NGO RIGHTS AND THEIR PROTECTION UNDER INTERNATIONAL HUMAN RIGHTS LAW

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Introduction

The activities of non-governmental organisations are generally recognised as an important element not only in the initial establishment of a genuine democracy but also in ensuring that, once achieved, it remains healthy and flourishing[1]. The contribution which such organisations make is often political in the broader and non-party sense but it is also manifested in their pursuit of a vast array of interests - such as culture, recreation, sport and social and humanitarian assistance, to say nothing of the rights of those at work and the simple personal fulfilment of those who belong to the bodies concerned – that underpin the vitality of civil society. However, the essential role played by non-governmental organisations, although not open to question, is not one that is appreciated by all States at all times, not least because it does entail an unambiguous commitment to democracy. Nonetheless realising and sustaining such a commitment is an objective of paramount importance for global and regional organisations such as the United Nations, the African Union, the Council of Europe, the Organisation for Security and Co-operation in Europe and the Organisation of American States and it is thus not surprising that provisions guaranteeing and promoting the rights of non-governmental organisations have readily found a place in many of the instruments adopted by all these bodies.

The principal basis for securing the position of non-governmental organisations rests upon the guarantee of freedom of association but there are also a limited number of instruments

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1 This is specifically recognized in Articles 16 and 18 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) (GA Res 53/144, 9 December 1998) and Paragraph 27 of the Document of the OSCE Istanbul Meeting, 1999 (Charter for European Society). The ‘essential’

directed specifically to such organisations and the latter are also able to rely upon other human rights guarantees that have a particular bearing on the pursuit of their activities2. This chapter focuses primarily upon the nature and scope of the international guarantee afforded to freedom of association, particularly the one found in the European Convention on Human Rights, but interweaves into the discussion an account of the provisions in international instruments that are directed specifically to non-governmental organisations. It first reviews the various instruments in which the guarantee of freedom of association is provided, then looks at the way in which the term 'association' is understood by those bodies charged with overseeing the effective implementation of this freedom and goes on to consider those aspects of it which the latter have identified as of particular significance. These aspects include the breadth of the categories of persons on whom freedom of association is conferred, the narrow range of circumstances in which an association's objectives might be considered objectionable, the nature of the rights that arise once an association has been formed, the general impermissibility of imposing penalties on persons solely on account of their membership of an association, the limited scope for regulating the activities of associations and the requirements governing how this should be conducted, the constraints applicable to any involvement by public bodies in the activities of associations and the particular considerations affecting the enjoyment of this freedom by public employees. These different elements all make an indispensable contribution to the enjoyment of a freedom that is meant to be extensive and thereby play a vital part in the strengthening of civil society. However, as freedom of association continues in practice to be subject to restrictions that are impermissible (whether for substantive or procedural reasons, or for both of these), the

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nature of their role has also been emphasized by the European Court of Human Rights; see *Gorzelik and Others v Poland*, 17 February 2004 [GC], para 92.

2 All these guarantees (other than the right of complaint; see n 283) relate only to the activities of non-governmental organisations within States; as to their status within international organisations, see A-K Lindblom, *The Legal Status of Non-Governmental Organisations in International Law*, (2001), chs 4, 7 and 8.

chapter concludes with a brief review of some of the global and regional procedures available to challenge them.

Sources of the guarantee

Global and regional human rights instruments contain a number of general guarantees of freedom of association which are addressed to persons forming bodies with all the concerns already mentioned - and many more besides – and the protection provided by the provisions concerned is reinforced in a number of other undertakings directed to associations with a particular type of membership or objective. The principal general guarantees are found in Article 20 of the Universal Declaration of Human Rights, Article 22 of the International Covenant on Civil and Political Rights, Article 10 of the African Charter on Human and Peoples' Rights, Article 16 of the American Convention on Human Rights, Article 11 of the European Convention on Human Rights and an undertaking made by States belonging to the Organisation for Security and Co-operation in Europe[3]. These guarantees are supplemented by provisions in the same instruments requiring that they be secured without any distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[4], as well as by specific guarantees against discrimination in the case of race, colour, descent, national or ethnic origin and gender that are to be found in the International Convention

3 See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Paras 9.3 and 10.3.

4 Article 2 of the Universal Declaration, Article 2(1) of the International Covenant, Article 2 of the African Charter, Article 1(1) of the American Convention, Article 14 of the European Convention and Para 5.9 of the Document of the Copenhagen Meeting. The last of these prohibits discrimination 'on any ground' and thus expands earlier CSCE commitments to non-discrimination given in Helsinki in 1975 (Declaration on Principles Guiding Relations between Participating States, principle VII, para 1) and Vienna in 1989 (Questions relating to Security in Europe, para 13.7), which were limited to race, sex, language and religion. The absence of any specified categories of discrimination was also a feature of OSCE meetings in Paris in 1990 (Human Rights, Democracy and Rule of Law, para 5) and Istanbul in 1999 (Summit Declaration, para 2) but in Budapest in 1994 (Summit Declaration, para 7) only race, colour, sex, language, religion, social origin or belonging to a minority were identified as the prohibited grounds of discrimination.

on the Elimination of All Forms of Racial Discrimination[5] and the Convention on the Elimination of All Forms of Discrimination against Women[6].

Apart from the Universal Declaration, the African Charter and the American Convention, all of the general guarantees make specific mention of the freedom applying to the formation of trade unions. However, the references to unions in these guarantees are intended only to clarify the position rather than to limit their scope in some way[7]. There are, however, several guarantees of freedom of association specifically directed to trade unions, notably Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 5 of the European Social Charter[8] and the Convention Concerning Freedom of Association and Protection of the Right to Organise of the International Labour Organization[9], as well as an undertaking given by members of the OSCE[10]. Furthermore there are a number of other guarantees concerned with the enjoyment of freedom of association by particular sectors in a society, namely, children[11], environmental campaigners[12], human rights defenders[13], judges[14], members of national minorities[15], migrant workers[16], refugees[17] and stateless persons[18], as well as for non-

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5 Article 5(d)(ix).
6 Article 1-3.
7 See further the discussion in 'Concept of association' below.
8 Also Article 5 of the Revised Charter adopted in 1996 and ratified by fifteen members of the Council of Europe.
9 ILO Convention No 87.
10 In Madrid in 1983 (Questions relating to Security in Europe, para 17). See also Article 8 of the Additional Protocol to the American Convention.
11 Convention on the Rights of the Child, Article 15 and African Charter on the Rights and Welfare of the Child, Article 8.
12 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Articles 1, 2 (4,5) and 3.
13 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) (GA Res 53/144, 9 December 1998) and undertakings made at several OSCE meetings, namely, Vienna in 1989 (Questions relating to Security in Europe, paras 13.3, 13.6 and 21), Copenhagen (paras 10, 10.1-10.4, 11 and 11.2) and Budapest (Chapter VIII, para 18)
14 UN Basic Principles on the Independence of the Judiciary, Council of Europe Recommendation R(94)12 'On the Independence, Efficiency and Role of Judges' and the European Charter on the Statute for Judges.
15 Framework Convention for the Protection of National Minorities, Articles 3, 7 and 8 and the undertakings made at the OSCE meeting in Copenhagen in 1990 (para 32.2, 32.6 and 33).
16 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 26 and 40.
17 Convention relating to the Status of Refugees, Article 15.

governmental bodies of an international character[19]. Moreover the guarantee – in Article 15 of the International Covenant on Economic, Social and Cultural Rights - of the right to take part in cultural life undoubtedly includes the possibility of forming associations for this purpose. In addition, although not formally a guarantee, it should be noted that the Council of Europe has also articulated some Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe ('Fundamental Principles')[20].

Some of the specific guarantees, particularly those relating to trade unions, undoubtedly require recognition of certain rights over and above those to be enjoyed by associations generally[21] and it is with the latter that this chapter is especially concerned[22]. Furthermore not all of the guarantees entail legal obligations but treaties such as the two International Covenants and those adopted by regional organisations are binding under international law on the States that are parties to them. Nevertheless the other instruments not only reinforce the significance of the political commitment to secure freedom of association but can also help to elucidate how it should be implemented in particular contexts[23]. However, given the lack of specificity in the language used in most of the guarantees, the most helpful source of guidance in determining the scope of the general freedom of association is to be derived from the case law generated under those instruments which enable individual or collective claims to be brought[24]. Of all of those

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18 Convention relating to the Status of Stateless Persons, Article 15.
19 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations.
20 Noted by the decision of the Deputies at their 837th meeting on 16 April 2003,
21 Such as the right to bargain collectively but the difference between the scope of the guarantee in civil and political rights instruments and that under economic, social and cultural ones may not be as great as at first appears; see 'Legal personality and other rights' below.
22 On the scope of obligations under the ILO Conventions and the European Social Charter, see International Labour Organisation, *International Labour Standards* (4th ed, revised, 1998) and D J Harris & J Darcy, *The European Social Charter* (2nd ed, 2001).
23 It is unlikely that freedom of association has yet attained the status of customary international law but this is of no significance for the many States that have treaty commitments to respect it.
24 ie, the Convention Concerning Freedom of Association and Protection of the Right to Organise, the Convention on the Elimination of All Forms of Discrimination against Women the European Convention, the European Social Charter, the International Convention on the Elimination of All Forms of Racial Discrimination and the International

instruments, it is only in respect of the Convention Concerning Freedom of Association and Protection of the Right to Organise and the European Convention that there is at present a significant body of case law. Although the approach in both of them is broadly the same, this chapter will focus mainly on that relating to the latter instrument[25] in order to ensure that there is no confusion between the general obligations and those of concern only with the treatment of trade unions[26]. Nevertheless it also needs to be kept in mind that this case law[27], notwithstanding the considerable benefit to be derived from it in understanding what freedom of association entails, addresses only those issues which have already been brought before the various tribunals. Although these are undoubtedly important ones, this does not mean that the full extent of the protection which States are legally obliged to afford to associations has yet been fully clarified. Indeed it remains the case that provisions such as Article 11 of the European Convention have not received the same degree of attention from international and regional tribunals as have many other rights and freedoms. The fact that this has begun to change in recent years means that the main elements of this freedom can now be readily discerned but this should not encourage a reluctance to draw upon other potentially useful sources of guidance as to how to interpret and apply the general guarantees[28]. Moreover it should not be overlooked that one possible explanation for the relative dearth of applications involving Article 11 of the European Convention may well be the limited controls applied in many European countries with respect

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Covenant.

25 ie, judgments of the European Court of Human Rights (‘the European Court’) and decisions and reports of the European Commission of Human Rights (‘the European Commission’). However, relevant cases considered by the UN Human Rights Committee under the First Optional Protocol to the International Covenant are also noted.

26 For the ILO case law see *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th ed (revised), 1996).

27 The limited case law of the Inter-American Court of Human Rights and the UN Human Rights Committee is also considered.

