



CONFERENCE OF INGOs  
OF THE COUNCIL OF EUROPE

CONFERENCE DES OING DU  
CONSEIL DE L'EUROPE

**EXPERT COUNCIL ON NGO LAW  
CONF/EXP(2017)4**

December 2017

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**NON-GOVERNMENTAL ORGANISATIONS: REVIEW OF  
DEVELOPMENTS IN STANDARDS, MECHANISMS AND  
CASE LAW 2015-2017**

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on behalf of the  
Expert Council of the Conference of INGOs  
of the Council of Europe**

*The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.*

## **FOREWORD**

The Expert Council on NGO Law is a pillar of the Conference of INGOs of the Council of Europe. It regularly contributes to the advancement of the principles and values of the Council of Europe, and notably the consolidation of the Rule of Law, through its expert Opinions on country situations where democratic life is threatened by restrictions imposed on civil society.

The Expert Council also issues Opinions or Reports on themes, topics or actions that influence for - good or bad - the functioning of civil society and its essential contribution to human rights and democracy.

The present Review is an outstanding example of the latter. For the fourth time, the immensely competent and experienced Jeremy McBride has surveyed and expounded developments in standards, mechanisms and case law affecting NGOs throughout the Council of Europe and beyond. The Review is an erudite explanation of decisions and opinions issued by the European Court of Human Rights and by several other Council of Europe organs (the Committee of Ministers, the Parliamentary Assembly, the Venice Commission and the Commissioner for Human Rights). It is noteworthy that the European Court has for the second time cited the Committee of Ministers Recommendation (2007)14 on the legal status of NGOs, a beacon of light in the European region.

The Review is comprehensive in that it also references actions taken by the OSCE, the Financial Action Task Force, and the United Nations (namely its Human Rights Council, Human Rights Committee, and the UN Special Rapporteurs who so lucidly and regularly remind governments of their international legal and moral obligations).

It is thus not surprising that in addition to the notorious cases of currently shrinking civil society space in Council of Europe member states (Azerbaijan, Hungary, Russian Federation, Turkey) the Review cites five other member states where problems are posed for civil society (Greece, Moldova, Poland, Romania and the United Kingdom) and 14 other countries throughout the world.

Many aggressive or insidious actions taken by governments to limit civil society freedoms not only have deleterious effects nationally but hamper constructive participation in international fora.

I thus heartily recommend this Review for study by governmental authorities at all levels, by intergovernmental institutions and by the widest range of NGOs. The Review indeed constitutes a learning exercise, whereby good practices regarding fundamental freedoms and civic participation in policy dialogues can be brought to the forefront and multiplied. Democracy, human rights and the rule of law will be the beneficiaries.

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 2015 and 31 October 2017. 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 the elaboration of new standards relating to the Internet, human rights defenders, the use of hate speech and the involvement or misuse of non-governmental organisations for terrorist purposes. They also include the important rehearsal of requirements relating to civil society space and the protection of human rights defenders.

The issues addressed by the mechanisms are concerned primarily with the implementation of human rights commitments but they have also concerned the achievements of civil society. In addition, the issues also include ones relating to the mandates of two key mechanisms, the particular problems faced by human rights defenders and marginalised workers and the definition of fundamentalism and its impact on the right to freedom of association, as well as many other ones arising in a wide range of countries.

The case law developments have been concerned with the concept of an association and then various issues relating to membership of them, their objects, formation, members and pursuit of activities, as well ones concerning the imposition of sanctions, the use of dissolution and the provision of remedies.

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 is noted to be both an endorsement of the immensely valuable role that non-governmental organisations continue to play but also a reflection of the considerable pressures to which they continue to be subject. Thus, continued efforts to ensure the effective implementation of all the standards that have been elaborated clearly remains vital for the maintenance of democratic societies.

## **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 2015 and 31 October 2017, 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 concern the exercise of freedom of association through the Internet, the participation of non-governmental organisations in the decision-making of public authorities, preserving and protecting civil society space, responding to the use of hate speech by non-governmental organisations and their members, the situation of human rights defenders and the possible involvement of non-governmental organisations in terrorism and their use for terrorist financing..

### *Internet freedom*

3. The changing nature of the environment in which the activities of non-governmental organisations may be undertaken has been appropriately recognised by the stipulation in paragraph 3 in the Appendix to Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom that:

3.1. Individuals are free to use Internet platforms, such as social media and other ICTs in order to associate with each other and to establish associations, to determine the objectives of such associations, to form trade unions, and to carry out activities within the limits provided for by laws that comply with international standards.

3.2. Associations are free to use the Internet in order to exercise their right to freedom of expression and to participate in matters of political and public debate.

3.3. Individuals are free to use Internet platforms, such as social media and other ICTs in order to organise themselves for purposes of peaceful assembly.

3.4. State measures applied in the context of the exercise of the right to peaceful assembly which amount to a blocking or restriction of Internet platforms, such as social media and other ICTs, comply with Article 11 of the Convention.

3.5. Any restriction on the exercise of the right to freedom of peaceful assembly and right to freedom of association with regard to the Internet is in compliance with Article 11 of the Convention, namely it:

- is prescribed by a law, which is accessible, clear, unambiguous and sufficiently precise to enable individuals to regulate their conduct;

- pursues a legitimate aim as exhaustively enumerated in Article 11 of the Convention;

- is necessary in a democratic society and proportionate to the legitimate aim pursued. There is a pressing social need for the restriction. There is a fair balance between the exercise of the right to freedom of assembly and freedom of association and the interests of the society as a whole. If a less intrusive measure achieves the same goal, it is applied. The restriction is narrowly construed and applied, and does not encroach on the essence of the right to freedom of assembly and association.<sup>1</sup>

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<sup>1</sup> Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies.

## *Participation*

4. Two instruments deal with aspects of participation of non-governmental organisations in decision-making by public bodies, one enabling it and the other seeking to ensure that it is not hampered by measures to address certain regulatory efforts to deal with lobbying.
5. The former is seen in the recognition of the need for engagement with football and other sports' supporter representatives found in the provisions of the Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events that are concerned with safety, security and service in public places and police strategies and operations.<sup>2</sup>
6. The latter is a feature of Recommendation CM/Rec(2017)2 of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making. This Recommendation has been adopted with a view to encouraging the establishment or further strengthening of a coherent and comprehensive framework for the legal regulation of lobbying activities in the context of public decision making.<sup>3</sup>
7. It envisages such a framework being based on the “Guiding Principles” set out in its Appendix. These define “lobbying” as “promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision making” and a “lobbyist” as any natural or legal person who engages in lobbying. The object of the legal regulation of lobbying is stated to be to “promote the transparency of lobbying activities”.
8. The Recommendation proposes the establishment of a public register of lobbyists<sup>4</sup> and stipulates that lobbyists should be guided by “the principles of openness, transparency, honesty and integrity”,<sup>5</sup> with the legal regulations on lobbying containing “effective, proportionate and dissuasive” sanctions for non-compliance.
9. The definitions of “lobbying” and “lobbyist” are certainly capable of embracing a great deal of the activities undertaken by many non-governmental organisations pursuant to the right to freedom of association.<sup>6</sup> It is thus important that Guiding Principle 4 specifically provides that:

Legal regulation of lobbying activities should not, in any form or manner whatsoever, infringe the democratic right of individuals to:

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<sup>2</sup> CETS, No. 218, Articles 6, 8 and 9. This treaty was opened for signature on 3 July 2016 and is now in force for the 6 States that have ratified it: France; Monaco; Norway; Poland; Republic of Moldova; and the Russian Federation.

<sup>3</sup> Adopted by the Committee of Ministers on 22 March 2017 at the 1282 meeting of the Ministers' Deputies.

<sup>4</sup> This should contain as a minimum: the name and contact details of the lobbyist; the subject matter of the lobbying activities; and the identity of the client or employer, where applicable.

<sup>5</sup> In particular, they should be expected to: provide accurate and correct information on their lobbying assignment to the public official concerned; act honestly and in good faith in relation to the lobbying assignment and in all contact with public officials; refrain from undue and improper influence over public officials and the public decision-making process; and avoid conflicts of interest.

<sup>6</sup> See paras. 146-147 and 162-165 below.

- a. express their opinions and petition public officials, bodies and institutions, whether individually or collectively;
- b. campaign for political change and change in legislation, policy or practice within the framework of legitimate political activities, individually or collectively.

10. Furthermore, such a provision should also undoubtedly be read in the light of the stipulation in paragraph 3 in the Appendix to Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom discussed above.<sup>7</sup>

### *Preserving and protecting civil society space*

11. The problems faced by non-governmental organisations as a result of various restrictions on their activities and ability to operate has been addressed in 2016 by both the Parliamentary Assembly of the Council of Europe and in a declaration addressed to the OSCE by civil society representatives. The need for effective action to counter these restrictions and to give effect to established standards was a feature of all the documents concerned.

12. Thus, the Parliamentary Assembly of the Council of Europe adopted both a Resolution and a Recommendation entitled “How can inappropriate restrictions on NGO activities in Europe be prevented?”<sup>8</sup>

13. In the Resolution, it was stated that:

1. The Parliamentary Assembly recalls the importance of the role of a dynamic civil society for the good functioning of democracy and pays tribute to all the non-governmental organisations (NGOs) whose work has strengthened human rights, democracy and the rule of law in their States.
2. The Assembly stresses that all States Parties to the European Convention on Human Rights (ETS No. 5) have agreed to ensure respect for freedoms of assembly and association and of expression and information, and thus to create a favourable environment for the exercise of those freedoms, guided by the case law of the European Court of Human Rights, Committee of Ministers Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe and the Joint guidelines on freedom of association adopted in December 2014 by the European Commission for Democracy through Law (Venice Commission) and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe.
3. The Assembly reaffirms its previous [Resolutions 1660 \(2009\)](#) and [1891 \(2012\)](#) on the situation of human rights defenders in Council of Europe member States, as well as [Resolution 2060 \(2015\)](#), [Recommendation 2073 \(2015\)](#), [Resolution 1729 \(2010\)](#) and [Recommendation 1916 \(2010\)](#) on the protection of whistle-blowers.

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<sup>7</sup> See para. 3 above.

<sup>8</sup> Both were adopted pursuant to a report with the same title by the Committee on Legal Affairs and Human Rights, Doc. 13940, 8 January 2016. In this report, the situation of civil society in four countries was examined: the Russian Federation, Azerbaijan, Turkey and Hungary. It expressed particular concern about the recent deterioration of the working environment for NGOs in the first two States due to recent changes in the legislation on NGOs. The report also noted that in Turkey several human rights organisations had been targeted, arbitrarily, on the basis of anti-terrorist legislation and took stock of the situation in Hungary, where certain NGOs receiving funds from abroad were raided by the authorities. The report called upon member States of the Council of Europe to fully implement the well-established standards on freedom of association and the Council of Europe should strengthen its co-operation with civil society.

4. The Assembly notes that in certain Council of Europe member States the situation of civil society has dramatically deteriorated over the last few years, in particular following the adoption of restrictive laws and regulations, some of which have been strongly criticised by the Venice Commission, the Council of Europe Commissioner for Human Rights and the Conference of International Non-governmental Organisations. In certain member States, NGOs encounter various impediments to their registration, operating and financing. In others, despite an appropriate legal framework, certain NGOs such as human rights defenders and watchdog organisations are stigmatised. The Assembly is particularly worried about the restrictions affecting civil society in Azerbaijan and the Russian Federation and about the situation in annexed Crimea and other territories outside the control of State authorities.

5. As regards the situation of civil society in Azerbaijan, the Assembly recalls its [Resolution 2062 \(2015\)](#) on the functioning of democratic institutions in Azerbaijan and condemns once again the deterioration of the working conditions of NGOs and human rights activists following changes to the legislation on NGOs that impose inappropriate restrictions on their activities. The Assembly calls on Azerbaijan to amend its legislation on NGOs in accordance with the recommendations of the Venice Commission (Opinions Nos. 636/2011 and 787/2014) and to fully and promptly implement judgments of the European Court of Human Rights, in particular those finding violations of the freedoms of association, assembly and expression. The Assembly expresses its serious concern over the continuing deterioration of the human rights situation in Azerbaijan, and calls on Council of Europe member States to attach special importance to human rights and fundamental freedoms in the context of bilateral co-operation.

6. The Assembly also expresses strong concern about the so-called “foreign agents law” modifying the Russian legislation on non-commercial organisations, to the effect that NGOs receiving foreign funding are obliged to register as “foreign agents”. It notes that dozens of NGOs have been unilaterally registered as foreign agents by the Minister of Justice and that even the laureate of the Assembly’s 2011 Human Rights Prize, the Nizhny Novgorod Committee against Torture, was recently forced to close down for this reason. The Assembly is also worried about the adoption, in May 2015, of the law on undesirable organisations, the implementation of which may lead to the closure of major international and foreign NGOs working in the Russian Federation. The Assembly calls on Russia to amend the legislation on NGOs in accordance with the Venice Commission’s Opinions Nos. 716/2013 and 717/2013 and calls on the authorities to implement the remaining provisions of this legislation in accordance with the international standards on the right to freedom of association and other relevant human rights.

7. The Assembly therefore calls on member States to:

7.1. fully implement Committee of Ministers Recommendation CM/Rec(2007)14;

7.2. review existing legislation with a view to bringing it into conformity with international human rights instruments regarding the rights to freedom of association, assembly and expression, by making use of the expertise of the Council of Europe, and in particular of the Venice Commission;

7.3. refrain from adopting any new laws which would result in inappropriate restrictions on NGOs;

7.4. ensure that NGOs are effectively involved in the consultation process concerning new legislation which concerns them and other issues of particular importance to society;

7.5. ensure an enabling environment for NGOs, in particular by refraining from any harassment (judicial, administrative or tax) and smear campaigns;

7.6. sign and/or ratify the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS No. 124), if this has not yet been done.

8. The Assembly, mindful of the precarious situation of civil society in the Council of Europe area, resolves to remain seized of the matter and to continue to give it priority, in view of the urgent need to monitor respect for freedom of association, of assembly and of expression.<sup>9</sup>

14. In the Recommendation, made with reference to the foregoing Resolution, the Assembly recommended that the Committee of Ministers:

1.1. call on member States of the Council of Europe to implement its Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe and prepare a study taking stock of progress made;

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<sup>9</sup> Resolution 2096 (2016), 28 January 2016.

- 1.2. consider revising Recommendation CM/Rec(2007)14 in order to adapt it to new threats to the functioning of independent civil society;
- 1.3. continue its thematic debate on the role and functioning of NGOs in the Council of Europe in order to follow, on a regular basis, the state of civil society and of the freedoms of association, assembly and expression in the member States;
- 1.4. increase the number of exchanges of views with civil society representatives and provide a fixed framework for such a dialogue;
- 1.5. consider creating a platform for the exchange of experience and good practices in the area of freedom of association between the member States.<sup>10</sup>

15. In December 2016 the OSCE-wide NGO coalition “Civic Solidarity Platform” organised the OSCE Parallel Civil Society Conference in Hamburg. Its participants, concerned about legislative and other measures to restrict the ability of civil society to operate freely, including the abuse of international agreements and cooperation concerning criminal matters, financing of terrorism, money laundering and taxation, adopted the Hamburg Declaration on Protecting and Expanding Civil Society Space<sup>11</sup>.

16. In this Declaration, the OSCE Parallel Civil Society Conference called on:

the authorities of OSCE participating States to reverse the backlash against civil society at the national level, inter alia, to:

- stop referring to civil society groups critical of government policies as political tools of foreign interference in domestic affairs,
- refrain from describing civil society groups critical of government policies as a threat to “traditional values” and stability,
- stop engaging in smear campaigns and making discrediting statements against civil society groups and activists;
- repeal “foreign agents” laws” and lift restrictions on international funding of civil society activities;
- promptly and effectively investigate all attacks against civil society activists and bring their perpetrators and masterminds to justice,
- stop conflating civic activism and extremism and imposing excessive and disproportionate restrictions of freedoms of association, assembly, and expression in the name of security, including countering terrorism,
- stop criminalising non-violent expression to suppress critical voices and prevent accountability of governments,
- recognise and support the role civil society plays in combating radicalisation and violent extremism by reaching out to include citizens and residents from minority groups,
- stop using the judicial system as a means of repression and pressure on civil society, including through unfair trials, politically motivated convictions, approval of surveillance and travel bans (denial of exit from the country),
- stop using economic mechanisms, including tax, financial, anti-money-laundering, and other regulations, to restrict civil society activities,
- stop using “collective punishment” to intimidate and repress civil society activists by targeting their relatives,
- consistently raise the issue of shrinking civil society space at various OSCE fora as well as in bilateral meetings with representatives of the States concerned, and consider adopting joint statements or declarations on this issue at the level of the Ministerial Council or the Permanent Council, or at the HDIM,
- establish a list of human rights defenders at risk and issue express long-term visas to them and their family members upon request, make recommendations to relevant government bodies on granting political asylum to persecuted activists, when necessary, and support shelter programmes for civic activists at risk,

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<sup>10</sup> Recommendation 2086 (2016), 28 January 2016

<sup>11</sup> Hamburg, 6-7 December 2016.

- review their implementation of international agreements on cooperation in criminal matters and their participation in relevant inter-governmental organisations such as Interpol to ensure that they do not contribute to abuse of such agreements and organisations for prosecuting human rights defenders and civic activists,
- review their implementation of international agreements on countering tax evasion, money laundering and terrorism financing to prevent that these agreements are used to restrict civil society activities and provide safeguards for activists from countries with repressive governments.

