

# FOAA ONLINE!

## The right to freedom of association

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## About FOAA Online!

The purpose of **FOAA Online!** is to provide easily accessible legal arguments to assist lawyers, activists and judges involved in freedom of peaceful assembly and freedom of association (FOAA) cases. The site is organized per thematic topic or sub-question in order to direct users as straightforwardly as possible to relevant legal arguments. The FOAA Q&A assists users to link actual facts and incidents to pertinent legal questions. The website focuses on the most widespread issues experienced by those exercising their FOAA rights around the world.

The legal arguments in **FOAA Online!** are based upon a range of international instruments. In addition to legally binding obligations under international human rights law, they refer to standards and principles emanating from international treaty bodies, jurisprudence of regional courts and existing or emerging practice. These include the findings of UN treaty bodies or of experts under the special procedures, as well as the jurisprudence of the Inter-American Court on Human Rights, the African Court on Human and People's Rights and the European Court on Human Rights. Further, the reports of the Inter-American Commission on Human Rights are included as well as guidelines and reports on the rights to freedom of peaceful assembly and of association emanating from the African Commission on Human and Peoples' Rights and the OSCE.

It is important to note that while some of these instruments or rulings may not be directly legally binding for a country, the findings and guidance provided by these instruments remain particularly relevant because of the similar wording used in all international instruments protecting these two rights.

We acknowledge that the materials presented are not geographically balanced, merely reflecting the fact that some mechanisms – notably the European Court of Human Rights – have decided more cases on FOAA than others. Note too that the materials do not offer a complete overview of the existing case-law; the objective has been to present a representative range of cases.

The UN Special Rapporteur is happy to add **FOAA Online!** to the [www.freeassembly.net](http://www.freeassembly.net) website before handing over his mandate on 1<sup>st</sup> of May 2017. He is grateful to the Open Society Justice Initiative for drafting the sections on freedom of peaceful assembly, and the American Bar Association, Justice Defenders Program for their contributions on the sections on freedom of association. As international law and jurisprudence and principles are continuously evolving, **FOAA Online!** will have to be updated over time. The UN Special Rapporteur vigorously encourages all actors involved not only to use the content of **FOAA Online!**, but also to spread the news about its existence so that the rights to freedom of peaceful assembly and of association may be enjoyed and protected globally.

## Abbreviations & Explanations

### **AComHPR** – African Commission on Human and Peoples’ Rights

The [AComHPR](#) is the body charged with promoting and protecting the rights guaranteed by the African Charter on Human and Peoples’ Rights and interpreting its provisions. It is empowered, among other things, to receive and consider Communications from individuals and organizations alleging that a State party to the Charter has violated one or more of the rights guaranteed therein.

### **ACtHPR**– African Court on Human and Peoples’ Rights

The [ACtHPR](#) is an international court that has jurisdiction over cases and disputes concerning the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol to the Charter on the Rights of Women in Africa, and any other relevant human rights instrument ratified by the States concerned. The Court may receive cases filed by the African Commission of Human and Peoples’ Rights, State parties to the Protocol or African Intergovernmental Organizations. NGOs with observer status before the African Commission and individuals can also institute cases directly before the Court as long as the State against which they are complaining has recognized the jurisdiction of the Court to accept such cases. An overview of these States can be found [here](#).

### **ACHPR** – African Charter on Human and Peoples’ Rights

The [ACHPR](#) (also known as the Banjul Charter) is an international human rights treaty to which most African States are parties; an overview can be found [here](#). The rights to freedom of association and freedom of assembly are guaranteed by its Articles 10 and 11, respectively.

### **ACHR** – American Convention on Human Rights

The [ACHR](#) (also known as the Pact of San José) is an international human rights treaty to which most States in the Americas are parties; an overview can be found [here](#). The rights to freedom of assembly and freedom of association are guaranteed by its Articles 15 and 16, respectively.

### **ASEAN – Association of Southeast Asian Nations**

The ASEAN was established in 1967 with the signing of the ASEAN Declaration. In 2009 the ASEAN Intergovernmental Commission on Human Rights to promote human rights in the ASEAN Countries was established. In 2012 the Declaration of Human Rights was adopted.

### **ECHR** – European Convention on Human Rights

The [ECHR](#) (formally called the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international human rights treaty to which most States wholly or partly located in Europe are parties; an overview can be found [here](#). The rights to freedom of assembly and freedom of association are guaranteed under Article 11 of the Convention.

### **EComHR** – European Commission of Human Rights

The EComHR was a mechanism to which individuals claiming to be victims of violations of the European Convention on Human Rights could complain. The EComHR became defunct with the entry into force of Protocol No. 11 to the Convention in 1998, which gave individuals direct access to the European Court of Human Rights. The EComHR’s case-law on freedom of

association and of peaceful assembly remains of some relevance in interpreting the Convention.

**ECJ** – European Court of Justice

The [ECJ](#) is the highest court in the European Union in matters of European Union law.

**ECtHR** – European Court of Human Rights

The [ECtHR](#) is an international court that rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights.

**Guidelines on Freedom of Association and Assembly in Africa**

In May 2017, during its 60th Ordinary Session, the AComHPR adopted the Guidelines on Freedom of Assembly and Association in Africa. The Guidelines were the result of an extensive process whereby first a draft of the guidelines (“Guidelines on Freedom of Association as Pertaining to Civil Society & Guidelines on Peaceful Assembly – DRAFT”) was drawn up by the Study Group on Freedom of Association and Assembly in Africa, a task force made up primarily of civil society organizations established by the Commission that had previously delivered a Report on Freedom of Association & Assembly in Africa. The process of adoption by the AComHPR was still ongoing at the time FOAA Online! was being developed. Therefore FOAA Online! may include references to the Study Report of the AComHPR and the draft guidelines. To the extent possible, earlier references to the draft principles have been replaced by the relevant references from the adopted guidelines. Alternatively, the relevant paragraph numbers have been added in the footnotes. (October 2017.)

**Human Rights Committee** – United Nations Human Rights Committee

The [Human Rights Committee](#) is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. The Committee’s activities include the examination of regular implementation reports that States parties are obliged to submit, and the issuance of General Comments on the interpretation of the ICCPR. The Committee also considers complaints lodged by individuals who claim that any of their rights under the ICCPR have been violated. Such complaints can only be lodged against States that are also parties to the [First Optional Protocol to the ICCPR](#). An overview of those States can be found [here](#).

**IACHR** – Inter-American Commission on Human Rights

The [IACHR](#) is an organ of the Organization of American States (OAS) whose mission is to promote and protect human rights in the American hemisphere. Its activities include monitoring the human rights situation in OAS Member States and issuing reports on priority thematic areas. It is also empowered to consider complaints against OAS Member States alleging violations of the human rights guaranteed by the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and other inter-American human rights treaties.

**IACtHR** – Inter-American Court of Human Rights

The [IACtHR](#) is an international court which interprets and applies the American Convention on Human Rights. Individuals do not have direct access to the Court; cases can be referred to the

Court by either the Inter-American Commission on Human Rights or a State Party to the Convention.

The IACtHR can only hear a case against a State Party which accepts the Court's jurisdiction. Several countries have indicated such acceptance on a blanket basis (see [here](#) for an overview); it is also possible for a State to accept the Court's jurisdiction *ad hoc*, for a particular case. All Member States and some organs of the Organization of American States are also able to request an advisory opinion from the IACtHR regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the Americas.

**ICCPR** – International Covenant on Civil and Political Rights

The ICCPR is the principal global treaty in the area of civil and political rights. It has been ratified by and is binding on a majority of States; an overview can be found [here](#). Article 21 guarantees the right of peaceful assembly, and Article 22 the right to freedom of association with others.

**ILO** – International Labor Organization

**Joint report on the proper management of assemblies**

The [Joint report](#) of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66, 4 February 2016.

**OSCE / ODIHR** – Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe

The [OSCE / ODIHR](#) assists the 57 participating States of the OSCE in meeting their commitments in the areas of elections, human rights, democracy, rule of law, and tolerance and non-discrimination. Jointly with the European Commission for Democracy through Law (also known as the Venice Commission) it adopted the [Guidelines on Freedom of Association](#) and the [Guidelines on Peaceful Assembly](#) that are widely regarded as an authoritative statement on good practice in the field.

**UDHR** – Universal Declaration of Human Rights

The [UDHR](#) was adopted by the United Nations General Assembly on 10 December 1948. While not itself legally binding, the UDHR inspired global and regional treaties including the ICCPR, ACHR, ACHPR and ECHR, as well as national constitutions and laws.

**UNGA** – the United Nations General Assembly

The General Assembly is the main deliberative, policymaking and representative organ of the United Nations.

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

The [UN Special Rapporteur on the rights to freedom of peaceful assembly and of association](#) is an independent expert appointed by the UN Human Rights Council to examine, monitor, advise and publicly report on these rights worldwide. Work methods include responding to individual complaints, conducting studies, providing technical assistance to governments, and engaging in public outreach and promotional activities – all with the ultimate goal of promoting and protecting the rights to freedom of peaceful assembly and of association.

**Venice Commission** – the European Commission for Democracy through Law

The [Venice Commission](#) is an advisory body that, like the European Court of Human Rights, forms part of the Council of Europe. The Commission delivers legal advice to its [Member States](#) in the fields of democracy, human rights and the rule of law, usually in the form of legal opinions on draft or enacted legislation which is submitted to it for examination. The Commission has published [compilations](#) of its opinions concerning freedom of association and peaceful assembly. It also produces studies and reports on topical issues, such as the authoritative [Guidelines on Freedom of Association](#) and the [Guidelines on Peaceful Assembly](#) adopted jointly with the OSCE/ODIHR.

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## **PART II: Freedom of association**

Freedom of association is explicitly guaranteed in all leading human rights instruments, including Article 20 of the [UDHR](#), Article 22 of the [ICCPR](#), Article 16 of the [ACHR](#), Article 10 of the [ACHPR](#), and Article 11 of the [ECHR](#).

The right to form and participate in trade unions, as a specific form of association, is also explicitly guaranteed in Article 8 of the [ICESCR](#), as well as the [ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize \(ILO Convention No 87\)](#) and the [ILO Convention of 1949 concerning the Application of the Principles of the Right to Organize and Collective Bargaining \(ILO Convention No 98\)](#).

The right to freedom of association is guaranteed by Article 24 of the [Arab Charter on Human Rights](#); however, the Charter does not set the same internationally recognized standards for restrictions, therefore the global standards are recommended to be used in the relevant countries. The [ASEAN human rights declaration](#), Article 27 (2), includes recognition of the freedom to form and join trade unions.

## 1. What is included in the notion of an association?

In his first thematic report to the Human Rights Council, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association clarified that an

*“association” refers to any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.<sup>1</sup>*

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Associations may take a variety of diverse forms, including, but not limited to, civil society organizations, clubs, cooperatives, non-governmental organizations (NGOs), religious associations, political parties, trade unions, foundations or online associations.<sup>2</sup> They may thus be formed for a variety of purposes: personal, cultural, political or otherwise. The key qualification is the freedom to function in unison towards some kind of joint goal. All of these different types of associations are protected under [international law](#).

### 1.1. Associations do not have to be registered in order to be protected

It is well established in international law that the right to freedom of association equally protects formal – such as those which have establishing documents and are registered – and informal associations – such as those which operate practically and have not secured registration.<sup>3</sup> [[Legal personality and registration](#).] The Special Rapporteur has on numerous occasions emphasized that the right to freedom of association applies to informal associations and does not require that a group be registered.<sup>4</sup>

In its [Guidelines on Freedom of Association and Assembly in Africa](#), the AComHPR’s definition of an association emphasizes that associations need not be formal: an association is a not-for-profit grouping of persons brought together with a common interest, purpose or activity, which has some degree of institutional, but not necessarily formal, structure, and more than a fleeting existence.<sup>5</sup>

Guideline 11 further states:

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<sup>1</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 51.](#)

<sup>2</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 52.](#)

<sup>3</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 56.](#)

<sup>4</sup> [UN Human Rights Council, Fourth Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/29/25, 28 April 2015, para. 59.](#)

<sup>5</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 1 and 2. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, Freedom of Association, art. I.1.](#)

*States shall not compel associations to register in order to be allowed to exist and to operate freely.*

*Legislation shall explicitly recognize the right to exist of informal associations. Informal associations shall not be punished or criminalized under the law or in practice.<sup>6</sup>*

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International legal bodies have repeatedly found that associations remain free to operate regardless of whether or not they have achieved an officially recognized status. For example, in *Movement for Democratic Kingdom v Bulgaria*, the EComHR affirmed a number of previous cases in which:

*a refusal of the authorities to register an association does not necessarily involve an interference with its rights under Article 11 (Art. 11) of the Convention where the association is nevertheless free to continue its activities.<sup>7</sup>*

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A 2011 [Venice Commission opinion on the rights of non-registered associations in Belarus](#) elucidated on this further, by underscoring that an association's actions cannot be penalized for the mere ground of lacking registration [click for full explanation].

In its 2011 Belarus Report, the Venice commission found that:

*the mere fact that an association does not fulfil all the elements of the legal regulation concerned does not mean that it is not protected by the internationally guaranteed freedom of association. In Chassagnou and Others v. France the ECtHR emphasized the autonomous meaning of "association": "The term "association" (...) possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point.*

*93. The principles and protection laid down in the ICCPR and the ECHR consequently apply also to non-registered NGO'S. ...*

*94. Hence, in the opinion of the Venice Commission, penalizing actions connected with the organization or management of an association on the sole ground that the association concerned has not passed the state registration, as Article 193-1 of the Criminal Code does, does not meet the strict criteria provided for under Article 22.2 ICCPR and 11.2 ECHR.*

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<sup>6</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 11. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, Freedom of Association, art. I.8.](#)

<sup>7</sup> [Movement for Democratic Kingdom v Bulgaria](#), EComHR, Judgment of 29 November 1995, para. 2.

*95. Criminalizing human rights activities as does Article 193-1 in cases where members of unregistered associations are supporting human rights work, cannot be regarded otherwise than as going against the underpinning values of the international human rights regime and in breach of the objectives of civil and political rights protected under the ICCPR and ECHR.*

*96. In conclusion, the Venice Commission considers that the mere fact that an association has not passed state registration may not be a ground for penalizing actions connected with such an association. This would make the activities of a non-registered association in fact impossible and, consequently, restrict the right to freedom of association in its essence.<sup>8</sup>*

Furthermore, in *Republican Party of Russia v. Russia*, the ECtHR re-confirmed that a State cannot force an association to choose a particular legal form, stating:

*it has already found it unacceptable that an association should be forced to take a legal shape its founders and members did not seek, finding that such an approach, if adopted, would reduce the freedom of association of the founders and members so as to render it either non-existent or of no practical value.<sup>9</sup>*

Associations may thus choose to operate without registration, and cannot be penalized for doing so. This is critical given the difficulty that certain organizations may encounter in registering, or the number of countries in which registration in general may be difficult to secure.<sup>10</sup> [[Link to registration](#)] Certain activities, such as opening a bank account or employing personnel, may however require associations to obtain legal personality. [[Link to legal personality](#)]

## 1.2. Online organizations are protected

In recent years the Internet has become vital in facilitating active citizen participation in order to build democratic societies and mobilize “calls for justice, equality, accountability and better respect for human rights.”<sup>11</sup> The UN Human Rights Council has repeatedly acknowledged the importance of information and communication technologies for the full enjoyment of the right to freedom of

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<sup>8</sup> [Venice Commission, Opinion on the Compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of Non-Registered Associations of The Republic of Belarus, 18 October 2011.](#)

<sup>9</sup> [Republican Party of Russia v. Russia](#), ECtHR, Judgment of 12 April 2011, para. 105; see also, [Zhechev v Bulgaria](#), ECtHR, Judgment of 21 June 2007, para. 56.

<sup>10</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 57.](#)

<sup>11</sup> [UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/17/27, 16 May 2011, para 2; see also, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para 32\(e\).](#)

association, reminding States of their obligations to respect and protect this right online as well as offline.<sup>12</sup>

As further noted by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,

*The Internet has not only made it easier for citizens to express themselves freely and openly, but has also provided ideal conditions for innovation and the exercise of other fundamental rights such as the right to education and free association.*<sup>13</sup>

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A [2011 joint declaration](#) by the UN Special Rapporteur on freedom of opinion and expression, the OSCE Representative on Freedom of the Media, OAS Special Rapporteur on freedom of expression and the ACHPR Special Rapporteur on freedom of expression and access to information similarly underscored that the Internet is necessary to promote other human rights, including freedom of association.<sup>14</sup>

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, at the conclusion of a visit to the Sultanate of Oman, specifically affirmed that the right to freedom of association applied equally online. Responding to reports of authorities hacking into online accounts, conducting online surveillance, and blocking Voice over Internet Protocol services, the Special Rapporteur stated that

*(t) these technologies are not only a means to facilitate these rights in the real world; they are a virtual space where the rights themselves are actively exercised. The rights to freedom of peaceful assembly and of association exist as much online as they do offline.*<sup>15</sup>

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For these reasons, States should ensure access to the Internet for all individuals. According to a [2014 report by the Inter-American Commission on Human Rights](#):

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<sup>12</sup> UN Human Rights Council, *The rights to freedom of peaceful assembly and of association*, UN Doc. A/HRC/RES/21/16, 11 October 2012, para. 1; see also UN Human Rights Council, *The rights to freedom of peaceful assembly and of association*, UN Doc. A/HRC/RES/24/5, 8 October 2013, para. 2.

<sup>13</sup> UN General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, UN Doc. A/66/290, 10 August 2011, para. 61.

<sup>14</sup> UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and the Internet*, 1 June 2011, para. 6(a).

<sup>15</sup> *Statement by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the Sultanate of Oman*, 13 September 2014; see also UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai, UN Doc. A/HRC/29/25/Add.1, 27 April 2015, para 34.

*the Internet offers space for strengthening the exchange of information and opinions. The Internet has been developed using design principles which have fostered and allowed an online environment that is decentralized, open and neutral. It is important for all regulation to be based on dialog among all actors and to maintain the basic characteristics of the original environment, strengthening the Internet's democratizing capacity and fostering universal and nondiscriminatory access.*<sup>16</sup>

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There are limited cases in which online activity may be restricted, notably to prevent offences under international criminal law and/or international human rights law such as incitement towards violence, genocide or terrorism. However, even these cases must pass the test of all restrictions of basic human rights: in being provided by law and being unambiguous, in pursuit of a legitimate purpose and in respect for the principles of necessity and proportionality.<sup>17</sup> [[Link to restrictions](#)] The OSCE/ODIHR and Venice Commission, for example, have noted that

*(t)he blocking of websites of associations, or of certain sources of information or communication tools, can have a significantly negative impact on associations. Security measures should be temporary in nature, narrowly defined to meet a clearly set out legitimate purpose and prescribed by law. These measures should not be used to target dissent and critical speech.*<sup>18</sup>

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The UN Human Rights Committee has expressly called on States to refrain from restrictions in special cases, such as the:

*(d)iscussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.*<sup>19</sup>

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By extension, this implies that online associations engaging in these sensitive areas are not only entitled to protection, but are entitled to special protection. As the ECtHR has found,

*pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" ... Although individual interests must on occasion be subordinated to those of a*

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<sup>16</sup> [IACHR, Office of the Special Rapporteur for Freedom of Expression, \*Freedom of Expression and the Internet\*, OEA/Ser.L/V/II.CIDH/RELE/INF.11/13, 31 December 2013, para. 11.](#)

<sup>17</sup> [UN General Assembly, \*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression\*, Frank La Rue, UN Doc. A/66/290, 10 August 2011, para. 37.](#)

<sup>18</sup> [OSCE/ODIHR and Venice Commission, \*Joint Guidelines on Freedom of Association\*, 2015, para. 270.](#)

<sup>19</sup> [UN Human Rights Council, \*Resolution 12/16 Freedom of expression and opinion\*, UN Doc A/HRC/RES/12/16, 12 October 2009, para. 5\(p\)\(i\).](#)

*group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.*<sup>20</sup>

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The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has particularly emphasized:

*The rights to freedom of peaceful assembly and of association play a key role in empowering individuals belonging to groups most at risk to claim other rights and overcome the challenges associated with marginalization. Such rights must therefore not only be protected, but also facilitated. It is the responsibility of all stakeholders to ensure that the voices of individuals belonging to groups most at risk are heard, and taken into account, in compliance with the principles of pluralism of views, tolerance, broadmindedness and equity.*<sup>21</sup>

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### 1.3. Are public associations entitled to the same protections as private ones?

Generally, the right to freedom of association applies only to private associations – that is, those that are formed by private individuals wishing to come together for a specific purpose – and not to public associations that are founded, organized by or integrated into the State. The UN Human Rights Committee has explained that Article 22 applies to private associations only; it has refused to find a violation where a State Party requires legal entities to register or pay dues to a public organization, so long as its establishment is not aimed at undermining the enjoyment of Article 22.

In [Wallman v. Austria](#), for example, the Committee held that Austria had not violated its citizen's right to freedom of association where it required his business to join and pay annual dues to a chamber of commerce established for business purposes:

*The Committee observes that the Austrian Chamber of Commerce was founded by law rather than by private agreement, and that its members are subordinated by law to its power to charge annual membership fees. It further observes that article 22 of the Covenant only applies to private associations, including for purposes of membership. ... The Committee considers that once the law of a State party establishes commerce chambers as organizations under public law, these organizations are not precluded by article 22 of the Covenant from imposing annual membership fees on its members, unless such establishment under public law aims at circumventing the guarantees contained in article 22. However, it does not appear from the material before the Committee that the qualification of the Austrian Chamber of Commerce as a public law organization, as envisaged in the*

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<sup>20</sup> [Young, James and Webster v United Kingdom](#), ECtHR, Judgment of 13 August 1981, para. 63.

<sup>21</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/26/29, 14 April 2014, para. 72.](#)

*Austrian Constitution as well as in the Chamber of Commerce Act of 1998, amounts to a circumvention of article 22 of the Covenant.*<sup>22</sup>

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Similarly, the ECtHR has found that whether an association was established by law is insufficient to determine that it is public and outside the protection of the right to freedom of association; it rather measures the association's level of integration into a State structure.

In [Chassagnou v. France](#), the Court held that mandatory, sub-regional hunting associations were private associations even though they had been established by law and were overseen by a public authority because 1) they were required to comply with the national law on private associations and 2) they were composed of private individuals who wished to come together for a specific purpose. The ECtHR reasoned that it was not a public association, as these two factors were insufficient to establish that the associations were "integrated within the structures of the State."<sup>23</sup>

The ECtHR has also found that an association created under law is public and outside the scope of Article 11's guarantees where it was established by law to pursue a public interest, namely the regulation of the medical profession. In [Le Compte, Van Leuven and De Meyere v. Belgium](#), the Court held that Belgium did not violate the applicant doctors' rights to freedom of association by requiring they join the official Belgian medical association, responsible for oversight of the profession, because the national professional association was a public institution and they remained free to join other private, professional associations [click for full case explanation].