28 These would include not only the non-binding instruments already referred to but also any General Comments issued by the UN Human Rights Committee in respect of the fulfilment of obligations under the International Covenant. Although no General Comment has so far been issued in respect of Article 22, the Committee has suggested that the guarantee afforded by this provision may be more extensive than that in Article 11 of the European Convention; concluding observation in respect of Iceland, CCPR/C/79/Add. 98, 8 November 1998, para

to this freedom and that this is something that should be more generally emulated. It should also be recalled that interference with the activities of associations may well engage other legally binding rights and freedoms - notably, rights to a fair hearing and peaceful enjoyment of possessions and freedom of assembly, conscience, correspondence and expression[29] – and appropriate account is taken of these in the discussion below.

Concept of association

Although the role of non-governmental organisations has been, and continues to be, important for the elaboration, implementation and protection of human rights, specific reference to them is not frequently found in human rights treaties[30]. Indeed this term is only used in two of them and then only with regard to the procedural competence to submit applications or petitions in respect of alleged violations of the substantive rights[31]. The failure to recognise them may have implications not only for their ability to complain to some supervisory bodies[32] but also to rely on the substantive rights afforded by some treaties[33]. Nevertheless the ability of most

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29 These are guaranteed by Articles 6, 8, 10 and 11 of the European Convention and Article 1 of the latter's First Protocol and (with the exception of possessions) Articles 14, 18, 19 and 20 of the International Covenant . Although an interference with an association's objectives that touches an interest covered by such a provision may be seen as also affecting freedom of association, a claim may sometimes be treated only as engaging the provision concerned on the basis that this is the *lex specialis* (see Appl No 23413/94, *L C B v United Kingdom*, 83 DR 31 (1995), with respect to Article 8) or examination of the association issue may simply be considered unnecessary once a violation of another right is established (see *Sadak and Others v Turkey*, 17 July 2001, with respect to Article 6).

30 This is not, of course, the case with the non-legally binding instruments referred to above or European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, which is not a human rights treaty.

31 American Convention, Article 44 ('non-governmental entity') and European Convention, Article 34 ('non-governmental organisation'). Article 14 and 2 respectively of the International Convention on the Elimination of All Forms of Racial Discrimination and the Optional Protocol to the Convention on the Elimination of Discrimination against Women authorise communications by 'groups of individuals' but these are only permitted by 'individuals' in the case the International Covenant (First Optional Protocol, Article 2) and 'on behalf of individuals' in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 22) and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 77). The African Charter does not specify the source of communications that it is competent to receive in addition to those from States (Article 55).

32 See 'Global and regional protection of the guarantee' below.

33 See 'Legal personality and other rights' below.

non-governmental organisations to exist and to operate is generally well-secured by the extensive guarantees of freedom of association[34].

As with all terms found in international human rights instruments, the concept of 'association' is something that has to be accorded an autonomous meaning; national provisions cannot, therefore, be conclusive in determining whether something is or is not an association for the purpose of guarantees such as that in Article 11 of the European Convention[35]. This not only means that it is inappropriate to attach too much significance to the language used in particular laws when trying to ascertain whether the exercise of freedom of association is involved[36] but also that the conditions which laws may impose before something will be regarded as an association will not necessarily be regarded as acceptable from the international perspective. Certainly a very inclusive approach is taken at the international level to the sort of gatherings of persons that are protected by freedom of association guarantees. However, in order for those guarantees to become applicable, it would have to be demonstrated that the grouping concerned is something more than a body of persons who have a common objective since it has already been established that Article 11 does not seek to protect a mere gathering of people desirous of sharing each other's company[37] and a different approach is unlikely to be taken to the

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34 Those excluded would be non-membership organizations since these do not involve any actual association but they do not appear to have figured in any case law involving this freedom and in many instances they can still enjoy the human rights enjoyed by other legal persons; see further 'Legal personality and other rights' below. However, the right to form non-governmental organizations that are not membership-based is recognized in principles 3 and 17 of the Fundamental Principles.

35 Any classification by national law is to be regarded as having 'relative value and constitutes no more than a starting point'; *Chassagnou and Others v France*, 29 April 1999, para 100.

36 There is certainly no need for the term 'association' actually to be used and other terms can thus be used in those provisions which seek to implement this freedom. Although 'associations' and 'non-governmental organisations' are terms that are often used interchangeably, the latter will also embrace bodies that have no membership (eg, foundations) and it will be seen that these are thus lacking an essential prerequisite for the application of the freedom of association guarantee. Such bodies are nonetheless also play a vital role in achieving and sustaining democracy and interference with their activities is likely to engage many other human rights (notably with regard to assembly, expression, fair hearing, property and religion).

37 See Appl No 8317/78, *McFeeley v United Kingdom*, 20 DR 44 (1980) in which a complaint by the applicants about not being allowed to meet other prisoners on account of the security regime to which they were subjected was held incompatible with the European Convention *ratione materiae*; the institutional element is clear in the European Commission's view that the concept of freedom of association was 'concerned with the right to form or be affiliated

interpretation of other guarantees[38]. Furthermore some forms of protest action such as demonstrations and public meetings, albeit gatherings of a more organised character, would still not be an exercise of freedom of association because of their essentially transient nature; they would, however, be regarded as activities coming under the protection of freedom of assembly[39], the second limb of that provision. What is thus required is that the gathering not only have been formed with the object of pursuing certain aims but also that it has a degree of stability as regards its existence and thus have some kind of institutional (albeit not formal) structure to which the persons comprising it can really be regarded as belonging[40].

In many instances associations will be bodies with a formal status – namely, legal personality - and this will also be what the founders of most of them want. Nevertheless the international guarantees are not limited to such bodies but also apply to groupings of an informal

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with a group or organisation pursuing particular aims' (p 98). In Appl No 7729/76, *Agee v United Kingdom*, 7 DR 164 (1976), the Commission had previously left open the issue of whether Article 11 protected contact with foreign intelligence officers but, regardless of whether this might be limited on grounds of national security, a sustained practice of meeting someone must now be regarded as conduct that does not come within freedom of association. See also Appl No 33489/96, *Anderson v United Kingdom*, 91 DR 79 (1997) in which it was found that no issue arose under Article 11 in respect of the indefinite exclusion of the applicants from a shopping centre for alleged misconduct and disorderly behaviour in the absence of their having any history of using it for any form of *organised* assembly or association.

38 In Comm No 397/1990, *PS v Desmond*, Views of the UN Human Rights Committee, 22 July 1992, a condition on a father's access to his son requiring that the latter did not *participate* in rallies, gatherings, meetings, missions or similar activities organized by Jehovah's Witnesses was held not to raise any issues under Article 22 of the International Covenant and in Comm No 566/1993, *Somers v Hungary*. Views of the UN Human Rights Committee, 23 July 1996, the seizure of a family's assets before the First Optional Protocol's entry into force was not shown to have produced effects after it became binding which constituted a violation of Article 22.

39 See *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, 2 October 2001 which concerned the practice of systematically banning peaceful assemblies organised by the applicants on account of their having previously been considered to be anti-constitutional and thus refused registration as an organisation. The appropriate approach as regards the latter is considered further below (see 'Regulation – formation') but the violation of Article 11 in this case stemmed from the interference with a particular activity rather than the status or general operation of its organisers. See also the treatment by the Court in *Djavit An v Turkey*, 20 February 2003, of the refusal of permits so that a Turkish Cypriot could not cross into southern Cyprus to participate in bi-communal meetings there as raising an issue of freedom of assembly but not, as had been submitted by the applicant, of association.

40 In *McFeeley* (above, n 37, at 98), the European Commission described freedom of association as being 'concerned with the right to form or be affiliated with a group or organisation pursuing particular aims'. See also Appl Nos 11567/85 and 11568/85, *Le Cour Grandmaison and Fritz v France*, 52 DR 150 (1987) in which the absence of any institutional framework meant that the preparation and distribution of leaflets alone was not regarded as a manifestation of trade union activity within the meaning of Article 11. See also the submission of the applicant in *Djavit An v Turkey*, 20 February 2003 that the 'Movement for an Independent and Federal Cyprus' had met 'the minimum organisation and stability tests' required for freedom of association to be invoked (para 49) but see also the preceding note.

character so long as they have, or are meant to have, more than a fleeting existence. This is a necessary consequence of the general freedom of those associating to determine the basis on which they do so[41]. The fact that some protection is available to the latter bodies will, of course, be particularly significant where a formal status has been improperly denied to persons who have formed an association[42] but it will also be important where it is not considered necessary by those establishing certain groupings that they should also have a formal legal character. It is thus not open to a State to require that freedom of association only be exercised by the establishment of an entity with legal personality.

Apart from the unacceptability of common objectives that are unconstitutional or illegal[43], the only qualification on what might be the aim of a grouping in order for this to be accepted as an exercise of freedom of association is that it is either intended not to be a profit-making body[44] or, where trading activities are undertaken, any profits accruing are ploughed back into the pursuit of the common objectives rather than distributed to its membership[45]. This is because this freedom is essentially a civil and political right rather than an economic one. Nevertheless this does not mean that an association cannot exist to advance the interests of its members; the specific inclusion of the formation of trade unions within the scope of the

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41 This freedom does not, however, preclude the possibility that certain institutional forms may be required if particular benefits are to be enjoyed; see 'Legal personality and other rights' below.
42 Such as in *Canea Catholic Church v Greece*, 16 December 1997, where the refusal to recognise the applicant church's legal personality was found to be an unjustified interference with its right of access to a court under Article 6. The European Court did not pursue the issue of whether this interference also affected its right to freedom of religion but there can be little doubt that in some circumstances denial of legal personality could have an adverse effect on both this right (see *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001, in which refusal of recognition was found to be improperly refused) and on freedom of association; as to the latter, see 'Legal personality and other rights' below.
43 See further 'Objectives' below.
44 The absence of profit-making as a primary aim is specifically stated as a characteristic of non-governmental organisations in Principle 4 of the Fundamental Principles. However, if it is not otherwise precluded by the law, there could be no objection to a grouping that used the device of a corporation being regarded as an association. It is also one of the categories of bodies mentioned in the guarantee of freedom of association in the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons (Article 15 in both cases).
45 On the importance of the ability to do this for associations, see 'Legal personality and other rights' below.

guarantee is the clearest indication that the securing of benefits for those who belong to an association is a legitimate objective and these benefits can be economic as much as moral, physical, social or spiritual. However, if the principal objective is trading or some other form of business activity then protection for the interests of those belonging to the body concerned should be sought in guarantees such as the right to property rather than freedom of association[46].

The fact that express reference is only made in general guarantees such as Article 11 of the European Convention to only one form of association, namely, trade unions, might lead to the conclusion that these either enjoyed a privileged position or that this provisions was not intended to cover all other forms of association[47]. However, as the European Court first made clear in *United Communist Party of Turkey and Others v Turkey*[48], the special mention of them is no more than a reminder that they are within the definition of associations; the conjunction 'including' in Article 11 'clearly shows that trade unions are but one example among others of the form in which the right to freedom of association may be exercised'[49]. This conclusion was reinforced in the context of that case, which concerned the dissolution of a political party, by the incontestable view that political parties were 'essential to the proper functioning of democracy in the Convention system' and they could thus not be excluded from the scope of Article 11.

