

C. Best practices related to the right to freedom of association

1. Definition of an association

51. 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 (see report of the Special Representative of the Secretary-General on human rights defenders, A/59/401, para. 46).

52. The word “association” refers, *inter alia*, to civil society organizations, clubs, cooperatives, NGOs, religious associations, political parties, trade unions, foundations or even online associations as the Internet has been instrumental, for instance, in “facilitating active citizen participation in building democratic societies” (A/HRC/17/27, para. 2). The Special Rapporteur underscores that these various types of associations are, in most cases, regulated by different types of legislations. As he has mainly received information

regarding allegations impacting civil society's work since the inception of his mandate, and due to the word limit, the present section of the report will primarily focus on this type of association, but will address others when relevant. This will not prevent him from focusing on other forms of associations in his future reports.

2. The right to form and to join an association

53. The Special Rapporteur emphasizes that the right to form and join an association is an inherent part of the right to freedom of association. It also includes the right to form and join trade unions for the protection of one's interests, as enshrined in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

54. International human rights law stipulates that everyone has the rights to freedom of association. As a result, legislation that does not set any specific limitation on individuals, including children (e.g. national human rights institution of Cote d'Ivoire) and foreign nationals (e.g. Burkina Faso and the United States of America) complies with international standards. However, under international human rights law, members of the armed forces and of the police may have their right lawfully restricted. Any restrictions must, nevertheless, comply with States' international human rights obligations as blanket restrictions shall not be considered lawful. The Special Rapporteur further considers as a best practice the Armenian and Estonian legislation that require no more than two persons to establish an association. A higher number may be required to establish a union or a political party, but this number should not be set at a level that would discourage people from engaging in associations.

55. An important component of the right to freedom of association is that no one may be compelled to belong to an association (e.g. Chile, Guatemala, Portugal and Republic of Moldova). Likewise, associations should be free to choose their members and whether to be open to any membership.³² This aspect is particularly relevant for unions or political parties since a direct interference in their membership may jeopardize their independence.³³

56. The Special Rapporteur underlines that the right to freedom of association equally protects associations that are not registered (e.g. Canada, Republic of Moldova, Slovenia and the United States). Individuals involved in unregistered associations should indeed be free to carry out any activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions, as the Special Rapporteur regrets is the case in Algeria, Belarus, Cambodia or the Syrian Arab Republic.³⁴ This is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views or beliefs.

57. The European Court on Human Rights clearly ruled "that citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning".³⁵ The procedure to establish an association as a legal entity varies from one country to another, but it is vital that Government officials act in good faith, in a timely and non-selective manner. The Special Rapporteur considers as best

³² *Key Guiding Principles of Freedom of Association*, para. 28.

³³ ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition (Geneva, 2006), para. 723.

³⁴ See footnote 21.

³⁵ European Court of Human Rights, *Sidiropoulos and Others v. Greece*, application No. 26695/95, 10 July 1998.

practice procedures which are simple, non-onerous or even free of charge (e.g. Bulgaria) and expeditious (e.g. Japan where registration applications may be directly filled in online).

58. The Special Rapporteur is of the opinion that a “notification procedure”, rather than a “prior authorization procedure” that requests the approval of the authorities to establish an association as a legal entity, complies better with international human rights law and should be implemented by States. Under this notification procedure, associations are automatically granted legal personality as soon as the authorities are notified by the founders that an organization was created. In most countries, such notification is made through a written statement containing a number of elements of information clearly defined in the law, but this is not a precondition for the existence of an association. It is rather a submission through which the administration records the establishment of the said association. Such a notification procedure is in force in a number of countries (e.g. Cote d’Ivoire, Djibouti, Morocco, Portugal, Senegal, Switzerland and Uruguay).

59. The Special Rapporteur believes the formation of branches of associations, foreign associations or unions or networks of associations, including at the international level, should be subject to the same notification procedure.

60. Under both notification and prior authorization regimes, registration bodies must be bound to act immediately and laws should set short time limits to respond to submissions and applications respectively. The Special Rapporteur echoes a ruling of the European Court which provided that “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”.³⁶ During this period associations should be presumed to be operating legally until it is proven otherwise (e.g. Uruguay). Failure to provide a response within a clear and short time limit should result in a presumption that associations are operating legally (e.g. Austria).