In distinguishing public associations from private associations, the ECtHR noted

*64. ... that the Belgian Ordre des médecins is a public-law institution. It was founded not by individuals but by the legislature; it remains integrated within the structures of the State and judges are appointed to most of its organs by the Crown. It pursues an aim which is in the general interest, namely the protection of health, by exercising under the relevant legislation a form of public control over the practice of medicine. Within the context of this latter function, the Ordre is required in particular to keep the register of medical practitioners. For the performance of the tasks conferred on it by the Belgian State, it is legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary law (prerogatives exorbitantes du droit commun) and, in this capacity, employs processes of a public authority....*

*65. Having regard to these various factors taken together, the Ordre cannot be considered as an association within the meaning of Article 11 (art. 11). However, there is a further requirement: if there is not to be a violation, the setting up of the*

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<sup>22</sup> [Wallman v. Austria, Human Rights Committee, UN Doc. CCPR/C/80/D/1002/2001, 1 April 2004, para. 9.5.](#)

<sup>23</sup> [Chassagnou v France, ECtHR, Judgment of 29 April 1999, para. 101.](#)



*Ordre by the Belgian State must not prevent practitioners from forming together or joining professional associations. Totalitarian régimes have resorted - and resort - to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses...*

*The Court notes that in Belgium there are several associations formed to protect the professional interests of medical practitioners and which they are completely free to join or not. ... In these circumstances, the existence of the Ordre and its attendant consequence - that is to say, the obligation on practitioners to be entered on the register of the Ordre and to be subject to the authority of its organs - clearly have neither the object nor the effect of limiting, even less suppressing, the right guaranteed by Article 11 par. 1 (art. 11-1).<sup>24</sup>*

The ECtHR examines on a case-by-case basis the “public” nature of the organization, e.g. when they impose compulsory membership.<sup>25</sup> [[Link to right not to associate](#)]

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<sup>24</sup> [Le Compte, Van Leuven and De Meyere v. Belgium](#), ECtHR, Judgment of 23 June 1981, paras. 64-5.

<sup>25</sup> [Sigurdur A. Sigurjonsson v. Iceland](#), ECtHR, Judgment of 30 June 1993, para. 31.

## 2. Who has the right to freedom of association?

Everyone has the right to freedom of association according to the [ICCPR](#), Article 22(1); [ACHR](#), Article 16(1); [ECHR](#), Article 11(1) and the [ACHPR](#), Article 10(1). The ICCPR and the ECHR explicitly include the right to form and join trade unions, and the ACHR clarifies it encompasses “the right to associate freely for ideological, religious, political economic, labor, social, cultural, sports or other purposes.” The ACHPR adds the caveat that this right is afforded to every individual “provided that he abides by the law.” [\[Link to objectives\]](#)

### 2.1. Applies without discrimination

All international human rights instruments guard against discrimination in respecting freedom of association. As provided by Article 2(1) of the ICCPR, each State must commit

*to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>26</sup>

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In addition, various international human rights conventions guarantee the right to freedom of association expressly for vulnerable populations, including refugees,<sup>27</sup> women,<sup>28</sup> children,<sup>29</sup> migrant workers<sup>30</sup> and persons with disabilities.<sup>31</sup> For example, Article 29 of the [Convention on the Rights of Persons with Disabilities](#) explicitly recognizes the rights of persons with disabilities to participate in associations concerned with public and political life and by forming and joining organizations to represent their interests at all levels.<sup>32</sup>

### 2.2. Applies to non-citizens

This general principle of international human rights law is also noted by Article 2(1) of the ICCPR, whose guarantees apply to all individuals within a State’s territory, and do not depend upon citizenship or other criteria:

*the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or*

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<sup>26</sup> [ICCPR, art. 2\(1\)](#).

<sup>27</sup> [Convention and Protocol Relating to the Status of Refugees, art. 15](#).

<sup>28</sup> [Convention on the Elimination of All Forms of Discrimination against Women, art. 7\(c\)](#).

<sup>29</sup> [Convention on the Rights of the Child, art. 15](#).

<sup>30</sup> [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 26 and art. 40](#).

<sup>31</sup> See [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/26/29, 14 April 2014, para. 20](#).

<sup>32</sup> [The Convention on the Rights of Persons with Disabilities, art. 29\(b\)](#).

*statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.*<sup>33</sup>

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This was confirmed by the IACtHR in [Escher, et al. v. Brazil](#), which held that States are obligated to respect and promote freedom of association for all persons within their jurisdiction:

*The Court has indicated that Article 16(1) of the American Convention establishes that anyone who is subject to the jurisdiction of a State Party has the right to associate freely with other persons, without an intervention of the public authorities that restricts or obstructs the exercise of the said right.*<sup>34</sup>

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Article 3 of the [Convention of the Council of Europe on the Participation of Foreigners in Public Life at Local Level](#) further provides that

*the right to freedom of association shall imply the right of foreign residents to form local associations of their own for purposes of mutual assistance, maintenance and expression of their cultural identity or defence of their interests in relation to matters falling within the province of the local authority, as well as the right to join any association.*<sup>35</sup>

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The legal status of an individual within a State's territory in and of itself never deprives the individual of such rights. For example, the ECtHR case of [Cisse v France](#) clarified that status as an illegal immigrant is insufficient to justify a breach of article 11.<sup>36</sup>

Similarly, the AComHPR has held that Article 2 of the ACHPR's guarantee that individuals shall enjoy the rights "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status" means that non-nationals are also fully protected. In [Good v. Botswana](#), the AComHPR found a series of violations where a non-national resident of Botswana was deported in apparent retaliation for criticizing the government. On the question of his access to judicial remedy, the AComHPR explained that:

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<sup>33</sup> [Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, Adopted 29 March 2004, para. 10.](#)

<sup>34</sup> [Escher, et al. v. Brazil, IACtHR, Judgment of 6 July 2009, para. 170.](#)

<sup>35</sup> [Convention of the Council of Europe on the Participation of Foreigners in Public Life at Local Level, Treaty No.144, para. A\(3\)\(b\).](#)

<sup>36</sup> [Cisse v France, ECtHR, Judgment of 9 April 2002, para. 50.](#)

*States parties to the African Charter thus have the duty to ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status. Thus, non-nationals are entitled to the enjoyment of this right just as do nationals.*<sup>37</sup>

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In addition, the Special Rapporteur on the rights to freedom of peaceful assembly and of association notes that freedom of association is international in nature, and thus “extends to cross-border or international collaboration between associations and their membership.”<sup>38</sup> For example, Article 36 of the [United Nations Declaration on the Rights of Indigenous Peoples](#) acknowledges that

*(i)Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.*<sup>39</sup>

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### 2.3. Applies individually and collectively

Although the basic right to freedom of association is an individual right, once individuals have come together in pursuit of a collective goal, they may assert a collective right to freedom of association:

*Just like individuals, associations as legal persons have the rights to freedom of association and all other universally and regionally guaranteed rights and freedoms applicable to them.*<sup>40</sup>

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The IACtHR has also held that individual and collective rights must be guaranteed simultaneously.<sup>41</sup>

When freedom of association is violated, both individuals and the associations may go to Court, as the ECtHR has confirmed, even after an association is dissolved.<sup>42</sup> This is an endorsement of the fact that the rights and remedies apply to both individuals and the association, or collectivity.

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<sup>37</sup> [Good v. Botswana](#), AComHPR, Judgment of 26 May 2010, para. 163.

<sup>38</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/26/29, 14 April 2014, para. 61.

<sup>39</sup> [United Nations Declaration on the Rights of Indigenous Peoples](#), art. 36; see also [Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities](#), art. 2(5).

<sup>40</sup> [Venice Commission, Opinion on the Compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of Non-Registered Associations of The Republic of Belarus](#), 18 October 2011, para. 69.

<sup>41</sup> [Huilca-Tecse v. Peru \(Merits, Reparations and Costs\)](#), IACtHR, Judgment of March 3, 2005, para. 72; see also [IACHR, Second Report on the Situation of Human Rights Defenders in the Americas](#), OEA/Ser/L/V/II Doc. 66, 31 December 2011, paras. 158-9.

## 2.4. Possible exceptions for certain groups of people

For certain limited categories of people, the right to freedom of association may be restricted. In particular, States may impose lawful limitations on the right to freedom of association of members of the armed forces and the police.

ICCPR Article 22(2) authorizes such restrictions, in asserting that

*This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*<sup>43</sup>

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Article 16 (3) of the ACHR similarly holds:

*The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association on members of the armed forces and the police.*<sup>44</sup>

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The ECHR also provides the possibility to restrict the freedom of association to civil servants in its Article 11:

*This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*<sup>45</sup>

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This does not mean that members of the armed forces and the police (and under the ECHR, civil servants) may be stripped completely of their right to freedom of association. It does mean that the considerations for imposing restrictions may differ.

The different international or regional bodies have given some guidance on how to interpret this exception, especially with regard to representative associations and membership of political parties.

### With regard to the police

In [Nilsen and Johnsen v. Norway](#), the ECtHR recognized that police may have representative professional associations and that they may have a particular role to play. The Court examined the claims made by two members of the Norwegian and Bergen Police Associations, who made accusations of defamation against a researcher who had been looking into allegations of police violence. Although

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<sup>42</sup> See [Refah Partisi \(the Welfare Party\) v. Turkey](#), ECtHR, 13 February 2003; and [Sindicatul "Pastorul cel bun" v. Romania](#), ECtHR, Grand Chamber Judgment of 9 July 2013, para. 70.

<sup>43</sup> [ICCPR, art. 2\(2\)](#).

<sup>44</sup> [ACHR, art. 16 \(3\)](#).

<sup>45</sup> [ECHR, art. 11](#).

the case revolved mainly around a violation of freedom of expression, the Court highlighted its relationship to freedom of association as well:

*A particular feature of the present case is that the applicants were sanctioned in respect of statements they had made as representatives of police associations in response to certain reports publicising allegations of police misconduct. While there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court (...), the same must apply to speech aimed at countering such allegations since it forms part of the same debate. This is especially the case where, as here, the statements in question have been made by elected representatives of professional associations in response to allegations calling into question the practices and integrity of the profession. Indeed, it should be recalled that the right to freedom of expression under Article 10 is one of the principal means of securing effective enjoyment of the right to freedom of assembly and association as enshrined in Article 11.<sup>46</sup>*

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In [Trade Union of the Police in the Slovak Republic and others v. Slovakia](#), the Police Union complained about intimidation by the Minister of the Interior following trade union activities. Following a union public assembly which included, among others, chants for the government to step down, the Minister publically communicated that all police officers who would not respect the ethical code would be dismissed. The complainants argued that such threat violated the right to freedom of association. However, the majority of the Court found no violation of the right to freedom of association, recognizing that the aim to protect public trust in the police was legitimate and that

*[the] aim was to ensure appropriate behaviour on the part of the police and maintain public trust in them. Those are indispensable conditions for the discharge of the duties of the police, which include ensuring public safety, prevention of disorder or crime and the protection of the rights and freedoms of citizens. The interference in issue therefore had a legitimate aim.<sup>47</sup>*

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In a case involving the membership of police in a political party, the ECtHR did not find the restriction, which was precisely defined in national law, to be an unlawful restriction, given the possible limitations on the right to freedom of association for police members foreseen by the Convention. The Court considered the “neutrality of the police” to be a legitimate aim to protect, and that the imposed restriction did not completely strip members of the police from any engagement in political activities:

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<sup>46</sup> [Nilsen and Johnsen v. Norway](#), ECtHR, Judgment of 25 November 1999, para. 44.

<sup>47</sup> [Trade Union of the Police in the Slovak Republic and others v. Slovakia](#), ECtHR, Judgment of 25 September 2012, para. 64. Note the dissenting opinion which found that the threats expressed by the Minister did violate the freedom of association.

*Bearing in mind the role of the police in society, the Court has recognised that it is a legitimate aim in any democratic society to have a politically neutral police force. In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate ... As to the extent of the restriction ... although the wording ... might prima facie suggest that what is in issue is an absolute ban on political activities, an examination of the relevant laws shows that police officers have in fact remained entitled to undertake some activities enabling them to articulate their political opinions and preferences.*<sup>48</sup>

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The ECtHR confirmed this approach in a more recent case concerning membership of police officers in a political party. In [Strzelecki v. Poland](#), the Court noted there is a wider margin of discretion for States when it comes to restrictions for police officers and that the approaches vary across different countries depending on traditions and histories. The Court found that protecting the trust of citizens in an impartial police is a legitimate aim to protect; it also underscored again that the restrictions did not amount to a complete denial of the freedom to associate or to participate politically.<sup>49</sup>

### With regard to the military

Similarly to the position taken with regard to the police, the ECtHR found that the blanket ban on trade unions within the French armed forces was contrary to the convention. The Court clarified that States may impose legitimate restrictions. However, such restrictions may not amount to a denial of the right to freedom to form a union as such<sup>50</sup>. Measures taken by States to soften the impact of the lack of a union for the military cannot substitute for this right<sup>51</sup>.

The OSCE has issued recommendations to protect and uphold the right to freedom of association for members of the military, in particular with regard to representative associations and political party membership:

*The Parliamentary Assembly of the Council of Europe considered in Recommendation 1572 (2002) that the Committee of Ministers should call on the*

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<sup>48</sup> [Rekvenyi v Hungary](#), ECtHR, Judgment of 20 May 1999, paras. 47-49.

<sup>49</sup> [Strzelecki v. Poland](#), ECtHR, Judgment of 10 April 2012, paras. 51, 52, 54, 57. Available only in French.

<sup>50</sup> [Adefdromil v. France](#), ECtHR, Judgement of 2 October 2014, para. 42-44. Only available in French. Para 42: “Elle [the Court] rappelle également que le paragraphe 2 n’exclut aucune catégorie professionnelle de la portée de l’article 11 ; il cite expressément les forces armées et la police parmi celles qui peuvent, tout au plus, se voir imposer par les États des « restrictions légitimes », sans pour autant que le droit à la liberté syndicale de leurs membres ne soit remis en cause.” See also, [Matelly v. France](#), ECtHR, Judgement of 2 October 2014, para. 56-58.

<sup>51</sup> [Matelly v. France](#), ECtHR, Judgement of 2 October 2014, para 70. Only available in French.

*governments of the member states to allow members of the armed forces and military personnel to organize themselves in representative associations (with the right to negotiate on matters concerning salaries and conditions of employment), to lift the restrictions on their right to association, to allow them to be members of legal political parties, and to incorporate all the appropriate rights in military regulations.*

*According to Assembly Recommendation 1572 (2002), with respect to the professional staff of the armed forces, freedom of association covers the following rights: the right of association, including the right to negotiate salaries and conditions of employment, and the right to belong to legal political parties. Arguably, members of the armed forces should fully enjoy the right, where the army is not involved in action, to set up specific associations geared to protecting their professional interests in the framework of democratic institutions, to join them, and to play an active part in them, while discharging their normal duties. The Assembly reiterated this view in Recommendation 1742 (2006), which additionally called on member states to permit members of the armed forces to join professional representative associations or trade unions entitled to negotiate, and to set up consultative bodies involving these associations representing all categories of personnel.<sup>52</sup>*

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<sup>52</sup> [OSCE/ODIHR, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, Chapter 9: Military Unions and Associations, 2008, p. 73.](#) In 2010 the Committee of Ministers on the human rights of members of the armed forces of the Council of Europe, adopted a recommendation that explicitly recognized the right to associate, form a union and join a political party. Restrictions should meet the three prong test.



### 3. Right not to associate

Freedom of association includes both the positive right to association as well as the negative right to refuse to associate with others. It is acknowledged in international law that no one may be compelled to belong to an association.<sup>53</sup>

Regional instruments have explicitly recognized the right not to associate. According to Article 10 of the African Charter

*[s]ubject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.*<sup>54</sup>

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Similarly, the IACtHR has noted that

*freedom of association includes a right and a freedom, to wit: the right to form associations without restrictions other than those permitted according to sections 2 [the three prong test for restrictions] and 3 [permissible exceptions for armed forces and police] of that conventional precept, and the freedom of all persons not to be compelled or forced to join the association.*<sup>55</sup>

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The 2011 [Venice Commission opinion on the rights of non-registered associations in Belarus](#) describes the principle as follows:

*There are in fact two fundamentals underpinning the principle of freedom of association – that is the personal autonomy where the individual has a right to join or not to join (the negative freedom) and the freedom of natural persons and legal entities to collaborate on a voluntary basis within an organizational context without government intervention, in order to realise a mutual goal. .... The “negative” right of freedom of association implies that no one can be forced to form and join an association.*<sup>56</sup>

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However, a clear distinction has been made between the right not to join an association and compulsory membership in a public association. The ECtHR has held that compulsory membership is not an interference with Article 11 provided that it is done by a public association that pursues aims in

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<sup>53</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 55.](#)

<sup>54</sup> [ACHPR, art. 10\(2\).](#)

<sup>55</sup> [Baena Ricardo et al. v. Panama, IACtHR, Judgment of 2 February 2001, para. 159.](#)

<sup>56</sup> [Venice Commission, Opinion on the Compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of Non-Registered Associations of The Republic of Belarus, 18 October 2011, para. 67-8.](#)

the general interest, such as public control over the practice of medicine, and in doing so acts as a kind of public authority.<sup>57</sup> [[Are public associations entitled to the same protections as private associations?](#)]

The ECtHR examines on a case-by-case basis the “public” nature of the organization imposing compulsory membership.<sup>58</sup> The classification in national law is only the starting point.<sup>59</sup> In a case involving compulsory membership in the Icelandic taxi association Frami, the ECtHR found a violation of the freedom not to associate where the public interest role of the association could have been served through other means than compulsory membership:

*The Court does not doubt that Frami had a role that served not only the occupational interests of its members but also the public interest, and that its performance of the supervisory functions in question must have been facilitated by the obligation of every licence-holder within the association’s area to be a member. However, the Court is not convinced that compulsory membership of Frami was required in order to perform those functions. Firstly, the main responsibility for the supervision of the implementation of the relevant rules lay with the Committee. Secondly, membership was by no means the only conceivable way of compelling the licence-holders to carry out such duties and responsibilities as might be necessary for the relevant functions; for instance, some of those provided for in the applicable legislation could be effectively enforced without the necessity of membership.<sup>60</sup>*

The IACtHR has also provided grounds for determining whether compulsory membership violates the freedom not to associate, for example, when it infringes on other rights, such as freedom of expression. At the request of the government of Costa Rica, the IACtHR issued an advisory opinion on compulsory membership in an association prescribed by law for the practice of journalism.<sup>61</sup> The specific request concerned “whether there is a conflict or contradiction between the compulsory membership in a professional association as a necessary requirement to practice journalism in general, and reporting, in particular.” The IACtHR found that the law in question – which would have required to journalists to be members of a “colegio” (association) in order to practice journalism, limited membership only to those who had completed a particular university specialization and imposed criminal penalties on those who failed to comply – constituted a violation of the right to freedom of expression [Article 13 of the ACHR] in that it denied such persons access to the media as a means to express themselves. The Court distinguished journalism from other professions in that

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<sup>57</sup> [Le Compte, Van Leuven and De Meyere v. Belgium](#), ECtHR, Judgment of 23 June 1981.

<sup>58</sup> [Sigurdur A. Sigurjonsson v. Iceland](#), ECtHR, Judgment of 30 June 1993, para. 31.

<sup>59</sup> [Chassagnou v. France](#), ECtHR, Judgment of 29 April 1999, para. 100.

<sup>60</sup> [Sigurdur A. Sigurjonsson v. Iceland](#), ECtHR, Judgment of 30 June 1993, para. 41.

<sup>61</sup> [Compulsory Membership in an Association, Prescribed By Law for the Practice of Journalism](#), IACtHR, Advisory Opinion Oc-5/85, 13 November 1985.

*journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "colegio." ... The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees. ... This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine -that is to say, the things that lawyers or physicians do- is not an activity specifically guaranteed by the Convention. ... The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.* <sup>62</sup>

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While the IACtHR in its majority advisory opinion primarily focused on the right to freedom of expression, Judge Rafael Nieto-Navia issued a separate opinion stating that requiring journalists to join the association in order to practice their profession infringed on their right not to associate. The judge's argument mirrored the logic of the ECtHR that there is a difference between journalist associations and those that "fulfill strictly public aims which transcend private interests."<sup>63</sup>

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<sup>62</sup> [Compulsory Membership in an Association, Prescribed By Law for the Practice of Journalism, IACtHR, Advisory Opinion Oc-5/85, 13 November 1985, paras. 71-3, 76.](#)

<sup>63</sup> [Compulsory Membership in an Association, Prescribed By Law for the Practice of Journalism, Separate opinion by Judge Rafael Nieto-Navia, IACtHR, Advisory Opinion Oc-5/85, 13 November 1985.](#)

#### 4. Associations may freely determine membership

The right to freedom of association applies also to associations themselves, implying that those within the association have the right to choose with whom to associate. The African Commission corroborates this principle<sup>64</sup> in its *Guidelines on Freedom of Association and Assembly in Africa*, explaining that

*[those] founding and belonging to an association may choose whom to admit as members, subject to the prohibition on discrimination.*<sup>65</sup>

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Similarly, the ECtHR has held that the right to freedom of association entails the right for a private association to choose its own members:

*Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership.*<sup>66</sup>

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At times a balance needs to be struck between the rights of the collective and the rights of the individual. In [Arenz et al v Germany](#), the UN Human Rights Committee ruled in favor of the freedom of a political party not to associate with Scientologists over the rights of the latter's desire to associate with them. The applicants in the case were Scientologists who were expelled from one of Germany's major political parties, the Christian Democratic Union (CDU) on the basis of their religion. The expulsions arose after the CDU adopted a resolution, which determined that Scientology was incompatible with CDU membership. The authors challenged their expulsions in court without success. The German courts had found that the CDU's decision was not arbitrary, and that they would not interfere with the political party's autonomy over its membership. The Human Rights Committee ultimately took the position that it could not interfere with the German courts' findings regarding the balance of interests between the authors and the members of the party.<sup>67</sup>

The OSCE/ODIHR and Venice Commission *Joint Guidelines on Freedom of Association* stipulate that associations shall be free to determine their rules for membership, subject only to the principle of non-discrimination.<sup>68</sup>

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<sup>64</sup> For the principle, see: [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, at para. 55.](#)

<sup>65</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 8. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, art. 1.2.2.](#)

<sup>66</sup> [Associated Society of Locomotive Engineers & Firemen \(ASLEF\) v. the United Kingdom, ECtHR, Judgment of 27 February 2007, para. 39.](#)

<sup>67</sup> [Arenz, Paul; Röder, Thomas and Dagmar v. Germany, Human Rights Committee, UN Doc. CCPR/C/80/D/1138/2002, 24 March 2004.](#)

<sup>68</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015, para. 28 \(principle 3\).](#)

#### 4.1. No criminalization of membership in an association

States cannot criminalize mere membership in an organization. In addition to the requirements that the State must meet before banning, dissolving or suspending an association [[link to suspension or dissolution](#)], it must prove additional, individualized assertions of criminal intent and acts on the part of any members to comply with international legal standards of due process and the individual right to a fair trial and to be free from the arbitrary deprivation of liberty.

The UN Human Rights Committee has indicated that a State has to demonstrate that any measure entailing the sanctioning of membership in an association is strictly necessary to avert a real danger to one of the legitimate aims a State may protect<sup>69</sup>.