46 See, eg, *Agrotexim and Others v Greece*, 24 October 1995 and *Lithgow and Others v United Kingdom*, 8 July 1986 which concerned the protection of the interests of shareholders affected by action taken against companies in which they had invested.

47 This impression is avoided in both the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons where trade unions are clearly identified as discrete entities from the other associations mentioned (Article 15 in both cases). Although 'non-governmental' trade unions are often treated quite separately from other non-governmental organisations; see paragraph 14 of the explanatory memorandum to the Fundamental Principles.

48 30 January 1998.

49 *Ibid*, para 24. This view has been reaffirmed in subsequent cases, such as *The Socialist Party and Others v Turkey*, 25 May 1998, *Sidiropoulos and Others v Greece*, 10 July 1998, *Freedom and Democracy Party (Özdep) v Turkey*, 8 December 1999, *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002 and *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002. It had also been something previously emphasised by the European Commission in Appl No 6094/73, *X v Sweden*, 9 DR 5 (1977) when pointing out that the fact that a students' association was not without any specific protection under Article 11 because it was not a trade union in the traditional sense of the term; 'Freedom of association is a *general capacity* for the citizens to join without interference by the State in associations in order to attain various ends' (p7) (emphasis added).

Nevertheless it is evident that no category of association is *a priori* denied the protection afforded by the general guarantees[50].

Some entities that may be treated as associations under domestic law will not, however, generally be so regarded for the purpose of Article 11 or other freedom of association guarantees. These are the many bodies which are established by law and to which doctors, lawyers, architects and other members of professions are often required to join[51]. The European Court has regarded these as being public law bodies designed to regulate a particular profession and, as such, they will not normally attract the protection of Article 11 or other freedom of association guarantees[52]. A similar view has also been taken of bodies such as works councils which may be required under employment legislation to be established to secure staff participation in the management at a particular work place; this is the sole basis on which the 'members' are brought together and the compulsion in their formation is sufficient to preclude such councils from being associations[53].

The fact that groupings are established pursuant to a legislative requirement does not,

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50 This does not, however, preclude differences in the laws or regulatory arrangements for the various possible categories of association; see further 'Legal personality and other rights' below.
51 As contrasted with ones which they choose to establish themselves and in which membership remains voluntary, such as the 'professional organisations' for judges envisaged by Article 1.7 of the European Charter on the Statute for Judges.
52 See, eg, *Le Compte, Van Leuven and De Meyere v Belgium*, 23 June 1981 (which concerned an obligation to belong to a body that was required to keep a register of medical practitioners) and *O V R v Russia*, 3 April 2001 (Admissibility Decision) (which concerned the requirement to belong to the regional notary chamber on pain of losing the right to practise as a private notary). This approach had previously been followed by the European Commission in Appl No 13750/88, *A and Others v Spain*, 66 DR 188 (1990), Appl No 8734/79, *Barthold v Federal Republic of Germany*, 26 DR 145 (1981), Appl Nos 14331/88 and 14332/88, *Revert and Legallais v France*, 62 DR 309 (1989) in respect of bodies created under legislation to regulate lawyers, veterinary surgeons, architects. It had also been followed in respect of chambers of trade established by law to eliminate and prevent unfair trade practices and further professional education and training and to which the applicant automatically became a member – with an obligation to pay an inscription fee – upon being granted a licence to run a restaurant; Appl No 14596/89, *Weiss v Austria*, 71 DR 158 (1991). However, the inapplicability of the freedom of association guarantee to such bodies does not mean that they might not still be able to rely on other guarantees – expression, fair hearing and property – insofar as their regulatory function is not such as to turn them entirely into a State entity. It is also possible that these bodies may be treated as non-governmental organisations in the course of the functioning of international organisations.
53 See *Karakurt v Austria*, 14 September 1999 (Admissibility Decision), which concerned ineligibility on grounds of nationality for the applicant to be elected to a works council established pursuant to industrial relations legislation.

however, necessarily mean that they will not be treated as associations for the purpose of international guarantees. Thus in *Chassagnou and Others v France* the Court had no hesitation in regarding as associations those bodies which had been established for the purpose of organising hunting where these were 'composed of hunters or owners of land or hunting rights, and therefore, of private individuals, all of whom, *a priori*, wish to pool their land for the purpose of hunting'[54]. It did not matter that the way in which these associations operated was subject to the supervisory power of the prefect as this was not in itself sufficient for them to be integrated into the structures of the State. It was, however, significant that these bodies did not enjoy

> prerogatives outside the orbit of the ordinary law, whether administrative, rule-making or disciplinary, or that they employ processes of a public authority, like professional associations'[55].

Attempts to exclude a particular body from the scope of the freedom of association guarantee by stipulating, as in this case, that it is 'public' or 'para-administrative' will thus not be effective if that is not actually an accurate reflection of its essential character[56].

The compulsion to belong to bodies such as professional associations and works councils can have the potential to encroach upon this freedom – as well as others such as conscience and

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54 29 April 1999, para 101.

55 *Ibid.* Similarly in *Sigurdur A Sigurjónsson v Iceland*, 30 June 1993, the conferment of regulatory functions in the public interest on a taxi-drivers' association was not sufficient for it be regarded as a public law association outside Article 11's ambit. In the Court's view, the critical considerations in concluding that it was predominantly a private law association were that it enjoyed full autonomy in determining its own aims, organisation and procedure and that its purpose was to promote the interests of its members, to negotiate conditions and wages for those members and to represent them before the public authorities. No determination was made as to whether the association was also a trade union.

56 It was not significant that there was confusion in French law as to whether the bodies were private associations, public or para-public associations or mixed associations since the issue before the Court was whether they were associations for the purpose of Article 11. It is possible that other compulsory groupings will also fall outside Article 11; see Appl No 6094/73, *Association X v Sweden*, 9 DR 5 (1977) in which compulsion to belong to a student union was not a violation of this provision as a university was a public institution and so the provision was not relevant in the circumstances of the complaint. The European Commission distinguished the student union from a professional organisation which upholds ethics and discipline within the profession or defends its members interests in outside disputes and the Commission also did not see it as a trade union in the sense of representing the students 'in a labour conflict situation against an employer'. In its view the union was in fact 'a formal way of organising student participation in the administration of the university. The "studentkår" seems to be democratically composed and the students are free to disagree with those political positions which it may adopt' (p 8).

expression – because of the constraint that might be imposed upon the manifestation of beliefs and opinions by their members[57]. Nevertheless such a problem does not tend to arise in practice because the bodies involved are primarily concerned with regulatory issues and do not have any monopoly over representing the interests and views of their members[58]. It should also be noted that voluntary groupings established within these bodies – such as a bar association's human rights committee – could be regarded as an association enjoying the protection of Article 11 and other freedom of association guarantees. This is because they will be concerned with promoting the objectives of those belonging to it rather than with the regulation of their professional conduct[59].

The right to found and to belong

The ability to form and join associations is something that the general guarantees[60] all provide as being open to 'everyone' within a State's jurisdiction and the scope for imposing limitations on this capacity is quite limited. 'Everyone' certainly means legal as well as natural

57 See, eg, *Ezelin v France*, 26 April 1991 in which it was found that disciplinary action taken against a member of the bar for taking part in a demonstration in which public buildings had been damaged and the judiciary had been insulted was a violation of Article 10 because the applicant had not himself been involved in any reprehensible act.
58 The European Court in *Le Compte, Van Leuven and De Meyere v Belgium*, 23 June 1981 emphasised that there would have been a violation of Article 11 if medical practitioners were not able to set up and join associations to represent their professional interests other than the body they were required to belong to for the purpose of professional registration. This was also an important consideration in all the other cases dealing with professional organisations (see n 52) and see also the European Commission's observation about the scope for disagreement in *Association X v Sweden* (n 56). See also the Inter-American Court of Human Rights's Advisory Opinion of 13 November 1985, No OC-5/85, *Compulsory membership in an association prescribed by law for the practice of journalism*, (1986) 7 *HRLJ* 74 that there would be a violation of freedom of expression where a membership requirement was used as a means of licensing journalists if it denied any person access to the full use of the news media as a means of expressing opinion or imparting information and that the particular Costa Rican law in respect of which the opinion was sought did have such an effect as it prevented certain persons from joining the association concerned (ie, those who did not have a degree in journalism or, if there was a lack of professional journalists, those not authorized by the association itself). Only Judge Nieto saw the membership requirement as incompatible with freedom of association; in his view achievement of the actual objectives of the association did not require compulsory membership. See the discussion at n 215 of a similar fact situation in Comm 633/1995, *Gauthier v Canada*, Views of the UN Human Rights Committee, 7 April 1999.
59 However, this would not be the case where the grouping is effectively part of the supervisory structure of the main body as was the position of young lawyers' groups within Spanish provincial bar associations; Appl No 13570/88, *A and Others v Spain*, 66 DR 188 (1990).
60 As well as Article 5 of the UN Declaration on Declaration on Human Rights Defenders.

persons as association is not one of the rights or freedoms that are capable of being exercised only by human beings[61]. The only exception in this regard would be public bodies since these are a part of the State which is bound to secure freedom of association rather than beneficiaries of this right.

The unqualified nature of the formulation in all instruments means that the freedom should be exercisable by children as much as by adults, without needing to rely on the specific guarantees in respect of the former in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Nevertheless this would not preclude the adoption of protective measures to ensure that they are not exploited or exposed to moral and related dangers, so long as the total exclusion of the ability to associate did not result[62]. Such measures, insofar as they are proportionate and meet the requirements of legal certainty, could be justified as a restriction on their freedom pursuant to provisions such as Article 11(2)[63]. However, in judging the appropriateness of any such measures account would have to be taken of the need stipulated by the Convention on the Rights of the Child to respect 'the evolving capacities of the child'[64] which would mean that the effect of any restrictions that might be

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61 Such as the prohibition on torture and right to marry. The issue of restrictions on the capacity of legal persons to exercise freedom of association has not yet been addressed by the European Court but it has accepted that corporate bodies can exercise the related freedom of expression; see, eg, *The Sunday Times v United Kingdom*, 26 April 1979. Although the position is the same under the International Covenant, corporate bodies are not able to lodge communications about possible violations of its provisions under the First Optional Protocol; see n 282. However, the guarantees in the American Convention are specifically restricted to 'human beings' by Article 1(2) and those under the African Charter are generally accorded only to 'citizens', 'individuals' and 'peoples'.

62 See the recommendations of the Committee on the Rights of the Child that Bahrain bring its legislation into conformity with Article 15 of the Convention as a step towards strengthening the participation of children in associations (CRC/C/15/Add.175, 11 March 2002, para 6), that Belarus 'guarantee to all children the full implementation of the rights to … freedom of association' (CRC/C/15/Add.180, 13 June 2002, para 34), that Georgia 'amend its legislation to ensure that youth are allowed to join political parties and that they fully enjoy their right to freedom of association' (CRC/C/15/Add.124, 28 June 2000, para 31). See also its concern that in Tunisia 'the right of the child … to freedom of association … [is] not fully guaranteed in practice' (CRC/C/15/Add.181, 13 June 2002, para 27) and that in Turkey 'persons under 18 cannot form associations' (CRC/C/15/Add.152, 9 July 2001, para 37).

