beyond the original industrial dispute. Given that it did not see the interference with the applicant union's freedom of association in the specific set of facts to be especially far-reaching since it was able in representing its members, to negotiate with the employer on behalf of its members who were in dispute with the employer and to organise a strike of those members at their place of work, it therefore concluded that the operation of the ban in relation to the impugned facts did not entail a disproportionate restriction on the applicant union's right under Article 11. The European Court did not accede to the submission that the European Committee on Social Rights and the ILO Committee of Experts were not competent to give authoritative interpretations of, respectively, the European Social Charter and ILO Conventions and indeed it reaffirmed its acceptance of their point of reference and guidance for the interpretation of certain provisions. However, it emphasised that the negative assessments made by them of the relevant legislation were not of such persuasive weight for determining whether or not the operation of the ban on secondary strikes in the specific circumstances of the present case remained within the range of permissible options open to the national authorities under Article 11 of the European Convention.

Harassment

85. A campaign of harassment and intimidation against a non-governmental organisation and its staff, together with the closure of the former and the freezing of is bank accounts on account of their perceived links with the International Criminal Court was found to violate the right to free association by the African Commission on Human and Peoples' Rights in the absence of any information showing that the activities of the organization endangered national security, morality, or the rights of other people[83].

Sanctions

86. There have been several cases in which the imposition of sanctions for carrying out trade union and related activities has violated the right to freedom of association. In addition, the need for a reasoned basis for imposing sanctions in respect of organisations has been insisted upon.

87. Thus, a police officer's intervention with the distribution in a hospital by a nurse of leaflets published by her union to other unions – involving the use of force and detention for about an hour – was considered by the European Court to be an unjustified interference with her rights under Article 11 of the European Convention as this action was not "prescribed by law", an essential precondition for any

[83] 379/09 *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, 14 March 2014.

restriction on rights under this provision[84]. This conclusion was inevitable given that the Government had not referred to any legal provisions which prohibit the distribution of leaflets in hospitals during working hours and without the hospital administration's permission and the absence of any administrative or criminal proceedings being brought against the nurse in connection with her distribution of the leaflets[85].

88. Similarly, the imposition of a reprimand on a teacher - who held office in a union - for taking part in a panel discussion organised by a political party was considered a disproportionate interference with the enjoyment of the right to freedom of association, and was therefore not "necessary in a democratic society"[86]. In this case, the European Court observed that the teacher had participated in his capacity as local leader of a union but had only listened without expressing himself or manifested any political opinion. Furthermore, no attention had been paid to the fact that he had attended the panel not as official but as a citizen and trade union leader. Although the disciplinary measure was small, it was likely to deter him and other union members from legitimately participating in peaceful demonstrations to defend their interests. In the European Court's view, the fact that the activity in question had no direct link with the main business of the union, did not matter since, given the manner in which the disciplinary process was handled, the penalty was likely to be a deterrent for future trade union activities.

89. Such a view was also taken of the imposition of a warning as a disciplinary sanction on a trade unionist for having held a referendum during a lunch break, in his capacity as secretary of a section of his union, on the country's budget and the rights of employees[87]. He had done so without applying for prior authorisation from the directorate general responsible for municipal electricity, gas and public transport, for which he worked. In this case the European Court again emphasised both that no attention had been paid to the capacity in which the referendum had been organised, citing the fact that the law actually prohibited official sanction for participating in a union demonstration taking place outside their hours of work even without the employer's permission, and that the sanction, however minimal, was likely to have a deterrent effect on activities by union members.

90. In some instances, such sanctions have been treated as entailing a violation of the right to freedom of assembly rather of the right to freedom of association but the associational dimension remained significant.

91. Thus, a violation of the right to freedom of assembly was also found in respect of the imposition of a fine on a civil servant who had taken part in a peaceful demonstration organised by his trade union at which a statement was made to the press calling for a crèche to be set up in the workplace of the demonstrators[88]. Amongst the

[84] *Fatma Akaltun Firat v. Turkey*, no. 34010/06, 10 September 2013.