*The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.*<sup>70</sup>

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According to the AComHPR Study Group on Freedom of Association & Assembly in Africa,

*In no cases should membership in an association alone be taken as grounds for criminal charges; in practice, this is generally linked to ungrounded prosecution by authorities of associations they disapprove of for political reasons.*<sup>71</sup>

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The case of [International PEN, et al. v. Nigeria](#) arose after a set of murders that followed a rally of the Movement for the Survival of the Ogoni Peoples (MOSOP) for the protection of those who lived in oil-producing areas of Ogoni land. Certain association members were detained for murder on the basis they had incited members of MOSOP to murder four rival Ogoni leaders. They were eventually sentenced to death and executed, before their case was submitted to the ACtHPR by non-governmental organizations. The ACtHPR found that Article 10 of the African Charter had been violated as they were essentially found guilty by the Nigerian court on the basis that they were part of an association, rather than for their individual behavior:

*Article 10.1 was violated because the victims were tried and convicted for their opinions, as expressed through their work in MOSOP. In its judgement, the Tribunal held that by their membership in MOSOP, the condemned persons were*

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<sup>69</sup> [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para. 7.2](#)

<sup>70</sup> [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para. 7.2.](#)

<sup>71</sup> [AComHPR, Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, III.C.1. \(36\).](#)

*responsible for the murders, guilt by association, it would seem furthermore that, government officials at different times during the trial declared MOSOP and the accused guilty of the charges, without waiting for the official judgement. This demonstrates a clear prejudice against the organisation MOSOP, which the government has done nothing to defend or justify.*<sup>72</sup>

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In addition, association members should not be penalized even when a member of an association has committed an offense, if they themselves were not involved in the offense in question. The AComHPR Guidelines confirm this basic principle of law with regard to the freedom of association:

*Offenses committed by particular members of associations shall not be taken as grounds to penalize the association itself, where the official decision-making structure of the association was not employed to pursue those offenses. Similarly, offenses committed by an association, i.e. through its officers, shall not be imputed to members of the association who did not take part in the offenses in question.*<sup>73</sup>

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<sup>72</sup> [International Pen and Others v. Nigeria, ACtHPR, 1998, para 108](#); see also [Malawi Africa Association and others v. Mauritania, AComHPR, Communication of 27 April - 11 May 2000, para. 107](#): “some presumed supporters of the Ba’ath Arab Socialist Party were imprisoned for belonging to a criminal association. ... The government did not provide any argument to establish the criminal nature or character of these groups.”

<sup>73</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 57. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para 51.1.](#)

## 5. Positive obligation of the State to promote and protect freedom of association

The obligations of the State to promote and protect freedom of association under international law are twofold. On the one hand, there is a negative obligation not to interfere with rights [[Link to restrictions](#)]. On the other hand, there is a positive obligation upon the State to facilitate the exercise of the right.<sup>74</sup>

States should take measures so that citizens who wish to come together to form associations are facilitated and encouraged to do so by the overall social, legal and political framework. An enabling environment for the exercise of the right to freedom of association should be free from fear, threats or intimidation.<sup>75</sup> It is the duty of the State to prevent attacks and investigate violations of the right.<sup>76</sup> As underscored by regional bodies (e.g., the IACtHR and the ECtHR), the obligations of the State should not be limited to the association's formation but should extend to the association's ability to carry out the purposes for which it was established. The protection afforded by the right to freedom of association lasts for an association's entire life.<sup>77</sup>

In a case involving the right to freedom of association of human rights defenders, the IACtHR phrased the positive obligation as follows:

*The Court has established that the States have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity.*<sup>78</sup>

The ECtHR similarly states that the positive obligation is necessary to render the exercise of the right to freedom of association practical and effective:

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<sup>74</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, at para. 63; IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 157.](#)

<sup>75</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, at para. 63.](#)

<sup>76</sup> [See IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 157.](#)

<sup>77</sup> [United Communist Party of Turkey and others v. Turkey, ECtHR, Judgment of 30 January 1998, para. 33; IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 155.](#)

<sup>78</sup> [Kawas-Fernández v. Honduras \(Merits, Reparations, and Costs\), IACtHR, Judgment of 3 April 2009, para. 146; see also Venice Commission, Opinion on the Law on Non-Governmental Organisations \(Public Associations and Funds\) as Amended of the Republic of Azerbaijan, 15 December 2014, para. 33.](#)

*the Court has often reiterated that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective ... It follows from that finding that a genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of the right to freedom of association.<sup>79</sup>*

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## 5.1. Proactive measures: enabling legal framework

The UN Human Rights Committee has clearly laid out the obligations of States to take appropriate measures to ensure that they live up to their legal obligations under the ICCPR, including the need to pass relevant supporting legislation:

*7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.*

...

*14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.<sup>80</sup>*

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Such regulating measures run the full range of an association's life cycle from [registration procedures](#) to [access to resources](#) to [dissolution](#). The joint guidelines issued by OSCE/ODIHR and the Venice Commission specify the standards for legislation and regulations in order that they fulfill a State's obligation:

*legal provisions concerning associations need to be well crafted. They need to be clear, precise and certain. They should also be adopted through a broad, inclusive and participatory process, to ensure that all parties concerned are committed to their content. In addition, they should be subject to regular review to ensure that they continue to meet the needs of associations, and should be adapted in a timely manner to reflect the ever-changing environment in which associations operate, including as a result of the advancement and use of new technologies.<sup>81</sup>*

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<sup>79</sup> [Ouranio Toxo and others v. Greece](#), ECtHR, Judgment of 20 October 2005, para. 37.

<sup>80</sup> [Human Rights Committee, CCPR General Comment No. 31 \(The Nature of the General Legal Obligation Imposed on States Parties to the Covenant\)](#), CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8.

<sup>81</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015](#), para. 22.



In [Kawas-Fernández v. Honduras](#), the IACtHR not only recognized that environmentalists are human rights defenders, it also stated that the State has to create the legal and practical conditions for the right to freedom of association:

*Given the important role of human rights defenders in democratic societies, the free and full exercise of this right [to freedom of association] imposes upon the State the duty to create the legal and factual conditions for them to be able to freely perform their task.*<sup>82</sup>

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## 5.2. Free from fear, threats and intimidation

States have an obligation to create an enabling environment free from fear, threats and intimidation to enable exercise of the right to freedom of association.<sup>83</sup>

The [Declaration on Human Rights Defenders](#) says that States bear the primary responsibility to create an environment in which people are not hindered by threat in the exercise of their rights. States have to

*“create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.”*<sup>84</sup>

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Specifically, States have to take measures to protect individuals from threats; this includes the elimination of impunity.<sup>85</sup>

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<sup>82</sup> [Kawas-Fernández v. Honduras \(Merits, Reparations, and Costs\)](#), IACtHR, Judgment of 3 April 2009, para. 146; see also [Noqueira de Carvalho et al. v. Brazil \(Preliminary Objections and Merits\)](#), IACtHR, Judgment of 28 November 2006, para. 77 (“The States have the duty to provide the resources necessary for human rights defenders to conduct their activities freely; to protect them when they are subject to threats and thus ward off any attempt against their life and safety...”).

<sup>83</sup> UN Human Rights Council, [First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association](#), Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, at para. 63.

<sup>84</sup> UN General Assembly, [Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms](#), G.A. Res. 53/144, 9 December 1999 [referred to as [Declaration on Human Rights Defenders](#)], article 2 and 12; see also UN Human Rights Council, [First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association](#), Maina Kiai, UN Doc A/HRC/20/27, 21 May 2012, at para. 8.

<sup>85</sup> UN General Assembly, [Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms](#), G.A. Res. 53/144, 9 December 1999, article 12 (2); see also UN General Assembly, [Report of the Special Representative of the Secretary-General on Human Rights Defenders](#), Hina Jilani, UN Doc. A/61/312, 5 September 2006, para. 101.

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association equally stresses the positive obligation of the State to create an enabling environment free from threats and intimidation, for all associations:

*It is crucial that individuals exercising this right are able to operate freely without fear that they may be subjected to any threats, acts of intimidation or violence, including summary or arbitrary executions, enforced or involuntary disappearances, arbitrary arrest or detention, torture or cruel, inhuman or degrading treatment or punishment, a media smear campaign, travel ban or arbitrary dismissal.*<sup>86</sup>

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An environment of threat, intimidation and impunity may not only lead to individual cases of violations of the right to freedom of assembly, but also leads to a general chilling effect for the exercise of the right. The IACtHR recognized such chilling effects specifically as a violation of the right to freedom of association.

In *Kawas Fernández v. Honduras*, the IACtHR clarified that:

*the States have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety...*<sup>87</sup>

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The IACtHR clearly recognizes the chilling effects of intimidation and finds that it restricts the right to freedom of association, not only of an individual but of the entire group of people with similar interests, as it did in [Cantoral Huamani and Garcia Santa Cruz v. Peru](#):

*The said due diligence is accentuated in contexts of violence against the trade union sector. ... executions like these not only restricted the freedom of association of an individual, but also the right and the freedom of a specific group to associate freely without fear ... this intimidating effect was accentuated and made more severe by the context of impunity that surrounds the case.*<sup>88</sup>

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<sup>86</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 64.](#)

<sup>87</sup> [Kawas-Fernández v. Honduras \(Merits, Reparations, and Costs\), IACtHR, Judgment of 3 April 2009, para. 145;](#) see also [Valle-Jaramillo et al. v. Colombia \(Merits, Reparations, and Costs\), IACtHR, Judgment of 27 November 2008, para. 91;](#) and also [Nogueira de Carvalho et al. v. Brazil \(Preliminary Objections and Merits\), IACtHR, Judgment of 28 November 2006, para. 77](#) ("The States have the duty to provide the resources necessary for human rights defenders to conduct their activities freely; to protect them when they are subject to threats and thus ward off any attempt against their life and safety...").

<sup>88</sup> [Cantoral Huamani and Garcia Santa Cruz v. Peru, IACtHR, Judgment of 10 July 2007, paras. 146-148.](#)

### 5.3. Protection from third parties

The obligation to create an enabling environment also includes the duty to take action that protects individuals and associations from the acts of third parties.<sup>89</sup> The UN Human Rights Committee has stated that the positive obligations of State parties:

*will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.*<sup>90</sup>

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The Special Rapporteur on the rights to freedom of peaceful assembly and of association has emphasized that States' failure to take appropriate measures or exercise due diligence to prevent, punish, investigate or redress the harm caused by non-state actors may constitute a violation of the right of freedom of association. This positive duty to prevent violations includes refraining from acquiescing to or enabling violations.<sup>91</sup> When rights are interfered with, authorities have to provide adequate remedies to secure or restore the exercise of human rights. [[Link to remedies](#)]

Regional human rights bodies equally recognize the positive obligations of the State to prevent third-party interference with the right.

The ECtHR has recognized a State's duty to provide protection against third party individuals seeking to disrupt the right to freedom of association. In [Ouranio Toxo and Others v. Greece](#), the Court held that States are obligated to take such measures, especially when the interference was foreseeable:<sup>92</sup>

*... it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote...*<sup>93</sup>

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The IACHR has also underscored that attacking a human rights defender's right to life, integrity or privacy also violates the freedom of association if that person belongs to an organization; the IACTHR

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<sup>89</sup> [UN Human Rights Committee, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment No. 31, CCPR/C/21/Rev.1/Add. 1326, 29 May 2004, para. 8.](#)

<sup>90</sup> [UN Human Rights Committee, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment No. 31, CCPR/C/21/Rev.1/Add. 1326, 29 May 2004, para. 8.](#)

<sup>91</sup> [UN Human Rights Committee, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/32/36, 31 May 2016, para. 25.](#)

<sup>92</sup> [Ouranio Toxo and others v. Greece, ECtHR, Judgment of 20 October 2005, para. 43.](#)

<sup>93</sup> [Ouranio Toxo and others v. Greece, ECtHR, Judgment of 20 October 2005, para. 37.](#)

has specifically established this obligation of States “in the case of those who are organized to defend and promote human rights.”<sup>94</sup> The IACtHR explained that:

freedom of association also gives rise to positive obligations, such as to prevent attacks on it, to protect those who exercise it, and to investigate violations. These positive obligations must be adopted, even in the sphere of relations between individuals, if the case merits it.<sup>95</sup>

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#### 5.4. Duty to investigate

In a case involving physical aggression by third parties, the ECtHR has held that:

*In cases of interference with freedom of association by acts of individuals, the competent authorities have an additional obligation to take effective investigative measures.*<sup>96</sup>

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The IACtHR has discussed the duty to investigate in several cases involving the extrajudicial killings of activists. In [Cantoral Huamani and Garcia Santa Cruz v. Peru](#), the IACtHR found that Peru had violated several articles of the American Convention where it had failed to undertake effective measures and investigations regarding events leading to the kidnapping and murder of two labor activists. In discussing the violation of the right to freedom of association, the IACtHR explained that:

*Freedom of association can only be exercised in a situation in which the fundamental human rights are fully respected and guaranteed, in particular the right to life and safety. The Court underscores the State’s obligation to investigate crimes against union leaders effectively and with due diligence, bearing in mind that the failure to investigate such facts has an intimidating effect, which prevents the free exercise of trade union rights.*<sup>97</sup>

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<sup>94</sup> [IACHR, Second Report on the Situation of Human Rights Defenders, OEA/Ser.L/V/II. Doc. 66, 31 December 2011, paras. 160-161.](#)

<sup>95</sup> [Cantoral Huamani and Garcia Santa Cruz v. Peru, IACtHR, Judgment of 10 July 2007, para. 144.](#)

<sup>96</sup> [Ouranio Toxo and others v. Greece, ECtHR, Judgment of 20 October 2005, para. 43.](#)

<sup>97</sup> [Cantoral Huamani and Garcia Santa Cruz v. Peru, IACtHR, Judgment of 10 July 2007, paras. 146-148.](#)

## 6. What conditions need to be fulfilled for legitimate restrictions?

As a general matter, any restrictions imposed on freedom of association by the State must be lawful, necessary and proportionate to a legitimate aim. The various international and regional human rights instruments guaranteeing the right to freedom of association share substantially similar language and jurisprudence. There is thus a growing common approach towards these standards globally.

The UN Human Rights Committee explained the scope of Article 22(2) [on restrictions] in [Belyatsky v. Belarus](#). It clarified that restrictions on the right to freedom of association must meet the following three requirements: (1) prescription by law; (2) the law may be imposed solely to protect national security or public safety, public order, public health or morals, or the rights and freedoms of others; and (3) the restrictions must be “necessary in a democratic society.”<sup>98</sup> The Human Rights Committee elaborated that the protection afforded by Article 22 extends to all activities of an association.<sup>99</sup> The legal framework and jurisprudence of the ACHPR, IACtHR and ECtHR also hold that allowable restrictions on the right to freedom of association must meet the same, enumerated three-prong test.<sup>100</sup> There are only slight variations in wording in the conventions and all relevant bodies have adopted the strict proportionality test. [[Link to proportionality](#)]

The African Charter states that freedom of association:

*shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.*<sup>101</sup>

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Similarly, the American Convention states that the exercise of the right to freedom of association:

*shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.*<sup>102</sup>

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<sup>98</sup> [Aleksander Belyatsky et al. v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, 24 July 2007, para. 7.3.

<sup>99</sup> [Korneenko, et. al v. Belarus](#), Human Rights Committee, CCPR/C/88/D/1274/2004, Views of 31 October 2006.

<sup>100</sup> [ECHR, art. 11](#); [ACHPR, art. 16](#); see also [Koretskyy v. Ukraine](#), ECtHR, 3 April 2008, para. 43; [Gorzelik v. Poland](#), ECtHR, 17 February 2004, para. 53; [Sidiropoulos et al. v. Greece](#), ECtHR, Judgment of 10 July 1998, para. 32; [Escher et al. v. Brazil \(Preliminary Objects, Merits, Reparations, and Costs\)](#), IACtHR, Judgment of 6 July 2009, para 173. [Civil Liberties Organisation \(in respect of Bar Association\) v. Nigeria](#), Comm. No 101/93, ACtHPR, Judgment of 22 March 1995; [AComHPR, Explanatory Note to the African Commission Human and Peoples’ Rights Guidelines on Freedom of Association as Pertaining to Civil Society & Guidelines on Peaceful Assembly 4 \(2016\)](#); [AComHPR, Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 24. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa](#), 22 September 2016.

<sup>101</sup> [ACHPR, art. 11](#).

The European Convention states that no restrictions shall be placed on the exercise of the right to freedom of association except such as are:

*prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*<sup>103</sup>

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In any case where the State imposes a restriction, it bears the burden of proof to demonstrate it has met this three-pronged test.<sup>104</sup>

### 6.1. Prescribed by law

The UN Human Rights Committee has explained that, to meet the requirement that a restriction be “prescribed by law,” a restriction must be “formulated with sufficient precision to enable an individual to regulate his or her own conduct accordingly, and it must be made accessible to the public.”<sup>105</sup>

Furthermore, to fulfill this prong, “the law itself has to establish the conditions under which the rights may be limited.”<sup>106</sup> In order to meet this principle of legality, the law should not use vague, imprecise or broad definitions of legitimate motives for restricting the right.<sup>107</sup> Finally, a law cannot allow for unfettered discretion upon those charged with its execution.<sup>108</sup>

The African, Inter-American and European Courts have all corroborated this approach in their rulings.<sup>109</sup>

Additional clarifications have at times been made:

#### *(1) On the instrument – the law*

The IACtHR has stated that, in the context of legitimate restrictions on rights, the term “law” refers to:

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<sup>102</sup> [ACHR, art. 16\(2\).](#)

<sup>103</sup> [ECHR, art. 11.](#)

<sup>104</sup> [UN Human Rights Committee, UN Doc. CCPR/C/115/D/2011/2010, Views adopted 29 October 2015, para. 7.3.](#)

<sup>105</sup> [UN Human Rights Committee, General Comment 34: Article 19 \(Freedom of opinion and expression\), UN Doc. CCPR/C/GC/34 \(2011\), para. 25.](#)

<sup>106</sup> [UN Human Rights Committee, General Comment 27: Article 12 \(Freedom of movement\), UN Doc. CCPR/C/21/Rev.1/Add.9 \(1999\), para. 12.](#)

<sup>107</sup> [IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 65.](#)

<sup>108</sup> [UN Human Rights Committee, General Comment 34: Article 19 \(Freedom of opinion and expression\), UN Doc. CCPR/C/GC/34 \(2011\), para. 25.](#)

<sup>109</sup> See [Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania](#), ACtHR, Judgment of 14 June 2013; [Kimel v. Argentina \(Merits, Reparations, and Costs\)](#), IACtHR, Judgment of 2 May 2008, para. 63; [Uson Ramirez v. Venezuela \(Preliminary Objection, Merits, Reparations, and Costs\)](#), IACtHR, Judgment of 20 November 2009, para. 56; [Koretskyy v. Ukraine, ECtHR, Judgment of 3 April 2008, para. 47.](#)

*a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose.*<sup>110</sup>

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Thus, restrictions on freedom of association cannot be imposed through a government order or administrative decree,<sup>111</sup> unless the power to issue that order or decree is itself based on a law, which meets the requirements stated above. The IACtHR stresses that any such delegation must be authorized by the Constitution; that the executive body should respect the limits of its delegated powers; and that it should be subject to effective controls.<sup>112</sup>

The ACtHPR explained that such laws must be laws of general application.<sup>113</sup>

The ECtHR takes a somewhat different approach. It takes the term “law” in its “substantive” sense and not necessarily in its formal one. In this way, the Court has included both “written law,” encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by parliament, and even unwritten law. According to the ECtHR, law must be understood to include both statutory and judge-made law.<sup>114</sup>

However, principle 9 of the OSCE/ODIHR and Venice Commission *Joint Guidelines on Freedom of Association* state that the law concerned shall be adopted through a democratic process that ensures public participation and review, and shall be made widely accessible.<sup>115</sup>

The OSCE/ODIHR and Venice Commission *Guidelines on Political Party Regulation* specifies even further that any restrictions on free association must have their basis in law, in the state constitution or parliamentary act, rather than subordinate regulations, and must in turn conform to relevant international instruments.<sup>116</sup>

## ***(2) On foreseeability and accessibility***

Various instruments confirm the principle that because people need to regulate their behavior on the basis of the law, the impact of the law needs to be “foreseeable.” This is often also connected to the accessibility of the law.

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<sup>110</sup> [IACtHR, \*The Word "Laws" in Article 30 of the American Convention on Human Rights\*, Advisory Opinion OC-6/86, May 9, 1986, para. 38.](#)

<sup>111</sup> [IACHR, \*Second Report on the Situation of Human Rights Defenders in the Americas\*, OEA/Ser.L/V/II, Doc. 66, 31 December 2011, para. 165.](#)

<sup>112</sup> [IACtHR, \*The Word "Laws" in Article 30 of the American Convention on Human Rights\*, Advisory Opinion OC-6/86, May 9, 1986, para. 36.](#)

<sup>113</sup> [Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania](#), ACtHPR, Judgment of 14 June 2013, at paras. 107.1, 112-113.

<sup>114</sup> [Gülcü v. Turkey](#), ECtHR, Judgment of January 19 2016, para. 104. With references to several other ECtHR cases.

<sup>115</sup> [OSCE/ODIHR and Venice Commission, \*Joint Guidelines on Freedom of Association\*, 2015, para. 34 \(principle 9\).](#)

<sup>116</sup> [OSCE/ODIHR and Venice Commission, \*Guidelines on Political Party Regulation\*, 19 May 2011, para. 49.](#)

The African Commission in its *Study Report on Freedom of Association & Assembly* has clarified that “prescribed by law” means the law “must be accessible, and formulated in clear language of sufficient precision to enable persons to regulate their conduct accordingly.”<sup>117</sup>

The ECtHR has often discussed the requirement that prescribed by law does not only mean that a restriction needs to have some basis in domestic law but also that it must meet basic standards of accessibility, specificity and foreseeability:

*The Court reiterates that the expressions “prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. ...*<sup>118</sup>

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Laws in which the restriction is contained must be enacted in view of the general interest and in accordance with the purpose it was enacted. Furthermore, States shall not promote laws and policies with a “vague and imprecise and broad definition.”<sup>119</sup>

### ***(3) On vagueness and discretion***

The ECtHR has repeatedly applied the principle embodied in the Human Rights Committee’s General Comment 34,<sup>120</sup> stating that prescribed by law means that the law must be precise enough and cannot provide unfettered decision-making powers to the executive:

*For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. ...*<sup>121</sup>

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<sup>117</sup> [AComHPR, Report of the Study Group on Freedom of Association & Assembly in Africa, 2014, para. 20.](#)

<sup>118</sup> [Maestri v. Italy, ECtHR, Judgment of 17 February 2004, para. 41. With references to numerous other cases.](#)

<sup>119</sup> [IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 165.](#)

<sup>120</sup> [UN Human Rights Committee, General Comment 34: Article 19 \(Freedom of opinion and expression\), UN Doc. CCPR/C/GC/34 \(2011\), para. 25.](#)

<sup>121</sup> [Maestri v. Italy, ECtHR, Judgment of 17 February 2004, para. 41. With references to numerous other cases.](#)



## 6.2. Legitimate aim

States may only impose restrictions on the right to freedom of association in pursuit of a limited number of legitimate aims. These are national security, public safety or public order, public health or morals, and to protect the rights and freedoms of others.<sup>122</sup> When a State party invokes a legitimate objective as a reason to restrict the right to association, the State party must prove the precise nature of the threat.<sup>123</sup> This includes a precise definition of the threat.