63 See text at n 83.

64 Article 5. Freedom of association is explicitly recognised by Article 15 of the Convention as a right exercisable by children but the provision permits the imposition of restrictions on the same basis as under the European Convention. The over-arching requirement to consider the best interests of the child in Article 4 of the African

adopted would undoubtedly have to be diminished as those affected grow older[65].

The inclusive nature of 'everyone' would also mean that freedom of association can, in principle, be exercised by people who are not actually citizens of the country concerned (whether they are citizens of another country or stateless persons). Article 16 of the European Convention does accept the possibility of some restrictions being imposed on the political activity of those who are not citizens and this is defined to cover freedom of association. However, in order to be acceptable, such restrictions ought to be compatible with the Convention's overall objectives of political democracy, freedom and the rule of law and they ought not to be disproportionate. It might, therefore, be possible to justify the exclusion of persons who are not citizens from membership of national political parties but it would certainly be harder to do so where the body was concerned only with local or non-party issues, particularly if those affected were established residents there. There is also likely to be a reluctance to accept restrictions as being justified under Article 16 where they relate to persons from a country with which the one imposing them has close political and institutional links[66]. Moreover restrictions on non-citizens forming or joining associations with no political objectives - such as those concerned with sport and culture - could hardly be defended by invoking Article 16[67]. There is no comparable restriction to Article

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Charter on the Rights and Welfare of the Child is likely to permit similar limitations on the right to freedom of association recognized in Article 8 as would be justified in respect of the right guaranteed by the Convention on the Rights of the Child.

65 Restrictions on the ability of persons who are mentally ill or incapacitated could undoubtedly by justified on a similar basis but a failure when applying them to take due account of the capacities of those affected would breach the principle of proportionality.

66 See *Piermont v France*, 27 April 1995 where Article 16 was not accepted as justifying restrictions on the exercise of freedom of expression by someone from another European Union member State and who was also a Member of the European Parliament. It is at least arguable that a similar approach would be appropriate where the country imposing the restriction and the country of which those affected are both members of the Council of Europe.

67 In the case of refugees and stateless persons there is an obligation with respect to freedom of association that is probably narrower than that under the general guarantees in that it requires that those who are lawfully in the country concerned be given the most favourable treatment accorded to a foreign national in the same circumstances but only as regards 'non-political and non-profit-making associations and trade unions'; Convention relating to the Status of Refugees, Article 15 and Convention relating to the Status of Stateless Persons, Article 13. However, the minimum standards in the instruments concerned would not prevent refugees and stateless persons, as much as any foreign nationals, from enjoying the less-restricted freedom conferred by the general guarantees.

16 in the other general guarantees of freedom of association but the International Convention on the Elimination of All Forms of Racial Discrimination does exclude differential treatment between citizens and non-citizens from its definition of discrimination[68], those concerned with refugees and stateless persons sets the freedom enjoyed by certain foreign nationals as regards 'non-political and non-profit-making associations and trade unions' as the standard to be met[69] and the right accorded by the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is limited to trade unions and certain forms of associations[70] and not all migrant workers can form (as opposed to join) them[71]. It is thus unlikely that some restriction on the political aspect of associational activity in respect of non-citizens might not be considered compatible with the freedom accorded by the other, ostensibly unrestricted, general guarantees but it seems improbable that anything going beyond the approach suggested appropriate for Article 16 of the European Convention would be considered acceptable[72].

Freedom of association entails the ability both to form associations with others and to seek to join existing ones. However, the latter freedom amounts only to a restriction on the power of the State to impose unjustified restrictions on the ability of persons - as defined above - to seek membership of an association; it is improbable that the guarantee would be construed as conferring any general right on them to join one against the wishes of its members. The matter

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68 Article 1(2).

69 For refugees it is to be 'the most favourable treatment accorded to nationals of a foreign country, in the same circumstances' (Article 15) and for stateless persons the treatment should be 'as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances' (Article 15).

70 Articles 26 and 40; the associations are ones that protect their economic, social, cultural and other interests but, in the case of those who are documented or in a regular situation, they can be ones that 'promote' these interests. However, this right does not prevail over the potentially wider right in more general instruments; Article 81.

71 Only those who are documented or in a regular situation; Article 40. However, this right does not prevail over the potentially wider right in more general instruments; Article 81.

72 The UN Human Rights Committee has certainly expressed its concern 'at limitations to the exercise of freedom of association for long-term permanent residents in Estonia, particularly in the political sphere'; CCPR/C/79/Add.59, 9 November 1995, para 22. See also principle 15 of the Fundamental Principles that 'Any person, be it legal or natural, national or foreign national, or a group of such persons, should be free to establish an NGO'.

has so far not been directly addressed by the European Court but this seems to be the inevitable conclusion of existing case law restricting the circumstances in which someone can be required to belong to an association[73]; compulsion to admit members would effectively amount to the same thing since it would be denying those who already belong to an association the freedom to choose with whom they wish to associate[74]. Nevertheless there would be good justification for constraining the freedom of existing members of an association to determine whom to admit as new members where this was done in order to fulfil obligations to prevent discrimination on any inadmissible ground and thereby protect the rights of others, as permitted by the second paragraph of Article 11[75].

A person's imprisonment is likely to be a constraint on his or her ability to take a full part in the activities of an association but this should not otherwise be an obstacle to his or her continued membership of it and involvement in its affairs; it would be very difficult to demonstrate that a restriction on freedom of association which went beyond the inevitable

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73 As to which, see further 'Regulation … Protecting members' rights' below.

74 In Appl No 10550/83, *Cheall v United Kingdom*, 42 DR 178 (1985) the European Commission expressed the view that 'unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union' (p 186) but did see a role for the State in protecting a union against exclusion which was not in accordance with those rules. The issue was raised but not resolved in the right to join *Rutkowski v Poland*, 16 April 2002 (Admissibility Decision), which concerned the refusal to accept the applicant as a member of certain local branches of the Polish Hunting Association - because there were already too many members, he was from outside the relevant area, the tone of his application was not liked - in circumstances where such membership was required in order to practice hunting. The merits of the application were not examined because he had in the meantime become a member of a branch and, even assuming that his claims fell within the ambit of Article 11, the fact that he was thus able to practice hunting within the legal framework provided by domestic law meant that he could no longer be considered to be a victim. In finding that no civil rights or obligations were being determined, the European Court emphasised that the association was 'a private entity dealing with a private pastime or hobby, rather than, for example, a professional body exercising certain statutory obligations delegated by the State, to which members of that profession are obliged by law to belong in order to earn their livelihood' (para 2). This was used to justify the conclusion that the fair hearing guarantee in Article 6 was inapplicable – in contrast to the decisions concerning professional regulatory bodies (see, eg, *Le Compte, Van Leuven and De Meyere v Belgium*, 23 June 1981) - but it also serves to cast doubt on the admissibility in general of the State interfering with the membership decisions of such bodies, even if the regulatory framework for hunting might lead one to doubt that there was no public dimension to such decisions in the present case.

75 See *Jersild v Denmark*, 23 September 1994 in which the Court accepted that the duty under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination to prohibit the dissemination of racist ideas could be taken into account in assessing the acceptability under Article 10 of the European Convention of a restriction on freedom of expression. Principle 21 of the Fundamental Principles provides that 'The ability of someone to join a particular NGO should be determined primarily by its statutes, and should not be influenced by

impracticality of attending meetings was something really needed for the purposes of confinement and that is the test by which the impact of a deprivation of liberty on other human rights must be judged[76]. Nevertheless it is possible that some limits could be imposed on a person's exercise of freedom of association as a penalty for certain conduct, provided that a legitimate aim for them could be demonstrated and that they were sufficiently carefully drawn to avoid being challenged for a lack of proportionality. Thus one of the penalties imposed on a Belgian newspaper editor who had collaborated with the German occupying authorities during the Second World War was a prohibition for life on involvement in the administration, management or direction of a professional or non-profit making association or the leadership of a political association. The principle of such a penalty was not specifically dealt with by the European Commission in *De Becker v Belgium* but it did consider other such indefinite restrictions affecting the applicant's freedom of expression could not be justified in so far as they covered non-political matters; the scope of the restriction was simply too broad[77]. The issue never went before the European Court as the applicant applied to have the case struck off after the restrictions on his civil and political rights had been withdrawn and the law permitting such penalties had been modified so that they would apply only for fixed periods determined according to the seriousness of the offence. In these circumstances it was not surprising that the Commission did not object to the case being struck off. However, it is evident that the Court will require very cogent justification for such restrictions on the exercise of freedom of association and it is unlikely that they would be seen as acceptable where their scope did not correspond to

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any unjustified discrimination'.

76 See *Golder v United Kingdom*, 21 February 1975. The observation in the dissenting opinion of Judge Gölcüklü in *Djavit An v Turkey*, 20 February 2003 that 'a person in police custody or detention pending trial cannot claim to be the victim of the infringement of … his freedom of association' (para 17) in the context of obstacles to attending meetings in a part of Cyprus ought to be regarded as an over-simplification of the position of such a person.

77 *Cf* the upholding by the European Commission in Appl No 6573/74 *X v The Netherlands,* 1 DR 87 (1974) of a ban, albeit permanent, which affected only participation in public life (including the right to vote) for those who had been convicted of 'uncitizenlike' conduct during the Second World War.

the nature of the offence giving rise to them or they lasted for an undue length of time[78].

There is no indication in case law or other practice in respect of treaties guaranteeing freedom of association as to the acceptability of imposing a minimum number of founders before an association can established. However, the Council of Europe's Fundamental Principles, while stating that 'Two or more persons should be able to establish a membership-based NGO', does accept the possibility that a higher number might be required 'where legal personality is to be acquired, but this number should not be set at a level that discourages the establishment of an NGO'[79]. This qualification took account of the fact that higher numbers were in fact required in the law of some of the States involved in the adoption of the Fundamental Principles. However, while a certain threshold might be appropriate where the entity then became eligible for certain exceptional benefits, it seems questionable whether a requirement of more than two – even where legal personality is being acquired – is a restriction that is really compatible with freedom of association, especially since incorporation in a commercial context can often be undertaken by an individual and no particular case other than control has been identified as the rationale for insisting upon it.