17. In addition, the Conference encouraged:

the OSCE bodies and institutions to take concrete steps without delay to develop appropriate and effective mechanisms and tools for protecting and expanding civil society space and in doing so take into account the following recommendations that have been developed by civil society representatives from across the OSCE region:

- OSCE Chairmanships should consider appointing a Special Representative on Civil Society,
- OSCE Chairmanships should consistently and publicly express support for the protection of civil society space across the OSCE region and in the OSCE's work and events,
- future OSCE Chairmanships should include in their priorities a focus on the protection of space for civil society and the security of human rights defenders, similar to 2014 Swiss Chairmanship,
- OSCE political bodies and institutions should mainstream protection of space for civil society in all OSCE activities and recognise the role of civil society in their programs,
- OSCE political bodies and institutions, including OSCE Chairmanships and ODIHR, should develop a system of prompt and effective reaction to cases of persecution of NGOs and civil society activists and violence against them, in particular, to each and every case of reprisals against NGOs and civil society activists for their participation in OSCE activities and events,
- ODIHR should set up an expert panel on freedom of association, similar to the existing expert panel on freedom of peaceful assembly,
- ODIHR should restore its focal point for human rights defenders and establish an expert (consultative) panel on the protection of human rights defenders,
- ODIHR should study how the Guidelines on the protection of human rights defenders are implemented by participating States, using reports and information from civil society organisations and going beyond the current system of collecting responses to questionnaires, and publish reports on this issue,
- All OSCE institutions, structures, units, and field presences, not only those in the field of human dimension, should designate liaison officers / focal points for civil society. These should not only disseminate information about their work to civil society, but also collect information, network and consult with civil society in a regular and consistent manner,
- Efforts by several successive OSCE Chairmanships and OSCE institutions to expand space for civil society participation in the OSCE work and events and to increase their cooperation with civil society should be continued and expanded,
- Attempts by some OSCE participating States to restrict participation of civil society organisations in the OSCE work and events and their efforts to substitute the existing commitment of unrestricted participation of civil society organisations (except those who engage in or support violence) by a principle of approval by governments, should be clearly and strongly resisted,
- OSCE field operations should more actively cooperate with and support civil society in their countries of presence, by maintaining regular contacts with civil society organisations and activists, accepting and using their information and recommendations, and reacting to instances of restrictive legislation and policies, persecution of and attacks against civil society groups and individual activists,
- The practice of including civil society representatives in ODIHR's expert panels /rosters of experts on specific topics (through open public calls) should be used more widely, and the fact of such involvement should be made public (lists of experts published online, etc.),
- The Chairperson-in Office and Special Representatives of the Chairperson should publicly meet civil society representatives while on official country visits to participating States,
- On the eve of human dimension events, OSCE field presences should organise preparatory meetings in the countries where they operate, bringing together the authorities and civil

society representatives, ODIHR and other OSCE actors should more systematically work with other inter-governmental organisations on the protection of civil society space and the security of human rights defenders,

- OSCE cooperation programmes should feature human rights conditionality. The benchmarks used should include implementation of UN Human Rights Committee views and European Court of Human Rights judgments issued in cases of persecution of civil society activists and human rights defenders,
- The protection of civil society space should be treated as a matter of conflict prevention. OSCE actors should consider repressive legislative and policy changes regarding civil society space early warning signs of a human dimension crisis,
- OSCE actors should ensure that civil society continues playing an active role in early warning, crisis prevention and conflict transformation; regularly involve local civil society actors, human rights experts in joint analyses and the development of policies and country strategies; develop early warning and human dimension crisis prevention indicators and actions jointly with civil society,
- OSCE actors should enhance their support of civil society groups, representatives of minorities and women activists in their conflict transformation and peacebuilding efforts,
- OSCE actors, other international actors and donors involved in conflict management in conflict regions and separatist-controlled territories should recognise the key role of civil society in monitoring the situation, collecting and analysing information and providing assistance to victims. They should provide support to civil society groups, regardless of their national origin

### ***Hate speech***

18. One restriction on NGO activity that is not inappropriate is its use to promote hate speech. This is recognised in the adoption by the Council of Europe's European Commission against Racism and Intolerance of its General Policy Recommendation No. 15 *On Combating Hate Speech*.<sup>12</sup>
19. After elaborating a definition of what constitutes hate speech, it recommends, amongst other measures, that governments of member States:

withdraw all financial and other forms of support by public bodies from political parties and other organisations that use hate speech or fail to sanction its use by their members and provide, while respecting the right to freedom of association, for the possibility of prohibiting or dissolving such organisations regardless of whether they receive any form of support from public bodies where their use of hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it.

### ***Human rights defenders***

20. The situation of human rights defenders has been addressed in two documents, one concerned with them in general and the other with those working in the field of business and human rights.
21. Thus, the United Nations Special Rapporteur on the situation of human rights defenders has observed that the protection of human rights defenders should be seen in the context of three obligations imposed on States by international human rights law, namely,

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<sup>12</sup> On 8 December 2015.

to respect human rights by refraining from violating them; to protect such rights by intervening through protective action on behalf of defenders against threats by others; and to fulfil them by ensuring a safe and enabling environment for defenders to enjoy their rights and to carry out their activities.<sup>13</sup>

22. In the light of these obligations, he has elaborated “seven principles” that, in his view, should underpin practices by States in the protection of human rights defenders, which will be much appreciated by non-governmental organisations working in this field. They are as follows:

- Principle 1: They should adopt a rights-based approach to protection, empowering defenders to know and claim their rights and increasing the ability and accountability of those responsible for respecting, protecting and fulfilling rights.
- Principle 2: They should recognize that defenders are diverse; they come from different backgrounds, cultures and belief systems. From the outset, they may not self-identify or be identified by others as defenders.
- Principle 3: They should recognize the significance of gender in the protection of defenders and apply an intersectionality approach to the assessment of risks and to the design of protection initiatives. They should also recognize that some defenders are at greater risk than others because of who they are and what they do.
- Principle 4: They should focus on the “holistic security” of defenders, in particular their physical safety, digital security and psychosocial well-being.
- Principle 5: They should acknowledge that defenders are interconnected. They should not focus on the rights and security of individual defenders alone, but also include the groups, organizations, communities and family members who share their risks.
- Principle 6: They should involve defenders in the development, choice, implementation and evaluation of strategies and tactics for their protection. The participation of defenders is a key factor in their security.
- Principle 7: They should be flexible, adaptable and tailored to the specific needs and circumstances of defenders.<sup>14</sup>

23. The elaboration of these principles has been usefully accompanied by a series of recommendations directed to States, regional intergovernmental organisations, civil society and human rights defenders, financial donors, national human rights institutions and the United Nations that are designed to enhance the protection of human rights defenders.<sup>15</sup> Many of these recommendations are of equal relevance for

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<sup>13</sup> *Report of the Special Rapporteur on the situation of human rights defenders*, (A/HRC/31/55, 1 February 2016), para. 110.

<sup>14</sup> *Ibid.*, para. 111.

<sup>15</sup> “112. The Special Rapporteur recommends that all stakeholders engaged in the protection of human rights defenders: (a) Apply the seven above-mentioned principles in the design and implementation of their protection practices; (b) Continuously develop good practices, critically reflecting on any gaps, gender-specific inequalities or cases of inequitable distribution of protection resources that may arise; (c) Explore ways to replicate and disseminate good protection practices, including by transferring them to different and new contexts. 113. The Special Rapporteur recommends that States: (a) Enact legislative and policy frameworks with a view to establishing national protection programmes for defenders, in consultation with defenders and civil society. In States with a federal structure, federal legislation should be the basis for the programme, and federal authorities should have oversight over the programmes that are administered by local governments; (b) Dedicate sufficient funding, and refrain from interfering with externally-sourced funding, for the protection of defenders; (c) Develop a mechanism to investigate complaints of threats or violations against defenders in a prompt and effective manner, and initiate appropriate disciplinary, civil and criminal proceedings against perpetrators as part of systemic measures to prevent impunity for such acts; (d) Disseminate the Declaration on Human Rights Defenders through policy measures and awareness-raising campaigns; (e) Provide training to relevant government officials, including police, military and other security officers, as well as members of the judiciary, on the legitimate role of defenders and their rights, in accordance with international human rights law. 114. The Special Rapporteur recommends that regional intergovernmental organizations: (a) Develop and disseminate

securing an enabling environment in which all non-governmental organisations can operate.

24. The Appendix to Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business<sup>16</sup> provides a valuable complement to those principles and recommendations. This is concerned with the measures to be taken for the implementation of the UN Guiding Principles on Business and Human Rights<sup>17</sup> and included in them are the following two provisions on the protection of human rights defenders:

69. Member States should ensure that the activities of human rights defenders within their jurisdiction who focus on the adverse effects of business-related activities on human rights are not obstructed, for example through political pressure, harassment, politically motivated or economic compulsion. In particular, the fundamental rights enjoyed by human rights defenders in accordance with Articles 10 and 11 of the European Convention on Human Rights must be protected.

70. Member States should protect and also support, for example through their diplomatic and consular missions, the work of human rights defenders who focus on business-related impacts on human rights in third countries, in accordance with existing international and European standards.

### ***Terrorism***

25. Two instruments deal with the issue of terrorism, the conduct of which may be facilitated through the use of non-governmental organisations but the fear of which can also lead to unjustified restrictions being imposed on them. One deal deals with

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strong policies and guidelines for the protection of human rights defenders, in consultation with defenders and civil society; (b) Where policies and guidelines are in place, develop concrete plans of action at all levels, with specific monitoring mechanisms to review their effectiveness on the ground, including by seeking feedback from defenders; (c) Develop interregional coordination mechanisms to share experiences with a view to strengthening protection practices. 115. The Special Rapporteur recommends that civil society and human rights defenders: (a) Develop strategies to raise general awareness about the right to defend rights and to be protected for exercising that right, including through promoting the self-identification of human rights defenders, building social support for human rights and the work of defenders, and disseminating the Declaration on Human Rights Defenders; (b) Foster a culture of “holistic security”, focusing in particular on the physical, digital and psychosocial dimensions of security, and facilitate the internalization of security awareness individually and collectively; (c) Build and support networks among defenders and their allies at all levels, critically reviewing their impact on the protection of defenders and ensuring diversity and inclusiveness in the scope of work and membership; (d) Develop concrete ways to strengthen the knowledge, skills and abilities of defenders, in particular on how to protect their rights and to manage their security; (e) Continuously adapt existing measures to protect defenders at risk, paying particular attention to the specific needs of those who are most at risk. 116. The Special Rapporteur recommends that financial donors: (a) Increase financial resources for protection initiatives focusing on the “holistic security” of defenders; (b) Ensure that funding for civil society and defenders is sensitive to their protection needs, including by ensuring that funding promotes long-term sustainability and is sufficiently flexible for operational needs, can be adapted in response to changes in the environment, is disbursed in a timely manner and not burdensome to administer. 117. The Special Rapporteur recommends that national human rights institutions: (a) Develop plans of action to protect defenders, establish focal points to coordinate their implementation and interact with defenders on a regular basis; (b) Monitor and investigate complaints received from defenders on the violations of their rights. 118. The Special Rapporteur recommends that the United Nations: (a) Formulate and implement strategies and plans of actions\ to strengthen the protection of defenders and to prevent violations against them, including in the framework of the Sustainable Development Goals and in the context of the Human Rights Up Front initiative; (b) Develop strategies of risk assessment and management in activities involving civil society and defenders, including by monitoring and responding to cases of reprisal for cooperation with the United Nations at all levels, in particular its human rights mechanisms”.

<sup>16</sup> Adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers’ Deputies.

<sup>17</sup> Endorsed by the UN Human Rights Council on 16 June 2011.

participation in associations or groups for the purpose of terrorism and the other is concerned with the use of certain non-governmental organisations to finance terrorist activity.

26. Thus, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism<sup>18</sup> has supplemented the original treaty by making provision for the criminalisation by States Parties of certain acts. Those covered include “participating in an association or group for the purpose of terrorism”, which is defined as participating:

in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group.<sup>19</sup>

27. The requirement to criminalise this and certain other acts<sup>20</sup> is, however, subject to the following important safeguards specified in Article 8 of the Additional Protocol:

1. Each Party shall ensure that the implementation of this Protocol, including the establishment, implementation and application of the criminalisation under Articles 2 to 6, is carried out while respecting human rights obligations, in particular the right to freedom of movement, freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and other obligations under international law.  
2. The establishment, implementation and application of the criminalisation under Articles 2 to 6 of this Protocol should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

28. This is an important recognition of the scope for misuse of anti-terrorist measures and the need for vigilance where these are undertaken.

29. The second measure is the revision by the Financial Action Task Force of its Recommendation No. 8 in its International Standards on Combating Money-Laundering and the Financing of Terrorism & Proliferation.

30. This now provides that:

Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including:

(a) by terrorist organisations posing as legitimate entities;  
(b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and  
(c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

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<sup>18</sup> CETS No. 217. The Additional Protocol was opened for signature on 22 October 2015 and is in force for the 10 States that have ratified it: Albania, Bosnia and Herzegovina, Czech Republic, Denmark, France, Italy, Latvia, Monaco, Montenegro and Republic of Moldova.

<sup>19</sup> Article 1.

<sup>20</sup> I.e., receiving training for terrorism; travelling abroad for the purpose of terrorism; funding travelling abroad for the purpose of terrorism; and organising or otherwise facilitating travelling abroad for the purpose of terrorism.

31. This involves a significant change in that the entire non-profit sector is no longer labelled as being “particularly vulnerable” for terrorist abuse; the new language puts the focus only on those organisations that are found to be at risk. It is also welcome that the revision now includes a call on countries to ensure that responses to such at-risk organisations are proportionate, effective, and respectful of international human rights law

32. It is important, as the Financial Action Task itself emphasises, that this Recommendation is applied in the light of its “Interpretive Note”. This provides, in particular, that it is only concerned with those non-profit organisations that primarily engage:

in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works”.

This definition is based on those activities and characteristics of an organisation which put it at risk of terrorist financing abuse, rather than on the simple fact that it is operating on a non-profit basis.

33. Furthermore, the approach to be taken in order to achieve the objective of the Recommendation, namely, to prevent these non-profit organisations from being misused by terrorist organisations, should be based on the following general principles:

(a) A risk-based approach applying focused measures in dealing with identified threats of terrorist financing abuse to NPOs is essential given the diversity within individual national sectors, the differing degrees to which parts of each sector may be vulnerable to terrorist financing abuse, the need to ensure that legitimate charitable activity continues to flourish, and the limited resources and authorities available to combat terrorist financing in each country.

(b) Flexibility in developing a national response to terrorist financing abuse of NPOs is essential, in order to allow it to evolve over time as it faces the changing nature of the terrorist financing threat.

(c) Past and ongoing terrorist financing abuse of NPOs requires countries to adopt effective and proportionate measures, which should be commensurate to the risks identified through a risk-based approach.

(d) Focused measures adopted by countries to protect NPOs from terrorist financing abuse should not disrupt or discourage legitimate charitable activities. Rather, such measures should promote accountability and engender greater confidence among NPOs, across the donor community and with the general public that charitable funds and services reach intended legitimate beneficiaries. Systems that promote achieving a high degree of accountability, integrity and public confidence in the management and functioning of NPOs are integral to ensuring they cannot be abused for terrorist financing.

(e) Countries are required to identify and take effective and proportionate action against NPOs that either are exploited by, or knowingly supporting, terrorists or terrorist organisations taking into account the specifics of the case. Countries should aim to prevent and prosecute, as appropriate, terrorist financing and other forms of terrorist support. Where NPOs suspected of, or implicated in, terrorist financing or other forms of terrorist support are identified, the first priority of countries must be to investigate and halt such terrorist financing or support. Actions taken for this purpose should, to the extent reasonably possible, minimise negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs.

Developing cooperative relationships among the public and private sectors and with NPOs is critical to understanding NPOs’ risks and risk mitigation strategies, raising awareness, increasing effectiveness and fostering capabilities to combat terrorist financing abuse within NPOs.

Countries should encourage the development of academic research on, and information-sharing in, NPOs to address terrorist financing related issues.

34. It is also important to note that the “Interpretive Note” provides that measures implemented pursuant to the Recommendation should take place “in a manner which respects countries’ obligations under the Charter of the United Nations and international human rights law”.<sup>21</sup>

### C. MECHANISMS

35. 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 continuation of the mandates of two of them, the achievements of civil society, the particular problems faced by human rights defenders and marginalised workers and the definition of fundamentalism and its impact on the right to freedom of association, as well as many different ones arising in a wide range of countries.

#### *Mandates*

36. In July 2016 and March 2017 the United Nations Human Rights Council (“the Human Rights Council”) extended for a further three years the mandates of respectively the Special Rapporteur on the rights to freedom of peaceful assembly and of association<sup>22</sup> and the Special Rapporteur on the situation of human rights defenders for a further three years<sup>23</sup>.

37. In a report reviewing the activities undertaken during his first mandate, the Special Rapporteur on the situation of human rights defenders concluded – with a view to his second mandate – that he was

particularly keen to strengthen initiatives to improve the implementation of recommendations and resolutions on the protection of defenders. To that end, he would like to develop tools to measure their implementation and to focus on strengthening the capacities of national actors to act on recommendations and resolutions and make them a reality on the ground.<sup>24</sup>

38. He also made the following recommendations to States that are clearly relevant for his future work:

- (a) Implement the Declaration on Human Rights Defenders;
- (b) Implement resolutions on the protection of defenders and monitor their continued implementation;
- (c) Publicly recognize and support the work of defenders through publicity campaigns and specific communication and information initiatives;

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<sup>21</sup> Recommendation No. 8 and the Interpretive Note can be found at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

<sup>22</sup> Resolution 32/32, 1 July 2016.

<sup>23</sup> Resolution 34/5, 23 March 2017.

<sup>24</sup> A/HRC/34/52, 23 January 2017, para. 83.

- (d) Develop holistic measures for protecting defenders based on the seven principles set out in his report to the Human Rights Council in March 2016 (A/HRC/31/55);
  - (e) Invite him to conduct official country visits, without limiting the duration or scope of such visits, inter alia, for the purpose of meeting with defenders who live in remote areas and cannot travel;
  - (f) Respond to requests for information sent by his office, particularly in respect of cases of defenders at risk, by providing any information necessary for an optimal evaluation of situations of concern;
  - (g) Remove the obstacles that some domestic laws place on the legitimate activities of defenders engaged in promoting and protecting human rights, including by ensuring respect for the rights to freedom of peaceful assembly and freedom of association.<sup>25</sup>
39. At its 34rd session, the Human Rights Council appointed Annalisa Ciampi to succeed Maina Kiai as Special Rapporteur on the rights to freedom of peaceful assembly and of association. She took up her role on 1 May 2017 and set out her vision of the mandate in her first report.
40. Her thematic priorities with regard to the right to freedom of association were stated to be its exercise online, professional associations (including their role in the promotion and protection of all human rights, the realization of development efforts and building and maintaining a democratic society, and also including how States and other relevant stakeholders may promote, create and maintain conditions conducive to the development and activities of professional associations<sup>26</sup>), the exercise of the right at the international level, specifically in the context of multilateral institution and Highlighting good and promising practices worldwide that promote and protect the rights.<sup>27</sup> However, Professor Ciampi subsequently resigned as Special Rapporteur and a new appointment is expected to be made at the thirty-seventh session of the Council.<sup>28</sup>

### *Communications to States*

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<sup>25</sup> *Ibid*, para. 85. In addition, “86. The Special Rapporteur encourages the United Nations to: (a) Further promote the Declaration on Human Rights Defenders by ensuring that it is accessible to the greatest number of people; (b) Continue to document and alert the international community to the numerous reprisals against defenders who cooperate with the United Nations; (c) Develop a database to monitor the implementation of resolutions and laws that have an impact on the situation of defenders; (d) Disseminate the Declaration on Human Rights Defenders and the Special Rapporteur’s reports through the various institutions and the regional and country offices, and develop training and information initiatives for State officials in order to raise their awareness of the role of defenders in the promotion and protection of human rights. 87. The Special Rapporteur recommends that national human rights institutions: (a) Designate focal points within the institutions to monitor the situation of defenders in their country and hold regular meetings with those focal points; (b) Take effective measures to protect human rights defenders when they are in danger; (c) Participate in following up on the Special Rapporteur’s recommendations; (d) Include coverage of the situation of defenders in the information submitted within the framework of the universal periodic review. 88. The Special Rapporteur encourages civil society to: (a) Develop innovative measures to familiarize the general public with the work of defenders, including as part of the celebration of the twentieth anniversary of the Declaration on Human Rights Defenders; (b) Participate actively in promoting gender equality and combating all forms of discrimination against women human rights defenders, including in their own organizations; (c) Continue to send information to the Special Rapporteur on a regular basis, including on any draft legislation that may jeopardize the safety and the work of defenders; (d) Help to develop national and regional defender networks and to strengthen existing networks”.

<sup>26</sup> In response to the invitation of the Human Rights Council, pursuant to paragraph 4 of its resolution 32/32, The rights to freedom of peaceful assembly and of association, (A/HRC/RES/32/32, 18 July 2016).

<sup>27</sup> A/72/135, 14 July 2017.

<sup>28</sup> 26 February to 23 March 2018.

41. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has issued two sets of observations on communications transmitted to governments and the replies received.<sup>29</sup>
42. Particular concerns that were expressed in these included: the shrinking of the space occupied by the civil society and human rights defenders; the failure to see associations, and in particular human rights associations, as crucial partners for both good governance and the strengthening of functioning democracies; the stigmatization and harassment of human rights defenders and members of associations; and the potential for security and counterterrorism legislation to have a significant impact that disproportionately restricts the right to freedom of association.