### Core notions

General Comment 34 of the UN Human Rights Committee has provided clarification on the core notions to describe the legitimate aims. Public order refers to the sum of rules ensuring the peaceful and effective functioning of society, while national security refers to the political independence and/or territorial integrity of the State.<sup>124</sup> In a joint report, the Special Rapporteurs on extra-judicial, summary and arbitrary executions and on the rights to freedom of peaceful assembly and of association clarified specifically that “national, political or government interest is not synonymous with national security or public order.”<sup>125</sup>

With regard to public morality, the Committee observes that content may differ widely from society to society. However, it clarified that the concept of morals cannot be derived exclusively from a single tradition.<sup>126</sup> Similarly, the ECtHR has found on many occasions that democracy does not simply mean that the views of the majority (or the collective) must always prevail. Fair and proper treatment of minorities must be assured and abuse of dominant positions must in general be avoided.<sup>127</sup> Economic interests as such are equally not part of the interests as enumerated.<sup>128</sup>

In discussing counterterrorism, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has underlined that governments must

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<sup>122</sup> [ICCPR, art. 22\(2\); ACHR, art. 16\(2\); ECHR, art. 11\(2\)](#) (using the phrase prevention of disorder or crime instead of “public order”).

<sup>123</sup> See, e.g., [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para. 7.3.](#)

<sup>124</sup> [UN Human Rights Committee, General Comment 34: Article 19 \(Freedom of opinion and expression\), UN Doc. CCPR/C/GC/34 \(2011\), para. 33.](#)

<sup>125</sup> [UN Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 4 February 2016, UN Doc. A/HRC/31/66, para. 31.](#)

<sup>126</sup> [UN Human Rights Committee, General Comment 34: Article 19 \(Freedom of opinion and expression\), UN Doc. CCPR/C/GC/34 \(2011\), para. 33.](#)

<sup>127</sup> See [Young, James and Webster v United Kingdom, ECtHR, Judgment of 13 August 1981, para. 63.](#)

<sup>128</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/32/36, 10 August 2016, para. 33.](#)

not use legitimate interests as smokescreens for hiding the true purpose of the limitations, such as suppressing opposition, or to justify repressive practices against their populations.<sup>129</sup>

### Need for precision

There has been a growing global trend of States abusing the enumerated legitimate interests to restrict human rights by, for example, basing their restrictive actions upon broad interpretations of legitimate interests or terminology loosely related to it. On national security, the Special Rapporteur on the freedom of opinion and expression warned specifically against the

*use of an amorphous concept [...] to justify invasive limitations on the enjoyment of human rights [...] The concept is broadly defined and is thus vulnerable to manipulation by the State as a means to justifying actions that target vulnerable groups.*<sup>130</sup>

Arguments thus need to be specific; they cannot be made *in abstracto* or by indicating general, unspecified risks,<sup>131</sup> but must be done in an individualized fashion,<sup>132</sup> applied in the particular case<sup>133</sup> or with a specific justification.<sup>134</sup> For example, restrictions on the right to freedom of association based on national security concerns must refer to the specific risks posed by the association; it is not enough for the State to generally refer to the security situation in the specific area.<sup>135</sup> On several occasions, the

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<sup>129</sup> [UN General Assembly, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, UN Doc. A/61/267, 16 August 2006, para. 20](#); see also [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para 21](#); [IACHR, Second Report on the situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II doc. 66, 31 December 2011, para. 167](#).

<sup>130</sup> [UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/23/40, 17 April 2013, para. 60](#).

<sup>131</sup> [Alekshev v. Russia, Human Rights Committee, UN Doc. CCPR/C/109/D/1873/2009, Views of 25 October 2013, para. 9.6](#). (The State argued that the subject addressed by the demonstration would provoke negative reaction that could lead to violations of public order, the Committee found that “[...] an unspecified and general risk of a violent counterdemonstration or the mere possibility that the authorities would be unable to prevent or neutralize such violence is not sufficient to ban a demonstration.”) See also [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para. 7.3](#).

<sup>132</sup> [UN Human Rights Committee, General Comment 34: Article 19 \(Freedom of opinion and expression\), UN Doc. CCPR/C/GC/34 \(2011\), para. 33](#).

<sup>133</sup> [Schumilin v. Belarus, Human Rights Committee, UN Doc. CCPR/C/105/D/1784/2008, Views of 23 July 2012, para. 9.4](#). (The Committee found the restriction violated the ICCPR because the state had not explained “how, in practice, in this particular case, the author’s actions affected the respect of the rights or reputations of others, or posed a threat to the protection of national security or of public order (ordre public), or of public health or morals.”)

<sup>134</sup> [Kim v. Republic of Korea, Human Rights Committee, CCPR/C/64/D/574/1994, Views of 4 January 1999, para. 12.5](#).

<sup>135</sup> See [Freedom and Democracy Party \(ÖZDEP\) v. Turkey, ECtHR, Judgment of 8 December 1999, paras. 44-48](#); [Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France, ECtHR, 7 June 2007, para. 47](#).

Human Rights Committee found a violation on the mere basis that no pertinent information or no information at all was given by the State to justify any of the legitimate interests.<sup>136</sup>

#### National security and terrorism – no abuse

The use of counter-terrorism efforts to restrict freedom of association has increasingly arisen as part of discussions of national security and public safety.

While recognizing that combatting terrorism is a legitimate aim, international legal experts have emphasized that the goal has also been misused as a pretext for illegitimately limiting the right to freedom of association.<sup>137</sup> The Special Rapporteur on the rights to freedom of peaceful assembly and association has noted that while States have a responsibility to address terrorism,

*this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work. In order to ensure that associations are not abused by terrorist organizations, States should use alternative mechanisms to mitigate the risk, such as through banking laws and criminal laws that prohibit acts of terrorism. In this context, all United Nations agencies, notably those focusing on actions countering terrorism, have a key role to play and bear the moral responsibility to ensure that human rights in general, and freedom of association in particular, are not impaired by counter-terrorism.*<sup>138</sup>

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has underlined that governments must not use these legitimate interests as smokescreens for hiding the true purpose of the limitations, such as suppressing opposition, or to justify repressive practices against their populations.<sup>139</sup> In a report to the General Assembly, the Special Rapporteur stressed that “States should not need to resort to derogation measures in the area

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<sup>136</sup> [Kovalenko v. Belarus, Human Rights Committee, UN Doc. CCPR/C/108/D/1808/2008, Views of 17 July 2013, para. 6](#): “In the absence of any pertinent explanations from the State party, the restrictions on the exercise of the author’s right to freedom of expression cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect for the rights or reputations of others. The Committee therefore finds that the author’s rights under article 19, paragraph 2, of the Covenant have been violated.” See also [Nurbek Toktakunov v. Kyrgyzstan, Human Rights Committee, CCPR/C/101/D/1470/2006, Views of 28 March 2011, para. 7.7](#) and [V. Evrezov et al. v. Belarus, UN Doc. CCPR/C/112/D/1999/2010, Views of 10 October 2014, paras. 8.7-8.8.](#)

<sup>137</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 21.](#)

<sup>138</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para 70.](#)

<sup>139</sup> [UN General Assembly, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, UN Doc. A/61/267, 16 August 2006, para. 20](#); see also [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para 21.](#) In the same sense see also [IACHR, Second Report on the situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II doc. 66, 31 December 2011, para. 167.](#)

of freedom of assembly and association. Instead, limitation measures, as provided for in ICCPR, are sufficient in an effective fight against terrorism.”<sup>140</sup>

The ICCPR Human Rights Committee recognized this in its review of a Russian law, “Combating Extremist Activities,” explaining that “the definition of ‘extremist activity’... is too vague to protect individuals and associations against arbitrariness in its application.”<sup>141</sup> For the legitimate aim of national security, the Committee has additionally clarified that the State must demonstrate the precise nature of the threat<sup>142</sup> as well as the fact that the restrictions “are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order.”<sup>143</sup>

The IACHR has stated that:

*In the case of organizations dedicated to the defense of human rights, in invoking national security it is not legitimate to use security or antiterrorism legislation to suppress activities aimed at the promotion and protection of human rights. The concept of civil society must be understood by the States in democratic terms, in such a way that organizations dedicated to defending human rights may not be subject to unreasonable or discriminatory restrictions.*<sup>144</sup>

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#### Legitimate aim and surveillance measures

In [Escher et al., v. Brazil](#), the IACtHR found clearly that associations are to be protected from surveillance measures, underscoring that such measures constitute a restriction to the right to freedom of association. Such measures may thus only be applied when strictly necessary to safeguard democracy and when the necessary safeguards are put in place to prevent abuse of such measures. In the case, the IACtHR found surveillance had been abused to monitor the activities of the association:

*[t]he State’s security forces may need to conduct legally-approved intelligence operations to combat crime and protect the constitutional order ... these actions*

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<sup>140</sup> [UN General Assembly, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, UN Doc. A/61/267, 16 August 2006, para. 53.](#)

<sup>141</sup> [UN Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant \(Concluding Observations: Russian Federation\), UN Doc. CCPR/CO/79/RUS, 1 December 2003, para. 20.](#)

<sup>142</sup> [UN Human Rights Committee, General Comment 34: Article 19 \(Freedom of opinion and expression\), UN Doc. CCPR/C/GC/34 \(2011\), para. 33.](#)

<sup>143</sup> [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, p. 7.2;](#) since then the Committee has confirmed this position in [Aleksander Belyatsky et al. v. Belarus, Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, 24 July 2007, para. 7.3.](#)

<sup>144</sup> [IACHR, Second Report on the situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II doc. 66, 31 December 2011, para. 167.](#)

*are legitimate when they constitute a measure that is strictly necessary to safeguard the democratic institutions, and when adequate guarantees exist to prevent abuse.*<sup>145</sup>

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Similarly, the UN Special Rapporteur on the promotion and protection of fundamental rights while countering terrorism emphasized the specific risks to freedom of association posed by the use of surveillance:

*Expanded surveillance powers have sometimes led to a ‘function creep’, when police or intelligence agencies have labelled other groups as terrorists in order to allow the use of surveillance powers which were given only for the fight against terrorism.*<sup>146</sup>

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### 6.3. Necessary in a democratic society

Freedom of association “is at the heart of an active civil society and a functioning democracy.”<sup>147</sup> Associations are also a key mechanism through which citizens participate in the democratic process.<sup>148</sup> In addition to a right in its own regard, freedom of association is an enabling right, whose existence is “necessary for and part and parcel of democracy,” as well as for the fulfillment of other rights.<sup>149</sup> Any limitation must therefore be necessary in a democracy; this has been interpreted as responding to a pressing social need and being proportional.

#### Pressing social need

The UN Human Rights Committee has clarified that the State must demonstrate that the restrictions placed on the right are in fact necessary to avert a real and not only a hypothetical danger.<sup>150</sup> “The mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient.”<sup>151</sup> In other words, the State measure must pursue a pressing need, and it must be the least severe (in range, duration and applicability) option available to the public authority in meeting that need.<sup>152</sup>

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<sup>145</sup> [Escher et al., v. Brazil, IACtHR, Judgment of 6 July 2009.](#)

<sup>146</sup> [UN Human Rights Council, Report of the UN Special Rapporteur on the promotion and protection of fundamental rights while countering terrorism, Martin Scheinin, HRC/13/37, 28 December 2009, para. 36.](#)

<sup>147</sup> [United Nations General Assembly, Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, UN Doc. A/59/401, paras. 46-7.](#)

<sup>148</sup> [Tebieti Mühafize Cemiyeti and Israfilov v Azerbaijan, ECtHR, Judgment of 8 October 2009, para. 53.](#)

<sup>149</sup> [AComHPR, Report of the Study Group on Freedom of Association and Assembly in Africa, 2014, p. 15.](#)

<sup>150</sup> [Aleksander Belyatsky et al v. Belarus, Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, Views of 24 July 2007, para 7.3.](#)

<sup>151</sup> [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para 7.2.](#)

<sup>152</sup> [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para 7.2.](#)

The African Court, like the ECtHR and IACtHR, takes the same approach:

*[j]urisprudence regarding the restrictions on the exercise of rights has developed the principle that, the restrictions must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued.<sup>153</sup>*

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The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, cites the OSCE guidelines when clarifying that the definition of necessary as a “pressing need” cannot be interpreted loosely and equated to notion such as “useful” or “convenient.” In addition, a democratic society includes tolerance, pluralism and broadmindedness:

*As outlined by the Organization for Security and Co-operation in Europe (OSCE), “the word ‘necessity’ does not mean ‘absolutely necessary’ or ‘indispensable’, but neither does it have the flexibility of terms such as ‘useful’ or ‘convenient’: instead, the term means that there must be a ‘pressing social need’ for the interference”. When such a pressing social need arises, States have then to ensure that any restrictive measures fall within the limit of what is acceptable in a “democratic society”. In that regard, longstanding jurisprudence asserts that democratic societies exist only where “pluralism, tolerance and broadmindedness” are in place. Hence, States cannot undermine the very existence of these attributes when restricting these rights.<sup>154</sup>*

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“[N]ecessary in a democratic society” indeed also implies that the restriction must not harm democratic values of pluralism, broad-mindedness and tolerance.<sup>155</sup> Plurality as a core characteristic of democratic societies is also affirmed by the Human Rights Committee:

*the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favorably received by the government or the majority of the population, is one of the foundations of a democratic society.<sup>156</sup>*

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<sup>153</sup> [Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania](#), ACHPR, Judgment of 14 June 2013, at para. 106.1; AComHPR, [Report of the Study Group on Freedom of Association & Assembly in Africa](#), 2014, p. 14.

<sup>154</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para. 17.

<sup>155</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Country report Rwanda](#), A/HRC/26/29/Add.2, 14 April 2014, para.86(a); see also, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary, Article 22*, para. 21, p. 394 (1993).

<sup>156</sup> [Mr. Jeong-Eun Lee v. Republic of Korea](#), Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, at para.7.2; [Aleksander Belyatsky et al. v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, Views of 24 July 2007, at para. 7.3; [Korneenko, et. al v. Belarus](#), Human Rights Committee, CCPR/C/88/D/1274/2004, Views of 31 October 2006, at para.7.3.

The ACtHPR, the ECtHR and IACtHR have similarly underscored the importance of opposition voices for the proper functioning of democracy.<sup>157</sup>

The Human Rights Committee applied these principles in [Lee v. Republic of Korea](#) and found a violation of Article 22 where the State Party had failed to show the specific threat to its national security and democratic order that would justify banning an organization and criminalizing its members [click for full case explanation]. At issue was the conviction of a student, Mr. Joeng Eun Lee, under South Korea's National Security Law for his membership in Hanchongnyeong. Hanchongnyeong was a student union, which the Supreme Court of South Korea had banned under the same national security law on the basis that its objectives appeared to align with those of the government of North Korea and as such were a threat to its national security and democratic order. The Committee found that the State had failed to show that the conviction was necessary to protect national security because it had not shown that it was necessary to avert a real danger to either:

*the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.*<sup>158</sup>

In its submissions, the Republic of Korea justified the conviction by reference to the necessity to protect its national security and order. The Human Rights Committee reasoned that there had been a violation of the right to freedom of association:

*7.2 ... "The issue before the Committee is whether the author's conviction for his membership in Hanchongnyeong unreasonably restricted his freedom of association, thereby violating Article 22 of the Covenant. The Committee observes that, in accordance with Article 22, paragraph 2, any restriction on the right to freedom of association to be valid must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be 'necessary in a democratic*

<sup>157</sup> [Manuel Cepeda Vargas v. Colombia \(Preliminary objections, merits, reparations and Costs\)](#) IACtHR, Judgment of 26 May 2010, para. 173; [Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan](#), ECtHR, Judgment of 8 October 2009, para. 53 ("The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively."); [Handyside v. the United Kingdom](#), ECtHR, Judgment of 7 December 1976, para. 49; [Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania](#), ACtHPR, Judgment of 14 June 2013.

<sup>158</sup> [Mr. Jeong-Eun Lee v. Republic of Korea](#), Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para. 7.2.



*society' for achieving one of these purposes. The reference to a 'democratic society' indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favorably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.*

*7.3 The author's conviction was based on article 7, paragraphs 1 and 3, of the National Security Law. The decisive question which must therefore be considered is whether this measure was necessary for achieving one of the purposes set out in Article 22, paragraph 2. The Committee notes that the State party has invoked the need to protect national security and its democratic order against the threat posed by the DPRK. However, it has not specified the precise nature of the threat allegedly posed by the author's becoming a member of Hanchongnyeon. The Committee notes that the decision of the Supreme Court of the Republic of Korea, declaring this association an 'enemy-benefiting group' in 1997, was based on Article 7, paragraph 1, of the National Security Law which prohibits support for associations which 'may' endanger the existence and security of the State or its democratic order. It also notes that the State party and its courts have not shown that punishing the author for his membership in Hanchongnyeon, in particular after its endorsement of the 'June 15 North-South Joint Declaration' (2000), was necessary to avert a real danger to the national security and democratic order of the Republic of Korea. The Committee therefore considers that the State party has not shown that the author's conviction was necessary to protect national security or any other purpose set out in Article 22, paragraph 2. It concludes that the restriction on the author's right to freedom of association was incompatible with the requirements of Article 22, paragraph 2, and thus violated Article 22, paragraph 1, of the Covenant."<sup>159</sup>*

## Proportionality

To meet the requirement that restrictions can only be imposed if they are "necessary in a democratic society," restrictions must be also proportional, i.e. "they must be appropriate to achieve their

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<sup>159</sup> [Mr. Jeong-Eun Lee v. Republic of Korea, Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005.](#)



protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”<sup>160</sup>

Factors on which proportionality may be considered include:

*The nature of the right in question; the purpose of the proposed restriction; the nature and extent of the proposed restriction; the relationship (relevancy) between the nature of the restriction and its purpose and whether there are any less restrictive measures available for the fulfillment of the stated purpose in light of the facts.*<sup>161</sup>

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Applying the same standard, the ECtHR has consistently held that restrictions that are vague and potentially applicable to an exceedingly large number of parties, and that impose onerous and burdensome requirements on associations, are disproportionate to the State’s purported objectives. In addition, measures that inflict overly severe punitive sanctions on associations that fail to comply with otherwise reasonable legal formalities are likely to be disproportionate.<sup>162</sup> Similarly, drastic measures, such as the dissolution of a NGO or barring it from carrying out its primary activity, can only be proportionate in extreme cases, such as when an association incites violence or advocates for the destruction of democracy.<sup>163</sup>

The ACtHPR applies the same standard, clarifying that the proportionality analysis is based on an assessment of the “demands of general interest” that led to the interference and the nature of the interference itself.<sup>164</sup>

The IACtHR and IACHR apply the same standard of proportionality and established the practice to verify – as part of the proportionality test – whether there indeed is a relationship between the claimed protected aim and the actual measure. In the case of *Escher et al. v Brazil*, the Court found a violation of the right to freedom of association as the surveillance measures did not in fact serve the proclaimed purpose of a criminal investigation. It found that:

*Even though the State affirms that the interception of the communications was not contrary to freedom of association, because it sought a legitimate purpose - the investigation of an offense - according to the documents in the case file, there is no evidence that the purposes declared by the police authority in its telephone interception request, namely, the investigation into the death of a member of*

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<sup>160</sup> [UN Human Rights Committee, General Comment No. 27: Article 12 \(Freedom of Movement\), UN Doc. CCPR/C/21/Rev.1/Add.9, para. 14.](#)

<sup>161</sup> [OSCE/ODIHR and Venice Commission, Guidelines on Political Party Regulation, 19 May 2011, para. 52.](#)

<sup>162</sup> See [Tebieti Mühafize Cemiyeti & Sabir Israfilov v. Azerbaijan](#), ECtHR, Judgment of 8 October 2009, para. 63.

<sup>163</sup> See [Refah Partisi \(the Welfare Party\) v. Turkey](#), ECtHR, Grand Chamber Judgment of 13 February 2003, paras. 98-100.

<sup>164</sup> [Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania](#), ACtHPR, Judgment of 14 June 2013, para. 106.4.

*COANA and the alleged diversion of public funds, was really what it was seeking. [...] The Court also notes that, in the summaries of the recorded tapes, none of the segments highlighted by the police authorities bears any relationship to the investigative purpose indicated in the interception request.*<sup>165</sup>

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#### 6.4. Particular scrutiny

The severer the impact of the restriction for a democratic society, the greater is the need to clarify the particular circumstances requiring such limitations to the right. Proportionality thus requires particular scrutiny in cases where an association may be prohibited or dissolved [[Link to suspension or dissolution](#)]. Similarly, jurisprudence has indicated that restrictions on associations that are essential for a democratic society, such as human rights defenders or political parties, deserve particularly careful scrutiny.

Measures of prohibition or dissolution should be of last resort, only used in cases of grave transgressions, and should never be used to address minor infractions.<sup>166</sup> The AComHPR confirmed this in the case [Interights and Others v Mauritania](#), where the Union des Forces Démocratiques-Ere nouvelle (UFD/EN, Union of Democratic Forces-New Era), a Mauritanian political party, been dissolved by the Prime Minister of the Republic of Mauritania. According to the State, the measure was imposed “following a series of actions and undertakings committed by the leaders of this political organisation, and which were damaging to the good image and interests of the country; incited Mauritians to violence and intolerance; and led to demonstrations which compromised public order, peace and security.”<sup>167</sup> However, the Commission found that the dissolution was not proportional to the nature of the offences committed because the State had a range of other options to consider, and therefore found a violation of the right to freedom of association (Article 10(1) of the African Charter):

*81. In this particular case it is obvious that the dissolution of the UFD/EN had the main objective of preventing the party leaders from continuing to be responsible for actions for declarations or for the adoption of positions which, according to the Mauritanian government, caused public disorder and seriously threatened the credit, social cohesion and public order in the country.*

*82. Nonetheless, and without wanting to pre-empt the judgment of the Mauritanian authorities, it appears to the African Commission that the said authorities had a whole gamut of sanctions which they could have used without having to resort to the dissolution of this party. It would appear in fact that if the respondent state wished to end the verbal 'drifting' of the UFD/EN party and to avoid the repetition by this same party of its behaviour prohibited by the law, the respondent state could have used a large number of measures enabling it, since*

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<sup>165</sup> [Escher et al. v. Brazil](#), IACtHR, Judgment of 6 July 2009, paras. 174, 176.

<sup>166</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015, para. 114.](#)

<sup>167</sup> [Interights and Others v Mauritania](#), AComHPR, June 2004, para. 3.

*the first escapade of this political party, to contain this 'grave threat to public order'.<sup>168</sup>*

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The AComHPR recognized that harassment and persecution of employees of a human rights organization amounts to a violation of the right to freedom of association.<sup>169</sup>

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<sup>168</sup> [Interights and Others v Mauritania, AComHPR, June 2004, paras. 81-82.](#)

<sup>169</sup> [Huri v. Nigeria, AComHPR, Communication of 23 October – 6 November 2000, para. 47-48.](#)

## 7. Legal personality and registration

It is well established in international law that the right to freedom of association equally protects registered and non-registered associations. [[Does an association need to be registered to be protected](#)]. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has on numerous occasions emphasized that the right to freedom of association applies to informal associations and does not require that a group be registered.<sup>170</sup>

Depending on the national legal context, registration and/or legal personality may be required to fulfill certain functions or access to certain benefits, which associations may wish to have access to.

Registration and obtaining legal personality may be – but are not necessarily – the same process in different legal systems.<sup>171</sup> However, the standards and principles applied in international law for both processes are very similar; therefore the arguments below are valid for both.