Although in practice most of the associations which are formed or joined are likely to be

78 The ban on the founders and managers of three political parties from holding similar office in any other political body was an important consideration in the finding in both *United Communist Party of Turkey and Others v Turkey*, 30 January 1998, *Socialist Party and Others v Turkey*, 25 May 1998 and *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002 that their dissolution was disproportionate and thus a violation of Article 11. Equally, where a dissolution was upheld, such a ban on five of the party's leaders but none on its other 152 MPs was the basis for a finding that this measure was not disproportionate in *Refah Partisi (The Welfare Party) and Others v Turkey*, 31 July 2001 (Chamber) and 13 February 2003 (Grand Chamber). See further, 'Regulation - Dissolution' below. See also the Court's condemnation in *Labita v Italy*, 6 April 2000 of a comparable ban involving the disenfranchisement for two years of a suspected Mafioso because it had been imposed only after his acquittal of the offences which had initially led to his being placed under a special supervisory regime; it would have accepted a temporary suspension of voting rights where there was evidence of Mafia membership. However, see the previous footnote for the upholding of a permanent ban in very special circumstances. Apart from improper activities of a 'political' nature, the most likely justification for a restriction on this aspect of freedom of association would be some form of financial misconduct by the person concerned; this would probably support limitations on his or her becoming an office-holder in an association where this involved financial responsibility but it is doubtful if this would justify anything more extensive than that. Principle 27 of the Fundamental Principles provides that 'National laws may disqualify persons from forming an NGO with legal personality for reasons such as a criminal conviction or bankruptcy' but does not envisage any limitation on the capacity to become a member for such reasons.

in the State where the persons concerned reside or are present, the freedom guaranteed by Article 11 would also extend to the creation and membership of associations in other countries[80] and this could be restricted by reference only to the same considerations that govern regulation.

Objectives

Apart from the instruments concerned with trade unions or devoted to particular groups of person, no substantive limitations are expressly placed on the type of objectives[81] that might be pursued by associations[82]. However, while none of the guarantees are framed in absolute terms, neither the requirement to abide by law found in the African Charter nor the broad grounds of limitations[83] found in instruments such as the International Covenant, the Convention on the Rights of the Child, the American Convention and the European Convention actually afford much indication as to what precisely will be regarded as objectionable. This is a matter of concern for those who would associate – particularly where a formal process of approval or registration must be followed in order to establish an association as a legal entity – but it has also proved problematic for States in Europe on a number of occasions as the European Court has

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79 Principle 16.

80 See *Cyprus v Turkey*, 10 May 2001, in which it was not established that there had been attempts to prevent Turkish Cypriots living in northern Cyprus from establishing associations with Greek Cypriots in the southern part of Cyprus.

81 These can be taken to cover not only the formal provisions in an association's constitution but also policy statements which amplify them. Although the actions of individual members of an association – whether or not in a leadership position – ought not to be automatically regarded as binding the latter, a failure to take disciplinary action against something which is supposedly 'out of line' with an association's objectives might point to it actually being endorsed; see *Refah Partisi (The Welfare Party) and Others v Turkey*, 31 July 2001 and 13 February 2003, in which the taking of such action was considered not to be truly voluntary but only a belated step to avoid dissolution (paras 78 and 115 respectively). An association's objectives can, as the European Court has repeatedly recognised, also be concealed behind formal provisions but such concealment has to be demonstrated - activities and statements may help in this regard - and cannot readily be assumed. See further 'Reaching conclusions about objectives' below.

82 Article 16 of the American Convention is the only one of the general guarantees even to enumerate possible purposes ('ideological, religious, political, economic, labor, social, cultural, sports') but, apart from its obvious breadth, this list is in fact open-ended as a result of the addition of 'or other purposes'.

83 Namely, national security, public health, public morals, public order, public safety and the protection of the rights of others.

found restrictions imposed by them on the objectives of associations to be excessive[84] and thus a violation of Article 11 of the European Convention. Nevertheless the jurisprudence which has emerged from the challenge to these restrictions[85] now affords considerable guidance both as to what can legitimately be treated as unacceptable – with particular emphasis being placed on respect for the principles of legality and democracy – and as to the equally important basis on which any assessment of objectives for this purpose should be carried out.

Legality

The starting point with respect to objectives is actually quite clear; an association should be able to pursue any activity which individuals alone are able to pursue since a grouping of individuals with the same objective does not thereby make that objective inherently objectionable. Indeed to accept the latter view would be to negate the very concept of freedom of association as a means for like-minded persons to come together. So it follows from this that, so long as the activities or objects are lawful, then it should be possible for an association to be formed to undertake or pursue them[86]. Although an association cannot be formed to pursue specifically unlawful objectives, it should be borne in mind, when determining what conduct is unlawful in this context[87], that the permitted restrictions on internationally guaranteed rights and freedoms must also not be exceeded and thus make it impossible for an association to be established to pursue objects that are entirely legitimate. No blank cheque is thus given to States

84. It is undoubtedly also a problem elsewhere but the European Court has so far been the main focus of international litigation concerning this issue.
85 Together with rulings of the former European Commission.
86 See the recognition by the European Court that ‘the fact that their activities form part of a collective exercise of freedom of association in itself entitles political parties to seek the protection of Articles 10 *and* 11 of the Convention’; *United Communist Party of Turkey and Others v Turkey*, 30 January 1998, para 43 (emphasis added).
87 See, eg, Appl No 23892/94, *A C R E P v Portugal*, 83 DR 57 (1995), in which an association claiming prerogatives normally within the exclusive domain of States and intending to carry out its activity under a previous (monarchical) constitution without regard to the one now in force was found by the European Commission to have an aim that could not be considered compatible with Portuguese public policy.

that would allow them to make unlawful anything to which they object[88].

Even where a particular activity is rendered unlawful without meeting the objection that this is through an improper use of State power, this status does not necessarily mean that the activity cannot still in some way shape the objectives of a would-be association. Certainly it is, in principle, perfectly proper for a body to be established to pursue a change in the law[89], so long as the intention is to do this only by lawful means[90]. Recognition of this can be seen in *X v United Kingdom*[91] in which it was found that the scope of certain offences concerned with homosexual relations was not such as to prevent the advocacy of reform of the criminal law[92]. On the other hand, the fact that the applicant's object in *Lavisse v France* did not appear to be confined to such advocacy meant that no objection was raised to the refusal of the registration of an association to promote surrogate motherhood; the endorsement of surrogacy could be regarded as inciting the commission of the offence of abandoning children[93]. Nevertheless the European Commission in that case regarded it as significant that this refusal – which meant that the association could not acquire legal personality - did not prevent the body from promoting a

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88 Thus in *Sidiropoulos and Others v Greece*, 10 July 1998, the European Court was not persuaded that the upholding of a country's cultural traditions and historical and cultural symbols fell within one of the legitimate aims listed in Article 11(2) and so a restriction having this purpose would not be justified. However, it accepted that the restriction imposed in that case could also be regarded as being intended to protect national security and to prevent disorder in view of the alleged intention of the association concerned to dispute Greek identity in Macedonia and to undermine Greek territorial integrity (paras 37-39). In Appl No 8652/79, *X v Austria*, 26 DR 89 (1981) the European Commission upheld as compatible with Article 11(2) the prohibition of an association because it continued the activities of a previously dissolved one but the nature of the conduct that was illegal was not discussed.

89 Apart from the case law to be discussed, this possibility is implicit in the right to participate in rule-making recognized in Article 7 of the Aarhus Convention and the right to participate in public affairs recognized in Article 8 of the UN Declaration on Human Rights Defenders. It is also expressly recognized in principle 11 of the Fundamental Principles.

90 However, see below with respect to the need for any restrictions on means also to be compatible with guaranteed rights and freedoms.

91 Appl No 7525/76, 11 DR 117 (1978).

92 Furthermore the European Commission emphasised that the material submitted to it did not support a claim that the mere existence of an '"explicit association" in groups, clubs or societies by homosexuals could be illegal' (*ibid*, p 131) and thus demonstrated how limited is the scope for using criminal offences to restrict the objectives of associations; the fact that certain conduct can legitimately be criminalised does not mean that there cannot be some form of grouping of persons linked with that conduct, so long as the aim is not to promote it.

93 Appl No 14223/88, 70 DR 218 (1991).

change in the law on this matter; it is thus implicit in the ruling that a refusal of registration to an association which merely sought to promote such a change would be incompatible with Article 11[94]. Similar objections that an association would cross the line between promoting a change in the law and promoting a breach of it were raised with respect to an association which wanted to promote the use of cannabis in Finland where such use was at the time a crime; in many respects the association concerned could be regarded as amounting to no more than a conspiracy to commit this very crime and thus could be seen as going well beyond advocacy of change[95].

The protection for the ability to propose changes in the established position can even extend to, and include, the very nature of the existing constitutional structure of a State. Thus in *The Socialist Party and Others v Turkey*[96] the European Court was not prepared simply to accept that objection could be taken to the applicant party's proposal for a federal system - in which Turks and Kurds would be represented on an equal footing and on a voluntary basis - because this would change the existing constitutional arrangements. Its reluctance to find such an objective inadmissible stemmed from the importance to be attached to political pluralism in applying the European Convention (and indeed other international human rights guarantees). On this basis it concluded that the fact that

> such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself[97].

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94 The ruling is, however, an instance of the respondent State being allowed a fairly generous margin of appreciation as to the conclusions reached about an association's objectives; the more recent rulings of the European Court discussed below point to a somewhat stricter assessment being required because it now emphasises that only convincing and compelling reasons are capable of justifying restrictions on freedom of association. On the scope of the requirement to accord legal personality to an association that seeks it, see 'Legal personality and other rights' below.

95 Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997). However, the principal concern was the detrimental consequences for health of what was being promoted and thus the case should be seen more as involving an inadmissible objective. See further below.

96 25 May 1998.

97 Para 47. This ruling reinforced the Court's earlier refusal in *United Communist Party of Turkey and Others v*

It is thus generally impossible to immunise matters from change through according them constitutional status[98].

Democratic means and outcome

However, there is an important qualification on the freedom to campaign for change in the legal and constitutional basis of the State at the end of the European Court's conclusion in the judgment just cited, namely, that the proposed change must not actually be anti-democratic. This qualification is both a corollary of the requirement that restrictions on freedoms such as that of association must be necessary in a democratic society and a reflection of the unambiguous stipulation in Article 17 of the European Convention that nothing in that instrument is to be interpreted as implying 'any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' set forth in it[99]. The qualification on the freedom to advocate change has subsequently been given some elaboration by the European Court in *Refah Partisi (The Welfare Party) and Others v Turkey*, demonstrating that it is in fact comprised

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Turkey, 30 January 1998 to accept that the dissolution of a political party could be justified solely by reference to the assertion that the party's constitution and programme called Turkey's constitutional order into question; such a restriction on freedom of association had still to be shown in the particular circumstances of the case to be necessary in a democratic society. A similar stance was also taken in *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999, *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002, *Selim Sadak and Others v Turkey*, 11 June 2002, *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002 and *Socialist Party of Turkey (STP) and Others v Turkey*, 12 November 2003.

98 In finding a violation of Article 11 in *Sidiropoulos and Others v Greece*, 10 July 1998, the Court observed that the refusal of registration to an association had been based only on a mere suspicion that the applicants intended to undermine Greece's territorial integrity but it seems unlikely that the advocacy of a boundary change is something that could in itself be seen as objectionable; this is, after all, a matter about which States are prepared to negotiate and the real concern must, therefore, be with the manner in which such a change is promoted. The absence of anything more than a suspicion in that case was particularly emphasized by Judges Costa, Zupančič and Kovler in their concurring opinion in *Gorzelik and Others v Poland*, 17 February 2004 [GC] when explaining that the refusal to register a 'minority' association in that case was not directed against the ability of its members to associate but against their acquiring an electoral advantage; see further nn 122 and 204.