### *Achievements of civil society*

43. The final report of Maina Kiai as Special Rapporteur on the rights to freedom of peaceful assembly and of association focused on the achievements of civil society. The conclusions of this wide-ranging report were as follows:

89. Civil society has a long history of contributing to freedom, dignity, development, peacebuilding and other pursuits that enhance human well-being. However, perhaps civil society's most important contribution has been its ability to give people hope. While this achievement may not be quantifiable, it is the starting point for every tangible success listed above. Without hope, there is no action and there is no change.

90. Unfortunately, the actions of many State and non-State actors throughout the world today are attempting to destroy that hope, and civil society's future contributions are far from guaranteed. The trend for closing civic space — laws and practices that restrict civil society's ability to operate — is threatening to take the air from civil society's lungs. This is unfortunate because it is both a self-destructive and short-sighted move, even for those orchestrating the closure. Repression today may help a government silence a critic tomorrow or boost a business' profits the next day — but at what cost next month, next year and for the next generation? The present report makes it clear that those costs would be monumental and would touch us all — regardless of geography, gender, wealth, status or privilege. Imagine a world without civil society. That world is bleak.

44. In the light of these conclusions it was recommended that States:

- (a) Recognize in law and in practice that civil society plays a critical role in the emergence and continued existence of effective democratic systems;
- (b) Ensure that conducive legal, political, economic and social environments exist for civil society to freely operate, including by ensuring that the rights to freedom of peaceful assembly and of association and other human rights are enjoyed by everyone, without discrimination;
- (c) Ensure that civil society and private enterprises are treated equitably in law and in practice;
- (d) Ensure that any restrictions to the rights to freedom of peaceful assembly and of association are prescribed by law, are necessary in a democratic society, are proportionate to the aim pursued and do not conflict with the principles of pluralism, tolerance and broadmindedness;
- (e) Ensure that victims of human rights violations and abuses are able to obtain timely and effective remedy and redress and safeguard civil society's ability to provide the full range of support necessary to achieve this;
- (f) Recognize civil society's legitimate role and interest in pursuing accountability and take measures to establish independent judicial and administrative mechanisms to facilitate accountability;

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<sup>29</sup> A/HRC/32/36/Add.3, 17 June 2016 and A/HRC/35/28/Add.3, 31 May 2017.

- (g) Take all measures necessary to ensure that civil society can participate in decision-making processes and in public affairs at the domestic and international level, without discrimination or undue restrictions;
- (h) Implement thorough and consistent policies that emphasize the importance of substantive engagement with civil society organizations at the domestic and international levels and facilitate such engagement in a comprehensive manner;
- (i) Take positive measures to ensure that all individuals belonging to marginalized and other groups most at risk have the ability to effectively exercise their rights and participate in decisions that concern them;
- (j) Encourage and facilitate innovation within civil society, including by ensuring unimpeded access to, and use of, information and communication;
- (k) Recognize and respect the significance of civil society as a stakeholder in fostering sustainable development, particularly in the context of natural resource exploitation and the conservation and management of environmental resources;
- (l) Ensure the ability of civil society to seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without undue impediments;
- (m) Recognize and facilitate civil society's role in assisting those facing humanitarian crises, without abdicating the State's responsibilities under international law, including those relating to migrants, refugees, conflict prevention and disaster mitigation.<sup>30</sup>

45. In addition, civil society was encouraged to:

- (a) Maintain and strengthen its role in advancing the ideals set out in the Charter of the United Nations and the Universal Declaration of Human Rights;
- (b) Consider increasing research into, and documentation of, civil society's achievements and successes, in order to promote incentives to protect civic space

and it was recommended that businesses:

- (a) Recognize the significant value that civil society adds to building democratic, fair and just societies that benefit business interests and thus take a more proactive role in supporting and influencing measures that enhance civic space;
- (b) Work collaboratively with civil society where interests align to shape solutions that benefit society.<sup>31</sup>

### ***Fundamentalism***

46. In a fifth thematic report the Special Rapporteur on the rights to freedom of peaceful assembly and of association addressed the phenomenon of fundamentalism and its impact on the exercise of the rights to freedom of peaceful assembly and of association.<sup>32</sup> This report emphasised that “fundamentalism” can encompass much more than religion and should be regarded as including:

any movement — not simply religious ones — that advocates strict and literal adherence to a set of basic beliefs or principles.<sup>33</sup>

47. As a result this term could also include adherence to the principles of free market capitalism (“market fundamentalism”) and the unbending belief in the superiority of one ethnic group, race, tribe or nationality (“nationalist fundamentalism”) given that they are also “based upon a set of strict, inflexible beliefs that are impervious to criticism or deviation”.<sup>34</sup>

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<sup>30</sup> Para. 91.

<sup>31</sup> Paras. 92 and 93.

<sup>32</sup> A/HRC/32/36, 10 August 2016.

<sup>33</sup> Para. 7.

<sup>34</sup> *Ibid.*

48. It was concluded that fundamentalism was a

mindset based on intolerance of difference — whether religious, secular, political, cultural, economic or otherwise. Such mindsets do not, in and of themselves, constitute violations of the rights to freedom of peaceful assembly and of association, or of other rights. But they can form the ideological basis for such violations. In the worst cases, they can also motivate extremist actions.<sup>35</sup>

49. Nonetheless, it was emphasised that:

emphasizes that the rights to freedom of peaceful assembly and of association are due to everyone without distinction. This includes both those who hold fundamentalist views and those who hold differing views. The rights to freedom of peaceful assembly and of association play a key role in promoting tolerance, broadmindedness, diversity and pluralism. States must walk a fine line in balancing the rights of various groups and must ensure that one group is not favoured, either in policy or in practice. Such rights must therefore not only be protected but also facilitated.<sup>36</sup>

50. The recommendations made to States were to:

- (a) Ratify all relevant international human rights instruments that protect the rights to freedom of peaceful assembly and of association;
- (b) Take all measures necessary to ensure that discrimination on prohibited grounds under international human rights law is eliminated, including in legislation or in practice, whether perpetrated by the State or by non-State actors;
- (c) Take positive measures to ensure that all individuals belonging to groups at risk of being targeted by fundamentalists have the ability to exercise their rights effectively, including the rights to freedom of peaceful assembly and of association;
- (d) Ensure that no individual is criminalized for exercising his or her rights to freedom of peaceful assembly and of association, nor is subjected to threats or use of violence, harassment, persecution, intimidation or reprisals;
- (e) Ensure that administrative and law enforcement officials are adequately trained to respect and protect the rights of individuals who may be at risk of being targeted by fundamentalist groups while exercising their rights to freedom of peaceful assembly and of association, in particular in relation to their specific protection needs;
- (f) Ensure that law enforcement authorities who violate the rights of individuals belonging to groups at risk of being targeted by fundamentalist groups are held personally and fully accountable by an independent and democratic oversight body and by the courts of law;
- (g) Establish or strengthen oversight mechanisms, for example through parliament or human rights institutions, to identify and deal with fundamentalist practices that restrict assembly and association rights;
- (h) Use ordinary provisions of the Criminal Code to prosecute extremist or terrorist acts and refrain from enacting legislation that specifically targets religious activities, religious organizations, civil society, human rights defenders and activists;
- (i) Become less restrictive in regulating civil society and the rights to freedom of peaceful assembly and of association, and recall that democracy, tolerance and inclusiveness are among the most reliable indicators for long-term security, prosperity and moderation.<sup>37</sup>

51. In addition, the United Nations Human Rights Committee (“the Human Rights Committee”) was encouraged to consider adopting general comments on articles 21 and 22 of the International Covenant on Civil and Political Rights (“the International

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<sup>35</sup> Para.90.

<sup>36</sup> Para. 91.

<sup>37</sup> Para. 92.

Covenant”), with a particular focus on the challenges posed by fundamentalism and groups at risk of being targeted by fundamentalists.<sup>38</sup>

52. Furthermore, States and civil society groups were encouraged to create and expand initiatives to educate people, particularly youth, on the importance of pluralism, tolerance and diversity in democratic societies.<sup>39</sup>
53. Moreover, it was recommended civil society strengthened research, monitoring and documentation of violations of peaceful assembly and association rights in the context of fundamentalism and it was considered that religious leaders, in particular, must make greater efforts to foster dialogue and tolerance among their followers, with other religious communities and with non-religious communities.<sup>40</sup>
54. It was also recommended that funding be increased for the promotion of democracy, particularly for local organizations and activists as the strengthening of democracy was considered to be the best long-term strategy for countering extremism,

as people are less likely to act upon extreme or violent views when they feel that they have a stake in their society.<sup>41</sup>

### ***Human rights defenders***

55. The Special Rapporteur on the situation of human rights defenders has produced two reports focusing respectively on the particular problems faced by defenders concerned with the environment and business and human rights defenders.<sup>42</sup>

56. In regard to environmental human rights defenders, he emphasised that they:

Environmental human rights defenders cannot properly defend environment-related rights without exercising their own rights to access to information, freedom of expression, peaceful assembly and association, guarantees of non-discrimination and participation in decision-making

and has emphasised that:

We should remember that empowering environmental human rights defenders is not only crucial to the protection of our environment and the human rights that depend on it, but also a safeguard to ensure that our future development will be less conflict-prone and more inclusive, leaving no one behind.<sup>43</sup>

57. In this report, a detailed series of recommendations are made to address the situation faced by environmental human rights defenders.<sup>44</sup>

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<sup>38</sup> Para. 93.

<sup>39</sup> Para. 94.

<sup>40</sup> Paras. 95 and 96.

<sup>41</sup> Para. 97.

<sup>42</sup> A/71/281, 3 August 2016 and A/72/170, 19 July 2017.

<sup>43</sup> A/71/281, 3 August 2016, paras. 93 and 95.

<sup>44</sup> “96. In order to reverse the tide of the worsening situation of environmental human rights defenders, the Special Rapporteur wishes to put forward a set of recommendations to the attention of various stakeholders. He calls on all stakeholders to urgently and publicly adopt a zero-tolerance approach to the killings of and violent acts against environmental human rights defenders, and to immediately launch policies and mechanisms to

## 58. The Special Rapporteur considered that the situation of defenders working in the field

empower and protect them. He further appeals to all actors to document more systematically information on the situation of environmental human rights defenders at risk, especially in countries of concern, with a view to advocating more actionable and effective measures for their protection. 97. The international community should: (a) Ensure that the implementation of the 2030 Agenda for Sustainable Development is guided by a human rights-based approach, guaranteeing meaningful participation of environmental human rights defenders and affected communities, as well as empowering and protecting defenders at the international, regional and national levels; (b) Publicly scrutinize and condemn violations of the rights of environmental human rights defenders and raise the visibility of their legitimate role in defending the land and environmental rights; (c) Ensure that any future bilateral and multilateral trade agreements involving countries where environmental human rights defenders are under threat include measures to prevent and address violations against defenders and mechanisms to investigate and remedy violations; (d) Ensure that all development aid and assistance is guided by human rights and the Declaration on Human Rights Defenders, applying them to programming in all sectors and at all stages; (e) Formulate an international treaty to prevent and address human rights violations by transnational and national business enterprises, also considering the heightened risk posed by business activities to environmental human rights defenders. 98. The General Assembly and the Human Rights Council should monitor violations against environmental human rights defenders. 99. Regional intergovernmental organizations should: (a) Urge negotiating parties in Latin America and the Caribbean to expedite the conclusion of the negotiations on the application of principle 10 of the Rio Declaration on Environment and Development; (b) Encourage more States to accede to the Aarhus Convention, in the absence of other multilateral and regional agreements at this stage; (c) Provide political and financial support to regional human rights mechanisms with a view to reinforcing the protection of environmental human rights defenders in the regions; (d) Formulate policies and measures to prevent and address reprisals against environmental human rights defenders for cooperating with regional mechanisms. 100. ECA and ESCAP should develop similar legally binding instruments on access to information, public participation and justice in environmental matters, including measures to protect environmental human rights defenders. 101. The ASEAN Intergovernmental Commission on Human Rights and the African Commission on Human and Peoples' Rights should establish a mechanism to provide emergency protection for defenders. 102. States should: (a) Reaffirm and recognize the role of environmental human rights defenders and respect, protect and fulfil their rights; (b) Ratify ILO Convention No. 169 and guarantee the right to consultation and participation of indigenous communities in decisions at every stage of a project's life cycle; (c) Ensure a human rights-based approach to development in all relevant legal and policy regulations, including multilateral and bilateral agreements or contracts, and establish mechanisms for due diligence concerning the protection of environmental human rights defenders and the environment; (d) Ensure a preventive approach to the security of environmental human rights defenders by guaranteeing their meaningful participation in decision-making and by developing laws, policies, contracts and assessments by States and businesses; (e) Formulate national action plans on business and human rights and ensure that they, as well as environmental impact assessments, are developed in full transparency and with meaningful participation prior to the granting of permission or concessions for the implementation of any business or development project; (f) Guarantee the effective implementation of any precautionary or urgent measures granted to environmental human rights defenders by regional human rights mechanisms; (g) Develop protection mechanisms for environmental human rights defenders, taking into account the intersectional dimensions of violations against women defenders, indigenous peoples and rural and marginalized communities; (h) Ensure prompt and impartial investigations into alleged threats and violence against environmental human rights defenders and bring to justice direct perpetrators and those that participated in the commission of crimes; (i) Engage with investors and business enterprises to uphold their human rights responsibilities and sanction those companies associated with violations against defenders, both at home and abroad. 103. United Nations organizations and agencies should: (a) Address the legal gaps that heighten risks for environmental human rights defenders, including weak environmental standards and laws protecting the rights of indigenous peoples, their land rights and customary title to territories and resources; (b) Formulate and implement strategies and action plans to strengthen the participation and protection of defenders and to prevent violations against them, including in the framework of the Sustainable Development Goals and the Human Rights Up Front initiative; (c) Monitor, document and respond to the cases of alleged acts of reprisal against environmental human rights defenders for cooperating with international financial institutions, United Nations agencies and United Nations human rights mechanisms. 104. International financial institutions should: (a) Respect and protect the human rights of defenders and implement their obligations in all activities to ensure an enabling environment for defenders; (b) Integrate a human rights-based approach in their policies for fund allocation and management; condition their funds on such an approach, in consultation with affected communities and environmental human rights defenders and with their continuing support in the implementation of human rights safeguards. 105. Business enterprises should: (a) Adopt and implement relevant international and regional human rights standards, including the Guiding Principles for Business and Human Rights and the Voluntary Principles on Security and Human Rights; (b) Fulfil legal and

of business and human rights was deteriorating. In his view, it was:

high time that we recognized the positive role of defenders working in the field of business and human rights—their legitimacy, experience, expertise and valuable contributions. It is high time that States, business enterprises and investors reaffirm their respective obligations. Concrete measures should be taken to de-escalate conflicts and counter the narrative against human rights advocacy. At the same time, underlying root causes, such as power imbalance, commodification and corruption, should be tackled to ensure long-term changes and to implement international commitments, such as the Sustainable Development Goals.<sup>45</sup>

59. He underlined the particular responsibilities of both States and business enterprises in ensuring that these defenders were not only protected but also able to function effectively:

87. Much of the business and human rights agenda, including the protection of defenders who document adverse impacts and take action, continues to depend heavily on what States are willing or reluctant to do. States cannot meet their duty to protect against human rights abuses within their territory and/or jurisdiction in the absence of a safe and enabling environment in which defenders can address corporate human rights abuses. Governments need to explore ways to ensure that there is policy coherence between their endorsement of the Guiding Principles and their domestic regulatory frameworks, the latter of which are far too often relied upon to obstruct the work of defenders that seek to address corporate abuse.

88. Although States hold the main responsibility for ensuring an enabling environment for defenders, business enterprises also have an important role to play. Through their investment and sourcing decisions, companies in virtually all sectors may in effect erode such a safe and enabling environment. The corporate responsibility to respect human rights entails a positive duty to support the States in which they operate to foster an environment that is conducive to the work of defenders. This requires not interfering with defenders' legitimate activities, but also assessing the status of civic freedoms as part of companies' human rights due diligence and proactively engaging with concerned Governments over the findings. Doing so is a precondition for a due diligence process that genuinely gauges and addresses the company's human rights risks to stakeholders.<sup>46</sup>

60. Detailed recommendations were thus made for steps to be taken by States and business enterprises, as well as by investors and financial institutions.<sup>47</sup>

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ethical obligations, including rigorous human rights due diligence, and perform human rights impact assessments for every project, ensuring full participation by and consultation with affected communities and environmental human rights defenders; (c) Refrain from physical, verbal or legal attacks against environmental human rights defenders and meaningfully consult with them in the design, implementation and evaluation of projects, and in due diligence and human rights impact assessment processes; (d) Disclose information related to planned and ongoing large-scale development projects in a timely and accessible manner to affected communities and environmental human rights defenders; (e) Establish the grievance mechanisms necessary to avoid, mitigate and remedy any direct and indirect impact of human rights violations; (f) Ensure that private security companies and other subcontractors respect the rights of environmental human rights defenders and affected communities and establish accountability mechanisms for grievances”.

<sup>45</sup> A/72/170, 19 July 2017, para. 86.

<sup>46</sup> *Ibid.* The “Guiding Principles” are the United Nations Guiding Principles on Business and Human Rights.

<sup>47</sup> “90. The Special Rapporteur calls upon States: (a) To adopt legislation that creates due diligence obligations for companies registered in their jurisdictions and those of their subsidiaries, subcontractors and suppliers where there is a risk of human rights violations or abuses; (b) To implement laws and policies which legitimize and guarantee the participation of communities and defenders in business-related decisions, including the rights of trade unions and the right to free, prior and informed consent; (c) In consultation with defenders, to review their domestic regulatory framework to ensure that it, in substance or effect, does not impede the work of defenders to effectively and without risk of retaliation (including legal retaliation) address corporate human rights impacts; (d) To adopt legislation requiring companies to publicly disclose information, including information on their corporate structure and governance, contracts, licences concessions, business relationships (investors, suppliers and other trading parties included), scientific information about company operations, and company filings; (e)

## *Marginalized workers*

61. In a report that examined the exercise and enjoyment of the rights to freedom of peaceful assembly and of association in the workplace, focusing in particular on the most marginalized portions of the world's labour force, including global supply chain workers, informal workers, migrant workers, domestic workers and others, the Special Rapporteur on the rights to freedom of peaceful assembly and of association identified various factors that led to the disenfranchisement of such workers and made a series of recommendations to address them.<sup>48</sup>
62. The factors leading to disenfranchisement were considered to include:
- the failure of much touted economic policies in reducing poverty and economic inequality; the increasing power of large multinational corporations and corresponding failure by States to effectively regulate and enforce norms and standards against those actors; the fragmentation of the workplace and diffusion of employer responsibilities across a range of actors; and the global crackdown on civil society that targets organizations and individuals working on labour issues.<sup>49</sup>
63. The many recommendations considered necessary to address this disenfranchisement included the need for:
- States to actively create an enabling environment for workers to establish independent, voluntary associations, including trade unions and to prohibit

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To publicly acknowledge, at the most senior levels of Government, the critical role that defenders play in helping to bring to the attention of States and business enterprises business-related impacts on human rights; (f) To adopt national guidelines on human rights defenders and national action plans on business and human rights to ensure policy coherence and establish clear consequences when companies have been found to be linked to attacks against defenders; (g) To promptly and impartially investigate all attacks against human rights defenders; (h) To take all measures to provide for effective redress; (i) To take measures, in policy and practice, to ensure that the security of defenders can be guaranteed at all times, including when accessing grievance mechanisms. Such measures should integrate intersectional, collective and holistic approaches. 91. The Special Rapporteur encourages companies: (a) To assess the situation of civic freedoms and human rights defenders in the countries in which they operate, identifying gaps between international standards and national laws and practice; (b) To ensure that their policy commitments on human rights reflect the critical role that defenders play in bringing human rights issues to their attention and address the risks they face in doing so; (c) To actively engage with defenders and grass-roots civil society organizations in the elaboration of their human rights policies; (d) To address the situation of and risks to company employees in their capacity as defenders, as well as external human rights defenders, and their opportunities to safely address business-related human rights grievances; (e) To establish and implement processes for the remediation of adverse human rights impacts arising in any area of operations. 92. The Special Rapporteur calls upon investors and financial institutions: (a) To include in ex ante impact assessments an analysis of the state of civic freedoms in the country of investment as well as the lender's track record of engaging with defenders; (b) To put into place gap-filling measures through which shortcomings are documented, including training for all staff, and ensure that respect for engagement with defenders and other stakeholders is duly reflected in contractual requirements; (c) To withhold approval for investment where impact assessments reveal serious threats to civic freedoms and defenders at the country or local level; (d) To develop guidelines that clearly communicate that criticism of activities financed by the institutions is an important part of improving the impacts of development efforts and that reprisals against defenders will not be tolerated; (e) To approve such guidelines by the most senior management of these institutions, including guidance and specific training for staff on how to effectively engage with complainants and ensure their safety; (f) To disclose all end users of financial intermediary loans and ensure that they bring their projects into line with safeguard requirements and human rights, whichever sets the higher standard, or stop lending to high-risk clients".