61. 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 authorization to establish a trade union violates the principles of freedom of association”.³⁷

62. Newly adopted laws should not request all previously registered associations to re-register so that existing associations are protected against arbitrary rejection or time gaps in the conduct of their activities. For instance, the Committee on the Rights of the Child, in its concluding observations on Nepal, expressed concerns over the wide-ranging restrictions, such as re-registration requirements, placed by the authorities on civil society organizations (CRC/C/15/Add.260, paras. 33 and 34).

3. The right to operate freely and to be protected from undue interference

(a) Positive obligation

63. The right to freedom of association obliges States to take positive measures to establish and maintain an enabling environment. It is crucial that individuals exercising this

³⁶ European Court of Human Rights, *Ismayilov v. Azerbaijan*, application No. 4439/04, 17 January 2008, para. 48.

³⁷ *Digest of decisions and principles*, para. 274.

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, notably for unionists. One or several of such violations is/are found in, e.g., Belarus, Colombia, the Democratic Republic of the Congo, Egypt, Israel, the Philippines, , Sri Lanka, Syrian Arab Republic and Zimbabwe.³⁸

(b) *Negative obligation*

64. Furthermore, States have a negative obligation not to unduly obstruct the exercise of the right to freedom of association. Members of associations should be free to determine their statutes, structure and activities and make decisions without State interference (e.g. legislation in Bulgaria, Slovakia and Slovenia). Associations pursuing objectives and employing means in accordance with international human rights law should benefit from international legal protection. Associations should enjoy, inter alia, the rights to express opinion, disseminate information, engage with the public and advocate before Governments and international bodies for human rights, for the preservation and development of a minority's culture³⁹ or for changes in law, including changes in the Constitution.⁴⁰ The Special Rapporteur recognizes that the formation of associations embracing minority or dissenting views or beliefs may sometimes lead to tensions, but he emphasizes the duty of the State to ensure that everyone can peacefully express their views without any fear. For instance, in Lesotho, the Registrar General registered the first ever lesbian, gay, bisexual and transgender organization in the country called Matrix in November 2010 (after numerous delays).

65. Authorities must also respect the right of associations to privacy as stipulated in article 17 of the Covenant on Civil and Political Rights. In this connection, authorities should not be entitled to: condition any decisions and activities of the association; reverse the election of board members; condition the validity of board members' decisions on the presence of a Government representative at the board meeting or request that an internal decision be withdrawn; request associations to submit annual reports in advance; and enter an association's premises without advance notice. The Special Rapporteur recognizes the right of independent bodies to examine the associations' records as a mechanism to ensure transparency and accountability, but 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. As a best practice, the decision of the African Commission on Human and Peoples' Rights found that the right to freedom of association had been violated when the Government of Nigeria provided the Nigerian Bar Association with a new governing body and laid down that 97 of the 128 members constituting this body would be appointed by the Government (report of the Special Rapporteur on the situation of human rights defenders, A/64/226, para. 34).

(c) *Build and strengthen the human rights capacity of administrative officials*

66. The Special Rapporteur notes with satisfaction that in Slovenia the Ministry of Interior is reportedly regularly supervising the work of its administrative units and checking the legality of how the registration procedures are conducted. During the supervision, officers in charge of the procedures are offered expert help and interpretation of the law.

³⁸ See footnote 21.

³⁹ European Court of Human Rights, *Ouranio Toxo and Others v. Greece*, application No. 74989/01, 20 October 2005, para. 40.

⁴⁰ European Court of Human Rights, *Zhechev v. Bulgaria*, application No. 57045/00, 21 June 2007.

4. The right to access funding and resources

67. The ability for associations to access funding and resources is an integral and vital part of the right to freedom of association. The Special Rapporteur makes reference to ILO principles which underline that “provisions which give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes ... are incompatible with the principles of freedom of association”.⁴¹ Numerous United Nations human rights bodies have also emphasized the principle that associations should access funding freely.⁴²

68. Any associations, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, civil society organizations, Governments and international organizations. Nonetheless, the Special Rapporteur notes with concerns that, in some countries, only registered associations are eligible for funding and resources. In this context, it appears essential that rules regulating the creation of associations comply with the aforementioned identified best practices to allow any associations to access funding and resources.