99 There are provisions to similar effect in the International Covenant (Article 5(1)), the African Charter (Article 27(2)) and the American Convention (Article 29), as well as the UN Declaration on Human Rights Defenders (Article 19). See also the deep concern of the UN Human Rights Committee at the tendency in the Republic of Congo 'of political groups and associations to resort to violent means of expression and to set up paramilitary structures that encourage ethnic hatred and incite discrimination and hostility… [calling upon the State party] to

of two elements, namely, that

> firstly the means used to that end must in every respect be legal and democratic; secondly the change proposed must itself be compatible with fundamental democratic principles[100].

Nevertheless it is a qualification that should not be taken entirely at face value. In the first place, although the insistence on the means being democratic rightly entails a process that respects political pluralism, the requirement of lawfulness must still be read subject to the need for any restrictions that ought to be observed being themselves compatible with international human rights standards; it is certainly conceivable that the means which have been rendered unlawful are in fact well-established elements of Convention rights or freedoms[101] and this cannot be an acceptable constraint on the freedom to advocate change. Moreover the qualification in a concurring opinion by Judges Ress and Rozakis ought also to be noted, namely, that insufficient account is taken in the Court's formulation of the scale of the violation of the law. Certainly this must be correct as far as the sanction of dissolution is applied for the occurrence of such violations that are minor since otherwise the well-established principle of proportionality would

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impose on all actors and political forces rules of conduct and behaviour that are compatible with human rights, democracy and the rule of law'; CCPR/C/79/Add.118, 25 April 2000, para 18.

100 13 February 2003, para 98, reiterating such a statement in para 47 of the previous ruling by a Chamber on 31 July 2001. Such a statement is also to be found in *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002, para 49, *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002, para 46 and *Socialist Party of Turkey (STP) and Others v Turkey*, 12 November 2003, para 38.

101 Thus a ban on advocating change through the holding of a public meeting or demonstration where there was no risk of inciting public disorder would not be compatible from the viewpoint of the European Convention. It should also be borne in mind that the risk of disorder cannot automatically be invoked to justify suppression of controversial views as there is also a positive obligation to prevent these from being disrupted by those hostile to them; *Plattform 'Artze für das Leben' v Austria*, 21 June 1988. See also the observation by the Court in *Sidiropoulos and Others v Greece*, 10 July 1998 that 'even supposing that the founders of an association like the one in the instant case assert a minority consciousness, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November 1990 – which Greece had signed – allow them to form associations to protect their cultural and spiritual heritage' (para 44). This underlines the need for the parameters of what is lawful to take account of international proclamations as to the legitimacy of certain objectives for particular types of organisation; eg, the development, discussion and advocacy of human rights ideas (Article 7 of the UN Declaration on Human Rights Defenders and para 10.3 of the Document of the Copenhagen Meeting), the protection of the environment (Aarhus Convention, Article 3(4)) and the safeguarding of judicial independence (principle 9 of the UN Basic Principles on the Independence of the Judiciary, and principle IV of the Council of Europe Recommendation R(94)12 'On the Independence, Efficiency and Role of Judges').

not be respected[102]. Nevertheless this does not affect the general inadmissibility of an association seeking to use unlawful means to achieve its objectives.

There should also be some concern about the way in which the second aspect of the qualification on the freedom to advocate change is applied, even though there is no basis for disputing the European Court's view that

> a political party whose leaders incite recourse 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[103].

The need for concern arises from the fact that it is not generally going to be self-evident that the objectives of an association are necessarily anti-democratic[104] or violent[105] and thus inherently objectionable. It is true that there were some early cases in which it was accepted that a State

102 See further 'Regulation' below.
103 *Ibid.*
104 Including anything that undermines internationally guaranteed rights and freedoms. It would also include anything anti-pluralist; a societal model which introduced 'into all legal relationships a distinction between individuals grounded on religion [which] would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement … cannot be considered compatible with the Convention system …Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned ... Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs'; *Refah Partisi (The Welfare Party) and Others v Turkey*, 31 July 2001, para 70 and endorsed in the Grand Chamber judgment of 13 February 2003 at para 119. It would also include the introduction of sharia (Islamic law) as the ordinary law since this was a regime 'which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts' *ibid*, para 72). Furthermore, bearing in mind that 'pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" … [and that] democracy does not simply mean that the views of the 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'; *Gorzelik and Others v Poland*, 17 February 2004 [GC], para 90. However, 'the State's duty of neutrality and impartiality … is incompatible with any power on the State's power to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group'; *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001, para 123.
105 Thus 'Refah's leaders did not dispel the ambiguity of … statements about the possibility of having recourse to violent methods in order to gain power and retain it'; *ibid*, para 74. This finding was endorsed by the Grand Chamber judgment of 13 February 2003, at para 131.

could, without further justification, object to bodies that had as their aim the promotion of fascist or communist ideology because these were organisations that were automatically to be regarded as being against the constitution and democratic values[106] but the rulings in them now have to be approached with some care as more recent decisions demonstrate that over-simplistic conclusions can be drawn too readily about the possible threat posed by an association's stated objectives, especially where the latter use terms or concepts which are open to a pejorative construction but that is not their only possible meaning.

Thus in *Vogt v Germany*[107] the European Court took into account the fact that the communist party had not actually been banned in the course of finding that the applicant's dismissal as a schoolteacher because of her membership of, and active role within, that party could not be necessary in a democratic society. It accepted that the dismissal was an act motivated by the legitimate aim of protecting constitutional democracy but the Court emphasised, that in determining the justifiability of such a step, the focus had to be on individual conduct and not abstract aims. In examining the former, it was evident not only that the applicant in this case had never confused her political and working lives – by using the classroom to promote party ideas - but also that she had asserted her belief in the German constitutional order.

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106 Even though this does not detract from the unacceptability of objectives that are anti-democratic; see Appl No 250/57, *German Communist Party* case, 1 *Yb* 222 (in which no objection was taken to the party's dissolution) and Appl No 6741/74, *X v Italy*, 5 DR 83 (1976) (in which an application complaining about criminal proceedings brought in respect of the founding of a political movement whose doctrine and platform were inspired by those of the fascist party and whose symbol had been copied was found to be manifestly ill-founded). The legitimacy of such an objection to associations with such objectives was also the subtext of the decisions in *Glasenapp v Federal Republic of Germany*, 28 August 1986 and *Kosiek v Federal Republic of Germany*, 28 August 1986 which respectively concerned public servants belonging to communist and fascist organisations but which were treated as raising only the issue of access to employment in the public service; as to restrictions on freedom of association for persons working in that service, see 'Public employees' below. See also Appl Nos 8348/78 & 8406/78, *Glimmerveen and Hagenbeek v The Netherlands*, 18 DR 187 (1979), Appl No 12194, *Kühnen v Germany*, 56 DR 205 (1988), Appl No 12774/87, *B H, M W, H P and G K v Austria*, 62 DR 216 (1989) and Appl No 25096/94, *Remer v Germany*, 82 DR 117 (1995), in all of which restrictions on national socialist ideas were found not to be incompatible with the guarantee of freedom of expression in Article 10. In addition see Comm No 117/1981, *M A v Italy*, Admissibility Decision, 10 April 1984, in which the UN Human Rights Committee stated that the reorganising of a dissolved fascist party was an act removed from the protection of the International Covenant.

107 26 September 1995.

Furthermore the absence of a formal ban on the party made it even harder to conclude that there was any danger being posed to that constitutional order by the employment as a teacher of someone who belonged to that party. The Court in that case was not actually concerned with whether it would have been acceptable then in Germany[108] to have banned the party but the importance that was attached to what it did, rather than conclusions to be drawn from its general objectives, would certainly have made it very unlikely that a cogent case could have been made for the imposition of a ban; whatever suppositions there might have been about the nature of the communist party's objectives, it would at that time have been scarcely credible, given the way it actually operated, to regard it as being anti-constitutional in practice[109].

Similarly, while in *Refah Partisi (The Welfare Party) and Others v Turkey* it was generally accepted that preserving secularism was necessary for the protection of the democratic system in Turkey[110], it was only in the particular context of remarks showing a wish to bring into being an order based on religious rules that the advocacy of changes in the law to take account of certain religious concerns – such as with respect to the wearing of Islamic headscarves and the organisation of working hours in the public sector to accommodate prayers - would necessarily be regarded as threatening secularism and thus be objectionable[111].

Reaching conclusions about objectives

The danger of authorities being too ready to assume the worst about the objectives of an

108 In which the circumstances were considerably different from those at the time of the cases referred to in n 83.
109 See also the earlier friendly settlement of an application alleging a violation of Article 11 on account of a conviction for the offence of being members of the Turkish Communist Party; Appl Nos 16311/90, 16312/90 and 16313/90, *Hazar, Hazar and Acik v Turkey*, 72 DR 200 (1991) and 73 DR 111 (1992). The European Commission, in approving the settlement, noted that the offence under which the applicants had been convicted had also been abrogated. The acceptability of a bar on the inclusion in electoral lists of someone linked to the country's former totalitarian communist regime is to be considered in *Zdanoka v Latvia*, 6 March 2003 (Admissibility Decision).
110 However, it should also be noted that the Chamber (but not the Grand Chamber) judgment the European Court pointed out that there was actually no agreement about the content, interpretation and application of the principle of secularism; 31 July 2001, para 65.

association is all too real. Certainly there have already been a significant number of cases, in a relatively short period of time, in which the European Court has found that they had been precipitous in reaching the conclusion that what certain associations were proposing to do posed a serious threat of unconstitutional or unlawful, notwithstanding that the particular restrictions involved were themselves entirely legitimate. Thus in *United Communist Party of Turkey and Others v Turkey*[112], the Court rejected the view that either the party's choice of name or certain statements in its programme about the treatment of Kurds in themselves demonstrated a real threat to either Turkish society or the Turkish State as to make its objectives inadmissible. The issue of the name had arisen out of the fact that it included the word 'communist' and there was a law making it an offence to carry on political activities inspired by communist ideology. However, the objection taken to this by the authorities was partly unsustainable because that law had been repealed but, even if that had not been the case, the Turkish Constitutional Court had itself concluded that the mere choice of name did not mean that the party was seeking 'to establish the domination of one social class over the others' Indeed it was evident that this particular party satisfied the requirements of democracy[113] and so there was no basis for objecting to the party on account of its name.

Furthermore the European Court could not be persuaded that the reference to the Kurdish 'people', 'nation' and 'citizens' in its programme was necessarily intended to promote the unconstitutional objective of secession. The view of Turkey was that the distinction that was being made between the Kurdish and Turkish nations had revealed an intention of working to create minorities that would pose a threat to its territorial integrity. However, there was actually nothing in the programme describing the Kurds as a minority or claiming special treatment for

111 13 February 2003, para 73.
112 30 January 1998.
113 The European Court distinguished the applicant party in this regard from the German Communist Party, to the

them[114], let alone an assertion of a right to secede from the rest of the Turkish population. Indeed it was evident from that that programme that the party was looking for a solution to the Kurdish problem that would enable the Kurdish and Turkish peoples to 'live together of their free will within the borders of the Turkish Republic'. In the Court's view there was no more than a wish to have a non-violent political dialogue as to how to resolve one of the country's problems and it emphasised that

> there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned ... that was indeed the TBKP's objective[115].