<sup>48</sup> A/71/385, 14 September 2016.

<sup>49</sup> Para. 94.

companies that fail to respect association rights from bidding for public contracts;

- businesses to respect the rights of all workers to form and join trade unions and labour associations and to engage in collective bargaining and other collective action, including the right to strike and to refrain from anti-union policies and practices, and reprisals against workers who exercise their association rights;
- civil society, including trade unions, to create alliances across civil society to monitor the effective implementation of these recommendations and to commit to the principle that labour rights are human rights, and recognize the urgent need for general human rights organizations to work on labour rights as a part of their core mandates, particularly in this era of weakening of workers' rights; and
- trade unions specifically to target outreach and advocacy at historically disenfranchised worker populations, including the full incorporation of domestic, migrant and informal workers into trade unions and negotiate collective agreements.<sup>50</sup>

### *Issues relating to particular countries*

64. The issues that have been addressed by the various mechanisms concerned with the situation of non-governmental organisations in particular countries have been wide-ranging and highly problematic for an enabling environment for their operation. They include: acts of violence and intimidation; arbitrary detention; difficulties in obtaining registration; disparaging remarks by public officials and harmful designations of entities and/or their activities; funding restrictions; grounds for suspension and dissolution; tax penalties; travel bans; and violent killings.

#### *Azerbaijan*

65. The environment in which non-governmental organisations operated in Azerbaijan was addressed by the Human Rights Committee, the Special Rapporteur on the situation of human rights defenders and Council of Europe Commissioner for Human Rights.<sup>51</sup>

66. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Committee was concerned about:

restrictive legislation negatively affecting the exercise of freedom of association, including stringent registration requirements for public associations and NGOs, broad grounds for denial of registration and temporary suspension or permanent closure of NGOs, restrictive regulations on grants and donations received by public associations and NGOs, including the ban on foreign funding, and heavy penalties for violations of the relevant legislation. The Committee is further concerned about threats against NGO leaders, the high number of criminal investigations against NGOs, the freezing of their assets and those of their members and the significant number of

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<sup>50</sup> Para. 98.

<sup>51</sup> See also para. 13 above.

NGOs that have been closed. It is also concerned about the reported obligation for persons living in the Autonomous Republic of Nakhchivan to join the ruling party ...<sup>52</sup>

67. It thus stated that Azerbaijan should:

revise relevant laws, regulations and practices with a view to bringing them into full compliance with the provisions of articles 19 and 22 of the Covenant, including by: (a) Simplifying registration rules and clarifying the broad grounds for denying the registration of and temporarily suspending or permanently closing NGOs; (b) Ensuring that legal provisions regulating NGO grants allow access to foreign funding and do not put at risk the effective operation of public associations as a result of overly limited or overly regulated fundraising options;(c) Ending the crackdown on public associations and ensuring that they can operate freely and without fear of retribution for their legitimate activities; (d) Eliminating any obligation for persons living in the Autonomous Republic of Nakhchivan to join the ruling party.<sup>53</sup>

68. Similar concerns were evident in the report by the Special Rapporteur on his mission to Azerbaijan:

111. Over the last several years, civil society in Azerbaijan has faced the worst situation since the country became independent. The Special Rapporteur was alarmed to observe that human rights defenders increasingly operate in a rather criminalized and heavily constrained environment. Defenders are exposed to serious challenges that in some instances appear to amount to violations of their fundamental rights and freedoms, as well as of their legitimate right to be a human rights defender, as enshrined in the Declaration on Human Rights Defenders.

112. Human rights defenders in Azerbaijan have been accused by public officials of being a fifth column of Western governments or of being foreign agents, accusations that are aimed at causing a misperception in the population of the truly valuable role played by civil society. Defenders are attacked, threatened, brought to court and sentenced under political or fabricated charges. They face smear campaigns in an attempt to discredit their work by relegating them to a political opposition, or indeed are branded as traitors.

113. Many human rights defenders and dozens of NGOs, their leaders and employees and their families have been subjected to administrative and crim prosecution, including arbitrary detention, the seizure of their assets and bank accounts, travel bans and enormous fines and tax penalties. Significant challenges are connected to the existing legal framework governing the exercise of fundamental freedoms, such as the rights to freedom of expression, peaceful assembly and association. Legislation pertaining to national security can also have a restrictive impact on the environment in which defenders operate.

114. Having carefully considered the information received from the Government, civil society and other stakeholders, the Special Rapporteur considers that, overall, human rights defenders in Azerbaijan are not able to operate in a safe and enabling environment. In sum, they are increasingly at risk and do not feel safe because of increasingly restrictive legislation, the lack of access to justice and criminalizing actions by government authorities. They do not feel empowered owing to the stigmatization spearheaded by high-ranking officials and the government-affiliated media and in the light of excessively intrusive oversight and scrutiny by the authorities.<sup>54</sup>

69. The Special Rapporteur urged the Government to adopt a corrective course of action and take urgent and concrete measures to address the challenges which he had identified, with a view to ensuring that human rights defenders carry out their valuable activities in a safe and enabling environment. In this connection, he made a

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<sup>52</sup> Concluding observations on the fourth periodic report of Azerbaijan, CCPR/C/AZE/CO/4, 16 November 2016, para. 40.

<sup>53</sup> *Ibid.*, para. 41.

<sup>54</sup> A/HRC/34/52/Add.3, 20 February 2017.

series of recommendations not only to Government but also to human rights defenders and the international community.<sup>55</sup>

70. Finally, in a third party intervention in the case of *Bagirov v. Azerbaijan*<sup>56</sup> which concerned the disbarment of an Azerbaijani lawyer - who had been actively involved in the defence of human rights - following remarks he had made at an appeal court hearing, the Commissioner stressed that reprisals against the civil society partners of his Office had made it increasingly difficult to work on human rights issues in Azerbaijan<sup>57</sup>. He submitted that these reprisals should immediately stop.

### *Bangladesh*

71. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Human Rights Committee was concerned about:

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<sup>55</sup> “116. The Special Rapporteur recommends that the Government of Azerbaijan: (a) Ensure that human rights defenders carry out their work in a conducive legal and administrative framework and promptly implement the outstanding recommendations and decisions of international and regional human rights mechanisms and courts; (b) Refrain from criminalizing the peaceful and legitimate activities of defenders and adopt a zero-tolerance approach, whether by public officials or non-State actors, towards the stigmatization and intimidation of defenders; (c) Review and abolish all administrative and legislative provisions that restrict the rights of defenders, including the rights to freedom of expression, peaceful assembly and association, and ensure that domestic legislation complies with international human rights law and standards; (d) Release all human rights defenders in detention, drop criminal charges against NGO leaders and employees, rescind travel bans and unblock their bank accounts, in line with the resolutions and recommendations of international and regional mechanisms; (e) Make the registration of associations simpler, less onerous and expeditious, adopt a notification procedure and review the current NGO legislation to ensure simplified and more accessible funding for civil society; (f) Refrain from restricting peaceful assemblies and ensure that any necessary restrictions do not impair the essence of the right to peaceful assembly, are prescribed by law, are proportionate and necessary in a democratic society, and still allow demonstrations to take place within sight and sound of its object and target audience; (g) Ensure genuine, meaningful and regular consultation between the authorities and civil society; (h) Formulate national guidelines on the promotion and protection of human rights defenders, in consultation with civil society organizations; (i) Strengthen the judiciary by ensuring it can operate independently and effectively, and allocate budgetary resources to ensure independent legal assistance to defenders. 117. The Special Rapporteur recommends that the Office of the Commissioner for Human Rights: (a) Strengthen the scope of its activities by prioritizing concerns raised by human rights defenders, establish working relations with networks of defenders and appoint a focal point for human rights defenders; (b) Actively engage the Constitutional Court on constitutional complaints, including those that may be considered political or institutional, and proactively follow up on the implementation by the Government of its recommendations. 118. The Special Rapporteur recommends that human rights defenders: (a) Become better informed about the Declaration on Human Rights Defenders and publicize it broadly in society, and make full use of the human rights mechanisms of the United Nations, the Council of Europe and OSCE in relation to human rights monitoring and protection; (b) Develop and strengthen national and local networks of support with shared objectives, reinforce partnerships in self-protection and fundraising, and work intersectorally. 119. The Special Rapporteur recommends that the international community, the United Nations, the Council of Europe and OSCE should: (a) Continue monitoring the situation of human rights defenders in Azerbaijan and intensify their efforts to empower and support them, including through political, legal and financial assistance; (b) Engage with the Government to encourage meaningful and regular dialogue between the Government of Azerbaijan and civil society, in order to ensure that institution-building, development and other programmes are participatory and human rights compliant; (c) Advocate for and support the Government of Azerbaijan in formulating a concrete action plan to implement the outstanding decisions and recommendations made by international and regional organizations and mechanisms, in consultation with civil society”.

<sup>56</sup> No. 28198/15.

<sup>57</sup> CommDH(2016)42, 22 November 2016, para. 45.

limitations on the rights of journalists, bloggers, human rights defenders and civil society organizations in the State party to exercise their right to freedom of opinion, expression and association, in particular:

- (a) The lack of police protection, registration of complaints, investigations and prosecutions for incidents of violent killings of “secular bloggers” by extremist groups, as well as death threats, physical attacks, intimidation and harassment of journalists, bloggers and human rights defenders;
- (b) The arrest of at least 35 journalists, “secular bloggers” and human rights defenders in 2016 under the Information and Communication Technology (ICT) Act of 2006 (amended in 2013), a de facto blasphemy law that limits freedom of opinion and expression using vague and overbroad terminology to criminalize publishing information online, that “hurts religious sentiment” and information that prejudices “the image of the State” with a punishment of 7 to 14 years;
- (c) The undue limitations on the ability of human rights defenders and non-governmental organizations (NGOs) to operate through the Foreign Donations (Voluntary Activities) Regulation Act, 2016, which restricts the ability of NGOs to secure resources and makes it an offence to make “inimical” or “derogatory” remarks against the Constitution or any constitutional body; the terms “inimical” and “derogatory” are undefined and can result in deregistration of the NGO in question (arts. 6, 19 and 22).<sup>58</sup>

72. The Committee considered that Bangladesh:

should immediately undertake the following measures to protect the rights of journalists, bloggers, human rights defenders and civil society organizations:

- (a) Protect them from unlawful killings, physical attacks and harassment; ensure that police and officials receive adequate training regarding the protection of human rights defenders; register complaints and thoroughly investigate all attacks on the life, physical integrity and dignity of these persons, bring perpetrators to justice and provide victims with appropriate remedies;
- (b) Repeal or revise the laws mentioned above with a view to bringing them into conformity with the State party’s obligations under the Covenant, taking into account the Committee’s general comment No. 34 (2011) on the freedoms of opinion and expression. In particular, it should clarify the vague, broad and open-ended definition of key terms in these laws and ensure that they are not used as tools to curtail freedom of expression beyond the narrow restrictions permitted in article 19 of the Covenant;
- (c) Repeal the Foreign Donations (Voluntary Activities) Regulation Act, ensure that any legal provisions restricting access to foreign funding does not risk the effective operation of NGOs as a result of overly limited fundraising options, and ensure that NGOs can operate freely and without fear of retribution for exercising their freedom of expression.<sup>59</sup>

*Chile*

73. Although the right to freedom of association was found to be generally protected in Chile, the Special Rapporteur recommended that the Government:

- (n) Ensure that the registration process for associations to obtain legal personality is completed in a speedy manner in all municipalities and provide guidance and support to municipal officials to enable them to fulfil their task effectively;
- (o) Enhance support and resources to civil society actors, especially accountability organizations, and ensure an enabling environment that is as conducive to success as the one accorded to the business sector;
- (p) Amend Act No. 19253 with a view to allowing indigenous traditional institutions to claim land restitution, while implementing International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), which acknowledges the legitimacy of such institutions;
- (q) Adopt labour legislation that recognizes trade unions as key players for democracy and addresses all concerns raised by ILO regarding current labour legislation;

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<sup>58</sup> Concluding observations on the initial report of Bangladesh, CCPR/C/BGD/CO/1, 27 April 2017, para.27.

<sup>59</sup> *Ibid*, para. 28.

(r) Ensure that all employers cease anti-union activities.<sup>60</sup>

### *Ecuador*

74. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Human Rights Committee was concerned about:

reports that the State party's legislation contains provisions enabling the dissolution on grounds that may be extremely broad or ambiguous of social organizations that have the status of legal persons (art. 22).<sup>61</sup>

75. It thus recommended that Ecuador:

take the necessary measures to ensure that all persons under its jurisdiction are able fully to enjoy their right to freedom of association and that any restriction on the exercise of that right should be in full compliance with the strict requirements of article 22 (2) of the Covenant. In particular, it recommends that the State party review its legislation with a view to ensuring that it is fully in line with article 22 of the Covenant.<sup>62</sup>

### *Greece*

76. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Human Rights Committee noted:

the State party's expressed intention to proceed with the registration of associations of groups claiming minority group status, in accordance with European Court of Human Rights decisions of 2008 and 2015,

but was concerned about the pace of implementation of those decisions.<sup>63</sup>

77. It thus considered that Greece:

expedite its measures to register associations of distinct communities, including those claiming minority group status, in accordance with article 22 of the Covenant.<sup>64</sup>

### *Honduras*

78. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Human Rights Committee was extremely concerned:

at the acts of violence and intimidation and the persistently high murder rates among, inter alios, human rights defenders, journalists, trade unionists, environmental activists, indigenous persons and lesbian, gay, bisexual, transgender and intersex persons, and which are committed by State

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<sup>60</sup> A/HRC/32/36/Add.1, 24 October 2016, para. 106.

<sup>61</sup> Concluding observations on the sixth periodic report of Ecuador, CCPR/C/ECU/CO/6, 11 August 2016, para. 31.

<sup>62</sup> *Ibid.*, para. 32.

<sup>63</sup> Concluding observations on the second periodic report of Greece, CCPR/C/GRC/CO/2, 3 December 2015, para. 39.

<sup>64</sup> *Ibid.*, para. 40.

officials and private individuals and result in the death of persons such as Berta Cáceres who were protected under precautionary measures issued by the Inter-American Commission on Human Rights. The Committee is also concerned about the excessive recourse to provisions on defamation and other criminal offences against persons exercising their rights to freedom of expression, freedom of assembly and freedom of association and about the continued stigmatization of such persons by government officials. The Committee is further concerned by the conviction on 7 June 2017 of three students of the National Autonomous University of Honduras and by the criticism that members of the Government, among others, levelled at the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Office of the National Commissioner for Human Rights in relation to their work promoting respect for the right to peaceful protest. While the Committee notes the adoption of the Act on the Protection of Human Rights Defenders, Journalists, Social Communicators and Justice Officials, it regrets that it has not been adequately implemented. The Committee also notes the fact that defamation, libel and insult do not carry a prison sentence (arts. 6, 7, 19, 21 and 22).<sup>65</sup>

79. It was also concerned:

at reports that senior government officials have made disparaging statements in the media about individuals and civil society organizations who contributed to its work in connection with the consideration of the second periodic report of the State party. The Committee draws particular attention to paragraph 8 of General Assembly resolution 68/268, of 9 April 2014, in which the Assembly “*strongly condemns* all acts of intimidation and reprisals against individuals and groups for their contribution to the work of the human rights treaty bodies, and urges States to take all appropriate action ... to prevent and eliminate such human rights violations”, and to the Guidelines against Intimidation or Reprisals (San José Guidelines) (arts. 19, 21 and 22).<sup>66</sup>

80. It thus considered that Honduras should:

as a matter of urgency, take practical steps to:

- (a) Provide effective protection to, inter alios, human rights defenders, journalists, trade unionists, environmental activists, indigenous persons and lesbian, gay, bisexual, transgender and intersex persons who are subjected to acts of violence and intimidation;
- (b) Increase training and education programmes on the importance of freedom of expression, freedom of association and freedom of assembly for law enforcement officers, military personnel, staff of private security companies, judges and prosecutors;
- (c) Ensure that all allegations concerning intimidation, threats and assault are investigated promptly, thoroughly, independently and impartially, that the perpetrators are brought to justice and duly punished in accordance with the gravity of the offence and that victims receive full reparation;
- (d) Set up a mechanism to ensure that acts of violence and threats against human rights defenders are properly investigated and are not treated as ordinary offences; consider introducing a protocol for the Attorney General’s Office on the investigation of such offences; and extend the jurisdiction of the Unit for the Protection of Human Rights Defenders to include offences committed by private individuals;
- (e) Consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious cases, and imprisonment is never an appropriate penalty;
- (f) Collect disaggregated data on assaults and murders among human rights defenders, journalists, trade unionists, environmental activists, indigenous persons and lesbian, gay, bisexual, transgender and intersex persons.<sup>67</sup>

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<sup>65</sup> Concluding observations on the second periodic report of Honduras, CCPR/C/HND/CO/2, 22 August 2017, para. 40.

<sup>66</sup> *Ibid.*, para. 42.