### 7.1. Access to legal personality

If associations wish to obtain legal personality, they should be allowed to do so. Acquisition of legal personality may be important for associations in order to obtain additional rights, such as public benefits, to solicit resources and to employ people. Legal personality also enables associations to fulfill certain needs, such as holding bank accounts, signing contracts or owning or renting property.

The Special Rapporteur on the rights to freedom of peaceful assembly and of association has confirmed that this entitlement to legal personality is a core element of the right to freedom of association, and has called on States to ensure and facilitate the ability of associations to acquire it.<sup>172</sup>

The ECtHR has consistently held the position that associations should be able to obtain legal personality if they wish:

*(t)he most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning.*<sup>173</sup>

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<sup>170</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association](#), UN Doc. A/HRC/20/27, 21 May 2012, at para. 56; [UN Human Rights Council, Fourth Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/29/25, 28 April 2015, at para. 59.

<sup>171</sup> For example: in certain countries, formally acknowledged and registered religious communities may have access to certain benefits (e.g. their leaders may receive a compensation from the State). At the same time, these religious communities do not necessarily have a legal personality as such.

<sup>172</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, at para. 57; see also [United Nations Special Rapporteur on the rights to freedom of peaceful Assembly and of association, Maina Kiai, Amicus curiae before the Constitutional Court of Bolivia](#), 30 April 2015, para. 22.

The Inter-American Commission subscribes to the same logic<sup>174</sup> as do the Guidelines of the African Commission<sup>175</sup>.

Given the critical role legal personality may play in enabling associations to pursue their objectives and activities effectively, States refusing to register associations – or which impose arbitrary or onerous requirements – may be found to interfere with the right to freedom of association. As the ECtHR has held:

*This implies that, as the recognition of the association as a legal entity is an inherent part of the freedom of association, the refusal of registration is also fully covered by the scope of Article 22 of the ICCPR and Article 11 of the ECHR.*<sup>176</sup>

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## 7.2. Notification versus authorization procedures

Generally, States rely upon two types of regimes with regard to the registration/legal personality of an association: (i) notification and (ii) prior authorization.

Notification regimes offer a higher level of protection of the freedom of association and are considered best practice by international legal experts, including the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Under a notification regime, the legal personality of an association does not depend upon the approval of the State; associations automatically acquire legal personality by notifying authorities of their creation.<sup>177</sup>

States that impose a prior authorization regime only recognize or grant legal personality to associations that have filed a request and obtained the approval of the State.<sup>178</sup> Where States require authorization, they must take great care to avoid arbitrary requirements or lengthy delays in approvals. The Special Rapporteur has thus called on States to follow best practices to allow for the procedure to be simple, non-onerous and expeditious.<sup>179</sup>

The IACHR has noted that States have the obligation to ensure that related laws and regulations are clear and unambiguous and that bodies responsible for registration do not exercise broad discretion in

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<sup>173</sup> [Gorzelik and Others v Poland](#), ECtHR, Judgment of 17 February 2004, at para 55.

<sup>174</sup> [IACHR, Second Report on the Situation of Human Rights Defenders in the Americas](#), OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 172.

<sup>175</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 12.

<sup>176</sup> [Venice Commission, Opinion on the Compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of Non-Registered Associations of The Republic of Belarus](#), 18 October 2011.

<sup>177</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para 58(e).

<sup>178</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para 61.

<sup>179</sup> [UN Human Rights Council, First Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para. 57.

interpreting provisions in ways that might limit freedom of expression.<sup>180</sup> The ECtHR accepts that some formal process may be applied, but follows the same logic. In practice, the ECtHR always assesses whether procedural requirements, as well as delays and overly wide discretionary powers, violate the right to freedom of associations.<sup>181</sup>

Generally, international standards demonstrate a clear preference for notification rather than authorization. The AComHPR Guidelines assert that:

*Registration shall be governed by a notification rather than an authorization regime, meaning that procedures shall be simple, clear, transparent, non-discretionary and non-burdensome.*<sup>182</sup>

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The Special Rapporteur has emphasized that prior to receiving a decision on legal personality, associations should be presumed to be operating legally.<sup>183</sup> The joint guidelines of the OSCE/ODIHR and Venice Commission on freedom of association equally reflect this presumption of lawfulness:

*There should be a presumption in favour of the formation of associations, as well as in favour of the lawfulness of their establishment, objectives, charter, aims, goals and activities. This means that, until proven otherwise, the state should presume that a given association has been established in a lawful and adequate manner, and that its activities are lawful. Any action against an association and/or its members may only be taken where the articles of its founding instrument (including charters, statutes and by-laws) are unambiguously unlawful, or where specific illegal activities have been undertaken.*

*This presumption should exist even where legislation stipulates that certain requirements, such as registration formalities, be fulfilled in order to establish an association. It is important to recall, however, that an unregistered association can also benefit from the protection conferred by Article 22 of the ICCPR and Article 11 of the ECHR, as well as by other international and regional instruments that reaffirm this freedom.*<sup>184</sup>

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### 7.3. Refusal to register and/or grant legal personality

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<sup>180</sup> [IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 172.](#)

<sup>181</sup> See [Koretskyy v. Ukraine, ECtHR, Judgment of 3 April 2008, paras. 48; 53-55.](#)

<sup>182</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 13. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para. 13.](#)

<sup>183</sup> [UN Human Rights Council, First Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 60.](#)

<sup>184</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015, paras. 68-9.](#)

Associations have the right to register and create a legal entity in pursuit of their objectives. Where the State denies an association's registration or legal personality, it must meet the three-prong test for [restricting the right to freedom of association](#).

A ruling of the European Court provided that the authorities' failure to reply to a registration request within the statutory time limit amounts to a de facto refusal to register. Generally, it indicated that a significant delay in the registration procedure attributable to the authorities amounts to an interference with the right to freedom of association.<sup>185</sup>

Courts have found the impact on the association – particularly whether or not the association would still be able to engage in its activities – to be a key determinant in deciding whether States had pursued a legitimate aim. Other cases have distinguished between the mere suspicion of illegality versus concrete actions that are contrary to the law. In a number of cases, courts have failed to find a violation of the right to freedom of association where the association could have easily complied with registration requirements and/or could continue their activities despite the State's refusal to register.

The ECtHR has held that States may not refuse to register or acknowledge an association on the basis that it was founded by "foreigners" or is a branch of an international association.<sup>186</sup>

#### Impact on the association

In a number of leading cases, the impact of the refusal on the association has been a key feature in deciding whether or not there was a violation.

In [Romanovsky v. Belarus](#), the UN Human Rights Committee found that the impact of the refusal to register was severe as it meant, under Belarus law, that all operations of the association were unlawful. The case concerned a group of retirees who, following an assembly, decided to form and register an organization. The Ministry of Justice denied their application asserting that the assembly was not held legitimately and that all decisions taken during it were therefore void. The Human Rights Committee found the State Party had not provided any arguments as to why the refusal to register was necessary or proportionate, noting the severe impact:

*The Committee notes the author's submission that registration of the association was refused on the basis of a number of reasons given by the State party, which must be assessed in the light of the consequences arising for the author and his association. The Committee also notes that, even though the reasons stated are prescribed by the relevant law, as it follows from the material before it, the State party has not attempted to advance any arguments as to why they are necessary*

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<sup>185</sup> [Ismayilov v. Azerbaijan, ECtHR, Judgment of 17 January 2008, para. 48](#): "significant delays in the registration procedure, if attributable to the Ministry of Justice, amounts to an interference with the exercise of the right of the association's founders to freedom of association."

<sup>186</sup> [Moscow Branch of Salvation Army v Russia, ECtHR, Judgment of 5 October 2006, para. 86](#); see also, [Partidul Comunistilor Nepeceeristi and Ungureanu v. Romania, ECtHR, Judgment of 2 February 2005, para. 49](#).

*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. The Committee further notes that, in the decisions of the domestic authorities that were made available, no explanation was given by the authorities, particularly the Supreme Court, as to why it was necessary to restrict the author's right to freedom of association, further to article 22(2) of the Covenant.*

*The Committee notes that the refusal to register the association led directly to the operation of the association in the territory of the State party being unlawful and directly precluded the author from enjoying his right to freedom of association.<sup>187</sup>*

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In [Presidential Party of Mordovia v. Russia](#), the ECtHR similarly found a violation of Article 11 due to the impact on the applicant. In this case, a regional political party attempted to renew its registration in accordance with a new law. The application was refused on disputed grounds. Approximately three years later the Russian Supreme Court ruled that the party could be re-registered; however, the law had changed again, rendering the party unable to participate in regional elections. Because of this impact and the irreparable damage, the ECtHR found a violation of Article 11:

*since [the applicant] was unable to function for a substantial period of time and could not participate in regional elections. Furthermore, the damage appears irreparable given that, under current legislation, the party cannot be reconstituted in its original concept.<sup>188</sup>*

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In [Movement for Democratic Kingdom v Bulgaria](#), the EComHR held that the refusal to register the association was not a violation of the right to freedom of association given that the association could still engage in political activity. The impact of the restriction was therefore not disproportionate:

*The Commission recalls its case law according to which a refusal of the authorities to register an association does not necessarily involve an interference with its rights under Article 11 (Art. 11) of the Convention where the association is nevertheless free to continue its activities ... The Commission notes that an unregistered association, such as the applicant in the present case, is authorised by law to engage in "political activity", but cannot participate in elections.<sup>189</sup>*

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<sup>187</sup> [Romanovsky v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/115/D/2011/2010, Views of 29 October 2015, paras. 7.3-7.5.

<sup>188</sup> [Presidential Party of Mordovia v. Russia](#), ECtHR, Judgment of 5 October 2004, para. 31.

<sup>189</sup> [Movement for Democratic Kingdom v. Bulgaria](#), EComHR, Judgment of 29 November 1995.



## Suspicion of intentions insufficient

A mere suspicion that the real intents or activities of an association may be illegal is insufficient to justify not registering or granting legal personality to an association.

In the landmark case [Sidiropoulos v. Greece](#), the ECtHR found that Greek courts' refusal to register applicants' association on the basis of suspicions as to the true intentions of the association's founders was disproportionate. The purpose of the association was legitimate and clear, namely to preserve and develop traditions and folk culture of the Florina region. The ECtHR added that if activities would raise any legality questions, they should be dealt with at that point and not by preemptive denial of registration:<sup>190</sup>

*once founded, the association might, under cover of the aims mentioned in its memorandum of association, have engaged in activities incompatible with those aims. ... [However] [i]f the possibility had become a reality, the authorities would not have been powerless; under Article 105 of the Civil Code, the Court of First Instance could order that the association should be dissolved if it subsequently pursued an aim different from the one laid down in its memorandum of association or if its functioning proved.*<sup>191</sup>

More recently, in [Association of Victims of Romanian Judges and Others V. Romania](#) [click for full case explanation] the ECtHR similarly found that mere suspicions of illegality of aims or activities cannot be a ground for refusing registration. The Court found that the refusal to register the Association of Victims of Romanian Judges was based on the mere suspicions that the true intentions of the founders of the association aimed at undermining the authority of the judiciary in the country. The ECtHR concluded that the right to freedom of association was violated as the refusal was not based upon an actual illegality of the aims of the association.

The case involved individuals who aimed to form an association to promote the interests of those who felt themselves to be victims of the justice system in Romania; the association aimed to use legal means for publicizing alleged injustices, irregularities or illegalities, including by lawfully protesting.

The national courts of Romania ruled that the refusal to register was legitimate as the aim of the association was in conflict with the Romanian Constitution (a.o. the principles of a State governed by the rule of law).

The Court ruled that:

<sup>190</sup> [Sidiropoulos et al. v. Greece, ECtHR, Judgment of 10 July 1998, para. 46.](#)

<sup>191</sup> [Sidiropoulos et al. v. Greece, ECtHR, Judgment of 10 July 1998, para. 46.](#)

*“Only convincing and compelling reasons can justify restrictions on freedom of association. All such restrictions are subject to rigorous supervision ... Consequently, in determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision, embracing both the law and the decisions applying it, including those given by independent courts ...*

*The Court considers that the domestic courts’ statements were based on mere suspicions regarding the true intentions of the association’s founders and the activities it might have engaged in once it had begun to function ...*

*Furthermore, the Court notes that the domestic law provides for the possibility of dissolving an association should it be demonstrated that it has goals which are contrary to public order or that it acts contrary to the provisions of its Articles ...*

*Taking into account all the above, the Court considers that the reasons invoked by the authorities for refusing registration of the applicant association were not determined by any ‘pressing social need’, nor were they convincing and compelling. Moreover, such a radical measure as the refusal of registration, taken even before the association started operating, appears disproportionate to the aim pursued.<sup>192</sup>*

### Ability to comply with the requirement

Where applicants could have taken reasonable steps to amend their applications, the ECtHR – and before that the European Commission – has found that the registration process was not overly burdensome and therefore it did not find a violation of the right to freedom of association when the State failed to register the organization.

The case of the [Movement for Democratic Kingdom v Bulgaria](#) concerned a political party whose request for registration was denied as its initial application did not conform to the requirements for registration and the applicant did not comply with the instructions of the courts to rectify the irregularities. The Bulgarian courts held that amendments had to be adopted by a general assembly, which the applicants had not convened.

The EComHR held that the refusal to register the association was not in violation of Article 11 given that (i) the association could still engage in political activity and (ii) the association could have met the requirement to convene a general assembly:

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<sup>192</sup> [Association of Victims of Romanian Judges and Others V. Romania, ECtHR, Judgment of 14 January 2014, paras. 25, 30, 32, 34.](#)

*Furthermore, the Commission notes that the applicant party was free at any time to rectify the procedural omissions by convening a general assembly for the approval of the amended statute. Such a formal requirement was neither arbitrary, nor an onerous obstacle.*

*Moreover, the possibility for the applicant party to submit a fresh petition for registration, once it has complied with the pertinent requirements under the law, has remained open.*

*Therefore, the Commission does not find that the Bulgarian courts, when refusing the applicant party's petition for registration in the particular circumstances of the case, have interfered with its rights under Article 11 (Art. 11) of the Convention.<sup>193</sup>*

In [Gorzelik and Others v Poland](#) [click for full case explanation], the ECtHR concluded that in this particular case, Polish national legislation provided that the adequate moment to intervene indeed was at registration and that the State did not act upon mere suspicion. The case involved the Polish authorities' refusal to register an association with the name "Organisation of the Silesian national minority" with the primary aim to strengthen national consciousness of Silesians. According to Polish law, an association recognized as a national minority – as mentioned in the association's denomination and constituting documents – automatically may trigger privileges with regard to elections. Therefore the risk of using the registration to acquire special status under the electoral laws of the country would automatically rise with the registration. In this specific circumstance, the ECtHR found that there had been no violation of Article 11. The moment to act for the State was at the point of registration. In addition, the applicants could have amended the organization's statutes to remove concerns about electoral ambitions, and in doing so, could have still continued to conduct its cultural and other activities.

In the [Gorzelik and Others v Poland](#), the ECtHR did not find a violation of article 11. The Court accepted the State's argumentation that it had to act at the moment of registration and in doing so it did not act upon mere suspicion.

*94. The principal reason for the interference thereby caused with the applicants' enjoyment of their freedom of association was to pre-empt their anticipated attempt to claim special privileges under the 1993 Elections Act, in particular an exemption from the threshold of 5% of the votes normally required to obtain seats in Parliament and certain advantages in respect of the registration of electoral lists. ... The applicants, for their part, asserted that the impugned restriction was premature and that the authorities had based their decisions on unfounded suspicions as to their true intentions and on speculation about their future actions.*

<sup>193</sup> [Movement for Democratic Kingdom v. Bulgaria, EComHR, Judgment of 29 November 1995.](#)

*They stressed that running for elections was not one of the aims stated in their memorandum of association ...*

*102. The Court will accordingly proceed on the understanding [... that] the risk that the association and its members might claim electoral privileges was inherent in any decision that allowed them to form the association without first amending paragraph 30 of the memorandum of association.*

*103. That being so, the appropriate time for countering the risk of the perceived mischief, and thereby ensuring that the rights of other persons or entities participating in parliamentary elections would not actually be infringed, was at the moment of registration of the association and not later. [...] In reality, imposing as a condition for registration of the association that the reference to an “organisation of a national minority” be removed from paragraph 30 of the memorandum of association was no more than the legitimate exercise by the Polish courts of their power to control the lawfulness of this instrument, including the power to refuse any ambiguous or misleading clause liable to lead to an abuse of the law ...*

*105. However, the degree of interference under paragraph 2 of Article 11 cannot be considered in the abstract and must be assessed in the particular context of the case. [...] It by no means amounted to a denial of the distinctive ethnic and cultural identity of Silesians or to a disregard for the association's primary aim, which was to “awaken and strengthen the national consciousness of Silesians.”<sup>194</sup>*

#### 7.4. Access to judicial review

Where the State denies registration, it must provide clear reasoning and ensure access to judicial review:

*Any decision rejecting the submission or application must be clearly motivated and duly communicated in writing to the applicant. Associations whose submissions or applications have been rejected should have the opportunity to challenge the decision before an independent and impartial court. In this regard, the Special Rapporteur refers to a decision of the Freedom of Association Committee of the International Labour Organization (ILO), in which it ruled that “the absence of recourse to a judicial authority against any refusal by the Ministry to grant an*

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<sup>194</sup> [Gorzelik v. Poland, ECtHR, 17 February 2004, paras. 94, 102-105.](#)

*authorization to establish a trade union violates the principles of freedom of association.”<sup>195</sup>*

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Judicial review is also vital in ensuring that refusal of registration is not used to limit freedom of association:

*States should guarantee the right of an association to appeal against any refusal of registration. Effective and prompt recourse against any rejection of application and independent judicial review regarding the decisions of the registration authority is necessary to ensure that the laws governing the registration process are not used as obstacles to the right to freedom of association.<sup>196</sup>*

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<sup>195</sup> [UN Human Rights Council, \*First Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai\*, UN Doc. A/HRC/20/27, 21 May 2012, para. 61.](#)

<sup>196</sup> [UN General Assembly, \*Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya\*, UN Doc. A/64/226, 4 August 2009, at para. 113.](#)

## 8. Determining objectives and activities of an association

### 8.1. Can the objectives, goals and activities be freely determined?

Freedom of association requires that an association be free to determine its own objectives, regardless of what these objectives may be, provided that they are not unlawful under international law.

The UN Human Rights Committee clearly stated this in the case of [Victor Korneenko et al v Belarus](#), explaining that:

*[...] the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by Article 22 extends to all activities of an association [...].*<sup>197</sup>

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This has been confirmed by Article 16(1) of the American Convention on Human Rights, which states that associations may engage in a wide range of activities for a variety of diverse purposes, including, ideological, religious, political, economic, labor, social, cultural, sporting or other aims.<sup>198</sup> Guideline 23 of the AComHPR Guidelines equally states that associations shall determine their purposes and activities freely.

The freedom to determine goals and objectives is thus an integral part of freedom of association:

*It lies at the heart of the freedom of association that an individual or group of individuals may freely establish an association, determine its organization and lawful purposes, and put these purposes into practice by performing those activities that are instrumental to its functions.*<sup>199</sup>

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This freedom applies not only to goals, but also to activities. As found by the IACtHR, freedom of association includes the right for associations:

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<sup>197</sup> [Victor Korneenko et al. v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/88/D/1274/2004, Views of 31 October 2006.

<sup>198</sup> [ACHR, art. 16\(1\)](#).

<sup>199</sup> [Venice Commission, Opinion on the Compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of Non-Registered Associations of The Republic of Belarus](#), 18 October 2011, para. 65.

*to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.*<sup>200</sup>

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## 8.2. Lawfulness under international law

States should assume that the goals and activities of an association are lawful.<sup>201</sup> Should a State seek to impose restrictions on the right to associate on the basis of the purpose of an association, it must meet the same test as it would for any other restrictive measure.

Lawfulness needs to be assessed under international law, not under national law. Only propaganda for war or advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20 of the Covenant on Civil and Political Rights) or acts aimed at the destruction of the rights and freedoms enshrined in international human rights law (Article 5) should be deemed unlawful.<sup>202</sup>

The AComHPR Draft Guideline 21 corroborates this, stating that:

*(t)he only acceptable limitations are relative to engagement in for-profit activities, anti-democratic activities, incitement to hatred, discrimination, establishing an armed group, or other activities characterized as unlawful under international human rights law. Such limitations shall be strictly interpreted and not abused to target associations of which political authorities disapprove.*<sup>203</sup>

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Both the UN Human Rights Committee and the European Court have accepted situations of lawful restrictions due to the objectives or activities of association, notably in cases where the associations' objectives demonstrated the purpose of overthrowing a democratic government and/or inciting racial and ethnic violence.

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<sup>200</sup> [Baena-Ricardo et al. v. Panama \(Merits, Reparations, and Costs\)](#), IACtHR, Judgment of 2 February 2001, para 156; see also [UN Human Rights Council, First Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para 65.

<sup>201</sup> [UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/23/39, 24 April 2013, para. 18.

<sup>202</sup> [UN Human Rights Council, First Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para 18; see also [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015, principle 4, para. 88.](#)

<sup>203</sup> The adopted Guidelines do not include specific guidelines on limitations on these specific activities, but generally state that limitations need to meet the three prong test and that the burden of proof for sanctions always lies with the State. AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 24 and 61.

In [MA v. Italy](#), the Human Rights Committee found a communication submitted on behalf of a detained, self-avowed fascist to be inadmissible on several grounds, including the failure to show that the prohibition on the reformation of the Italian fascist party under Italian national law was a violation of its ICCPR obligations. Instead, the Committee noted that the acts for which the petitioner was convicted were removed from the protection of the ICCPR by Article 5 (acts aimed at the destruction of rights) and were justifiably prohibited as legitimate restrictions on, amongst others, Article 22 rights.

More recently, in [Vona v Hungary](#) [click for full case explanation], the ECtHR did not find a violation of Article 11 in a case involving the Hungarian Guard Association, which had founded a related Hungarian Guard Movement. Among its activities were the holding of rallies in Roma communities under the theme of “Gypsy criminality,” which included participants wearing armbands similar to those of the Arrow Cross, a nationalist socialist party during World War II. The public prosecutor brought an action against both the Movement and the Association, claiming that their activities represented racist intimidation. The specific activities - termed by the Court as “concrete steps” - played a role in the Court’s considerations.

In [Vona v Hungary](#), the ECtHR did not find a violation of article 11 in the dissolution of the Hungarian Guard Association. In addressing the dissolution, the ECtHR argued that:

*57... the State is also entitled to take preventive measures to protect democracy vis-à-vis such non-party entities if a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions. One such value is the coexistence of members of society free from racial segregation, without which a democratic society is inconceivable. ... the State is entitled to act preventively if it is established that such a movement has started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy. ...*

### 8.3. What if the objectives of the association are contrary to current government policies?

Associations are free to choose their objectives and goals; States cannot restrict associations even if these run counter to government policies. The UN General Assembly has explicitly recognized the right to criticize the government specifically within the context of freedom of association:

*the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of*



*their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.*<sup>204</sup>

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Unpopular views or activities are insufficient grounds for limiting this right. The Human Rights Council has reminded that the right to freedom of association is:

*is indispensable [...], particularly where individuals may espouse minority or dissenting religious or political beliefs...*<sup>205</sup>

The Venice Commission has also explicitly reaffirmed this right, stating that:

*that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.*<sup>206</sup>

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The Guidelines of the AComHPR clearly protects associations which critique state actions:

*28. The right to freedom of association protects, inter alia, expression; criticism of state action; advancement of the rights of discriminated-against, marginalized and socially vulnerable communities [...]*

*29. States shall respect, in law and practice, the right of associations to carry out their activities, including those denoted above, without threats, harassment, interference, intimidation or reprisals of any kind*<sup>207</sup>

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Associations are equally allowed to engage with objectives which may not be popular with the majority of the population and/or government. In a case concerning homosexuality and freedom of expression, the Human Rights Committee concluded that the State failed to demonstrate why on the basis of the presented facts it was necessary to restrict the applicant's right to express her sexual identity, seek understanding for it and even engage children in discussion on issues of homosexuality<sup>208</sup>.