The mistake in the approach of the Turkish authorities had been to focus on matters of form rather than to consider issues of real substance as regards the nature of the party's objectives.

There was a similar failure in *The Socialist Party and Others v Turkey*[116], which was concerned with the fact that references to the right to self-determination of the 'Kurdish nation' and the latter's right to secede had been taken out of their context; they were not meant to encourage unlawful secession but to emphasise that a proposed federal system should not come about without the freely given consent of the Kurds, to be given by way of a referendum[117]. Equally the European Court found it unjustified in *Freedom and Democracy Party (ÖZDEP) v Turkey*[118] to conclude that a party's support for 'the just and legitimate struggle of the [Kurdish] peoples for independence and freedom' meant that they wished to incite people to use violence or otherwise break the rules of democracy; the use of the term 'struggle' was rightly recognised as a commonplace term used by parties in Europe for their political demands. Furthermore, as

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dissolution of which no objection had been taken; see n 106.

114 It is questionable whether this would, in any event, have been considered an admissible ground for objecting to the party's objectives since efforts to assure rights for minorities are a feature of a number of global and regional treaties, to say nothing of the obligation to respect minority rights in Article 27 of the International Covenant.

115 30 January 1998, para 57.

116 25 May 1998.

117 The dissolution in the present case was not based on the party's programme but on statements by its chairman

in the previous case, references to 'self-determination' of the 'national or religious minorities' were not to be taken out of their context; there was no intention to encourage people to separation from Turkey but to emphasise the need for the consent of the Kurds to the political reforms being proposed[119].

It is thus evident from these cases that any evaluation of objectives, particularly where this has a bearing on conferment or retention of some legal status, must be well-informed. Furthermore such an evaluation must itself be respectful of the political pluralism underlying the European Convention and other international human rights guarantees; different views must be respected and any conclusions as to where they will lead must not be shaped by prejudice or narrow-minded perspectives[120]. In general freedom of association will be better respected if the imposition of restrictions is guided by the deeds of the body concerned[121] rather than the terms used in its formal statement of objectives[122]. The focus should thus be much more on the

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but the evaluation of them is essentially the same as that involved in judging the admissibility of objectives.

118 8 December 1999.

119 Similarly in *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002, *Selim Sadak and Others v Turkey*, 11 June 2002 and *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002 the European Court found that too much had been read into such objectives when it found that the dissolution of the associations concerned was contrary to Article 11. See also the finding in *Sidiropoulos and Others v Greece*, 10 July 1998 that a refusal of registration for an association was 'based on a mere suspicion as to the true intentions of the association's founders and the activities it might have engaged in once it had begun to function' (para 45). See also the conclusion of the Court in *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 that 'the possibility that the applicant church, once recognised, might constitute a danger to national security and territorial integrity … [was] a mere hypothesis which, in the absence of corroboration, cannot justify a refusal to recognise it' (para 125).

120 This is emphasised in principle 32 of the Fundamental Principles.

121 As well as by those of its leaders; in *Refah Partisi (The Welfare Party) and Others v Turkey*, 13 February 2003 it was remarks and policy statements made by the latter which persuaded the European Court that the party was aiming at 'a model of State and society organised according to religious rules' (paras 111-115). However, see n 257 for the conclusion reached by the dissenting judges in the Chamber judgment of 31 July 2001. See also *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002, in which dissolution based on remarks of party's former president was held to be a disproportionate response.

122 The objection that the refusal to register an association that described itself as an 'organisation of a national minority' because of a perceived risk that it would seek to exploit certain advantages enjoyed by national minorities under the electoral law amounted to being based on 'unfounded suspicions' about its future actions was not accepted in *Gorzelik and Others v Poland*, 17 February 2004 [GC] because this action was directed to controlling the 'lawfulness' of the claim made in its memorandum of association – the term being used suggesting that the body had the rights conferred by the electoral law – and the case was thus distinguishable from the situation in the two cases previously cited.

regulation of the former instead of on exercising control at the time of formation[123].

Legal personality and other rights

The essence of freedom of association is the pursuit of the common objectives of a group of persons (natural or legal). This may be achievable through the individual legal capacities of those persons but in practice the objectives may be best pursued through the body concerned having a distinct legal personality from those persons who seek to establish or belong to it. Such a personality will certainly entail certain basic legal capacities and possibly some others essential for the pursuit of its objectives but it certainly does not follow that associations should enjoy all the rights which might prove useful for that pursuing them. Moreover the fact that some of these additional rights are conferred on certain types of associations is not inherently objectionable so long as the principle of non-discrimination is respected.

Legal personality

There are undoubtedly certain activities that will be essential for the basic operation of an association, such as the ability to enter into contracts related to the pursuit of its objectives and to make payments for the goods and services thereby obtained. The former will range from the printing of documentation through the arrangement of appropriate advertising and the renting of premises (both for offices and meetings) to the employment of staff and they may also include matters as diverse as the purchase and maintenance of vehicles, the purchase and storage of food, clothing and other humanitarian supplies and the organisation of training and educational programmes. In theory these are all activities that could be carried out on behalf of the association by those belonging to it, relying on their own legal personalities and also their private

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123 See 'Regulation – Policing [and] Dissolution' below.

bank accounts for the purpose of making payments in respect of the contracts concerned. However, this is often likely to be an impracticable solution for a number of reasons. Certainly members of associations may be discouraged from acting as a conduit for its transactions because of the tax liability that they might face on account of the funds flowing into their bank accounts, as well as the potential for incurring obligations to meet civil liabilities in circumstances over which they had no direct control. Furthermore many organisations are likely to be reluctant to deal with an association in this indirect way since they may be concerned about the possibility of funds going astray and the absence of clear lines of accountability, to say nothing of possible legal restrictions on them contracting through an intermediary. Most importantly, however, such an arrangement is likely to make the day to day working of many associations subject to inappropriate delays and uncertainties and result in the pursuit of their objectives being at best extremely difficult and at worst impossible[124].

There is, of course, no reason why an association should not choose to work in this way – indeed it may be unproblematic in the case of ones with very limited objectives, a preference for less formal structure or both[125] – but it is unlikely that it would be suitable for most associations. It is not surprising, therefore, that the European Court readily accepted in *Sidiropoulos and Others v Greece* that the refusal to register the applicants' association – with the result that it was denied legal personality – was an interference with freedom of association. In its view

> The refusal deprived the applicants of any possibility of jointly or individually pursuing the aims they had laid down in the association's memorandum of association and of thus exercising the right in question[126].

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124 These concerns – which are essentially about effective operation - are, of course, similar to those which have led to the recognition of the need for a separate legal personality for commercial bodies from those who have invested in it as shareholders, notwithstanding the substantial interest of the latter in the former. The performance of the functions mentioned in the text is also likely to necessitate access to banking facilities, as is explicitly recognised in principle 51 of the Fundamental Principles.

125 This is recognised in principle 5 of the Fundamental Principles and also by the Aarhus Convention as its provisions apply to 'groups' as well as associations and organisations (Article 2(3)).

126 10 July 1998, para 31.

The fundamental importance of legal personality being granted for associations was further underlined by the Court when it went on to state that

> The 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[127].

It is essential, therefore, that the option of acquiring legal personality be available to those who wish to establish an association unless it can clearly be demonstrated that the lack of such personality will not impede the pursuit of its activities[128], with the latter being potentially of

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127 *Ibid*, para 40. This view was reaffirmed by a Chamber of the Court in *Gorzelik and Others v Poland*, 20 December 2001, para 55 and by the Grand Chamber in its judgment of 17 February 2004, para 88, with the latter also stating that 'forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights' (para 93). Similar considerations to those underpinning the essential importance of legal personality established in *Gorzelik* and *Sidiropoulos* led the Court to find in *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 that the failure to recognise the applicant church was an interference with freedom of religion; 'not being recognised, the applicant church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practice their religion and, not having legal personality, it is not entitled to judicial protection of its assets' (para 105). However, having taken Article 11 into account in finding a violation of Article 9, the Court considered that it was unnecessary to deal separately with the denial of recognition as a violation of freedom of association. The issue of recognition had previously been left open by the European Commission in Appl No 14223/88, *Lavisse v France*, 70 DR 218 (1991), Appl No 23892/94, *A C R E P v Portugal*, 83 DR 57 (1995), Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997), Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) and Appl No 28973/95, *Basisan for 'Liga Apararii Drepturilor Omului Din Romania' v Romania*, 91 DR 29 (1997), having decided instead to address the issue of whether any interference with Article 11 was justified (as to which, see 'Objectives' above and 'Regulation' below). The need to accord appropriate recognition to bodies promoting environmental protection is also stipulated in Article 3(4) of the Aarhus Convention but the provision in para 43 of the Document of the OSCE Moscow Meeting, 1991 that recognition should be 'according to existing national practices' (para 9) is potentially less exacting than the duty identified by the European Court.

128 Certainly, although the ability to form a legal entity is clearly fundamental, there could still be situations where the inability to do so will not be regarded as a violation of Article 11. Thus the European Commission did point out in Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997) that an unregistered association in Finland 'could engage in certain activities, just as it can possess funds through its members' and this led it to question whether the inability to register had prevented it from pursuing its objectives' (p 69). Furthermore in Appl 8652/79, *X v Austria*, 26 DR 89 (1981) it found that 'the practice even of a non-recognised religion is fully guaranteed in Austria … independently from any form of registration' (p. 93) and in both Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) and Appl Nos 29221/95 and 29225/95, *Stankov and United Macedonian Organisation 'Ilinden' v Bulgaria*, 94 DR 68 (1998) it considered that the refusal of registration of an association would not be a violation of Article 11 if the association is able to perform its activities without registration; in the former the association was found not to have proved that it could not exercise its functions but in the latter the ability to function was used to support the competence of an unregistered body to submit a complaint under Article 11. *Cf* the concern of the UN Human Rights Committee that in Uzbekistan 'The legal requirement for registration, subject to the fulfilment of certain conditions, provided for in article 26 of the Constitution and the Public Associations in the Republic of Uzbekistan Act of 1991 operates as a restriction on the activities of non-governmental organisations. The State party should take the necessary steps to enable the national non-governmental human rights organisations to function effectively'; CCPR/CO/71/UZB, 26 April 2001, para 22.

particular significance while an application for recognition is being processed[129]. This personality should, of course, be clearly distinct from that of any or all of its members and officers and thus they should not be personally liable for its debts and other obligations[130].