<sup>67</sup> *Ibid.*, para. 41.

and should also

take all necessary steps to protect those persons who have contributed to the work of the Committee and to ensure that public officials cease to make disparaging statements about them. In addition, the State party should inform the Committee of the measures taken in this regard.<sup>68</sup>

### *Hungary*

81. A Draft Law on the Transparency of Organisations Receiving Support from Abroad – which aimed at establishing a new category of civil society organisations receiving foreign funds beyond a certain threshold, for which there would be additional reporting and disclosure obligations - was the subject of opinions by both the European Commission for Democracy through Law (“the Venice Commission”) and the Expert Council on NGO Law.<sup>69</sup>
82. Although the purported aim of the draft law were legitimate ones, namely, to prevent undue foreign political influence and to combat money laundering, the Venice Commission drew attention to the virulent campaign by some state authorities against non-governmental organisations receiving foreign funding and the risk of these organisations being stigmatised, thereby adversely affecting their legitimate activities and having a chilling effect on freedom of expression and association. It also emphasised that the legitimate aims could not be used as a pretext to control non-governmental organisations or to restrict their ability to carry out their legitimate work.
83. The Venice Commission considered that there was a need for public consultation before the draft law was adopted. As to its substance, the Venice Commission considered that the exclusion of various associations and organisations from the scope of the draft law either needed to be justified in clearer terms or deleted; the three-year interval between an organisation ceasing to receive foreign funding and being deregistered was excessive and should be reduced to one year; the data included in the register and made public should be limited to the major sponsors; the obligation for a registered organisation to mention on all its press products and publications that it qualifies as an organisation receiving support from abroad appeared excessive and should be reduced; and express provision should be made to the proportionality principle in the provision dealing with sanctions for non-fulfilment of obligations.
84. Similar concerns were expressed in the opinion of the Expert Council on NGO Law, which additionally pointed to the failure to provide any evidence as why and how the non-governmental organisations affected posed a concrete danger to the society and indicated that the mere fact that they influenced public opinion was not a justifiable ground for the imposition on them of administrative and financial burdens that would be likely to stigmatize them and hamper their ability to carry out their statutory mission. Furthermore, it was observed that the Hungarian legal system already had strict reporting and transparency requirements on all non-governmental organisations

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<sup>68</sup> *Ibid.*, para. 43.

<sup>69</sup> Respectively, *Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad*, (CDL-AD(2017)015, 20 June 2017) and *Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad* (Conf/Exp(2017)1, 24 April 2017); available at <https://rm.coe.int/168070bfbb>.

which satisfied the need for transparency. In addition, there was concern that condemning one type of organisations would lead to the condemnation and weakening of trust in the whole non-governmental sector.

85. The Law was adopted on 13 June 2017 with certain amendments to the draft considered in these two opinions. These comprised: an additional exception for certain national minority organisations and associations concerned with the cultural autonomy of a national minority; a limitation on the obligation to disclose the identity of individual donors has been limited to donations of more than 500 000 forints (around 1 600 euros); the removal of the reference to dissolution as an automatic sanction and the addition of a reference to the proportionality of the sanctions; and deregistration was made possible if no important foreign funding had been received during a year.
86. These addressed some of the problematic issues identified above but, as the Venice Commission noted, they did not do enough to alleviate its concerns:

that the Law will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination, including due to the absence of comparable transparency obligations which apply to domestic financing of NGOs. Indeed, the broad and even increased exceptions to the application of the Law, coupled with the negative rhetoric that continues to surround this matter, cast further doubt on the genuine aim of ensuring general transparency. Moreover, the obligation to publish the information that the association is foreign funded on all press products is clearly disproportionate and unnecessary in a democratic society. The Venice Commission also regrets that contrary to its recommendations no public consultation has taken place prior to the final adoption of the Law.<sup>70</sup>

87. The foregoing concerns were also raised by the Council of Europe Commissioner for Human Rights in a letter to the Speaker of the Hungarian National Assembly, in which the latter was encouraged to reject what was then a proposed law.<sup>71</sup>
88. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Human Rights Committee was concerned about:

### *Kazakhstan*

89. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Human Rights Committee reiterated its concern that:

regulations on the registration of public associations, including political parties, impose undue restriction on the exercise of freedom of assembly and political participation. It notes with concern reports indicating that associations, including political parties, can be held criminally responsible for carrying out their legitimate activities, including under the offence of incitement to “social, national, clan, class or religious discord”. The Committee is also concerned about the broad grounds for the suspension or dissolution of political parties. It is further concerned that the restrictive legal framework regulating strikes and the mandatory affiliation of trade unions to regional or sectorial federations under the 2014 Act on Trade Unions may adversely affect the right to freedom of association under the Covenant. Finally, the Committee notes that civil society organizations fear that the establishment of a central “operator” and other provisions under the

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<sup>70</sup> CDL-AD(2017)015, 20 June 2017, at para. 64.

<sup>71</sup> CommDH(2017)14, 3 May 2017.

law of 2 December 2015 regulating the allocation of funds to public associations may be used to tighten control over them and limit their ability to receive funds from abroad (arts. 22 and 25).<sup>72</sup>

90. It thus considered that Kazakhstan should:

bring its regulations and practice governing the registration and functioning of political parties and non-governmental organizations, as well as the legal frameworks regulating strikes and trade unions, into full compliance with the provisions of articles 19, 22 and 25 of the Covenant. It should, *inter alia*:

- (a) Refrain from criminalizing public associations, including political parties, for their legitimate activities under criminal law provisions that are broadly defined and not compliant with the principle of legal certainty;
- (b) Clarify the broad grounds for the suspension or dissolution of political parties;
- (c) Ensure that the new legislation on the allocation of funds to public associations will not be used as a means of undue control and interference in the activities of such associations nor for restricting their fundraising options.<sup>73</sup>

*Kuwait*

91. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Human Rights Committee was concerned that:

articles 2, 3, 6 and 22 of Law No. 24 (1962) on clubs and public welfare societies place restrictions on the establishment and operation of civil society organizations, including by prohibiting them from engaging in political or religious advocacy and limiting their fundraising activities. In addition, the Committee remains concerned at reports that the State party imposes undue restrictions on the exercise of freedom of association, including arbitrary application of the law and its terms to limit dissent and the full participation of non-governmental organizations in civil society (art. 22).<sup>74</sup>

92. It thus considered that Kuwait should:

- (a) repeal or revise laws restricting the right to freedom of association to bring them into conformity with the Covenant; (b) clarify the vague, broad and open-ended definition of key terms in those laws and ensure that they are not used as tools to curtail freedom of association beyond the narrow restrictions permitted in article 22 (2) of the Covenant; and (c) ensure that civil society organizations can operate free of undue government influence and without fear of reprisals or unlawful restrictions on their operations.<sup>75</sup>

*Madagascar*

93. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee was concerned:

by reports of breaches of freedom of association and freedom of assembly in the State party in the form of: (a) the denial of permits for public protests by trade unions and non-governmental organizations; and (b) restrictions on joining trade unions. In addition, the Committee is

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<sup>72</sup> Concluding observations on the second periodic report of Kazakhstan, CCPR/C/KAZ/CO/2, 9 August 2016, para. 53.

<sup>73</sup> *Ibid.*, para. 54.

<sup>74</sup> Concluding observations on the third periodic report of Kuwait, CCPR/C/KWT/CO/3, 11 August 2016, para. 44.

<sup>75</sup> *Ibid.*, para. 45.

concerned at reports that political opponents are systematically denied the right to public protest, even when exercised peacefully (arts. 21 and 22).<sup>76</sup>

94. It thus considered that Madagascar should:

take all necessary steps to ensure that all individuals and political parties fully enjoy the right to peaceful assembly and freedom of association in practice and to ensure that all restrictions on the exercise of these rights comply with the strict conditions laid down in the Covenant.<sup>77</sup>

#### *Morocco*

95. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee welcomed the fact that the procedures for filing a declaration of association have been streamlined but is nonetheless concerned about the fact that many associations are refused the right to register. It was also was concerned:

by reports that the activities of human rights defenders are subject to disproportionate, unjustified restrictions and that human rights defenders' freedom of movement is limited, particularly in Western Sahara (arts. 12, 21 and 22).<sup>78</sup>

96. It thus considered that Morocco should:

as a matter of urgency, take all necessary steps to put an end to violations of the right to freedom of association and any practices that place restrictions on that right which go beyond the strictly defined limitations set forth in article 22 (2) of the Covenant. It should ensure that it does not exert any undue influence over human rights defenders and that they are free to work without fear of reprisals or unjustified restrictions on their activities.<sup>79</sup>

#### *Pakistan*

97. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee was concerned that:

the Policy for Regulation of International Non-Governmental Organizations in Pakistan may, contrary to its intention, constrict the registration of international non-governmental organizations (NGOs) and their activities. It is particularly concerned by the broad and vague grounds for cancellation of the registration of these organizations (arts. 18, 19 and 22).<sup>80</sup>

98. It thus considered that Pakistan should:

review its legislation on the registration of international NGOs with a view to bringing it into line with article 22 of the Covenant.<sup>81</sup>

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<sup>76</sup> Concluding observations on the fourth periodic report of Madagascar, CCPR/C/MDG/CO/4, 22 August 2017, para. 51.

<sup>77</sup> *Ibid.* para. 52.

<sup>78</sup> Concluding observations on the sixth periodic report of Morocco, CCPR/C/MAR/CO/6, 1 December 2016, para. 41.

<sup>79</sup> *Ibid.*, para. 42.

<sup>80</sup> Concluding observations on the initial report of Pakistan, CCPR/C/PAK/CO/1, 23 August 2017, para. 39.

<sup>81</sup> *Ibid.*, para. 40.

*Poland*

99. The OSCE Office for Democratic Institutions and Human Rights has published an opinion on the Draft Act of Poland on the National Freedom Institute - Centre for the Development of Civil Society.<sup>82</sup> This Draft Act seeks to establish a new structure at the central level, namely, the National Institute, to support the development of civil society and public benefit activity and volunteer work in Poland.
100. Although the proposed institutional set-up for civil society development generally seemed to reflect schemes found in other OSCE countries, the Opinion considered that more detail could be provided with respect to the modalities and procedures for effective co-ordination and meaningful inclusion and participation of civil society in the National Institute's work, as well as regarding the oversight over this new body. This was considered appropriate as the Draft Act would then be more in line with international and regional standards and recommendations on the right to participate in the conduct of public affairs, including the participation of civil society organizations in public decision-making processes. It was also considered that such additional information and detail would be consistent with the National Institute's tasks to promote the involvement of citizens and civil society organizations in public life and decision-making processes and civic control over public institutions.
101. This could be achieved through: increasing the number of civil society representation so that its representatives made up at least half of the total number of Board members; actively involving civil society organizations in the designation of potential candidates for the positions of Director/Deputy Directors of the National Institute and their selection; ensuring the participation of civil society organizations in the development of the National Institute's draft annual activity and financial plans and reports, in the process of determining the rules of open tenders, including the type of tasks eligible for funding and templates for open bid tenders and when evaluating the applications and the selected projects; introducing into the Draft Act modalities for civil society organizations to be actively involved in the exercise of general oversight over the National Institute itself; and ensuring that such participation of civil society organizations is inclusive and non-discriminatory, and based on a fair, public, transparent, open, non-discriminatory, inclusive and competitive selection process.
102. Moreover, there was concern that the executive branch appeared to have a decisive influence on the governance and operation of the National Institute and it was therefore recommended to reconsider the current oversight and organizational structure and to provide measures or safeguards limiting potential government interference in the National Institute's work.
103. Furthermore, it was considered that this new civil society development scheme should not lead to a situation where, in practice, the responsibility of distributing the great majority of public funds or resources to civil society organizations would be assigned to just one entity. Indeed, it was pointed out that international and regional recommendations and good practices advise that this responsibility be given various bodies free from government influence, and not to just one executive body.

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<sup>82</sup> Opinion-Nr: NGO-POL/303/2017, 22 August 2017.

104. In addition, the Polish legislator was encouraged to ensure that the Draft Act was subject to further inclusive, extensive and meaningful consultations up until its adoption, including before the Parliament.

*Republic of Korea*

105. The situation of non-governmental organisations in this country has been addressed by both the Human Rights Committee and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.
106. In connection with the implementation of the right to freedom of association under Article 22 of the International Covenant, the Committee was concerned both that:

that the dissolution of the Unified Progressive Party, which was ordered by the Constitutional Court in 2014 for the alleged violation of the basic democratic order, was substantially based on the alleged propagation of the ideology of the Democratic People's Republic of Korea by the party members, who have already faced charges under article 7 of the National Security Act (arts. 19 and 22).<sup>83</sup>

and that:

unreasonable restrictions are being placed on public officials' freedom of association. It is also concerned about cases in which trade unions have been refused registration on the ground that their membership includes employees who have been dismissed (art. 22).<sup>84</sup>

107. It thus considered that

In view of the particularly far-reaching consequences of dissolving a political party, the State party should ensure that the measure is used with utmost restraint and as a last resort only, and that it reflects the principle of proportionality<sup>85</sup>

and that:

the State party should withdraw its reservation to article 22 of the Covenant and enable all sectors of the labour force, including public officials and employees who have been dismissed, to join trade unions.<sup>86</sup>

108. In his report on the Republic of Korea, the Special Rapporteur found that, while the Government is cognisant of the important role that the right to freedom of association played, there was a tendency to tightly control expressions of dissent.<sup>87</sup> Furthermore, although government authorities clearly made efforts to observe the rule of law, the legal framework did not comply with international standards in a number of key areas and provided excessive discretion to the authorities. Moreover, it was considered that the authorities did not pay sufficient attention to the obligations to respect, protect and facilitate assembly and association rights.

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<sup>83</sup> Concluding observations on the fourth periodic report of the Republic of Korea, CCPR/C/KOR/CO/4, 3 December 2015, para. 50

<sup>84</sup> *Ibid.*, para. 54.

<sup>85</sup> *Ibid.*, para. 51.

<sup>86</sup> *Ibid.*, para. 55.

<sup>87</sup> A/HRC/32/36/Add.2, 17 November 2017. The Government's response is in A/HRC//32/36/Add.5, 15 June 2016.

109. As a result, the specific recommendations made to the Government were to:

- (a) Ensure that the establishment of associations, including trade unions and political parties:
  - (i) Is subject at most to a notification process
  - (ii) Is simple, expeditious and non-onerous, with clear requirements, including as to the relevant responsible authority;
  - (iii) Results in the acquisition of legal personality;
  - (iv) Is not subject to overly intrusive and burdensome transparency and accountability requirements prior or subsequent to fundraising;
- (b) Amend the labour laws to reflect the rights of all workers:
  - (i) To freedom of association, including the ability to form or join trade unions;
  - (ii) To freely engage in collective action, including strikes;
  - (iii) To enforce collective agreements in conformity with international labour law standards;
  - (iv) To freedom of expression, including opinions that may be considered political;
- (c) Implement as a matter of urgency the recommendations issued by the Committee on Freedom of Association, including in relation to the recognition of the Korean Teachers and Education Workers Union and the Korean Government Employees Union;
- (d) Ensure that the laws and policies guiding the establishment of political parties encourage the formation of small parties and ensure a level playing field in terms of funding.<sup>88</sup>

110. It was also recommended that Article 7 of the National Security Act - which prohibits praising, inciting or propagating the activities of anti-State organizations, acts of instigating or propagating a rebellion against the State, or joining organizations that engage in those acts, was used as a basis to prosecute members of such organizations – be repealed.<sup>89</sup>

#### *Republic of Moldova*

111. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee, while noting the planned reforms of the laws governing the registration of associations was concerned about:

the lengthy and burdensome process of registering a non-governmental or religious organization under the current laws and procedures. It is also concerned that numerous non-governmental and religious organizations have been refused registration on grounds that appear to lack clear legal bases (art. 22).<sup>90</sup>

112. It thus considered that the Republic of Moldova should:

review its laws and practice for registering organizations to ensure their compliance with article 22 of the Covenant, and in particular with the need to develop transparent legal criteria that would meet requirements of necessity and proportionality. It should also consider transferring the responsibility of registering an organization to an independent authority.<sup>91</sup>

#### *Russia*

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<sup>88</sup> Para. 96.

<sup>89</sup> Para. 97.

<sup>90</sup> Concluding observations on the third periodic report of the Republic of Moldova, CCPR/C/MDA/CO/3, 18 November 2016, para. 37.

<sup>91</sup> *Ibid.*, para. 38.

113. The situation of non-governmental organisations in this country has been addressed by both the Venice Commission and the Council of Europe Commissioner for Human Rights.
114. An opinion of the Venice Commission focused on the adoption by the Russian Federation of the Federal Law on Undesirable Activities of Foreign and International non-governmental organisations.<sup>92</sup> Under this Law it became possible for the activities of non-governmental organisations to be designated as “undesirable”, with provision also being made for a list of the organisations concerned to be made public, the imposition of various restrictions on the carrying out of the activities so designated after such listing<sup>93</sup> and for the creation of criminal liability for anyone carrying out or participating in them.
115. Although recognising the right of States to monitor the activities of non-governmental organisations on their territory, the Venice Commission found that the resulting restrictions on the rights to freedom of association and freedom of expression did not respect the necessary conditions under the European Convention regarding their legality, legitimacy, and being necessary in a democratic society in two main respects.
116. Firstly, the vague definition in the law of certain fundamental concepts, such as “non-governmental organisations”, the grounds on the basis of which the activities may be declared undesirable, “directing of” and “participating in” the activities of a listed non-governmental organisation, coupled with the wide discretion granted to the Office of the Public Prosecutor to list activities as “undesirable” and the lack of specific judicial guarantees contradicted the principle of *legality*.
117. Secondly, the automatic legal consequences (blanket prohibitions) imposed upon non-governmental organisations whose activities were declared undesirable (prohibition to organise and conduct mass actions and public events or to distribute information materials) – even though there might not be a serious threat to the security of the state or to fundamental democratic principles - contradicted the need for a pressing social need and the principle of proportionality. Furthermore, the inclusion in the list did not have to be made on the basis of clear and detailed criteria following a judicial decision or to be at least subject to an appropriate judicial appeal.<sup>94</sup>
118. In the view of the Venice Commission, the various prohibitions in the law could only be considered acceptable if the various recommendations which it made were adopted.<sup>95</sup>
119. In a third party intervention in the case of *ECODEFENCE and others v. Russia and 48 other applications*<sup>96</sup> before the European Court of Human Rights (“the European

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<sup>92</sup> *Opinion on Federal Law No. 129-fz on amending certain legislative acts*, (CDL-AD(2016)020, 13 June 2016).

<sup>93</sup> Notably, as regards the organisations establishing structural units, distributing their information, implementing projects and programmes and organising mass action and public events in the Russian Federation.

<sup>94</sup> Similar conclusions were reached in the Expert Council’s opinion on the draft Law, available at: <https://rm.coe.int/1680306f73>.

<sup>95</sup> Namely, clarification of the concept of “NGO”, concrete criteria for inclusion in the list and either inclusion decisions to be taken by a judge or to be based on detailed reasoning by the Office of the Prosecutor General and then subject to judicial appeal.

<sup>96</sup> No. 9988/13.

Court”), the Commissioner stated his finding that the application of Law on Foreign Agents had had a major “chilling effect” on the work of civil society organisations in the Russian Federation<sup>97</sup>. In effect, those organisations have been silenced, marginalised and punished for their legitimate activity in the field of human rights, democracy and the rule of law.