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<sup>204</sup> [UN General Assembly, Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN General Assembly, UN Doc. G.A. Res. 53/144, 9 December 1998, para. 8.](#)

<sup>205</sup> [Human Rights Council, Resolution 15/21, October 2010, p. 2.](#)

<sup>206</sup> [Venice Commission, Opinion on the Compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of Non-Registered Associations of The Republic of Belarus, 18 October 2011, para. 58.](#)

<sup>207</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 28-29. The Draft Guidelines used even clearer language in this regard see [ACOMHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para. 24.1.](#)

<sup>208</sup> [Irina Fedotova v. Russia, Human Rights Committee, U.N.Doc. CCPR/C/106/D/1932/2010, para. 10.8.](#) It regards a freedom of assembly case, but the legitimate aims is applicable to both association and assembly rights.

#### 8.4. Can one create an association with the same objective as an already existing association?

International human rights law has repeatedly confirmed that freedom of association includes the freedom of an association to determine one's own objectives. It thus follows that a newly formed association may choose the same or similar objectives as other, existing associations. Given that restrictions on freedom of association must follow strict tests, mere duplication cannot provide grounds for denying the freedom of an association to determine its objectives.

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association addressed these principles following his visit to the Sultanate of Oman. In expressing concern that the executive branch has unbridled discretion over who can form and operate an association and on what issues associations can focus, the Special Rapporteur specifically highlighted a number of cases where organizations had been denied registration because their work was "already covered" by other associations.<sup>209</sup> The Special Rapporteur re-emphasized the importance of independence from the Government as a founding aspect of the right to freedom of association, stating:

*(t)he right is meant to empower individuals to come together and work for their interests, so long as they are doing so for legal and peaceful purposes. The Special Rapporteur urges the Government to accord civil society actors the same freedom to establish themselves as businesses, even where they are working on the same issues. It is unlikely ... that the Government would prohibit, for example, the establishment of a hotel because another was established in the same area. There is no justifiable reason to distinguish between civil society and business sector organizations, both of which are non-State actors.*<sup>210</sup>

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The UN Special Rapporteur made a similar statement at the conclusion of his visit to the Republic of Kazakhstan, expressing again his concern that associations are at time denied registration on the grounds that similar associations already existed.<sup>211</sup>

#### 8.5. Can an association be forced to expand or limit its activities or goals to certain regions?

The freedom of an association to determine its own activities includes the freedom of an association to choose where to conduct its activities.

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<sup>209</sup> [Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, on his mission to Oman, A/HRC/29/25/Add.1, 27 April 2015, para. 43](#); see also [Statement by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the Sultanate of Oman, 13 September 2014](#).

<sup>210</sup> [Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, on his mission to Oman, A/HRC/29/25/Add.1, 27 April 2015, para. 47](#).

<sup>211</sup> [Statement by the Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the Republic of Kazakhstan, 27 January 2015](#).

The UN Human Rights Committee addressed this question in [Kungurov v Uzbekistan](#), where the Uzbekistan Ministry of Justice had refused to register an organization by the name of “Democracy and Rights,” asserting that the organization’s application materials failed to demonstrate that the organization was physically present in every region of Uzbekistan, which the State argued was required for public associations. In its ruling, the Human Rights Committee concluded that such a requirement did not meet the strict standards necessary for the limitation of freedom of association:

*the State party’s authorities did not specify to be granted a national status, authorising it to disseminate information in all parts of the country. The Committee considers that even if these and other restrictions were precise and predictable and were indeed prescribed by law, the State party has not advanced any argument as to why such restrictions would be necessary, for purposes of Article 22, paragraph 2, to condition the registration of an association on ... the existence of regional branches of “Democracy and Rights.”*<sup>212</sup>

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The AComHPR Draft Guidelines directly assert this right:

*There shall be no internal geographical or territorial limitations on associations, and the same registration procedure shall be employed throughout the country.*<sup>213</sup>

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Furthermore, the Draft Guidelines recommend that:

*Law or policy shall not prohibit the conduct of the activities of associations within particular geographic or territorial localities.*<sup>214</sup>

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## 8.6. May associations freely determine their internal rules and procedures?

Associations may establish their own internal rules and procedures. This implies also that authorities must respect and may not interfere with decisions on board compositions and elections and the internal conflict resolution procedures.<sup>215</sup>

In [Baena Ricardo et al. v. Panama](#), the Inter-American Court clarified that indeed the right to freedom of association includes the right:

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<sup>212</sup> [Nikolay Kunurov v. Uzbekistan](#), Human Rights Committee, CCPR/C/102/D/1478/2006, Views of 20 July 2011, at para 8.5.

<sup>213</sup> [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para. 10.3.](#)

The adopted Guidelines do not include specific guidelines on geographical scope, but generally states that limitations need to meet the three prong test and that the burden of proof for sanctions always lies with the State AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 24 and 61.

<sup>214</sup> [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para. 22.4.](#)

<sup>215</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para 65\(e\).](#)

*to set into motion their internal structure, activities and action program, without any intervention by the public authorities that could limit or impair the exercise of the respective right.*<sup>216</sup>

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In Article 36 of the Guidelines, the African Commission has asserted the freedom of associations to be self-governing, recommending that associations shall be:

*free to determine their internal management structure and rules for selecting governing officers.*

*Law or regulation shall not dictate the internal organization of associations, beyond basic provisions providing that non-discriminatory and rights-respecting principles be followed.*

*Associations shall not be required to obtain permission from the authorities to change their internal management structure or other elements of their internal rules.*

*Public authorities shall not interfere with associations' choices of managing officers, unless such persons are barred by national law from holding the positions in question on the basis of legitimate grounds as interpreted by international human rights law.*<sup>217</sup>

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The African Commission has also confirmed that States are not entitled to interfere with an association's internal matters. In a case concerning the Nigerian Bar Association, the Commission found a violation of the right to freedom of association where the Government of Nigeria sought to determine the composition of its governing body.<sup>218</sup>

In [Civil Liberties Union \(in respect of the Nigerian Bar Association\) v. Nigeria](#), the AComHPR found a violation of the right to freedom of association where the State established a new governing body of the Nigerian Bar Association, the "Body of Benchers," which was composed almost entirely of government nominees, with the Bar Association only able to nominate 31 out of 128 seats:

*14. Article 10 of the African Charter reads: '(1) Every individual shall have the right to free association provided that he abides by the law.' Freedom of association is*

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<sup>216</sup> [Baena Ricardo et al. v. Panama \(Merits, Reparations, Costs\)](#), IACtHR, Judgment of 2 February 2001, para. 156; see also [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para. 65.

<sup>217</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 36. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa](#), 22 September 2016, para. 30.

<sup>218</sup> [Civil Liberties Organisation \(in respect of the Nigerian Bar Association\) v. Nigeria](#), AComHPR, 25 March 1995. See also reference in [UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggva](#), UN Doc. A/64/226, 4 August 2009, para. 34.

*enunciated as an individual right and is first and foremost a duty of the state to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without state interference, in associations in order to attain various ends.*

*15. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.*

*16. The Body of Benchers is dominated by representatives of the government and has wide discretionary powers. This interference with the free association of the Nigerian Bar Association is inconsistent with the preamble of the African Charter in conjunction with UN Basic Principles on the Independence of the Judiciary and thereby constitutes a violation of article 10 of the African Charter.<sup>219</sup>*

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The ECtHR similarly found that associations have the freedom to determine their own rules in a case concerning the Associated Society of Locomotive Engineers and Firemen in the United Kingdom:

*Prima facie trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member.<sup>220</sup>*

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In addition, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association clarified that the protection of privacy also extends to associations. As part of an associations' right to privacy, it should be free to determine its own internal matters and States shall not be entitled to interfere to: condition decisions and activities of the association; reverse the election of its board members; condition the validity of board members' decisions on the presence of a government representative; or request that an internal decision be withdrawn.<sup>221</sup>

Independent bodies, established by law, may legitimately examine associations' records for the purpose of ensuring transparency and accountability. However, such lawful requirements shall be the

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<sup>219</sup> [Civil Liberties Organisation \(in respect of the Nigerian Bar Association\) v. Nigeria, AComHPR, 25 March 1995.](#)

<sup>220</sup> [Associated Society of Locomotive Engineers and Firemen v United Kingdom, ECtHR, Judgment of 27 February 2007, para. 38.](#)

<sup>221</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, para. 65.](#)

least intrusive and restrictive possible and any procedures established for such purposes shall respect the individuals' right to privacy and shall not be arbitrary and discriminatory.<sup>222</sup>

### 8.7. Can an association defend the rights of people who are not members of the association?

As a general matter, associations may defend the rights of people who are not members of the associations. In [Zvozkov v Belarus](#), the key issue before the UN Human Rights Committee was whether Belarus violated the applicants' rights to freedom of association by refusing to register the organization "Helsinki XXI" because it sought to represent and defend the rights of vulnerable citizens who were not "members" of the organization, which was prohibited by Belarus law.

The Committee noted that even if such restrictions were indeed prescribed by law, the State party did not advance any argument as to why it would be necessary to condition the registration of an association on a limitation of the scope of its activities to the exclusive representation and defense of the rights of its own members. The Committee concluded that refusing to recognize an organization that defended the rights of third parties was an impermissible restriction on the right to freedom of association:

*[The Committee] considers that even if such restrictions were indeed prescribed by law, the State party has not advanced any argument as to why it would be necessary, for purposes of article 22, paragraph 2, to condition the registration of an association on a limitation of the scope of its activities to the exclusive representation and defence of the rights of its own members. Taking into account the consequences of the refusal of registration, i.e. the unlawfulness of operation of unregistered associations on the State party's territory, the Committee concludes that the refusal of registration does not meet the requirements of article 22, paragraph 2.*<sup>223</sup>

The Universal Declaration of Human Rights Defenders fully embraces this principle; people may strive for the defense and promotion of human rights of all, not just their members.<sup>224</sup>

When a person or association formally represents another person, however, consent is needed.<sup>225</sup>

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<sup>222</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, para. 65.](#)

<sup>223</sup> [Boris Zvozkov et al. v. Belarus, Human Rights Committee, UN Doc. CCPR/C/88/D/1039/2001, 17 October 2006, para. 7.4.](#)

<sup>224</sup> [Universal Declaration of Human Rights Defenders.](#)

<sup>225</sup> See, for example [Boris Zvozkov et al. v. Belarus, Human Rights Committee, UN Doc. CCPR/C/88/D/1039/2001, 17 October 2006](#), finding the petitioner had standing to bring the complaint on his own behalf and on behalf of those individuals from whom he had submitted letters authorizing him to do so and refusing the submissions concerning the remaining named individuals in the complaint, from whom he had no such authorization.

### 8.8. May associations freely determine their name?

Any restriction on an association's chosen name must meet the same three-part test established under international law - it must be lawful, necessary and proportionate to a legitimate aim. For example, the ECtHR ruled that the use of a specific word in the name of the association was not a reason to reject its registration. The Greek association was called "House of Macedonian Civilisation," and the registration was rejected on the ground that the word "Macedonian" was liable to cause confusion both *vis-à-vis* States wishing to contact the applicant association in the exercise of its activities and among any individuals wishing to join the association.

The domestic courts added that there was also a risk to public order because the existence of the applicant association could be exploited by persons wishing to promote the creation of a "Macedonian nation," which it claimed had not historically existed. The ECtHR noted that the objectives of the association as defined in its documents were legitimate under international law and that therefore there was no reason not to register the association. The ECtHR did thus not accept the restrictions the State wished to impose on the name of the association and ruled that the non-registration constituted a violation of the freedom of association.<sup>226</sup>

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<sup>226</sup> [House of Macedonian Civilisation and others v. Greece, ECtHR, Judgment of 9 July 2015, paras. 27-44](#). Available in French.

## 9. Political Parties

Political parties are essential to any pluralistic democracy. Forming and joining political parties is one of the most common ways in which individuals engage in public dialogue and decisionmaking and realize their right to “participate in the conduct of public affairs.”<sup>227</sup>

In its [Guidelines on Political Party Regulation](#), the Venice Commission defines a political party as

*a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections. Political parties are a collective platform for the expression of individuals’ fundamental rights to association and expression and have been recognized by the European Court of Human Rights as integral players in the democratic process. Further, they are the most widely utilized means for political participation and exercise of related rights.*<sup>228</sup>

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The Commission also explained that

*[a]lthough the legal capacity and standing of a political party may vary from state to state, political parties have rights and responsibilities regardless of their legal status. While political parties may be governed under laws separate from general associations, at a minimum they still retain the basic rights provided to other associations.*<sup>229</sup>

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In discussing government regulation of political parties, the Commission noted that

*[w]here regulations are enacted, they should not unduly inhibit the activities or rights of political parties. Instead, legislation should focus on facilitating the role of parties as potentially critical actors in a democratic society and ensuring the full protection of rights relevant to their proper functioning. While a specific law for political parties is not required, political parties must at a minimum retain the*

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<sup>227</sup> ICCPR, art. 25 guarantees to everyone “the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.”

<sup>228</sup> [Venice Commission/OSCE, Guidelines on Political Party Regulation, paras. 9-10 \(2010\).](#)

<sup>229</sup> [Venice Commission/OSCE, Guidelines on Political Party Regulation, para. 27 \(2010\).](#)



*same basic rights afforded other associations, as well as the rights to nominate candidates and participate in elections.*<sup>230</sup>

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### 9.1. Objectives and means of political parties in a democracy

Political parties may pursue any political goal, including changes in the laws and policies of the State, so long as they use lawful avenues and are pursuing changes that do not conflict with fundamental democratic principles.

The ECtHR has explained that:

*a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds ...*<sup>231</sup>

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In [Yatama v. Nicaragua](#), the IACtHR recognized the importance of political parties as essential for democracy as well as the explicit protection political parties enjoy. Yet, it found that Nicaragua had violated the convention where its electoral law: (1) prohibited citizens to stand for office unless put forward by a registered political party, and (2) required for municipal elections that parties present candidates in at least 80 percent of the municipalities in the district. These requirements impaired the ability of local indigenous communities to put forward candidates<sup>232</sup>. In a later decision, the IACtHR limited the reach of *Yatama v. Nicaragua* and accepted for federal elections in Mexico the need for candidates to be registered by a political party<sup>233</sup>.

### 9.2. Banning, Dissolving, or Refusing to Register

States must ensure the right to form and join political parties. Any blanket ban on the right to form political parties is a *per se* violation of the right to freedom of association, among other fundamental rights. For example, in *Jawara v. the Gambia*, the AComHPR found violations

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<sup>230</sup> [Venice Commission/OSCE, Guidelines on Political Party Regulation, para. 29 \(2010\).](#)

<sup>231</sup> [Yazar, Karataş, Aksoy and the People's Labour Party \(HEP\) v. Turkey, ECtHR, Judgment of 9 April 2002, para 49.](#)

<sup>232</sup> [Yatama v. Nicaragua, IACtHR, Judgment of 23 June 2005, paras 215-224.](#)

<sup>233</sup> [Castañeda Gutman v. México, IACtHR, Judgment of 6 August 2006.](#)

where the government had banned political parties and further banned government officials from a prior regime from running for office or joining a political party, among other restrictions:

*67. The imposition of the ban on former Ministers and Members of Parliament is in contravention of their rights to participate freely in the government of their country provided for under Article 13(1) of the Charter. Article 13(1) reads:*

*"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."*

*68. Also, the banning of political parties is a violation of the complainants' rights to freedom of association guaranteed under Article 10(1) of the Charter. In its decision on communication 101/93, the Commission stated a general principle on this right, to the effect that "competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards". And more importantly, the Commission in its Resolution on the Right to Freedom of Association had also reiterated that: "The regulation of the exercise of the right to freedom of association should be consistent with States' obligations under the African Charter on Human and Peoples' Rights"<sup>234</sup>.*

In [Lawyers for Human Rights v. Swaziland](#), the AComHPR again found a ban on all political parties to be a per se violation of the right to freedom of association.<sup>235</sup>

In rare instances, a State may ban a specific political party where the party's objectives and activities are entirely antithetical to democracy and pose a severe risk to the rights of others, but such restrictions are subject to the strictest review.

A strict scrutiny is warranted and no false attribution can be made on party intentions. In *HADEP and Demir v. Turkey*, the ECtHR found a violation where the State dissolved a political party after conflating its members' public criticisms of government policy as advocating for violence, while the party's aims as set out in its program was to solve problems in a democratic manner.

In the case *HADEP and Demir v. Turkey*, the People's Democracy Party, "HADEP" advocated "a democratic solution to the Kurdish problem". HADEP was dissolved

<sup>234</sup> [Jawara v. the Gambia, AComPHR, Communication No. 147/95 and 149/96, paras. 67-68 \(2000\).](#)

<sup>235</sup> [Lawyers for Human Rights v. Swaziland, AComPHR Communication No. 251/02, paras. 60-62 \(2005\).](#)

in 2003 by a decision of the Turkish Constitutional Court, finding that the party had become a centre of illegal activities, which included aiding and abetting the illegal Workers Party of Kurdistan (PKK). The Constitutional Court further banned a number of HADEP's party members from becoming founders or members of any other political party for five years. The Court found a violation of Article 11 of the Convention. It held that certain statements made by party members – calling the actions of the Turkish security forces in south-east Turkey in their fight against terrorism a “dirty war” – to which the Turkish court had referred when concluding that HADEP was guilty of aiding and abetting the PKK, were a sharp criticism of the Government's policy but did not encourage violence, armed resistance or insurrection. Those statements could therefore not in themselves constitute sufficient evidence to equate the party with armed groups carrying out acts of violence. The European Court further found, in particular, that statements by HADEP members which considered the Kurdish nation as distinct from the Turkish nation had to be read together with the party's aims as set out in its programme, namely that it had been established to solve the country's problems in a democratic manner. Even if HADEP advocated the right to self-determination of the Kurds, that would not in itself be contrary to democratic principles and could not be equated to supporting acts of terrorism.<sup>236</sup>

In *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* [[click for case explanation](#)], the ECtHR found a violation of the right to freedom of association where the State refused to allow a communist party to register. The court found that registration was rejected on the sole basis of the political programme of the party while in fact the programme stressed the importance of upholding the constitutional order and did not contain passages calling for violence or rejecting democratic principles.

In *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, Partidul Comunistilor (Nepeceristi), a party of Communists who had not been members of the Romanian Communist Party, “the PCN”, had been founded in March 1996. Its registration as a party was refused by the Romanian courts in a decision upheld in August 1996 on the grounds that the PCN was seeking to gain political power in order to establish a “humane State” founded on communist doctrine, meaning that it considered the constitutional and legal order that had been in place since 1989 as inhumane and not based on genuine democracy. The Court found a violation of Article 11 of the Convention. Having examined the PCN's constitution and political programme – on the sole basis of which the Romanian courts had rejected the application for the party's registration – it noted that they stressed the importance of upholding the national sovereignty, territorial integrity and

<sup>236</sup> [HADEP and Demir v. Turkey, ECtHR Judgment \(December 14, 2010\).](#)

legal and constitutional order of the country, and democratic principles including political pluralism, universal suffrage and freedom to participate in politics. They did not contain any passages that might be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. It was true that there were passages criticising both the abuses of the former Communist Party before 1989, from which the PCN distanced itself, and the policy that had been followed subsequently. However, the Court considered that there could be no justification for hindering a political group that complied with the fundamental principles of democracy solely because it had criticised the constitutional and legal order of the country and had sought a public debate in the political arena. Romania's experience of totalitarian communism prior to 1989 could not by itself justify the need for the interference with the party's freedom of association."<sup>237</sup>

See also [Destructing democracy and inciting violence](#) and [Suspension or dissolution of associations](#).

### 9.3. Access to Foreign Funding

Although generally the right to freedom of association includes the right to access funding [\[political parties and foreign funding\]](#), including funding from foreign sources, certain restrictions on access to foreign funds for political parties – those vying for power – may meet the three-prong test under international law and serve to avoid “undue influence by foreign interests in domestic affairs.”<sup>238</sup> For example, the ECtHR has upheld restrictions on political parties' access to funds from foreign political parties where the national party in question had access to the same public funding mechanism available to other political parties in the State and it could not show a disproportionate impact on its ability to engage in its activities.<sup>239</sup> In discussing such regulations, the Venice Commission has commented that it is vital such restrictions are carefully drawn to avoid violating the right to freedom of association, noting in particular that “legislation should carefully weigh the protection of national interests against the rights of individuals, groups and associations to co-operate and share information.”<sup>240</sup> It also highlighted the increasingly important role of external support for individuals, groups and organizations promoting human rights and fundamental freedoms and the need for any regulations to avoid unduly restricting such cooperation and support.<sup>241</sup>

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<sup>237</sup> [ECtHR Press Unit, Fact Sheet on Political Parties and Associations, 4 \(October 2016\)](#), discussing [Partidul Comunistilor \(Nepeceristi\) and Ungureanu v. Romania](#), ECtHR Judgment (February 3, 2005 (emphasis added)).

<sup>238</sup> [OSCE/Venice Commission, Guidelines on Political Party Regulation, para. 172.](#)

<sup>239</sup> [Basque Nationalist Party – Iparralde Regional Organisation v. France, ECtHR Judgment of 7 June 2007\).](#)

<sup>240</sup> [OSCE/Venice Commission, Guidelines on Political Party Regulation, para/ 172.](#)

<sup>241</sup> [OSCE/Venice Commission, Guidelines on Political Party Regulation, para 172.](#)

## 9.4. Election Periods

International and regional bodies have adopted explicit resolutions on the vital position of freedom of association within the context of elections.<sup>242</sup> The Human Rights Council, for example, has called on States:

*to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.*<sup>243</sup>

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The protection of freedom of association is especially significant in the context of elections because of the vulnerabilities and risks associated with this period.<sup>244</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has emphasized that all associations are entitled to engage in the activities related to the electoral process without any regard to the character or position of the association, “whether they are apolitical in their means and operations, partially or totally supportive of the Government or express criticism of Government policies.”<sup>245</sup>

*The right to freedom of association is an essential component of democracy that empowers men and women and is therefore particularly important where individuals may espouse minority or dissenting religious or political beliefs ... As such, no restrictions should be placed on associations, solely because they do not share the same views as those in authority.*<sup>246</sup>

*The Special Rapporteur also called upon States to step up the scrutiny for imposing legitimate restrictions on the right freedom of association during times of elections*

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<sup>242</sup> [United Nations General Assembly, Enhancing the Role of Regional, Subregional and Other Organizations and Arrangements in Promoting and Consolidating Democracy, G.A. Res. 59/201 \(Dec. 20, 2004\); African Charter on Democracy, Elections, and Governance \(2011\).](#)

<sup>243</sup> [UN Human Rights Council, UN Doc. A/HRC/RES/15/21, 6 October 2010, para. 1.](#)

<sup>244</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/68/299, 7 August 2013, para 15\(e\).](#)

<sup>245</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/68/299, 7 August 2013, para 46.](#)

<sup>246</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/68/299, 7 August 2013, para 47.](#)

*to ensure that the strictest test of necessity and proportionality in a democratic society, coupled with the principle of non-discrimination, is imposed:<sup>247</sup>*

*In the context of elections, the Special Rapporteur believes that the test threshold should be raised to a higher level. It is therefore, not sufficient for a State to invoke the protection of the integrity of the election process, the need to ensure non-partisan and impartial elections, the need to preserve peace or security to limit these rights, insofar as the context of elections is a critical time when individuals have a say about the fate of their country.<sup>248</sup>*

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<sup>247</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/68/299, 7 August 2013, para 58\(f\).](#)

<sup>248</sup> [UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/68/299, 7 August 2013, para. 49.](#)

## 10. Access to resources

### 10.1. Does an association have a right to access resources?

The right to freedom of association encompasses the right to mobilize resources, including human and financial.