[85] *Cf. Bereketoğlu v. Turkey* (dec.), no. 8205/08, 9 September 2014, in which the Court found a complaint about a union member being disciplined to be manifestly ill-founded because the sanction had been imposed not for seeking to put up a notice from the union in a teachers' common room but for being disrespectful in a discussion with his superior following his refusal to remove it and so there was no interference with his freedom of association.

[86] *İsmail Sezer v. Turkey*, no. 36807/07, 24 March 2015

[87] *Doğan Altun v. Turkey*, no. 7152/08, 26 May 2015.

[88] *Akarsubaşı v. Turkey*, no. 70396/11, 21 July 2015.

considerations relevant for this finding was the failure to investigate whether the event was part of the defence of a legitimate interest for the civil servant concerned, in his capacity as member of a union which called for the creation of a crèche in the institution where he worked.

92. Similarly, the imposition of a disciplinary sanction – involving a one-year freeze on promotion - on teachers for attending an event organised on the theme "World Peace against World War", organised by a civil-society group bringing together various associations, political parties and trade unions, including the trade union to which they were affiliated was found by the European Court to violate the right to freedom of peaceful assembly under Article 11 of the European Convention[89].The sanction had been imposed on the ground that they had taken part in an unauthorised event to commemorate the arrest of the leader on an illegal organisation, and that they were in fact activists in a political party. Although the European Court accepted - in line with established case law - that a measure whose purpose is to maintain the political neutrality of a particular category of public servants could in principle be considered as legitimate and proportionate to the aims of Article 11, it emphasised that such a measure could actually undermine the very essence of the right to freedom of assembly and association if no account were taken of the specific functions and role of the official concerned and the particular circumstances of the case. In respect of the latter considerations, the European Court observed that the sanction had been imposed pursuant to a law applicable to all public officials without any distinction based on their function or role within the administration, the actual event involved had been peaceful, the teachers had participated in a purely passive way without expressing political views of such a nature that they could jeopardise their ability to practice their profession of teacher in public schools and it had not been demonstrated by what acts attributable to them they had acted in favour of a particular political party during the said event. In the European Court's view, the teachers' participation in this peaceful protest was an exercise of their freedom of peaceful assembly. As the severity of the penalty – the most serious before revocation of appointment – was considered by the European Court to be likely to deter union members from participating in peaceful demonstrations, its imposition could not be regarded as necessary in a democratic society. The European Court reached a similar conclusion in respect of the transfer of two teachers to posts in other towns for having taken part in a demonstration organised by a civil-society group bringing together various trade unions[90].

93. Finally, the General Court of the European Union has annulled several Regulations implementing the imposition of specific restrictive measures - essentially the freezing of funds - directed against certain persons and entities with a view to combating terrorism and repealing others in so far as those measures concern the Liberation Tigers of Tamil Eelam on account of the failure to fulfil the obligation to state reasons for its continued inclusion in the list of those subject to the measures concerned[91]. The General Court found that the Council of the European Union, instead of taking, for the factual basis of its assessment, decisions adopted by competent authorities that have taken into consideration the specific acts and acted on the basis of those acts, and then verifying that those acts are indeed 'terrorist acts' and that the group concerned is

[89] *Küçükbalaban and Kutlu v. Turkey*, no. 29764/09, 24 March 2015.
[90] *Dedecan and Ok v. Turkey*, no. 22685/09, 22 September 2015.
[91] Joined Cases T-208/11 and T-508/11, *Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union*, 16 October 2014.