120. The Commissioner considered that the Law was incompatible with international and European human rights standards and emphasised that, as any continuing use of the term “foreign agent” in the legislation and practice in relation to nongovernmental organisations would only lead to further stigmatisation of civil society in the Russian Federation and intensify the chilling effect upon its legitimate activities and speech, the use of that pejorative designation should be abandoned.
121. Furthermore, he underlined that the activities qualified as “political” under the Law were among the most commonly-practiced, basic and natural methods for civil society institutions to perform their work and that they constituted important elements of the democratic process. In his view, the application of the Law on Foreign Agents against civil society groups advocating for changes in law and practice, or against those scrutinising the human rights compliance of decisions, actions and policies of public authorities, greatly undermined their role as a public watchdog in a democratic society.
122. The Commissioner pointed out that, as a result of the energetic application of the Law on Foreign Agents, there has been considerable interference with the free exercise of the rights to freedom of association and freedom of expression of many non-commercial organisations (“NCOs”) and human rights defenders, sometimes with severe consequences. Apart from the difficulties in securing funding, he indicated that such groups and the persons working in them have been subjected to ostracism, harassment, and even physical attacks and that dozens of NCOs have had no choice but to suspend their operations or shut down altogether. In his view, the negative effects of the Law on Foreign Agents upon human rights defenders and NCOs raised questions about the legitimacy of the State’s restrictive measures in light of Article 18 of the European Convention, which provides that permitted restrictions on rights and freedoms should not be applied for any purpose other than for which they have been prescribed.
123. The Commissioner thus recommended a thorough revision of the legislation regulating the activities of NCOs in Russia, with the aim of establishing a clear and coherent framework in line with applicable international standards. In addition, as the possibility of applying criminal charges for “malicious” non-compliance with the Law in the absence of any real and specified public danger was especially problematic, the relevant provisions should be repealed. Furthermore, he underlined that there was a need for NCOs to enjoy the presumption of lawfulness of their activities in law and practice, to be free to solicit and receive funding not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws on customs, foreign exchange and money-laundering, as well as those on elections and funding of political parties, and for reporting requirements to be set up on an equal and non-biased basis regardless of the sources of income.

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<sup>97</sup> CommDH(2017)22, 5 July 2017.

## *Rwanda*

124. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee was concerned that:

Law No. 04/2012 and Law No. 05/2012 contain onerous obligations for the registration of national and international NGOs, respectively, and international NGOs are requested to provide evidence of funding for the entire period for which they seek registration, leading many of them to seek registration for short periods only. The Committee also notes with concern the invasive role that the Rwanda Governance Board has played in the determination of the leadership of certain NGOs (arts. 19 and 21-22).<sup>98</sup>

125. It thus considered that Rwanda should:

amend the legislation and take other measures necessary to ensure that all individuals and political parties fully enjoy, in practice, their rights to freedom of expression, peaceful assembly and association, including by guaranteeing that any restrictions on the exercise of such rights comply with the strict requirements set out in the Covenant. The State party should also refrain from interfering with the internal functioning of NGOs and political parties.<sup>99</sup>

## *South Africa*

126. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee was concerned:

about reports of threats, intimidation, harassment, excessive use of force and physical attacks, some resulting in deaths, by private individuals and police forces against human rights defenders, in particular those working on corporate accountability, land rights and transparency issues, as well as lesbian, gay, bisexual, transgender and intersex persons and HIV activists. It also notes with concern reports about the lack of due diligence of law enforcement officers in protecting human rights defenders, including registering and investigating allegations of human rights violations, and in securing accountability for such violations (arts. 2, 6, 9, 19, 21 and 22).<sup>100</sup>

127. It thus considered that South Africa should:

take all measures necessary to protect the rights of human rights defenders to freedom of expression, association and peaceful assembly. It should ensure that police officials receive adequate training regarding the protection of human rights defenders. The State party should also thoroughly investigate all attacks on the life, physical integrity and dignity of these persons, bring perpetrators to justice and provide victims with appropriate remedies.<sup>101</sup>

## *Swaziland*

128. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee was concerned:

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<sup>98</sup> Concluding observations on the fourth periodic report of Rwanda, CCPR/C/RWA/CO/4, 2 May 2016, para. 41.

<sup>99</sup> *Ibid.*, para. 42.

<sup>100</sup> Concluding observations on the initial report of South Africa, CCPR/C/ZAF/CO/1, 27 April 2016, para. 40.

<sup>101</sup> *Ibid.*, para. 41.

at reports of attacks on journalists, political opponents, human rights defenders and trade unionists, and reports that proposed amendments to the Public Order Act will severely restrict freedom of expression, assembly and association, impose cumbersome requirements for obtaining permits before holding a meeting or hosting an activity and give law enforcement officers discretionary powers to interrupt meetings. It is also concerned at reports that a monitor should be present during public meetings. The Committee is concerned at reports that trade union leaders have been kept in preventive detention to prevent them from engaging in legitimate trade union activities (arts. 19, 21 and 22).<sup>102</sup>

129. It thus considered that Swaziland should:

prevent and redress attacks on human rights defenders and other social activists and promptly adopt legislation to ensure that any restriction on the exercise of freedom of expression, assembly and association complies with the strict requirements in the Covenant. The State party should take all measures necessary to protect the rights to freedom of expression, association and peaceful assembly and ensure that police officials, judges and prosecutors receive adequate training regarding such protection.<sup>103</sup>

130. In connection with the implementation of Article 22 of the International Covenant, the Human Rights Committee was concerned:

the restrictions on freedom of association, including under the 2014 Voluntary Association Act, such as the compulsory registration of associations, provisions allowing wide monitoring powers of the authorities over the activities and finances of associations and the broad legal grounds for closing them down by court order. It is also concerned about the very limited number of registered non-governmental organizations working on human rights issues (art. 22).<sup>104</sup>

131. It thus considered that Turkmenistan should:

revise relevant laws, regulations and practices with a view to bringing them into full compliance with the provisions of articles 19 and 22 of the Covenant.<sup>105</sup>

### *United Kingdom*

132. In a report on a follow-up mission, the Special Rapporteur on the rights to freedom of peaceful assembly and of association suggested that the United Kingdom:

should truly consider its civil society a national treasure. It epitomizes the kind of “unity through diversity” that civil society can so uniquely foster. The Special Rapporteur believes that these individuals — and the hundreds of thousands of people like them — are the reason for many of the positive attributes that are enjoyed in the country.<sup>106</sup>

133. He also noted that efforts had been made to address recommendations in his previous report but expressed concern that certain measures had:

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<sup>102</sup> Concluding observations on Swaziland in the absence of a report, CCPR/C/1, 23 August 2017, para. 44.

<sup>103</sup> *Ibid.*, para. 45.

<sup>104</sup> Concluding observations on the second periodic report of Turkmenistan, CCPR/C2/TKM/CO/2, 20 April 2017, para. 46.

<sup>105</sup> *Ibid.*, para. 47.

<sup>106</sup> A/HRC/35/28/Add.1, 8 June 2017, para. 87. For the Government’s response, see A/HRC/35/28/Add.4\*, 2 June 2017.

negatively impacted the exercise of the rights to freedom of association and freedom of peaceful assembly and, in general, are resulting in the closing of space for civil society. In many instances, these moves have been subtle and gradual, but they are as unmistakable as they are alarming. He is concerned that, put together, these measures suggest that the Government has a negative view of civil society as a critical partner that can and should hold it accountable.<sup>107</sup>

134. The Special Rapporteur thus called upon the competent authorities to:

- (a) Allow an independent review of the *Prevent* strategy<sup>108</sup> to determine its impact upon the enjoyment of fundamental freedoms, including freedoms of association and peaceful assembly, with a view to amending/repealing it; this review should seek inputs from all relevant stakeholders;
- (b) Not introduce the Counter-Extremism and Safeguarding Bill before Parliament<sup>109</sup>;
- (c) Make greater efforts to ensure that charities and other groups are not subjected to de-risking or de-banking where there are options for mitigating or managing risk;
- (d) Uphold recommendation 8 on non-profit organizations of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation of the Financial Action Task Force, and its interpretive note;
- (e) Amend the Investigatory Powers Act 2016 to address the issues of concern identified in the present report<sup>110</sup>, and to bring it into compliance with international human rights norms and standards governing the right to privacy, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and the right to freedom of association;
- (f) Clarify the definition of “regulated activity” under the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 by introducing the notion of “actual intention”, and proceed with care at the implementation level;
- (g) Amend the guidance of the Electoral Commission to clarify what activities civil society groups are entitled to undertake;
- (h) Amend the Trade Union Act 2016 to address the issues of concern identified in the present report, with a view to ensuring its full compliance with international human and labour rights norms and standards;
- (i) Pursue a policy of sectoral equity in the treatment of businesses and associations;
- (j) Request the Special Rapporteur on the right to education and the Special Rapporteur on freedom of religion or belief to undertake official missions to the United Kingdom.<sup>111</sup>

### *United States*

135. While recognising that the right to freedom of association had always played a central role in past struggles for justice and equality in the United States of America, the Special Rapporteur on the rights to freedom of peaceful assembly and of association issued a report on a follow-up mission to the country suggesting that this right (together with that to freedom of assembly) remained just as important today, at a time when the country was experiencing some of the deepest social and political

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<sup>107</sup> Para. 85.

<sup>108</sup> This “focuses on individuals and groups who “vocal[ly] or active[ly] oppos[e] fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs” and who are seen as being predisposed to respond positively to terrorist ideologies” (para.7; footnote omitted).

<sup>109</sup> This was intended to “authorize the issuance of civil orders to, inter alia, ban non-violent extremist groups, stop individuals engaging in extremist behaviour and close down premises used to support extremists” (para. 15). However, the bill was not introduced before Parliament.

<sup>110</sup> In particular the possibility of issuing “thematic warrants” which “target a group or category of people without requiring each target of the surveillance to be individually identified” (para. 27).

<sup>111</sup> Para. 90.

divisions in a generation. In his view, addressing those divisions required an environment that encouraged:

participation, openness, dialogue and a plurality of voices, and achieving that kind of pluralism requires maximum protection and promotion of the rights to freedom of peaceful assembly and of association.<sup>112</sup>

136. The Special Rapporteur thus recommended in this connection that the competent authorities:

- (a) Recognize uniformly in law and practice that the rights to freedom of peaceful assembly and of association are a legitimate means through which individuals, especially those belonging to marginalized groups, can aggregate and express their views, and further recognize that it is incumbent on the authorities to facilitate rather than diminish the exercise of those rights;
- (b) Ensure that the legal framework affecting those rights conforms to international human rights norms, including by providing an objective and detailed framework through which decisions restricting rights are made, while ensuring that restrictions are the exception and not the rule.<sup>113</sup>

137. More specific recommendations included a call for the competent authorities to:

- (a) Ratify outstanding international labour conventions, particularly the ILO Forced Labour Convention, 1930 (No. 29), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Equal Remuneration Convention, 1951 (No. 100) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- (b) Increase funding and staffing at the National Labour Relations Board and the Department of Labour to vigorously enforce the National Labour Relations Act and other labour laws;
- (c) Ensure that migrant workers involved in ongoing labour disputes are not deported for immigration violations until after the disputes are resolved;
- (d) Take measures to strengthen the independence of the National Labour Relations Board, so that its work and budget are not subject to partisan politics;
- (e) Amend the National Labour Relations Act to:
  - (i) Impose tougher sanctions on employers who are found to delay or engage in bad faith tactics during collective bargaining negotiations;
  - (ii) Prohibit state “right to work” laws as a violation of workers’ right to freedom of association under international human rights law;
  - (iii) Strengthen sanctions against employers who engage in unfair labour practices, adding fines, punitive damages and compensation provisions, in order to deter future violations of workers’ rights;
- (iv) Forbid the permanent replacement of striking workers;
- (v) Allow union meetings to be held without management being present and information to be distributed in the workplace without harassment or retaliation; also give union organizers the right of rebuttal in “captive audience” meetings or to hold their own such meetings without harassment or retaliation;
- (f) Provide legal assurance for not-for-profit organizations and their donors that legitimate aid work in conflict areas will not immediately attract sanctions or adverse actions;
- (g) Adopt a consistent policy of “sectoral equity” in the regulation of businesses and associations (including trade unions) to ensure a fair, transparent and impartial approach to regulating each sector;
- (h) Revamp campaign finance laws to reduce the influence of money in the political process and to ensure a level playing field for the expression of the concerns of all citizens during elections;
- (i) Establish an independent counter-terrorism ombudsperson to monitor compliance of United States laws and practices in the fight against terrorism with international human rights law.<sup>114</sup>

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<sup>112</sup> A/HRC/35/28/Add.2, 12 June 2017, para. 82.

<sup>113</sup> Para. 85.

<sup>114</sup> Para. 87.

## D. CASE LAW

138. The case law developments have, with one exception, been those arising from the judgments and decisions delivered by the European Court in relation the concept of an association and then various issues relating to membership of them, their objects, formation, members and pursuit of activities, as well ones concerning the imposition of sanctions, the use of dissolution and the provision of remedies. The exception concerns the views of the Human Rights Committee in relation to the formation of an association.

### *Associations*

139. The European Court has reaffirmed its approach to determining whether or not a particular entity is to be treated as an “association” for the purpose of Article 11 of the European Convention. Thus, its understanding is that this term has an autonomous meaning and the particular qualification given to it by a Contracting State will not be decisive. In particular, the crucial elements in resolving any debate as to whether an entity should be considered as private or public – with only the former benefiting from the guarantee in Article 11 - are: whether it was founded by individuals or by the legislature; whether it remained integrated within the structures of the State, whether it was invested with administrative, rule-making and disciplinary power, and whether it pursued an aim which was in the general interest.
140. As a union of viticultural cooperatives was found not to be integrated within the structures of the State and not to be vested with administrative, rule-making or disciplinary prerogatives, it was considered by the European Court to be an association for the purpose of Article 11 notwithstanding that it was established by law pursuant to a constitutional provision authorising a system of compulsory membership in such cooperatives.<sup>115</sup>

### *Membership*

141. The refusal to grant a wine-making licence to two winegrowers to produce and market Samos muscat wine because the Samos Union of vinicultural cooperatives had exclusive rights for this purpose was found to have unjustifiably infringed their freedom not to belong to an association under Article 11 of the European Convention.<sup>116</sup> The two wine-growers had previously sought permission to withdraw their membership from the union – an association with compulsory membership to which winegrowers were obliged to hand their entire production of wine<sup>117</sup> - in order to freely dispose of and market their wine production but had never received a reply.

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<sup>115</sup> *Mytilinaios and Kostakis v. Greece*, no. 29389/11, 3 December 2015.

<sup>116</sup> *Ibid.*

<sup>117</sup> See para. 139 above.

142. The refusal of the licence - and thus the insistence on membership of the union - was recognised by the European Court to pursue the legitimate aims of protecting the quality of the grape variety, which was a precious resource for Greece's economy, and to develop the cultivation of the grapevines, whose low prices at the time had put farmers off growing the vines. However, although aware that such cooperatives were firmly embedded in the local economic fabric and contributed to the development of the area and the activity of their members, the European Court considered that these reasons did not appear particularly relevant at the present time as there were a large number of winegrowers, Samos muscat wine having received the controlled designation of origin label and the export market being very buoyant.
143. Moreover, the distinction made between winegrowing, which was unrestricted, and producing and marketing the wine, for which membership of a cooperative was compulsory, was seen to be artificial one and as one that actually excluded any form of autonomy or independence of the winegrowers concerned. Furthermore, the aims being pursued could also be achieved by other, much less restrictive, means, such as the control over quality through the use of a certification procedure. In these circumstances, the refusal of the licence was to be regarded as having exceeded what was necessary to strike a fair balance between the conflicting interests and could not be regarded as proportionate to the aims pursued.
144. However, a requirement to contribute to a social welfare fund as a result of the terms of a collective agreement between employers' associations in the building industry and a trade union being made generally applicable to all employers even though they were not party to the agreement<sup>118</sup> was not considered by the European Court to breach an employer's negative freedom of association.<sup>119</sup> This was because the contributions in question – which funded social welfare entitlements in the interest of all employees working in the building industry, based on the principle of solidarity – could not be regarded as membership contributions.
145. Furthermore, as the European Court pointed out, the duty to pay contributions was offset by the applicant company's entitlement to reimbursement by the Social Welfare Fund where it provided the respective benefits to its employees. Moreover, non-members of employers' associations were not treated less favourably than members in relation to transparency and accountability or any other aspect of the operation of the social welfare fund. In addition, there was a significant level of involvement of, and control by, public authorities over the operation of the fund.
146. Thus, the European Court concluded that any de facto incentive for the applicant company to join one of the employers' associations in the building industry in order to be able to participate in that association's decision-making process and to assert its interests by exercising control over the activities of the Social Welfare Fund was to be regarded as too remote to strike at the very substance of the right to freedom of association guaranteed by Article 11 of the Convention and did, therefore, not amount to an interference with the applicant company's freedom not to join an association against its will.

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<sup>118</sup> The applicant employer could not, in fact, become a party to the collective agreement and it was not obliged to become a member of any of the employers' organisations that were parties to it.

<sup>119</sup> *Geotech Kancev GmbH v. Germany*, no. 23646/09, 2 June 2016.

## Objects

147. The refusal to register an association on the basis that the formulation of the provisions in its memorandum and articles of association led to the conclusion that it wanted to carry on activities that could be perceived as belonging to the field of activity of political parties, for which different legislation to that for associations and foundations was applicable, was considered by the European Court to be an interference with freedom of association under Article 11 of the European Convention that was not necessary in a democratic society.<sup>120</sup>
148. The focus on the ruling was not on the compatibility of the proposed objectives and activities of the association with the right to freedom of association<sup>121</sup>, which did not seem at all problematic given a previous ruling of the European Court and the content of Recommendation CM/Rec(2007)14<sup>122</sup>. Instead, it was concerned more with the application of a provision in the relevant legislation whereby the judge reviewing an application for registration could allow some time for the person making the application to remedy any irregularities affecting the registration after that person had been summoned and been asked in writing to do so, as well as the assessment made about the founders intentions and the association's possible activities.

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<sup>120</sup> *Costel Popa v. Romania*, no. 47558/10, 26 April 2016.

<sup>121</sup> The association's objectives were to: increase expertise in the development of sustainable public policies in Romania; improve the process of the development of sustainable public policies by facilitating public participation in and access to relevant information about the environment; increase the accountability of the relevant official bodies by scrutinising the implementation of public policies with an impact on the environment; facilitate the access of official bodies to best practices by examining the Government's environmental initiatives in a European context; ensure transparency in the work of public institutions and increase their responsibility for their actions in relation to other citizens; review whether public institutions worked on the basis of principles of sustainability; and defend the right to a clean environment, as provided by international treaties. The activities envisaged for the achievement of these objectives were: research and analysis; public debates and conferences; monitoring the implementation of European Union directives; public communication campaigns; opinion polls; reviewing the development and implementation of public policies in the environmental field; training; raising citizens' awareness; informing people of matters of public concern; raising the awareness of the community and of public authorities about the need to protect the environment; organising meetings between citizens and representatives of public authorities; organising debates and opinion polls on issues impacting the environment; developing programmes in partnership with public authorities; active involvement of citizens in the development of public policies and the decision-making process; improving the legal framework; setting up annual prizes for environmental activities; awarding scholarships for promoting sustainable development; networking with similar national and international organisations; supporting and defending the association's members and volunteers; and other lawful activities.

<sup>122</sup> Thus, in *Koretsky and Others v. Ukraine*, no. 40269/02, 3 April 2008, the European Court found wanting any "indication of the necessity of the existing restrictions on the possibility of associations to distribute propaganda and lobby authorities with their ideas and aims, their ability to involve volunteers as members or to carry out publishing activities on their own" (para. 52) and in *Zhechev v. Bulgaria*, no. 57045/00, 21 June 2007 it had been even more explicit in stating that the "alleged "political" character of the association's aims was also not a sufficient ground to refuse its registration" (para. 57). Furthermore, paragraph 12 of Recommendation CM/Rec(2007)14 provides that "NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law". However, in view of the approach that it took in its judgment in *Costel Popa*, the European Court saw "no need to speculate whether the said Law defines any field of activity as an exclusive domain of political parties, which an association is not allowed to enter, and whether the goal and objectives of the applicant's association as described by its memorandum and articles of association could have had any attributes that entered that hypothetical domain" (para. 41). See also the reference to the concurring opinion of Judge Wojtyczek in fn.125 below.