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has explained that the right to freedom of association includes the ability to seek, receive and use resources – human, material and financial – from domestic, foreign and international sources.<sup>249</sup>

The term “resources” encompasses a broad concept that includes financial transfers (e.g. donations, grants, contracts, sponsorships, social investments, etc.); loan guarantees and other forms of financial assistance from natural and legal persons; in-kind donations (e.g. contributions of goods, services, software and other forms of intellectual property, real property, etc.); material resources (e.g. office supplies, IT equipment, etc.); human resources (e.g. paid staff, volunteers, etc.); access to international assistance, solidarity; ability to travel and communicate without undue interference and the right to benefit from the protection of the state.<sup>250</sup>

### 10.2. Associations may access financial resources in general

The right to access funding is a direct and essential component of the right to freedom of association, as confirmed by various sources both at the global and regional level.

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association dedicated a specific report on access to resources and found that “the ability to access funding and resources is an integral and vital part of the right to freedom of association,”<sup>251</sup> explaining:

*The ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small. The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.*<sup>252</sup>

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<sup>249</sup> [UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/23/39, 24 April 2013, para. 8\(e\).](#)

<sup>250</sup> [UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/23/39, 24 April 2013, para. 10.](#)

<sup>251</sup> [UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful Assembly and of association, Maina Kiai, UN Doc. A/HRC/23/39, April 24, 2013, para. 8.](#)

<sup>252</sup> [UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maini Kiai, UN Doc. A/HRC/23/39, April 24, 2013, para. 8.](#)

Many associations, in particular those formed to defend human rights, function as “not-for-profit” entities and therefore depend almost exclusively on external sources of funding to carry out their work. Therefore, “undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.”<sup>253</sup>

Similarly, the Human Rights Committee has consistently expressed concern over funding restrictions as an impediment to fully realizing the right to freedom of association. For example, after reviewing Egyptian legislation, which required NGOs receiving foreign funding to register with the government, the Committee stated that:

*The State Party should review its legislation and practice in order to enable non-governmental organizations to discharge their functions without impediments, which are inconsistent with the provisions of article 22 of the Covenant, such as prior authorization, funding controls, and administrative dissolution.*<sup>254</sup>

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In [Ramazanova v. Azerbaijan](#), the ECtHR found that State measures hampering an NGO’s access to funding may infringe its right to the freedom of association, thereby recognizing that access to resources is part and parcel of the right to freedom of association. The Court found that:

*even assuming that theoretically the association had a right to exist pending the state registration, the domestic law effectively restricted the association’s ability to function properly without legal entity status. It could not, inter alia, receive any ‘grants’ or financial donations that constituted one of the main sources of financing of non-governmental organizations in Azerbaijan. Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence.*<sup>255</sup>

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The UN Human Rights Committee, the Inter-American Court and Commission on Human Rights and the European Court of Human Rights have all recognized that restricting access to foreign funding may constitute a violation of the right to freedom of association, thereby asserting the principle that accessing resources is part and parcel of the right to freedom of association. access foreign funding

### 10.3. Associations may access foreign funding

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<sup>253</sup> [UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maini Kiai, UN Doc. A/HRC/23/39, April 24, 2013, para. 9.](#)

<sup>254</sup> [UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY, 28 November 2002, para. 21.](#)

<sup>255</sup> [Ramazanova v. Azerbaijan, ECtHR, Judgment of 1 February 2007, para. 59.](#)



International law has consistently held that the right to freedom of association includes accessing foreign funding and that limitations to it may constitute violations of the right to freedom of association.

The Human Rights Committee commented that legislation in Egypt<sup>256</sup> and Ethiopia restricting foreign funding warrants revision. The Ethiopian law prohibited Ethiopian NGOs from obtaining more than 10% of their budget from foreign donors<sup>257</sup>. The law in question also prohibited NGOs considered by the government to be “foreign,” from engaging in human rights and democracy related activities:

*The State party should revise its legislation to ensure that any limitations on the right to freedom of association and assembly are in strict compliance with articles 21 and 22 of the Covenant, and in particular it should reconsider the funding restrictions on local NGOs in the light of the Covenant and it should authorize all NGOs to work in the field of human rights. The State party should not discriminate against NGOs that have some members who reside outside of its borders.*<sup>258</sup>

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The European<sup>259</sup> and Inter-American human rights systems have also found that restricting access to foreign funding may infringe on an NGO’s right to freedom of association.<sup>260</sup> The IACHR has determined that:

*[t]he right to receive international funds in the context of international cooperation for the defense and promotion of human rights is protected by freedom of association, and the State is obligated to respect this right without any restrictions that go beyond those allowed by the right of freedom of association.*<sup>261</sup>

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The Inter-American Commission also found that restrictions on receiving “international funding to defend political rights” are not permitted by international law.<sup>262</sup>

International institutions have specifically emphasized and acknowledged the right to access foreign funding for associations protecting human rights. The United Nations General Assembly’s Declaration on Human Rights Defenders states:

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<sup>256</sup> [UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY, 28 November 2002, para. 21.](#)

<sup>257</sup> As of May 2017 this law is still in place in Ethiopia.

<sup>258</sup> [UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Ethiopia, UN Doc. CCPR/C/ETH/CO, 19 August 2011, para. 25.](#)

<sup>259</sup> [Ramazanova v. Azerbaijan, ECtHR, Judgment of 1 February 2007, para. 59.](#)

<sup>260</sup> [Ramazanova v. Azerbaijan, ECtHR, Judgment of 1 February 2007, para. 59.](#)

<sup>261</sup> [IACHR, Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc. 54, 30 December 2009, para. 585.](#)

<sup>262</sup> [IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 185](#) (noting that “a situation different from the one just described would be one in which an organization was proselytizing on behalf of a certain political party or candidate to a particular post. Under this circumstance, the activity would not be protected by the aforementioned standard.”).

*[e]veryone has the right, individually and in association with others, to solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.*<sup>263</sup>

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The Special Representative of the Secretary-General on the Situation of Human Rights Defenders has also stated that:

*Governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments.*<sup>264</sup>

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The Human Rights Council resolution 22/6 calls upon States to ensure:

*that no law should criminalize or delegitimize activities in defense of human rights on account of the origin of funding thereto.*<sup>265</sup>

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#### 10.4. Stringent conditions for restricting funding

Because access to funding, domestic and foreign, is a part of the right to association, any restriction to accessing funds is a restriction on the right to freedom of association and must be evaluated against the legal international framework to meet the narrowly tailored regime developed by the Human Rights Committee.<sup>266</sup> It is instructive to note that the same test is applicable to restrictions on the right to freedom of association as guaranteed in Article 11 of the ECHR and Article 16 of the ACHR. [[Link to three prong test](#)]

##### No vague terminology

Any restriction on an association's access to funding, including foreign funding, must be precisely drafted so as to eliminate the possibility of arbitrary or overly-broad interpretations of its terms.<sup>267</sup> For example, in [Zhechev v. Bulgaria](#), the ECtHR found that the term "political activity" was too broad and open to so many potential interpretations that most activities carried out by any organization could be considered a political activity:

*[I]n the present case these courts [Bulgarian national courts] deemed that a campaign for changes in the constitution and the form of government fell within*

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<sup>263</sup> [Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms](#), UN Doc. G.A. Res. 53/144, 9 December 1998, art. 13 (under this framework, States are supposed to adopt legislation to facilitate and not impede the solicitation, receipt and use of resources.)

<sup>264</sup> [United Nations General Assembly, Special Representative of the Secretary-General on the Situation of Human Rights Defenders](#), UN Doc. A/59/401 (2004), para. 82 (l).

<sup>265</sup> [UN Human Rights Council, Resolution 22/6](#), 15 March 2013, para. 9.

<sup>266</sup> [Aleksander Belyatsky et al. v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, 24 July 2007, para. 7.3.

<sup>267</sup> See [Ezelin v. France](#), ECtHR, Judgment of 26 April 1991, paras. 21–22, 45.

*that category. In another recent case these same courts had, more questionably, stated that the ‘holding of meetings, demonstrations, assemblies and other forms of public campaigning’ by an association campaigning for regional autonomy and alleged minority rights also amounted to political goals and activities within the meaning of Article 12 § 2 of the Constitution of 1991.’*<sup>268</sup>

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A complete ban on access to domestic or foreign funding for groups engaged in activities of e.g. a “political nature” in order to maintain and protect a vague “national interest” does not meet the legality and proportionality requirement under international law.<sup>269</sup> To meet the proportionality criteria, the State measure must always pursue a pressing need, and it must be the least severe (in range, duration, and applicability) option available to the public authority in meeting that need.<sup>270</sup> Blanket bans seldom meet that standard.

### 10.5. Political parties and foreign funding

The ECtHR found that restrictions on the funding of political parties, namely those vying for public office in elections, may be justified. In [Parti Nationaliste v. France](#), a Basque separatist political party in France was prohibited from receiving funding from a foreign political party. The ECtHR found that the restriction on foreign funding of associations involved in promoting candidates for public office served a legitimate aim and was proportionate.<sup>271</sup> The Court recognized that the protection of the institutional order – including the sovereignty of the State - is legitimate under Article 11 of the European Convention.<sup>272</sup>

The court clearly makes a distinction between political parties vying for power and organizations involved in “political activities.” The latter is too vague and therefore too broad to form the basis for restricting the right to freedom of association.<sup>273</sup> Similarly, the IACHR has distinguished foreign funding restrictions for political parties or organizations speaking on behalf of a political party as not falling within the same protected standard.<sup>274</sup>

#### Protecting national interests?

The reasons for which freedom of association may be restricted are exhaustively determined under international law. [\[Link to legitimate aim\]](#) The general argument of “protecting national interests” to

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<sup>268</sup> [Zhechev v. Bulgaria](#), ECtHR, Judgment of 21 June 2007, para. 55.

<sup>269</sup> See [UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Information note to the Government of India. Analysis on international law, standards and principles applicable to the Foreign Contributions Act 2010 and Foreign Contributions Regulations 2011.](#)

<sup>270</sup> See [Mr. Jeong-Eun Lee v Republic of Korea](#), Human Rights Committee, UN Doc. CCPR/C/84/D/1119/2002, Views of 20 July 2005, para. 7.2.

<sup>271</sup> [Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France](#), ECtHR, 7 June 2007, para. 47.

<sup>272</sup> [Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France](#), ECtHR, 7 June 2007, para 43.

<sup>273</sup> [Zhechev v. Bulgaria](#), ECtHR, Judgment of 21 June 2007, para. 55.

<sup>274</sup> [IACHR, Second Report on the Situation of Human Rights Defenders in the Americas](#), OEA/Ser/L/V/II Doc. 66, 31 December 2011, para. 185.

limit access to foreign funding is not a protected aim under international law. In a joint report, the UN Special Rapporteur on the rights to freedom of peaceful assembly and association and the UN Special Rapporteur on extrajudicial, arbitrary and summary executions noted:

*When a state invokes national security and protection of public order [...] It is not sufficient for the State to refer generally to the security situation. National, political or government interest is not synonymous with national security or public order.*<sup>275</sup>

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Within the same realm, the ECtHR has held that States may not refuse to register or acknowledge an association on the basis that it was founded by “foreigners” or is a branch of an international association.<sup>276</sup>

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<sup>275</sup> [Human Rights Council, Joint report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and association and the UN Special Rapporteur on extrajudicial, arbitrary and summary executions, UN Doc. A/HRC/31/66, para. 31.](#)

<sup>276</sup> [Moscow Branch of Salvation Army v Russia, ECtHR, Judgment of 5 October 2006, para. 86; see also, Partidul Comunistilor Nepeceeristi and Ungureanu v. Romania, ECtHR, Judgment of 2 February 2005, para. 49.](#)

## 11. Reporting requirements

In the legitimate interests of transparency and accountability, States may require that certain types of associations file reports in specific circumstances. International standards provide that such reporting not be arbitrary or burdensome. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has recognized that States may request reports, but asserts that:

*such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk.*<sup>277</sup>

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The right to freedom of association includes the duty of States “to protect individuals and associations against defamation, disparagement, undue audits and other attacks in relation to funding they allegedly received.”<sup>278</sup>

The Venice Commission and the OSCE/ODIHR have also issued guidelines emphasizing that reporting requirements should not be burdensome, and shall be proportionate to the size of the association and the scope of its activities, taking into consideration the value of its assets and income.”<sup>279</sup> A joint opinion on the Kyrgyz Republic further cautioned that excessive reporting burdens can hinder the exercise of freedom of associations:

*Excessively burdensome or costly reporting obligations could create an environment of excessive State monitoring over the activities of non-commercial organizations. Such an environment would hardly be conducive to the effective enjoyment of freedom of association. Reporting requirements must not place an excessive burden on the organization.*<sup>280</sup>

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In [Cumhuriyet Halk Partisi v. Turkey](#), the ECtHR held that financial-inspection mechanisms should not be abused for political purposes:

*[i]n 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*

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<sup>277</sup> UN Human Rights Council, [First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para. 65.

<sup>278</sup> UN Human Rights Council, [Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/23/39, 24 April 2013, para. 37.

<sup>279</sup> OSCE/ODIHR and Venice Commission, [Joint Guidelines on Freedom of Association](#), 2015, para. 104.

<sup>280</sup> Venice Commission and OSCE/ODIHR, [Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic](#), 16 October 2013, para. 69.

*specific requirements imposed and the sanctions that the breach of those requirements entails.*<sup>281</sup>

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AComHPR's Guidelines 47 , 48 and 49 extensively discuss the parameters of reporting requirements, outlining the conditions under which reporting may not be considered burdensome, including limiting reporting to a single body. Some extracts:

*Reporting requirements shall not be overly burdensome.*

*Reporting requirements shall be entirely laid out in a single piece of legislation, and reports shall only be required to a single governmental body.*

*Any yearly reporting requirements shall not require extensive details, but shall rather be aimed at ensuring financial propriety.*

*Reporting requirements shall be proportionate to the size and scope of the organization. In no circumstances shall not-for-profit associations be subjected to greater reporting requirements than for-profit entities.*

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Reporting requirements shall not be used as a way to limit or target associations.<sup>282</sup>

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<sup>281</sup> [Cumhuriyet Halk Partisi v. Turkey, ECtHR, Judgment of 26 April 2016, para. 88.](#)

<sup>282</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 48/5. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016](#), para 43-44

## 12. Suspension or dissolution of associations

Suspension and the involuntary dissolution of an association are among the severest restrictions on freedom of association. Such measure must always comply with the requirements of Article 22(2) of the Covenant. Given the severity of these measures, they may only be used when there is a clear and imminent threat to for example national security of public<sup>283</sup> in accordance with the interpretations of international human rights law. It must be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.<sup>284</sup>

The Human Rights Committee applies a strict proportionality assessment for dissolutions.<sup>285</sup> Paragraph 58 of the African Guidelines mirrors this high standard for assessing the proportionality of the measure, and has emphasized that it should be a measure of last resort only:

Suspension or dissolution of an association by the state may only be applied where there has been a serious violation of national law, in compliance with regional and international human rights law and as a matter of last resort.

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### 12.1. Proportionality: severity of the measure and last resort measure

The Human Rights Committee has highlighted the particularly “severe consequences” of an organization’s dissolution and has taken this severity into account when assessing the proportionality of the restrictive measure:

*Taking into account the severe consequences of the dissolution of “Viasna” for the exercise of the author’s and his co-authors’ right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Belarus, the Committee concludes that the dissolution of the association is disproportionate.*<sup>286</sup>

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The *Study Report on Freedom of Association & Assembly* by the African Commission affirmed that dissolution may only be applied if there is a clear and imminent danger.<sup>287</sup> Similarly, the OSCE/ODIHR and Venice Commission Joint Guidelines clarify that it should always be a measure of last resort:

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<sup>283</sup> Note that the legitimate aims which may be protected are exhaustively enumerated in article 22 of the ICCPR: national security, public safety, public order, protection of public health or morals and the protection of the rights and freedoms of others.

<sup>284</sup> [UN Human Rights Council, \*First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai\*, UN Doc. A/HRC/20/27, 21 May 2012, para 75.](#)

<sup>285</sup> [Belyatsky v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, Views of 24 July 2007, para. 7.5.

<sup>286</sup> [Belyatsky v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, Views of 24 July 2007, para. 7.5; see also [Korneenko v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/88/D/1274/2004, Views of 31 October 2006, para. 7.7.

<sup>287</sup> [AComHPR, \*Report of the Study Group on Freedom of Association & Assembly in Africa\*, 2014, p. 24](#); see also [Interights and Others v Mauritania](#), AComHRP, 4 June 2004, paras. 80-84.

*A restriction shall always be narrowly construed and applied and shall never completely extinguish the right nor encroach on its essence. In particular, any prohibition or dissolution of an association shall always be a measure of last resort, such as when an association has engaged in conduct that creates an imminent threat of violence or other grave violation of the law, and shall never be used to address minor infractions.*<sup>288</sup>

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Also, the ECtHR has underscored the extreme and severe nature of an involuntary dissolution when finding this form of interference to be disproportionate.<sup>289</sup>

## 12.2. Only by a judicial body

Given the severity of the interference, the Inter-American Commission has held that dissolution of an association may only result from a determination by a court, as opposed to an administrative body.<sup>290</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association fully endorses this position:

*Suspension or involuntarily dissolution of associations should be sanctioned by an impartial and independent court in case of a clear and imminent danger resulting in a flagrant violation of domestic laws, in compliance with international human rights law.*<sup>291</sup>

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Paragraph 58 of the African Guidelines takes the same approach:

*Suspension may only be taken following court order, and dissolution only following a full judicial procedure and the exhaustion of all available appeal mechanisms. Such judgments shall be made publicly available and shall be determined on the basis of clear legal criteria in accordance with regional and international human rights law*<sup>292</sup>.

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The European Court confirmed that once dissolved – or refused registration – the association maintains its right to bring a claim before the ECtHR.<sup>293</sup> In the case *United Communist Party and Others v Turkey*, the ECtHR held that “[t]he right guaranteed by Article 11 would be largely theoretical and illusory if it

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<sup>288</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015, para. 35.](#)

<sup>289</sup> [Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan](#), ECtHR, Judgment of 8 October 2009, para. 82; [United Communist Party of Turkey v. Turkey](#), ECtHR, Judgment of 30 January 1998, paras. 46, 54, 61.

<sup>290</sup> [IACHR, Second Report on the Situation of Human Rights Defenders](#), OEA/Ser/L/V/II Doc. 66, 31 December 2011, at para. 168; see also [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, para 75-76.

<sup>291</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai](#), UN Doc. A/HRC/20/27, 21 May 2012, paras. 77, 100.

<sup>292</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 58.

<sup>293</sup> [Sindicatul “Pastorul cel bun” v. Romania](#), ECtHR, Judgment of 9 July, 2013, para. 70.



were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention.”<sup>294</sup>

The ILO’s Committee on Freedom of Association follows the same logic and holds that because of the extreme nature of the measure, suspension or involuntary dissolution must always be subject to judicial review and the association’s rights to defense must be fully guaranteed.<sup>295</sup>

### 12.3. Failing to comply with administrative obligations

Failing to comply with administrative obligations enshrined in national law is not a sufficient ground for dissolution. The UN Rapporteur specifically clarified that should an association fail to meet its reporting obligations, such a violation should not lead to involuntary dissolution, closure of association or prosecution of its members. Instead, the association should be given an opportunity to rectify the situation.<sup>296</sup>

The Human Rights Committee has examined several cases where the State improperly dissolved or suspended an association. In a string of cases arising in Belarus, it has found violations of the right to freedom of association where the State arbitrarily used its laws on association to dissolve or suspend organizations.

In [Korneenko et al v. Belarus](#), the applicants’ NGO had been dissolved for failing to comply with national law regarding the use of foreign funds, equipment purchased with foreign funds and for apparent flaws in its official documents. The Human Rights Committee found the State Party had violated the applicants’ rights to freedom of association because it failed to show (1) that the restrictions on the use of foreign funds were necessary to any legitimate State interest, or (2) that the dissolution of an organization was proportionate to any technical failings in its attempts to comply with Belarussian law [click for full case explanation].

*In the case of Korneenko et al v. Belarus, the Human Rights Committee reasoned that:*

*“In the present case, the court order dissolving ‘Civil Initiatives’ is based on two types of perceived violations of the State party’s domestic law: (1) improper use of equipment, received through foreign grants, for the production of propaganda materials and the conduct of propaganda activities; and (2) deficiencies in the association’s documentation. These two groups of legal requirements constitute de*

<sup>294</sup> [United Communist Party of Turkey and others v. Turkey, ECtHR, Judgment of 20 January 1998, para. 33.](#)

<sup>295</sup> [ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth \(revised\) edition, para. 699 \(2006\).](#)

<sup>296</sup> [UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, UN Doc. A/HRC/23/39, April 24 2013, para 38\(e\).](#)

*facto restrictions and must be assessed in the light of the consequences which arise for the author and 'Civil Initiatives'.*

*On the first point, the Committee notes that the author and the State party disagree on whether 'Civil Initiatives' indeed used its equipment for the stated purposes. It considers that even if 'Civil Initiatives' used such equipment, the State party has not advanced any argument as to why it would be necessary, for purposes of Article 22, paragraph 2, to prohibit its use 'for the preparation of gatherings, meetings, street processions, demonstrations, pickets, strikes, production and the dissemination of propaganda materials, as well as the organization of seminars and other forms of propaganda activities'.*

*On the second point, the Committee notes that the parties disagree over the interpretation of domestic law and the State party's failure to advance arguments as to which of the three deficiencies in the association's documentation triggers the application of the restrictions spelled out in Article 22, paragraph 2, of the Covenant. Even if 'Civil Initiatives' documentation did not fully comply with the requirements of domestic law, the reaction of the State party's authorities in dissolving the association was disproportionate."<sup>297</sup>*

In [Belyatsky v Belarus](#), the Human Rights Committee found that Belarus violated the applicants' rights to freedom association where it dissolved an NGO, Viasna, for its monitoring of Belarus' 2001 national elections. Viasna raised questions about the legitimacy of the elections. It was dissolved by court order soon after for violating the laws on elections by sending monitors to election committee meetings and polling stations, and for violating the law governing public associations by paying third party observers in addition to relying on "members" of the association.<sup>298</sup> The Human Rights Committee held that Belarus had again failed to show that the dissolution of the organization was in pursuit of a legitimate aim or was necessary or proportionate to any such State interest. Instead, the HRC took the opportunity to remind the State Party that "the existence and operation of associations, including those which peacefully promote ideas not necessarily favorably received by the government or the majority of the population, is a cornerstone of a democratic society"<sup>299</sup> [click for full case explanation].