69. In many countries, domestic funding is very limited or non-existent, leading associations to rely on foreign assistance to conduct their activities. The Special Rapporteur echoes the recommendations put forward by the then Special Representative of the Secretary-General on the situation of human rights defenders who affirmed 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” (A/59/401, para. 82). He believes that the same principle should apply to any associations regardless of the goals, in line with international law, they pursue. He considers as best practice legislation that does not prescribe the approval of the authorities before receiving domestic and foreign funding (e.g. Lebanon, Morocco and the United States). The barriers to foreign funding range from undue delay in approval for funding an association’s project (e.g. Bangladesh) to the requirement of obtaining a prior authorization from the authorities. Some legislation even prohibits human rights associations from receiving more than 10 per cent of their overall resources from foreign sources. In Ethiopia where this legislation is in place, out of the 127 associations advocating for human rights active before the 2009 Charities and Societies Proclamation entered into force, very few reportedly still operate.

70. States have a responsibility to address money-laundering and terrorism, but 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 and anti-money-laundering regulations. All measures adopted in this context should promote transparency and engender greater confidence in the sector, across the donor community and with the general public so that charitable funds and services reach intended legitimate beneficiaries.

⁴¹ *Digest of decisions and principles*, para. 485.

⁴² See Committee on the Elimination of Discrimination against Women, concluding observations on Lithuania, A/55/38, para. 155; Committee on the Rights of the Child, concluding observations on the Central African Republic, CRC/C/15/Add.138, paras. 22 and 23; Committee on the Elimination of Racial Discrimination on Ireland, CERD/C/IRL/CO/2, para.12.

71. As far as political parties are concerned, the Special Rapporteur considers that different rules may be applied. In any case, rules governing domestic funding and resources must be non-discriminatory and their implementation should not be arbitrary, with a view to not jeopardizing the independence of political parties and their ability to genuinely compete in elections. Foreign donations may be regulated, limited or prohibited to avoid undue influence of foreign interests in domestic political affairs.

72. The Special Rapporteur indicates the necessity for States not resort to tax pressure to discourage associations from receiving funds, notably from abroad. On a positive note, several States provide tax and other exemptions and privileges for associations (e.g. Bulgaria and Lithuania).

5. The right to take part in the conduct of public affairs

73. Article 71 of the Charter of the United Nations provides that “the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence”. General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service further provides that “the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25” (para. 26). In Lithuania, article 4 of the Law on Procedure for Drafting Laws provides that all legal and natural persons shall have the right to submit proposals on drafting of a legal act. Both individuals involved in association and the association itself must be protected by international human rights law and shall be able to participate in the State’s decision making process. This is particularly crucial for unions as the right to bargain collectively is a fundamental right, which is enshrined in ILO Convention No. 98 (1949) on Right to Organise and Collective Bargaining. In this regard, the Special Rapporteur recognizes that best practices are those that allow for genuine social dialogue with meaningful negotiation.

74. Furthermore, when State authorities intend to regulate the framework governing associations, beneficiaries of the law should be key partners of the drafting process. In Serbia, the law on association was prepared by a working group composed of representatives of the Ministry of Human and Minority Rights, and of associations. On another note, the 2011 New Zealand Disability Bill was reportedly drafted with the participation of the Disabled Persons’ Association.

6. Termination, suspension and dissolution of associations

75. The right to freedom of association applies for the entire life of the association.⁴³ The suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.

76. According to ILO jurisprudence, decisions to dissolve labour organizations “should only occur in extremely serious cases; such dissolutions should only happen following a judicial decision so that the rights of defence are fully guaranteed”.⁴⁴ The Special Rapporteur values as best practice legislation that stipulates that such drastic measures be taken by independent and impartial courts. In the United Republic of Tanzania, the case of

⁴³ European Court of Human Rights, *United Communist Party of Turkey and Others v. Turkey*, No. 19392/92, para. 33.

⁴⁴ *Digest of decisions and principles*, para. 699.

an association working on gender equality that had been deregistered by the authorities was successfully overturned by the Constitutional Court.