149. The aforementioned provision was, as the European Court pointed out, intended to allow an association making an application for registration to comply with all the necessary formalities during the registration proceedings, should there be any irregularities in the initial application. However, it observed that, after the supposed irregularities had been found, no effort appeared to have been made to allow an opportunity for them to be remedied. Moreover, the European Court considered that none of the provisions in the memorandum and articles of association gave any indication that its goal was the setting up of a political party or to involve itself in political activities. Nor was there any evidence in the case file that the association's founding members had intended to use their association as a de facto political party.
150. This meant that the refusal of registration was based on mere suspicions regarding the true intentions of the association's founders and the activities which it might have engaged in once it had begun to function, which the European Court has never considered a justifiable basis for such a decision. In this connection, it was significant that the law provided for the possibility of dissolving an association should it be demonstrated that its goals or activities had become unlawful or contrary to public order or that it had achieved them by means that were unlawful or contrary to public order.
151. Furthermore, the European Court was not prepared to accept that the refusal could not be regarded as having deprived the organisation of the possibility of making another application for registration as a political party as that was not the object of the founders.<sup>123</sup> In addition, it reaffirmed its position that requiring the founders to make a fresh application for registration as an association would amount to a disproportionate burden given that the domestic legislation had allowed for the possibility of having the potential irregularities remedied during the course of the first set of registration proceedings.<sup>124</sup>
152. As a result, the European Court concluded that the reasons invoked by the authorities for refusing the association's registration were not guided by any "pressing social need" and were not convincing and compelling so that such a radical measure was disproportionate to the aim pursued.<sup>125</sup>
153. However, the refusal to register an association of victims of Polish judicial crimes formed by five prisoners with the objects of supporting such victims, documenting the crimes concerned and keeping a register of those responsible for their commission has

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<sup>123</sup> In so doing, it distinguished its judgment in *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17 February 2004, in which it had found no violation of Article 11 where the applicants had refused to amend the provisions of the articles of association without any perceptible practical purpose other than preparing the ground for enabling their association and its members to benefit from the electoral privileges afforded by Polish election laws even after the authorities had notified them during the registration process that the registration of their association would not be possible in the absence of such amendments.

<sup>124</sup> See *Bozgan v. Romania*, no. 35097/02, 11 October 2007.

<sup>125</sup> Judge Wojtyczek agreed with the result but not the approach, stating in his concurring opinion that "I do not consider that the requirement to amend the internal rules of an association and to resubmit a registration request is a disproportionate burden per se. The problem is not that it was necessary to amend the internal rules and resubmit the registration request but the fact that it was not possible to register as an association a non-governmental organisation which did not wish either to obtain the status of a political party or to use the tools belonging by nature to political parties, but intended to influence public policies".

been regarded by the European Court as an interference with their right to freedom of association that was necessary in a democratic society.<sup>126</sup> Two reasons had been given for this refusal; the unconstitutional nature of the association's intention to arrogate to itself powers that had been devolved to the courts in the search for the perpetrators of criminal offenses and the consideration that its purposes did not correspond to any type of activity likely to contribute to the objective of the sentence of imprisonment, namely the social reintegration of prisoners.

154. The European Court did not base its decision on the first reason in view of its doubts that the constraints of life in prison – where the association was to operate – would allow the association to carry out an activity similar to that of the courts or could have created a structure capable of replacing that of justice.<sup>127</sup> However, as regards the second reason, it considered that there had not been a deprivation of the right to freedom of association but only a restriction on its exercise to activities likely to promote his social reintegration so that the refusal of registration was to be seen as proportionate to that goal for prisoners.
155. The refusal to register a new religious association called the Ahmadiyya Muslim Community ultimately on the ground that its constitution lacked a sufficiently precise and clear indication of the beliefs and rites of the Ahmadi faith was not considered by the European Court to be necessary in a democratic society and thus in violation of the right to freedom of religion under Article 9 of the European Convention interpreted in the light of the right to freedom of association under Article 11.<sup>128</sup>
156. The European Court accepted that the refusal was prescribed by law and, in seeking to distinguish between the different denominations and avoid confrontations between religious communities pursued the legitimate aims of protecting public order and the rights and freedoms of others. However, it had difficulty in seeing how the name of this religious association – which clearly indicated that it belonged to the Ahmadiyya Community - could be a source of confusion. Moreover, the association's constitution clearly showed that it belonged to the Ahmadi branch of Islam and set out the beliefs and fundamental values of its followers. Although the domestic courts had found this to be insufficient, the European Court pointed out that legislation did not contain any specific indication as to the degree of precision required for such a description or as to what specific information should be given in the “statement of beliefs and rites” accompanying the registration request. Furthermore, there appeared to be no other accessible regulations or guidelines which could have guided the applicants and they had not been given the possibility of rectifying the shortcoming by providing additional information.

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<sup>126</sup> *Ogrodniczuk v. Poland* (dec.), no. 1286/09, 23 February 2016.

<sup>127</sup> The refusal of registration of associations – whose founders were not prisoners - on account of a mere suspicion of an intention to set up such parallel structures was considered in both *Bozgan v. Romania*, no. 35097/02, 11 October 2007 and *Association of Victims of Romanian Judges and Others v. Romania*, no. 47732/06, 14 January 2014 not to meet a pressing social need and to be disproportionate given that the decision was taken even before they started operating.

<sup>128</sup> *Metodiev and Others v. Bulgaria*, no. 58088/08, 15 June 2017. The refusal was initially based on: a report that the Ahmadis were to be distinguished from the Muslim religion, were known for their religious intolerance, refusal of modernity, and polygamy, and were regarded as a sect by Muslims; the fact that the constitution did not specify the association's beliefs but merely copied aims and activities referred to in the law on non-profit legal entities; and the view that the registration of this association could provoke a schism within the Muslim community in Bulgaria.

157. In addition, the European Court considered that the approach being adopted – namely to require the association, as a prerequisite for registration, to show how it was different from denominations already registered and, in particular, from the mainstream Muslim faith – would lead in practice to the refusal of registration of any new religious association with the same doctrine as an existing religion, with the consequence that only one religious association for each religious movement, to which all followers would be required to adhere, would be allowed. This would be inconsistent with the European Court’s established case law that the right to freedom of religion excluded in principle any assessment by the State of the legitimacy of religious beliefs or the forms of expression of those beliefs and that the authorities’ role was not to take measures capable of giving priority to one religious denomination over another, or to remove the cause of tension by eliminating pluralism, but consisted in ensuring that opposing groups tolerated each other.
158. A violation of Article 9 interpreted in the light of Article 11 was also found by the European Court in respect of the refusal to register another religious association on the basis that its name resembled that of an association which already existed, its constitution was identical and its stated aim of changing the already registered organisation created a risk of a schism among its members.<sup>129</sup>
159. The European Court recognised that a refusal to allow several religious organisations with the same name and beliefs so as to avoid misleading the public and to preserve legal certainty pursued the legitimate aim of protecting public order and the rights and freedoms of others. However, while a requirement to adopt a name which was not likely to mislead the public was in principle a justified restriction on the right of association to freely choose its own name, the European Court considered that it was having the same beliefs rather than the similarity of the names was the main reason for the refusal. Moreover, the two names were not identical as the new association was distinguished by the adjective “international”, it was located in a different district of the capital and no indication was given as to how it could have changed its name to gain acceptance. Furthermore, several cults with similar names had been registered. As a result the European Court considered that the similarity in names could not be sufficient to justify the refusal of registration.
160. This left the other ground, namely, the sharing by the followers of the new association of the same beliefs and rites as those of the pre-existing one. In the European Court’s views, such an approach to registration would, in practice, lead to the refusal of the registration of any new cult which has the same doctrine as an existing one and, given that an association with religious activities could not obtain legal personality in any other way, this could force believers to turn to the existing association. It found that this approach was difficult to reconcile with the freedom of religion and freedom of association guaranteed by Articles 9 and 11 of the European Convention and again emphasised that the State should not generally be assessing the legitimacy of religious beliefs, giving priority to one religious denomination over another or eliminating pluralism in order to remove tension.

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<sup>129</sup> *Genov v. Bulgaria*, no. 40524/08, 23 March 2017.

161. In view of the wish of the founders to create a new organisation rather than a branch of an existing one, the European Court did not consider it to be necessary and proportionate to the pursuit of the legitimate aim of allowing the public to distinguish different cultural association for the applicant to be required to practice his beliefs within the framework of the already registered association on the grounds that, in the opinion of the domestic authorities, his beliefs would be identical to those of this cult. In this connection, it was not seen as material by the European Court that the decision to create a new religious association might be the consequence of a division within the pre-existing cult. Moreover, it was also significant that the applicant did not have the possibility of creating a new branch of the existing religion since the law did not allow the creation of such a branch in the same city and without an express decision of the parent association. As a result, the similarity of beliefs and rites between the two associations was also not capable of justifying the refusal to register the new one.

### ***Formation***

162. The refusal to register an association was the subject of two cases, one before the European Court and the other before the Human Rights Committee.
163. In the former, the refusal concerned an association dedicated to promoting the rights of the Muslim minority in Bulgaria. The European Court found that the grounds for this refusal – namely, that its purpose was political in nature, it sought to conduct political activities and its aims and name breached the Constitution and presented a danger to national security – were in violation of Article 11 of the European Convention.<sup>130</sup>
164. Unlike the first judgment considered under the preceding heading, the European Court dealt directly with the political nature of the association’s aims, recalling its case law that such a ground could not justify a refusal to register an association. In the light of this case law, it found that there was no “pressing social need” to require any association wishing to pursue political aims to set up a political party if it was not the intention of its founders to take part in elections. In the European Court’s view, the declared aim of the association to “contribute to the development of political pluralism in the country” did not seem to imply that it wished to take part in elections or in the exercise of power. Nonetheless it accepted that if it had been otherwise, it could have been justified to impose on the association’s founders the more restrictive legal form of political party.
165. With regard to the supposed danger to national security, the European Court observed that the expression of separatist views did not in itself imply a threat to the territorial integrity of the State or national security and did not as such justify a restriction of the rights secured by Article 11 of the Convention. Moreover, it did not consider that the

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<sup>130</sup> *National Turkish Union and Kungyun v. Bulgaria*, no. 4776/08, 8 June 2017. Article 12(2) of the Constitution provides that “Associations, including trade unions, shall not pursue any political objectives, nor shall they engage in any political activity which is in the domain of the political parties” and Article 44 stipulates that “(1) All citizens shall be free to associate.2) The organization/s activity shall not be contrary to the country's sovereignty and national integrity, or the unity of the nation, nor shall it incite racial, national, ethnic or religious enmity or an encroachment on the rights and freedoms of citizens; no organization shall establish clandestine or paramilitary structures or shall seek to attain its aims through violence”.

use of the words “National Turkish” in the name of the association was capable of undermining the territorial integrity or unity of the Bulgarian nation. Furthermore, it could not see – as the Government had submitted - how the association’s challenge to the monopoly of a political party in ethnically mixed regions would represent a risk for ethnic peace and would thus compromise the country’s security.

166. In addition, the European Court noted that the domestic courts had not referred to any action of the association or its members which might have compromised the territorial integrity or unity of the nation, or any action or speech which might have been regarded as a call to hatred or violence. In any event, it also observed that the national authorities would not have been powerless to respond to any such action as the courts were empowered to dissolve an association whose activities were incompatible with the Constitution, with the law, or with public morals. As the European Court has made clear on many previous occasions, the mere supposition that an association could have engaged in such activities could not afford a justification for a refusal to register it. Thus, in this case as many others such a refusal could not be regarded as “necessary in a democratic society”.
167. The second refusal related to an association which an assembly of Belarusian retirees decided to establish.<sup>131</sup> The Ministry of Justice refused to register the association, stating that the assembly lacked “legitimacy” and consequently, all the decisions adopted during it, including the decision to establish the association, were legally void. It also stated that one of the signed records of the assembly was not presented in the form of a final document, but as a draft. Subsequently, the Ministry explained that the assembly was illegitimate because there was no record establishing the rules of representation at the assembly and that during regional meetings some individuals were appointed as representatives, although they were not present at the meetings in question. The author of the communication to the Human Rights Committee – who had been a participant in the assembly - stated that the absence of some of the representatives may have been due to sickness, which should not have constituted an obstacle to their appointment as representatives at the founding assembly. In that regard, he noted that those individuals had given their prior consent to be representatives and were designated as representatives in their absence. As such, they had later participated in the assembly.
168. Recalling its case law, the Human Rights Committee emphasised that it was for the State party to demonstrate that, in the case in question, the restrictions imposed on the right to freedom of association were justified. It noted that, even though the reasons stated were prescribed by the relevant law, Belarus had not attempted to advance any arguments as to why they were 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, nor why the refusal to register the association was a proportionate response in the circumstances. Furthermore, there was no such explanation given in the decisions of the domestic authorities that were made available. As the refusal to register the association led directly to its operation in the territory of Belarus being unlawful and directly precluded the author from enjoying his right to freedom of association and as the requirements of Article 22 (2) of the Covenant concerning the necessity of a restriction had not been met, the Human

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<sup>131</sup> *Romanovsky v. Belarus*, Communication No. 2011/2010, Views of 29 October 2015.

Rights Committee concluded that the author's right to freedom of association with others did not benefit from adequate or effective protection and there had thus been a violation of his rights under Article 22 (1) of the International Covenant.

### *Members*

169. No violation of the European Convention was considered to result from either the publication in the register of associations of certain information concerning members or a requirement to present an excerpt from the tax record of some new members – which would show whether or not they had committed acts contrary to tax and customs law and the consequential measures taken against them - when registering amendments to the statute designed to take account of their having joined it.<sup>132</sup> The latter requirement was intended to prevent and tackle tax evasion, ensure the proper administration of taxes and other taxes due to the State and to prevent the commission of fiscal offenses.
170. One of the new members of the association – which was an activist one for the rights of sexual minorities – had claimed to fear for her safety on account of being compelled to have her identity and personal data published in the register and had invoked the right to respect for private life under Article 8, taken alone and in conjunction with the prohibition on discrimination in Article 14. The information relating to members alleged by her to be included in the register comprised the surnames, first names, nationalities, professions, domiciles and numbers and dates of issue of their national identity cards or passports.
171. In connection with her fear, she referred to the degree of intolerance that exists in Romanian society towards these minorities, this intolerance often being manifested in the form of violence. However, as regards the publication of her name, the European Court considered that the applicant did not want to keep it confidential as it had also been published on the association's website. Furthermore, it noted that the legal provisions in force only required the name of a member of an association to be published and not his or her personal data and that was indeed the only information in the register concerning the applicant. The European Court also pointed out that, even supposing other data were published in the register, this could be challenged in the domestic courts.
172. Furthermore, the European Court did not accept that the right to freedom of association had been unduly hampered by the refusal to register the change in the association's statute without the provision of the extract from the tax record of the members concerned. This was because: the formalities for obtaining it were not complex or onerous; the association, despite the rejection of its application to register its new members, had continued to exist and to carry out its activities without any constraint; and the new member – who had been accepted to become one of the association's active members – had not shown in a concrete manner what actions she could not do or would be affected by the lack of recognition by the authorities or third parties of her status within the association.

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<sup>132</sup> *Association "Accept" and Others v. Romania* (dec.), no. 48301/08, 24 May 2016.

173. However, the complete denial of access to court by the member of a hunting association seeking to contest his expulsion from it for being in breach of its statute was found by the European Court to be in violation of the right to a fair trial under Article 6(1) of the European Convention.<sup>133</sup> In this case, disciplinary proceedings had been brought against the member concerned for having reported another member to the police, which was considered to be a serious breach of his duties as a member. The expulsion decision had been taken at a general meeting without any reasons being given. The courts had declined jurisdiction over the matter on the basis that there was no legal basis for such action in the relevant legislation and the decision to expel a member concerned the association's internal affairs, which could not be reviewed by the courts.
174. Article 6(1) was found to be applicable as the dispute concerned the determination of a "civil right" because the right to be a member of an association is a right of a civil nature<sup>134</sup> and the dispute related to membership of an association having a private law character<sup>135</sup>.
175. The European Court emphasised that the right of access to a court under Article 6(1) is not absolute and that the organisational autonomy of associations could serve as a legitimate aim for restricting the right of access to court. In particular, it considered that associations must be able to wield some power of discipline, even to the point of expulsion, without fear of outside interference. However, this organisational autonomy was also not absolute and in the European Court's view – citing both Recommendation CM/Rec(2007)14 and (for the first time) the Fundamental Principles on the Status of Non-governmental Organisations in Europe<sup>136</sup> – an association must be held to some minimum standard in expelling a member. In this connection, it recalled its previous observation that expulsion from an association could constitute a violation of the freedom of association of the member concerned if, for example, it is in breach of its rules or arbitrary<sup>137</sup>.
176. Although, the European Court was prepared to accept that the scope of judicial review might be restricted, even to a significant extent, in order to respect the organisational

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<sup>133</sup> *Lovrić v. Croatia*, no. 38458/15, 4 April 2017.

<sup>134</sup> This had previously been established by the European Court in *Sakellariopoulos v. Greece* (dec.), no. 38110/08, 6 January 2011.

<sup>135</sup> The European Court reaffirmed that Article 6(1) would not be applicable where the dispute concerned membership of a political party, citing its decision in *Refah (Prosperity) Party and Others v. Turkey* (dec.), nos. 41340/98, 3 October 2000. It also emphasised that the present case – which concerned the rights of an existing member of an association – was to be distinguished from a dispute about a refusal of admission of a potential member, to which it had found in *Rutkowski v. Poland* (dec.), no. 30867/96, 16 April 2002 that Article 6(1) was inapplicable. The European Court reaffirmed in *Les Authentiks and Supras Auteuil 91 v. France*, no. 4696/11, 27 October 2016 – discussed below at paras 201-202 in the context of dissolution – that Article 6(1) was applicable to all procedures concerning the legal existence of an association.

<sup>136</sup> Respectively paragraphs 23 ("Members of NGOs should be protected from expulsion contrary to their statutes") and paragraphs 22 and 66 ("Members of an NGO should be protected from expulsion contrary to its statutes" and "NGOs may be regulated in order to secure the rights of others, including members .."). The Fundamental Principles were subsequently cited in *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, 27 June 2017, a case concerned with the imposition of liability on an NGO for defaming a public official; see further para. 183 below. The European Court has previously cited Recommendation CM/Rec(2007)14 in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009.