In the case of [Belyatsky v. Belarus](#), the Human Rights Committee observed that:

<sup>297</sup> [Viktor Korneenko et al. v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/88/D/1274/2004, Views of 31 October 2006, paras. 7.2-7.4.

<sup>298</sup> [Aleksander Belyatsky et al. v Belarus](#), Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, Views of 7 August 2007, para. 7.5.

<sup>299</sup> [Aleksander Belyatsky et al. v. Belarus](#), Human Rights Committee, UN Doc. CCPR/C/90/D/1296/2004, Views of 7 August 2007, para. 7.3.

*The mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose.*

*In the present case, the court order which dissolved “Viasna” is based on perceived violations of the State party’s electoral laws carried out during the association’s monitoring of the 2001 Presidential elections. This de facto restriction on the freedom of association must be assessed in the light of the consequences which arise for the author, the co-authors and the association.*

*The Committee notes that the author and the State party disagree over the interpretation of article 57, paragraph 2, of the Civil Procedure Code, and its compatibility with the lex specialis governing the legal regime applicable to public associations in Belarus. It considers that even if “Viasna’s” perceived violations of electoral laws were to fall in the category of the ‘repeated commission of gross breaches of the law’, the State party has not advanced a plausible argument as to whether the grounds on which “Viasna” was dissolved were compatible with any of the criteria listed in Article 22, paragraph 2, of the Covenant. As stated by the [Belarus] Supreme Court, the violations of electoral laws consisted of “Viasna’s” non-compliance with the established procedure of sending its observers to the meetings of the electoral commission and to the polling stations; and offering to pay third persons, not being members of “Viasna”, for their services as observers.<sup>300</sup>*

In [Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan](#), a case in which the State had dissolved an association on the basis of not respecting rules on holding a meeting of the general assembly, the ECtHR took the same approach. The Court did not find a pressing social need for dissolution and concluded that:

*the order to dissolve the association on the ground of the alleged breaches of the domestic legal requirements on internal management of NGOs was not justified by compelling reasons and was disproportionate to the legitimate aim pursued<sup>301</sup>*

The Venice Commission’s opinion on Belarus similarly clarified that penalizing actions connected with the organization or management of an association on the sole ground that the association has not been registered does not meet the three-prong test for restricting the right to freedom of association.<sup>302</sup>

<sup>300</sup> [Aleksander Belyatsky et al. v. Belarus](#), HUMAN RIGHTS COMMITTEE, UN Doc. CCPR/C/90/D/1296/2004, Views of 24 July 2007, para. 7.3-7.5.

<sup>301</sup> [Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan](#), ECtHR, Judgment of 8 October 2009, para. 82.

## 12.4. Mere allegations of criminal conduct

In [Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan](#), the State also advanced criminal allegations to dissolve the association. These allegations were however not substantiated by evidence, nor by any criminal charges against the leadership of the association. The ECtHR found that unproven allegations of unlawful activities were not a legitimate basis for dissolution of the association.<sup>303</sup>

## 12.5. Destructing democracy and inciting violence

Measures of suspension or dissolution may be proportionate in extreme cases, such as when an association incites violence or advocates for the destruction of democracy.

The protection of associational objectives which promote ideas not favorable to the government is guaranteed under international law [[Link to objectives](#)]. The ECtHR has emphasized on several occasions that an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State.<sup>304</sup> In [Refah Partisi v. Turkey](#), the ECtHR clarified however, that a political party inciting to violence or aiming at destroying the democratic order cannot claim protection under the Convention:<sup>305</sup>

*It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds<sup>306</sup>*

More recently, in [Vona v Hungary](#), the ECtHR extended the application of the reasoning in [Refah Partisi v. Turkey](#), and held that States can take preventive measures to protect democracy, including vis-à-vis associations that are not political parties. It did not find a violation of Article 11 in a case whereby the Hungarian Guard Association was dissolved. The association had also founded a related Hungarian Guard Movement. Among its activities were holding military-like parading with military-style uniforms and rallies in Roma communities under the theme of “Gypsy criminality,” which included participants wearing armbands similar to those of the Arrow Cross, a nationalist socialist party during World War II. In addressing the dissolution of the association, the ECtHR gave weight to concrete steps taken by the movement and reasoned:

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<sup>302</sup> [Venice Commission, Opinion on the Compatibility with Universal Human Rights Standards of Article 193-1 of the Criminal Code on the Rights of Non-Registered Associations of The Republic of Belarus, 18 October 2011, para. 113.](#)

<sup>303</sup> [Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan](#), ECtHR, Judgment of 8 October 2009, para. 84-91.

<sup>304</sup> [United Communist Party and Others v Turkey](#), ECtHR, Judgment of 30 January 1998.

<sup>305</sup> See [Refah Partisi \(the Welfare Party\) v. Turkey](#), ECtHR, Judgment of 13 February 2003, para. 98-100.

<sup>306</sup> See [Refah Partisi \(the Welfare Party\) v. Turkey](#), ECtHR, 2003, para. 98; see also [Yazar and others v Turkey](#), ECtHR, Judgment of 9 April 2002, para. 49.

*The State is also entitled to take preventive measures to protect democracy vis-à-vis such non-party entities if a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions. [...] the State is entitled to act preventively if it is established that such a movement has started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy.*<sup>307</sup>

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It is important to note that the specific facts of this case – especially the paramilitary nature of some of the activities, the history of the country and the intimidating effects on a vulnerable ethnic group – seem to have played an important role in the conclusion by the ECtHR. The Court accepted in this case that the threat posed could only be effectively eliminated by removing the movement’s organizational backing.<sup>308</sup>

In [Eusko Abertzale Ekintza – Accion Nacionalista Vasca v Spain](#), the European Court accepted the legitimacy of the dissolution of the party taking into account the linkages, albeit not formal, but practical, including financial, between the party and Euskadi Ta Askatasuna (ETA), declared a terrorist organization in Spain.<sup>309</sup>

In a remarkable case, [Les Authentiks and Supras Auteuil 91 v. France](#), the ECtHR found that the dissolution of a football supporters’ club in France did not amount to a violation of the right to freedom of association. Even though, in this case, the local courts had not established any negligence on the part of the applicant associations for very violent acts (resulting in deaths), they established that their involvement in the events had led to public disorder by certain supporters acting as members of the association. Again, it is important to consider the case in its specific context of a long period of very violent outbreaks in football stadiums for which a number of other government measures had not yielded effects. In this particular situation, the ECtHR accepted the legitimacy of the “pressing social need” to impose drastic restrictions on groups of supporters, thereby infringing the very essence of freedom of association, in order to prevent and eliminate the risk of public disorder.<sup>310</sup> When considering the necessity of the measure, the Court also took the nature of the organization into account, namely the promotion of a football club. The Court found such association to be less vital to a democratic society.<sup>311</sup>

Even in cases where State authorities take the measure of dissolution because they find the association is inciting violence, a strict proportionality test must be applied.

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<sup>307</sup> [Vona v Hungary](#), ECtHR, Judgment of 9 July 2013, para. 57.

<sup>308</sup> [Vona v Hungary](#), ECtHR, Judgment of 9 July 2013, paras. 71-72.

<sup>309</sup> [Eusko Abertzale Ekintza – Accion Nacionalista Vasca v. Spain](#), ECtHR, Judgment of January 15, 2013, para 73.

Available in French.

<sup>310</sup> [Les Authentiks and Supras Auteuil 91 v. France](#), ECtHR, Judgment of 27 October 2016, para. 83. The rule is available only in French. A summary is available [in English](#).

<sup>311</sup> [Les Authentiks and Supras Auteuil 91 v. France](#), ECtHR, Judgment of 27 October 2016, para. 84.

The AComHPR confirmed this clearly in the case [Interights and Others v Mauritania](#), where the Union des Forces Démocratiques-Ere nouvelle (UFD/EN, Union of Democratic Forces-New Era), a Mauritanian political party, had been dissolved by the Prime Minister of the Republic of Mauritania. According to the State, the measure was imposed “following a series of actions and undertakings committed by the leaders of this political organisation, and which were damaging to the good image and interests of the country; incited Mauritians to violence and intolerance; and led to demonstrations which compromised public order, peace and security.”<sup>312</sup> However, the Commission found that the dissolution was not proportional to the nature of the offences committed because the State had a range of other options to consider, and therefore found a violation of the right to freedom of association (Article 10(1) of the African Charter):

*81. In this particular case it is obvious that the dissolution of the UFD/EN had the main objective of preventing the party leaders from continuing to be responsible for actions for declarations or for the adoption of positions which, according to the Mauritanian government, caused public disorder and seriously threatened the credit, social cohesion and public order in the country.*

*82. Nonetheless, and without wanting to pre-empt the judgment of the Mauritanian authorities, it appears to the African Commission that the said authorities had a whole gamut of sanctions which they could have used without having to resort to the dissolution of this party. It would appear in fact that if the respondent state wished to end the verbal 'drifting' of the UFD/EN party and to avoid the repetition by this same party of its behaviour prohibited by the law, the respondent state could have used a large number of measures enabling it, since the first escapade of this political party, to contain this 'grave threat to public order'.<sup>313</sup>*

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## 12.6. De facto dissolution

It may be argued that a number of measures amount to a *de facto* dissolution.

The Special Rapporteur has argued in an amicus brief that hasty approvals by government authorities of a new composition of an association’s board – while knowing that it was contested by the governing board and against a background of earlier threats by authorities not to renew the association’s registration – had the effect of an involuntary dissolution of the association.<sup>314</sup>

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<sup>312</sup> [Interights and Others v Mauritania](#), AComHPR, June 2004, para. 3.

<sup>313</sup> [Interights and Others v Mauritania](#), AComHPR, June 2004, paras. 81-82.

<sup>314</sup> [UN Special Rapporteur on the rights to freedom of peaceful assembly and association Maina Kiai, Amicus Curiae before the African Court on Human and Peoples’ Rights in the case of Laurent Munyandikirwa versus Rwanda, January 2015, para. 43.](#)

Similarly it can be argued that the impact of withdrawing the legal personality of an association may be so severe that it amounts to a *de facto* dissolution. Without legal personality, associations often cannot transact or engage resources (human and financial) in the name of the association, which are key to carrying out the purposes for which they are formed.<sup>315</sup> [\[Link to legal personality\]](#)

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<sup>315</sup> For a specific application of this argument see [UN Special Rapporteur on the rights to freedom of peaceful assembly and of association Maina Kiai, \*Amicus curiae\* before the Constitutional Court of Bolivia, April 2015, paras. 34, 42, 49.](#)

### 13. Remedies

Everyone has a right to an effective remedy for acts violating their human rights.<sup>316</sup> When the right to freedom of association has been infringed, both associations and their members have the right to an effective remedy, which includes access to judicial review and reparations. States have an obligation to investigate fully any allegations of a violation of the right to freedom of association and to hold individuals, including State authorities, responsible for malicious infringement of the right. In addition, States must take measures to prevent future violations of the right, such as the revision of laws, the issuance of prosecutorial guidelines, and any other necessary measures.

In its [General Comment 31](#), the UN Human Rights Committee explained that:

*15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognised under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretative effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.*

*16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in*

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<sup>316</sup> [UDHR, art. 8](#): "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."



*relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.*

*17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.<sup>317</sup>*

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### 13.1. Right to judicial review

The right to an effective remedy is integral to the exercise of the right to freedom of association. This right to a remedy includes the right to a fair hearing by an independent and impartial tribunal on matters affecting one's realization of the right to freedom of association. The right to a fair trial or adjudication of one's rights before an impartial tribunal is guaranteed in Article 14 of the [ICCPR](#), Article 7 of the [ACHPR](#), Article 6 of the [ECHR](#), and Article 8 of the [ACHR](#).

The right to judicial review applies to both associations and members:

*116. Associations, their founders and members should have the right to an effective remedy concerning all decisions affecting their fundamental rights, in particular those concerning their rights to freedom of association, expression of opinion and assembly. This means providing them with the right to appeal or to have reviewed by an independent and impartial court the decisions or inaction by the authorities, as well as any other requirements laid down in legislation, with respect to their registration, charter requirements, activities, prohibition and dissolution or penalties...*

*117. All associations should have equal standing before impartial tribunals and, in case of an alleged violation of any of their rights, have full protection of the right to a fair and public hearing. This is a fundamental aspect of protecting associations from undue control by the executive or administrative authorities.*

*118. The founders, members and representatives of associations should likewise enjoy the right to a fair trial in any proceedings commenced by or against them. Therefore, in matters concerning restrictions placed on an association, the right to*

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<sup>317</sup> [UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004.](#)

*receive a fair hearing by an independent and impartial tribunal established by law is an essential requirement to be secured by legislation.*<sup>318</sup>

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### 13.2. Restitution/compensation

Under international law, a State Party is obliged to provide reparation for any injury or damage caused when it violates its obligation to promote or protect the right to freedom of association under an international or regional human rights treaty. As the Permanent Court of International Justice (PCIJ) (which preceded the current International Court of Justice - ICJ) explained almost 100 years ago, reparation “is the indispensable complement of a failure to apply a convention and there is no need for this to be stated in the convention itself.”<sup>319</sup>

In cases of infringement of freedom of association, associations and their members have the right to restitution as well as compensation for any damages that resulted from the violation.<sup>320</sup>

The AComHPR Guidelines specify that “[i]n addition to restitution remedying the specific harms inflicted, associations shall have the right to compensation for any and all damages that may have occurred.”<sup>321</sup> The OSCE/ODIHR and Venice Commission’s Joint Guidelines on Freedom of Association similarly instruct States that effective remedy for violations of freedom of association in the national courts “should include compensation for moral or pecuniary loss.”<sup>322</sup>

In addition, each of the major human rights treaties has a treaty-monitoring body, or mechanism, that explicitly envisions States Parties’ obligation to attempt to make victims’ of rights violations whole, including through compensation for injuries sustained. The pertinent regional human rights courts retain a great deal of discretionary power in ordering reparations and specific remedial measures.

Article 63 of the [ACHR](#) provides:

*1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*

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<sup>318</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015.](#)

<sup>319</sup> [Case Concerning the Factory At Chorzów \(Claim for Indemnity\) \(The Merits\), PCIJ, Judgement of 13 September 1928.](#)

<sup>320</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 81.](#)

<sup>321</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 62. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para 60.1.](#)

<sup>322</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015, para. 116.](#)

*2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.*

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Article 41 of the [ECHR](#) states that:

*If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*

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Article 27 of the [Protocol to the African Charter on the Establishment of the African Court](#) states that:

*1. If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.*

*2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.*

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In [Baena-Ricardo v. Panama](#), a case involving the wrongful termination of government workers on the basis of their involvement in workers' organizations, the IACtHR awarded the workers: (1) unpaid salary and employment benefits from the period of termination; (2) reinstatement, if possible, and indemnification for termination if not; (3) small lump sums for moral damages to each individual; and (4) reimbursement for expenses and costs incurred by the workers in bringing the case.<sup>323</sup>

In [HADEP and Demir v. Turkey](#), the ECtHR refused to award the large sums requested in damages by the applicants where they had failed to show a causal link between the violation and the damages sought but awarded instead a smaller amount in non-pecuniary, or moral, damages to the members of the dissolved political party.<sup>324</sup> Similarly, it ordered the State to pay only those costs and expenses for which the applicants submitted evidence, in this case a bill for translation services. In [Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan](#), the ECtHR refused to award pecuniary damages to a wrongfully dissolved association on the basis that the sum submitted was hypothetical and based only on an estimate of lost opportunities to seek and solicit funds. It did, however, award them non-pecuniary damages upon its finding that:

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<sup>323</sup> [Baena-Ricardo v. Panama](#), (Merits, Reparations and Costs), IACtHR, Judgment of 2 February 2001, para. 214.

<sup>324</sup> [HADEP and Demir v. Turkey](#), ECtHR, Judgment of 14 December 2010, paras. 98-100.

*the Association’s founders and members must have suffered non-pecuniary damage as a consequence of the Association’s dissolution, which cannot be compensated solely by the finding of a violation. Ruling on an equitable basis, the Court awards the Association the sum of EUR 8,000 in respect of non-pecuniary damage, plus any tax that may be chargeable. This sum is to be paid to Mr Sabir Israfilov, who will be responsible for making it available to the Association.*<sup>325</sup>

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In [Tanganyika Law Society et al. v. United Republic of Tanzania](#), the ACtHPR found that Tanzania’s prohibition on independent candidates in elections violated its obligation to promote freedom of association by requiring individuals to join a political association to run for office. It then ordered Tanzania to “to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken” and gave the individual applicant the further opportunity to make submissions concerning compensation and other reparation.<sup>326</sup>

### 13.3. Duty to investigate

The failure to undertake a complete, impartial, and effective investigation into instances of intimidation or attacks upon members of an association constitutes a violation of the association members’ rights to freedom of association.

In the case of [Huilca Tecse v. Peru](#), the IACtHR found a series of violations, including of the right to freedom of association, where a Peruvian trade union leader, Pedro Huilca Tecse, was extra-judicially executed by members of the “Colina Group,” a death squadron with links to the Peruvian Army.<sup>327</sup> The State subsequently failed to undertake a complete, impartial and effective investigation into the facts. The IACtHR determined that the State violated Huilca Tesca’s rights to life (Article 4) and freedom of association (Article 16) where it had used its military intelligence to facilitate the covert operation to execute Huilca Tesca and subsequently been actively involved in covering up the assassination.<sup>328</sup> It reasoned that this had not only deprived him arbitrarily of his life but also restricted his ability to freely associate without pressure or fear by the Government:

*Article 16(1) of the Convention includes the “right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.” These words establish literally that those who are protected by the Convention not only have the right and freedom to associate freely with other persons, without the interference of the public authorities limiting or obstructing the exercise of the respective right, which thus represents a right of each*

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<sup>325</sup> [Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan, ECtHR, Judgment \(Merits and Just Satisfaction\), paras. 84-91 \(October 8, 2009\).](#)

<sup>326</sup> [Tanganyika Law Society et al. v. United Republic of Tanzania, ACtHPR, Judgment of 14 June 2013.](#)

<sup>327</sup> [Jonathan Arjonilla, Case Summary: Huilca Tesca v. Peru, Loyola Los Angeles IACHR Project \(2005\).](#)

<sup>328</sup> [Huilca Tecse v. Peru, \(Merits, Reparations and Costs\), IACtHR, Judgment of 3 March 2005, para. 64.](#)

*individual; but they also enjoy the right and freedom to seek the common achievement of a licit goal, without pressure or interference that could alter or change their purpose. Therefore, the execution of a trade union leader, in a context such as that of this case, not only restricts the freedom of association of an individual, but also the right and freedom of a determined group to associate freely, without fear; consequently, the right protected by Article 16 has a special scope and nature, and this illustrates the two dimensions of freedom of association.*<sup>329</sup>

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The Court held that when an individual's rights to life and safety are not fully guaranteed and respected, the freedom of association cannot be fully exercised because it is implied that the freedom of association contains the power to choose how to exercise it:

*The Court considers that the content of freedom of association implies the power to choose how to exercise it. In this regard, an individual does not enjoy the full exercise of the freedom of association, if, in reality, this power is inexistent or is limited so that it cannot be implemented. The State must ensure that people can freely exercise their freedom of association without fear of being subjected to some kind of violence; otherwise, the ability of groups to organize themselves to protect their interests could be limited.*<sup>330</sup>

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The Court found that, in this case, the right to freedom of association became illusory because Huilca Tecse was not capable of exercising his right to freely associate without being subjected to fatal repercussions by State authorities.<sup>331</sup> The Court also considered that Huilca Tecse's murder, and the failure to investigate or hold anyone accountable for the murder, would intimidate other workers in the trade union movement to self-impose a limitation on associating with a group for fear of similar reprisals.<sup>332</sup>

Similarly, where State authorities have misused legal or regulatory powers with the intent to harass associations or their members, the State must investigate and hold accountable those who misused the authority of the State. Abuses may include frivolous criminal charges, arbitrary audits, warrantless searches, and other forms of intimidation where pursued with the intent of harassing particular associations. The AComHPR Guidelines note that:

*Where the authorities pursue warrantless sanctions, or have pursued sanctions with the aim of harassing particular associations, those responsible for prosecuting*

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<sup>329</sup> [Huilca Tecse v. Peru, \(Merits, Reparations and Costs\), IACtHR, Judgment of 3 March 2005, para. 69.](#)

<sup>330</sup> [Huilca Tecse v. Peru, \(Merits, Reparations and Costs\), IACtHR, Judgment of 3 March 2005, para. 77.](#)

<sup>331</sup> [Huilca Tecse v. Peru, \(Merits, Reparations and Costs\), IACtHR, Judgment of 3 March 2005, para. 78.](#)

<sup>332</sup> [Huilca Tecse v. Peru, \(Merits, Reparations and Costs\), IACtHR, Judgment of 3 March 2005, para. 78.](#)

*the cases in question shall be held liable for violating the right to freedom of association.*<sup>333</sup>

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In cases of infringement of the right to freedom of association, associations and their members have the right to restitution and compensation for any damages that resulted from the violation.<sup>334</sup>

The AComHPR Guidelines specify that “[i]n addition to restitution remedying the specific harms inflicted, associations shall have the right to compensation for any and all damages that may have occurred.”<sup>335</sup> The joint guidelines of the OSCE/ODIHR and Venice Commission similarly instruct States that effective remedy for violations of freedom of association in the national courts “should include compensation for moral or pecuniary loss.”<sup>336</sup>

#### 13.4. Investigation and prosecution

In cases where infringement on the right to freedom of association takes the form of intentional harassment or intimidation of an association or its members, responsible authorities must be held liable for their role in the infringement. According to the AComHPR Guidelines:

*Where the authorities pursue warrantless sanctions, or have pursued sanctions with the aim of harassing particular associations, those responsible for prosecuting the cases in question shall be held liable for violating the right to freedom of association.*<sup>337</sup>

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In addition, where non-State actors have threatened or attacked association members on the basis of their membership, the State must investigate and, if sufficient evidence exists, prosecute those responsible. The failure to undertake a complete, impartial, and effective investigation of such incidents constitutes a violation of the association members’ rights to freedom of association.<sup>338</sup>

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<sup>333</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 62.2. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para 60.2.](#)

<sup>334</sup> [UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 81.](#)

<sup>335</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 62.1. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para 60.1](#)

<sup>336</sup> [OSCE/ODIHR and Venice Commission, Joint Guidelines on Freedom of Association, 2015, para. 116.](#)

<sup>337</sup> AComHPR, [Guidelines on Freedom of Association and Assembly in Africa](#), 2017, para. 62.2. See also [AComHPR, Draft Guidelines on Freedom of Association and Assembly in Africa, 22 September 2016, para 60.2.](#)

<sup>338</sup> See, for example, [Huilca Tecse v. Peru, \(Merits, Reparations and Costs\), IACtHR, Judgment of 3 March 2005.](#)