indeed 'a group', as defined in Common Position 2001/931, in order to decide, on that basis and in exercising its broad discretion, whether to adopt a decision at EU level, the Council does the reverse in the grounds for the contested regulations. Thus, it began with assessments which are, in actual fact, its own assessments, classifying the LTTE as a terrorist from the first sentence of the grounds — which determines the question which those grounds are supposed to resolve — and imputing to it a series of acts of violence which the Council took from the press and the internet (first and second paragraphs of the grounds for the contested regulations). In the General Court's view, the fact that the case involved a review of the list relating to frozen funds, which therefore takes place after previous examinations, could not justify any a priori classification. It emphasised that, without ignoring the past, a review of a fund-freezing measure was by definition open to the possibility that the person or group concerned was no longer terrorist at the time of the decision and so that conclusion could only be reached at the end of the review. The General Court noted that the Council had not sought to show that national review decisions, or other decisions of competent authorities, had actually examined and upheld the specific acts set out at the beginning of the grounds for the implementing regulations. At the same time, it was made clear that the obligation to make new imputations of terrorist acts only on the basis of decisions of competent authorities did not in any way preclude the Council's right to maintain the person concerned on the list relating to frozen funds, even after the cessation of the terrorist activity in the strict sense, if the circumstances warranted it. Thus the annulments were only on fundamental procedural grounds and the General Court made it clear that this did not imply any substantive assessment of the question of the classification of the LTTE as a terrorist group within the meaning of Common Position 2001/931.

Dissolution

94. Following well-established case law, the European Court found the dissolution of a religious organisation belonging to the Pentecostal movement of the Christian faith – purportedly to put an end to unlicensed education in inadequate sanitary conditions - to be a violation of Article 9 of the European Convention interpreted in the light of Article 11 since this put an end to the existence of a long-standing religious organisation and constituted a most severe form of interference, which could not be regarded as proportionate to whatever legitimate aims were being pursued[92]. In reaching this conclusion, the European Court had regard to the fact that the organisation had never been informed of any irregularities or that its activities required a licence for running a Sunday school, it was not afforded time or, indeed, the opportunity to remedy the alleged irregularities found following an inspection, the dissolution had not been shown to be the only option for the fulfilment of the aims being pursued and account had not been taken of relevant rulings of the Constitutional Court and the impact on the fundamental rights of Pentecostal believers.

95. Furthermore, the dissolution of an association because it had engaged in religious activities despite having the status of a non-governmental organisation was held to be an interference with its freedom of association that was not prescribed by law because the lack of any definition of the term "religious activity" made it impossible for the association and its members to foresee what constituted "religious activity" in order to

[92] *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, 12 June 2014.

carry out their activities in line with domestic law[93]. In reaching this conclusion, the European Court noted that the legislation on non-governmental organisations was not applicable to religious organisations, which were defined in the Law on Freedom of Religion. Moreover, no such definition had been provided by the Ministry of Justice and the domestic courts, with the latter instead having imposed the burden of proof on the association and having held that it had failed to submit any reliable evidence proving that it had not engaged in such activity. The European Court also found it significant that neither the Ministry of Justice nor the domestic courts had specified the religious activities in which the association had allegedly engaged and, in particular, had not referred to any action taken by it which could be qualified as religious activity. The only evidence on which the authorities had relied in this respect was the minutes of the association's general assembly, in which the organisation of pilgrimages to holy shrines and the Caucasus Muslim Board's "monopoly" regarding their organisation had been discussed. The European Court points out that the organisation of pilgrimages to holy shrines constituted one of the aims of the association as provided for in its charter, which had been registered by the Ministry and if it had considered that this was a religious activity, it could have asked the association to amend the relevant provisions of its charter in order to bring it into line with domestic law but had never done so. The European Court considered that the lack of any definition gave the authorities an unlimited discretionary power in that sphere, which was not compatible with Article 11 of the European Convention.

E. CONCLUSION

96. The situation of non-governmental organisations continues to generate considerable activity in terms of standard-setting, the functioning of various supervisory and other mechanisms and in regional courts and tribunals. This is both an endorsement of the immensely valuable role that non-governmental organisations, in a wide range of forms, continue to play and – notwithstanding this role - a reflection of the various pressures to which they continue to be subject. Recent developments have reinforced the standards that should be respected and also provided elaboration as to what these entail in practice. Nonetheless, the continuation of efforts to ensure their effective implementation clearly remains vital.

[93] *Islam-Ittihad Association and Others v. Azerbaijan*, no. 5548/05, 13 November 2014.