<sup>137</sup> See *Cheall v. the United Kingdom* (dec.), no. 10550/83, 13 May 1985.

autonomy of associations, the violation of Article 6(1) in the present case arose from the complete inability of the applicant to contest his expulsion in court.<sup>138</sup>

### *Pursuit of activities*

177. An association complaining about being deprived of one of the means of achieving its statutory purpose, namely, being represented in the Economic, Social and Environmental Council established under the French Constitution because of the specification that the representatives of family associations were to be either directly appointed or otherwise designated by the National Union of Family Associations - which it had chosen not to join – was considered by the European Court not to have established that it was a victim of a violation of Articles 9, 11 and 14 of the European Convention.<sup>139</sup> This was because it had not mentioned any direct individual measure of which it would have been the object under the legal provisions which it criticizes and so it was open to question whether those provisions had effectively prevented any representation within the Council of family associations which, like it, were not affiliated to the National Union. The European Court, accepting the government's submission that the situation complained about arose not from the legal provisions but the practice of the National Union, considered that an individual measure conferring on the association the status of a victim of violation of the Articles of the European Convention that it had invoked would have been constituted by a refusal of any request made by it to the National Union that it be entitled to appoint one of the members of the Council.
178. Although the European Court has held that Contracting States are required under Article 11 both to permit and make possible a trade union's freedom to protect the occupational interests of its members by collective action<sup>140</sup>, it has not considered that a State's positive obligations under this provision extended to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector<sup>141</sup>. In its view, there were relevant and sufficient reasons for the abolition of a forum for collective bargaining in the agricultural sector, namely, that similar bodies for other sectors had already been abolished twenty years earlier, there was evidence that agricultural workers were already negotiating their own agreements and the financial implications of abolition on workers and farmers and the net savings in terms of operating costs had been assessed.
179. Moreover, the applicant union was not prevented from engaging in collective bargaining as there were legislative provisions deeming collective agreements legally enforceable and for the terms of a collective agreement which is not, itself, legally enforceable to be incorporated into an individual employment contract and thus

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<sup>138</sup> Judge Kjølbros dissented on the basis that the domestic courts' interpretation of domestic law is to be understood as a substantive limitation concerning the right invoked by the applicant before the domestic courts, and not merely as a procedural limitation on the right to institute court proceedings concerning a right recognised in domestic legislation.

<sup>139</sup> *Union des Familles en Europe v. France* (dec.), no. 25317/13, 31 May 2016.

<sup>140</sup> *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, at para. 141. In that case, the European Court found a violation of Article 11 as a result of the absence of legislation necessary to give effect to the provisions of international labour conventions ratified by Turkey and a court judgment annulling the voluntary collective agreement entered into by the applicants on account of that absence.

<sup>141</sup> *Unite the Union v. United Kingdom* (dec.), no. 65397/13, 3 May 2016.

become indirectly enforceable, as well as a right for a union to be entitled to conduct collective bargaining on behalf of a group of workers. Furthermore, even if it were accepted that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical, the European Court did not consider that this was sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation since the applicant union remained free to take steps to protect the operational interests of its members by collective action, including collective bargaining, by engaging in negotiations to seek to persuade employers and employees to reach collective agreements and it has the right to be heard.

180. On the assumption that there was a right not to be dismissed while holding a position in a trade union body but without determining this point, the European Court found that an allegation that a particular employee's dismissal was a consequence of his trade-union activities had not been sufficiently or convincingly substantiated.<sup>142</sup>
181. The European Court has accepted that a judicial decision annulling the establishment of a trade union's representation of the employees in three factories belonging to a company - which had enabled it to conclude on behalf of its members, collective labour agreements with the company in question - was an interference with the right to form and join trade unions protected by Article 11.<sup>143</sup> However, it also considered that the view of the domestic court that the representativeness of the applicant union was, under the applicable legislation, to be based on the total number of employees working for the company and not just those in its head office to be neither arbitrary nor patently unreasonable.
182. Furthermore, the European Court was not convinced that the refusal of representativeness to the union - pending its acquisition of a larger number of members among the employees in the whole enterprise - had another purpose than enabling the rights of the workers to be defended by powerful trade unions. Moreover, in assessing whether the annulment could be regarded as necessary in a democratic society, it took into account the following considerations: the fact that it was valid only so long as the number of members of the applicant union had not reached the simple majority of the employees of the 'business; the union was not precluded from seeking to persuade the employer to listen to what it has to say on behalf of its members by means other than collective bargaining and from seeking to enlarge its membership; the employees in the head office did not actually appear to benefit from the collective agreements concluded for their sector; and there was no challenge to the actual criteria for determining representativeness. As a result, the method used to

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<sup>142</sup> *Predescu v. Romania* (dec.), no. 72417/10, 3 May 2016; “40. The Court further notes that the applicant was dismissed in the context of a wide reorganisation process initiated by his former employer as a result of serious financial difficulties. Moreover, it is uncontested by the parties that that process had been initiated in November 2008, long before the applicant had initiated court proceedings against his employer to claim salary rights or had become an auditor at the union. Furthermore, following an assessment of the available evidence, the domestic courts accepted F.’s argument that the selection of the personnel affected by the downsizing process had been based on objective criteria and had been in compliance with the priority rules set down in the collective agreement”.

<sup>143</sup> *Tek Gıda İş Sendikası v. Turkey*, no. 35009/05, 4 April 2017. Judges Lemmens and Turković considered that the annulment could also be analyzed from the point of view of a failure on the part of the respondent State to fulfill its positive obligation to ensure the union requesting the enjoyment of its rights deriving from the Article 11 of the Convention. However, they did not disagree with the conclusion that there had been no violation of Article 11 in this case.

calculate the number of employees representing the majority in a company could not be regarded as affecting the heart of union activity but only a secondary aspect.

183. The European Court has recognised the importance of the role of an NGO reporting on alleged misconduct or irregularities by public officials, emphasising that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press. However, in upholding the imposition on some NGOs of civil liability for defamation<sup>144</sup>, the European Court - citing the World Association of Non-Governmental Organisations' Code of Ethics and Conduct for NGOs<sup>145</sup> - has also found that, similarly to newspapers, they can be bound by the requirement to verify the veracity of the allegations which they make. In its view, the national court had correctly concluded that the NGOs in the case under review had acted negligently in simply reporting - in a letter written to the highest authorities in their district - the alleged misconduct of the entertainment editor of a public radio station without making a reasonable effort to verify its accuracy. As a result, the European Court considered that the national courts had struck a fair balance between the radio entertainment editor's right to reputation (as a prospective candidate for a position as a public servant, namely the director of a public radio station) and the NGOs' right to report irregularities about the conduct of a public servant to the body competent to deal with such complaints.<sup>146</sup>

### *Sanctions*

184. An agency worker in the construction industry who was active in his trade union and whose name was included in a database used by companies to vet job applicants and refuse to employ any of them those listed on it was considered by the European Court not to have suffered any significant disadvantage as a result of the alleged violation of his right to freedom of association under Article 11 of the European Convention so that his application was ruled inadmissible pursuant to Article 35(3)(b).<sup>147</sup> Although accepting that a change in the law that made it unlawful to refuse a "worker" – and so covering agency workers as well as employees - employment for reasons related to the fact that he or she is a member of a trade union can come too late to benefit the applicant, the European Court noted that he had received financial compensation in

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<sup>144</sup> *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, 27 June 2017.

<sup>145</sup> "C. Human Rights and Dignity An NGO should not violate any person's fundamental human An NGO should give out accurate information, whether regarding itself and its projects, or regarding any individual, organization, project, or legislation it opposes or is discussing. VI. Public trust B. Public advocacy 1. Accuracy and in context Information that the organization chooses to disseminate to the media, policy makers or the public must be accurate and presented with proper context. This includes information presented by the NGO with respect to any legislation, policy, individual, organization, or project it opposes, supports, or is discussing ... 2. Verbal and written statements The organization shall have clear guidelines and approval processes for the issuing of verbal and written statements. 3. Disclosure of bias The organization shall present information in a fair and unbiased manner. Where a possible bias is unavoidable or inherent, it is to be disclosed".

<sup>146</sup> The European Court was divided 11-6 in this conclusion, with dissenting opinions by Judge Sajó, Karakaş, Motoc and Mits, Vehabović and Kūris, in which their appreciation of the factual circumstances differed from that of the majority.

<sup>147</sup> *Smith v. United Kingdom* (dec.), no. 54357/15, 28 March 2017. Article 35(3) provides that "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: ... (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as de-fined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".

the settlement proceedings before the domestic courts and that the only consequence for him of the lacuna in protection under the law was that the domestic courts could not examine in substance his arguments under Article 11.

185. Moreover, despite the fact that they were not able to rule on the substance of this claim, the domestic courts had acknowledged that he had suffered an injustice as a result of being “blacklisted”. Furthermore, the European Court did not consider that respect for human rights did not require it to continue the examination of the applicant’s complaint as the problem which affected him had been the object of detailed scrutiny at the domestic level by the Parliament and other domestic bodies, a clear consensus that what happened was “unethical and to be condemned” had been established and appropriate follow up action was also taken at the domestic level with the changes to the legislative framework, making the issue one of historical interest only.
186. The ability of a company to choose between paying compensation and reinstating employees whom it had wrongfully dismissed after their refusal of its request to cancel their membership of a trade union at their employer’s request was considered, in the particular circumstances of a case, by the European Court to entail a violation of the right to form and join trade unions protected by Article 11 of the European Convention.<sup>148</sup> The employer’s request and the dismissals had been made after the union had sought its establishment as representing the employees in three factories belonging to the company.<sup>149</sup>
187. The European Court recognised that the option afforded to an employer by the law could allow tensions in the workplace to be avoided, thereby protecting the rights of others and defending public order. However, in concluding that its availability in this case could not be regarded as necessary in a democratic society, the European Court noted that it had prevented the union from organising itself within the company and had resulted in the de-unionisation of all the company’s employees and the loss by the union of all its members. In its view, this loss affected the core of the union’s activity so that a stronger justification was necessary to establish the proportionality of the interference with the right guaranteed by Article 11. This was not found to exist since, in granting the minimum amounts of compensation possible, the domestic courts did not appear to have carried out a careful examination as to their deterrent effect with account being taken of factors such as the low level of wages of dismissed employees and the company’s great financial strength.
188. Although there had been no violation of domestic law, the courts could not be regarded as having imposed sufficiently dissuasive penalties on the company which, by making excessive mass dismissals, had nullified the freedom of the union to try to convince employees to join. As a result, the European Court concluded that neither the legislature nor the courts in the present case had fulfilled their positive obligation to ensure the effective right of the union to seek to persuade the employer to listen to what it has to say on behalf of its members and, in principle, its right to bargain collectively with the employer. In these circumstances, the need for a proper balance

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<sup>148</sup> *Tek Gıda İş Sendikası v. Turkey*, no. 35009/05, 4 April 2017

<sup>149</sup> This had been granted but was subsequently annulled; see para. 180 above.

between the competing interests of the union and of society as a whole had not been respected.

189. The refusal of a request for the reinstatement of an applicant's French nationality – in part on account of his alleged links with a movement engaged in violent actions and advocating a radical practice of Islam - was not considered by the European Court to have interfered with his ability to join organisations of his choice.<sup>150</sup> Moreover, any suggestion that this measure had had a deterrent effect on his ability to exercise this right had not been supported and indeed it did not appear from the file that he had given up associative commitments or the expression of his opinions following the latter. In reaching its conclusion in this case, the European Court attached considerable weight to the domestic court's finding that there was doubt about the applicant's loyalty to France.<sup>151</sup>
190. The European Court has addressed for the first time the oversight of political parties' financial accounts.<sup>152</sup> In doing so it recognised the necessity of supervising political parties' financial activities for purposes of accountability and transparency, which serve to ensure public confidence in the political process. Thus, the inspection of political parties' finances did not in itself raise an issue under Article 11 of the European Convention.
191. However, while the absence of any uniform practice in Council of Europe member States meant that they were regarded by it as enjoying a relatively wide margin of appreciation regarding both how they inspect such accounts and what sanctions they may impose for irregular transactions, the European Court also made it clear that any inspection of finances which has the effect of inhibiting a political party's activities might amount to an interference with the right to freedom of association. This could equally be relevant for the assessment of inspection of the finances of associations that are not political parties.
192. Furthermore, the European Court stressed that, while the important purpose served by the financial inspection of political parties is undeniable, such inspection should never be used as a political tool to exercise control over political parties, especially on the pretext that the party is publicly financed. It thus considered that:

in order to prevent the abuse of the financial inspection mechanism for political purposes, a high standard of "foreseeability" must be applied with regard to laws that govern the inspection of the finances of political parties, in terms of both the specific requirements imposed and the sanctions that a breach of those requirements entails.<sup>153</sup>
193. In the case considered by the European Court approximately EUR 1,154,840 of a political party's assets had been confiscated following a finding that some of its expenditure was unlawful under the Political Parties Act. This was found by it to be in violation of Article 11 of the European Convention on the basis that both the provisions concerning "unlawful activities" and those relating to the applicable

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<sup>150</sup> *Boudelal v. France* (dec.), no. 14894/14, 13 June 2017.

<sup>151</sup> As it did in the case of *Petropavlovskis v. Latvia*, no. 44230/06, 13 January 2015, which also concerned a refusal of nationality.

<sup>152</sup> *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, 26 April 2016.

<sup>153</sup> Para. 88.

sanctions met the foreseeability requirement for a restriction on the right to freedom of association to be “prescribed by law”.

194. The effect of the confiscation was to weaken the party’s ability to compete in the political arena, with its local expenditure being substantially reduced, some branches being closed and some political activities being postponed or stopped. In finding that this was an interference with the right to freedom of association, the European Court made it clear that it was not material that some of the party’s income was made up of State funding because it considered that the provision of financial support to political parties does not give States carte blanche to interfere in their political and/or financial affairs.
195. The expenses concerned ranged from one that were undocumented, through others that were for invoices or tickets had been made out in the name of individual party employees or members, in excess of either contractual provisions or legal ones concerning severance payments and the production costs for television broadcasts of live events, to coins as wedding gifts and flowers for special events given by the party’s leaders.
196. The lack of foreseeability regarding “unlawful expenses” stemmed from the lack of guidance as to how the “objectives of a political party” would be interpreted<sup>154</sup>, the activities that would fall outside the scope of those objectives and the nature and scope of the inspection to be carried out by the Constitutional Court, which had only been mitigated by case law developed after the confiscation in question had occurred. Furthermore, the European Court found that the Constitutional Court decisions in question also contained some inconsistencies as to the criteria to be applied in the assessment of the lawfulness requirements, which added to their unpredictability.
197. The lack of foreseeability concerning the sanctions that could be imposed arose from the fact that the formulation of the relevant provisions was such that it was not possible to foresee whether and when unlawful expenditure would be punished by a warning or a confiscation order. In the view of the European Court, the serious consequences that a confiscation order may entail for a political party required that the law should set out more precisely the circumstances in which such a sanction could be applied as opposed to the less intrusive sanction of a warning.

### ***Dissolution***

198. Following well-established case law concerning the use of such an extreme measure as the dissolution of an association, the European Court has found that the dissolution of a political party was in violation of Article 11 of the European Convention where this had been based on the view that it had become an instrument of a terrorist organisation’s strategy and that it supported terrorism because it had not openly distanced itself from that organisation’s activities.
199. Contrary to the first of these assertions, the European Court found that the party’s programme actually condemned violence and put forward democratic political

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<sup>154</sup> There was a list of unlawful income but not of unlawful expenses.

solutions that were compatible with the rule of law and respect for human rights. Moreover, it emphasised that a political project that was incompatible with the current principles and structures of a State was not inadmissible so long as it did not harm democracy itself and that was not the case with principles espoused by the party, such as a peaceful solution to the Kurdish problem and recognition of Kurdish identity. Furthermore, any parallelism between the principles of the party and the terrorist organisation could not be sufficient to justify a conclusion that it advocated the use of force in order to implement them. In fact, the European Court noted, the leaders of the party had explicitly excluded the use of force. In addition, although certain leaders had spoken about the actions of the leader of the terrorist organisation and his conditions of detention, the former remarks had concerned actions unrelated to violence and the latter ones did not entail approval or support for the actions of the terrorist organisation. Such statements were considered by the European Court to be political speech, protected by the right to freedom of expression.

200. The European Court has previously held that a refusal to condemn violence against a background of terrorism could be seen as tacit political support for terrorism.<sup>155</sup> It was therefore prepared to consider that the fact that the party had not openly distanced itself from actions or speeches by its members or local leaders that were likely to be interpreted as tacit support for terrorism could reasonably be regarded as corresponding to a pressing social need. However, it saw dissolution – together with the transfer of the party’s assets to the Treasury, the stripping of two of its leaders of their status as members of parliament and the ban on 37 members of the party from almost all involvement in any political party for five years - as the most severe of the measures available.<sup>156</sup>
201. In this context, it was also particularly significant that the party wished to play a mediatory role to bring an end to the violence in Turkey, the two leaders had essentially recommended “democratic” and “peaceful” solutions to the Kurdish problem and it had not been alleged that the central leaders had refrained from condemning a particular violent act carried out by the PKK at a given moment or that its positions were likely to give rise to social conflict between its supporters and the other political formations.
202. As a result, the dissolution of the party could not be regarded as proportionate to the aim pursued and the reasons given for it, while relevant, could not be considered as sufficient to justify the interference with the right to freedom of association.
203. On the other hand, no violation of Article 11 was found by the European Court in respect of the dissolution of two supporters’ associations of a football club on account of the involvement of their members in the course of a match in projectile throwing at the police and violent clashes in which one supporter had died.<sup>157</sup>
204. While entirely conscious of the severe nature of the measure involved, the European Court indicated that it also understood that a State would consider it essential to

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<sup>155</sup> See, e.g., *Herri Batasuna and Batasuna v. Spain*, no. 25803/04, 30 June 2009, at para. 88.

<sup>156</sup> A lighter one would have been depriving it partially or entirely of financial assistance from the State.

<sup>157</sup> *Les Authentiks and Supras Auteuil 91 v. France*, no. 4696/11, 27 October 2016. The European Court also found that there had been no violation of the right to a fair trial under Article 6(1) with respect to the proceedings leading to the dissolution decisions.

effectively combat stadium violence in order to satisfy the legitimate aspirations of individuals to be able to attend sporting events in complete safety. Having regard to the particularly difficult context in which the contested measures were taken, the European Court thus accepted that the national authorities might have considered that there was a "pressing social need" to impose drastic restrictions on groups of supporters, and thereby undermine the very substance of the freedom of association, so as to prevent the risks of disturbances to public order and put an end to them. Thus, as it had found (albeit without any reasoning) in an earlier admissibility decision relating to the dissolution of another supporters' association involved in the same events<sup>158</sup>, the European Court considered that the dissolution was necessary in a democratic society for the defense of order and the prevention of crime.

### **Remedies**

205. The European Court has reaffirmed its view that – pursuant to Article 35(2)(b) of the European Convention<sup>159</sup> - it has no jurisdiction to consider an application submitted to it by the subordinate unit of an organisation where this concerns the same complaint which the latter organisation has already submitted to another procedure of international investigation or settlement and it contains no relevant new information.<sup>160</sup>

### **E. CONCLUSION**

206. As seen in previous updates, 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 can be seen as an endorsement of the immensely valuable role that non-governmental organisations, in a wide range of forms, continue to play. However, it is also a reflection of the various pressures to which they continue to be subject.
207. Recent developments have undoubtedly reinforced the standards that should be respected and have also provided useful elaboration as to what these entail in practice. Nonetheless, those standards are not always being observed and, in some instances, this is happening without even a purported legal basis for the action concerned. There is, therefore, a real need for vigorous efforts to be made not only to re-affirm the importance of non-governmental organisations for democratic societies but also to ensure that there is effective and universal implementation of the standards which have been established.

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<sup>158</sup> *Association nouvelle des Boulogne Boys v. France* (dec.), no. 6468/09, 22 February 2011.

<sup>159</sup> “2. The Court shall not deal with any application submitted under Article 34 that...(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”

<sup>160</sup> *Komisja Zakładowa NSZZ Solidarność at Frito Lay Poland Ltd v. Poland* (dec.), no. 56270/07, 2 February 2016. The applicant trade union in this case was an enterprise-level unit of the “Solidarność” Trade Union, a national trade union and the latter had already complained to the Committee on Freedom of Association of the ILO about the unlawful verification of the trade union membership at the company and the lack of appropriate reaction of the authorities to it.