This obligation to grant legal personality to associations where this is sought relates only to ones actually being established within the country of the State concerned and does not appear to extend to recognising the personality of organisations established elsewhere, although a failure to do so could have implications for the association rights of persons in that State as well as the property and fair hearing rights of any organisation whose personality is not recognised. However, there is also a quite distinct obligation under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations. Under this convention a State party is generally obliged to recognize the legal personality of an association, foundation or other private institution established under the law of another State party[131], but only where the body concerned has a non-profit making aim of international utility and is carrying on its activities in at least two States and its statutory office, management and control is in the territory of a State party[132]. However, provision is made for 'restrictions, limitations or special procedures governing the exercise of the rights arising out of the legal capacity' to be recognised when these are 'required by essential public interest'[133]. Furthermore there is provision for excluding the application of the Convention in respect of a non-

129 See the urging by the UN Human Rights Committee that legislation in Azerbaijan 'should clarify the status of associations, non-governmental organisations and political parties in the period between the request for registration and the final decision; such status should be consistent with articles 19, 22 and 25 of the Covenant'; CCPR/CO/73/AZE, 12 November 2001, para 23.

130 This is recognised in principles 24 and 72 of the Fundamental Principles, although this does preclude them being held liable for their personal misconduct such as misuse of powers as an officer of the association (principle 73) and their acts may be evidence of the actual objectives of an association (see nn116 and 120 and 'Regulation, Dissolution' below).

131 The proof of such personality is generally to be through presentation of the body's memorandum and articles of association or other basis constitutional instruments, although there is provision for this to be dispensed with under an optional system of publicity; Article 3.

132 The State parties are Austria, Belgium, Cyprus, France, Greece, Portugal, Slovenia, Switzerland the Former Yugoslav Republic of Macedonia and the United Kingdom.

governmental organisation if the body invoking it

by its object, its purpose or the activity which it actually exercises:

a contravenes national security, public safety, or is detrimental to the prevention of disorder or crime,

the protection of health or morals, or the protection of the rights and freedoms of others; or

b jeopardises relations with another State or the maintenance of international peace and security.

Nonetheless it would be very surprising if either of these possibilities could legitimately be given a broader construction than that seen in the earlier discussion of acceptable objectives for associations or in the discussion below of regulation. It should also be noted that the legitimacy of international human rights non-governmental organisations operating within individual countries is increasingly being recognised[134].

It remains to be seen whether an ability to establish branches should be regarded as an inherent aspect of the internal organisational capacity of an association, at least where these are not intended to have a distinct legal capacity[135]. However, in many countries branches are automatically subject to registration requirements than can be as problematic as those governing the acquisition of legal personality by the parent association[136].

The requirement that legal personality should be capable of being acquired – in the event that this is the wish of an association's founders[137] – is, of course, subject to the objectives being acceptable[138] and it certainly does not entail an obligation to ensure that every possible legal

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133 Article 2(2).
134 See the UN Declaration on Human Rights Defenders and see also the especial concern of the UN Human Rights Committee in respect of Vietnam 'about obstacles placed in the path of national and international non-governmental organisations and special rapporteurs whose task is to investigate allegations of human rights violations in the territory of the State party'; CCPR/CO/75/VNM, 5 August 2002, para 20. Principle 37 of the Fundamental Principles provides that the establishment of a new entity should not be required of a foreign non-governmental organisation before it can operate and principle 38 encourages ratification of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations.
135 As to the freedom there should be in respect of this, see 'Regulation, Controls over management' below.
136 Principle 40 of the Fundamental Principles provides that the only authorisation required to establish branches should be that of the organisation's statute.
137 See the discussion in 'The concept of association' above.
138 The European Court disagreed with the view that they were not acceptable in the *Sidiropoulos* and *Metropolitan Church of Bessarabia* cases; see 'Objectives' above. A refusal of legal personality might also be justified where the

capacity should be enjoyed[139]. However, in addition to the legal capacities already mentioned it may also be essential to recognise that an association can exercise ownership rights in respect of property since this is likely to be an important means of pursuing its objectives, both directly (such as the premises in which they take place) and indirectly (as a source of finance for them)[140]. Furthermore it should be able to protect those property rights, as well as any other legal interests that it may have, and this would undoubtedly necessitate the possibility of being able to bring and defend legal proceedings[141]. The failure to accord such a right, or rather the taking away of it, was characterised as a violation of the right to property in the case of *Holy Monasteries v Greece*[142] but, although it was not considered in that case that any issue arose in respect of Article 11[143], the latter could be significant in other circumstances; loss of control over property could, for example, frustrate the purpose of an association[144]. This case is, however, also a useful reminder that rights in addition to freedom of association in some international human rights treaties can sometimes also be invoked to protect associations[145]; interference with

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proposed name of an association encroached on the rights of existing bodies or was misleading (see 'Regulation – Formation' below) but an appropriate modification should ensure that this is not a permanent basis for preventing an association with a particular set of objectives acquiring legal personality.

139 Principle 8 of the Fundamental Principles stipulates that 'NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and be subject to the same administrative, civil and criminal law obligations and sanctions generally applicable to them'.

140 This is implicit in the principle cited in the preceding note but also in the provision in principle 52 that 'NGOs with legal personality should be able to sue for redress of harm caused to *their* property' (emphasis added).

141 See the principle cited in preceding note and the requirement in principle 9 that acts or omissions by a governmental organ should be open to challenge in an independent and impartial court with full jurisdiction. These are elements of the right to an effective remedy afforded by treaties such as the International Covenant and the European Convention and required also by Article 9 of both the Aarhus Convention and the UN Declaration on Human Rights Defenders.

142 9 December 1994.

143 The suggestion that the action taken against the monasteries 'would prevent an increase in the numbers of monks and would deter the faithful from making gifts to them' was considered to be no more than 'hypothetical'; *ibid*, paras 86 & 87.

144 See also the discussion in 'Regulation – dissolution' below.

145 Associations, quite separately from their members, can invoke rights secured by the European Convention and the International Covenant (although they cannot complain to the UN Human Rights Committee about violations of the latter; see 'Global and regional protection of the guarantee' below) but they cannot rely on rights guaranteed by the African Charter or the American Convention (see n 61). Principle 7 of the Fundamental Principles stipulates that 'All NGOs enjoy the right to freedom of expression'.

their activities will thus not always be just a matter of being able to associate[146]. The need to recognise that associations are able to enjoy some form of property rights does not, however, necessitate they must also have the right to acquire it in particular ways; a bar on them benefiting from legacies was not, for example, objectionable where an association had other means of acquiring income[147]. Nonetheless non-binding instruments do point to the need for associations to be able to solicit and receive funding not only within the State party concerned but also from other countries[148].

It is not particularly significant what form the legal personality acquired by an association takes; many countries have a special regimes governing such personality but there would no be anything inherently objectionable in the provisions regarding corporate entities also being used for this purpose, if they did not create any difficulties regarding the pursuit of an association's objectives[149]. It is also possible for the law to require associations for certain purposes to take on even more specific legal forms[150], as commonly happens in the case of religious associations and trade unions but such forms, while possibly advantageous for the purpose of regulation or

146 See also *Canea Catholic Church v Greece*, 16 December 1997 in which the inability of a church to have any dispute relating to its property rights determined by the courts as a result of a Cassation Court ruling that it had no capacity to take legal proceedings was found to be a denial of access to court contrary to Article 6(1) of the European Convention. The European Court did not find it necessary to address the issue from the perspective of either freedom of religion or the right to property. In *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 emphasised that, 'one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11but also in the light of Article 6' (para 118). However, in that case the failure to recognise the applicant church was found only to be a violation of freedom of religion; the Court, having taken account of the impact of non-recognition on the church's right of access to court in reaching that finding, considered that it was unnecessary to examine separately the Article 6 issue.
147 Appl No 14635/89, *Union of Atheists v France, Report of the Commission*, 6 July 1994.
148 Principle 50 of the Fundamental Principles (subject to generally applicable foreign exchange and customs laws) and Article 13 of the UN Declaration on Human Rights Defenders (for the express purpose of promoting and protecting human rights and fundamental freedoms). See also the concern of the UN Human Rights Committee about 'the restrictions placed by Egyptian legislation and practice on … the activities of such organisations such as efforts to secure foreign funding, which require prior approval from the authorities on pain of criminal penalties'; CCPR/CO/76/EGY, 28 November 2002, para 21.
149 *Cf* the conclusion in the Chamber judgment in *Gorzelik and Others v Poland*, 20 December 2001 that the need to use a procedure not designed for the purpose of being recognized as belonging to a national minority had not had any consequences for the applicants' rights under Article 11 (para 63). This issue was not addressed in the Grand Chamber judgment of 17 February 2004.
150 This recognised in principle 58 of the Fundamental Principles.

the conferment of benefits[151], should did not create any unjustifiable impediments to the pursuit of a particular association's objectives[152]

Other rights

Apart from enjoying these essential aspects of legal personality, an association is not generally entitled by virtue of freedom of association to the grant of any other rights – no matter how useful those might be – in order to pursue its objectives. The reluctance to regard other rights as inherent in freedom of association is premised on the assumption that the absence of them does not render the fact of association devoid of all practical meaning; thus it will still be possible for the collective objectives to be advanced, even if the preferred means cannot be used. Thus an association could not expect to have an automatic entitlement to be able to challenge the lawfulness of some activity in the courts simply because this has a bearing on some matter that falls within its objectives. So the concern of, for example, an environmental group about certain construction being contrary to the applicable law would not be a sufficient basis for it to be able to insist that it should be able to bring legal proceedings to challenge the authorisation for this construction to proceed[153]. An environmental group would only be able to bring such proceedings by reference to freedom of association where its own interests were directly

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151 See further 'Regulation' below.

152 See Appl No 8652/79 *X v Austria*, 26 DR 89 (1981) in which the need for an alternative form of legal organisation for religious communities was not pursued because their apparent exclusion from being registered under the associations law was not actually treated, in principle, as an obstacle to the registration of religious organisations as associations.

153 The lack of a legal capacity to bring such proceedings would not be an insurmountable obstacle to the expression of its concerns since other avenues were open to it for this purpose, such as campaigning and public protest. See Appl. No 9234/81, *X Association v Federal Republic of Germany*, 26 DR 270 (1981) in which the applicant had the special aim of preventing the construction of a nuclear power station. However, its complaint about being refused standing to challenge the authorisation given for this was held to be manifestly ill-founded. In the European Commission's view, 'Associations are treated like all other plaintiffs in that they have to show a legal interest of their own if they want to bring a court action. Unless this is the case, there can therefore be no question of an interference with their freedom of association. The possibility of suing, irrespective of a legal interest, is not an element necessarily inherent in the notion of freedom of association, nor was it in the circumstances of this particular case indispensable for the effective enjoyment of this freedom' (p 271).

affected[154] and, in the absence of that, such a challenge would probably only be feasible if country concerned took a very generous view of standing in public law proceedings in general[155].

It is the context of cases involving the activities of trade unions that the relatively limited expectations that an association should have following its formation can most clearly be seen but it is evident from these cases that a minimalist approach should not be taken to extremes as there are certainly some positive obligations within Article 11 as to the maintenance of a favourable environment for associations. Certainly the Strasbourg institutions have rejected claims based on freedom of association that unions should be able to insist on collective bargaining with employers[156], on rights of consultation by government prior to the adoption of legislation[157] and on representation on a national labour council[158]. Furthermore it has also not been accepted that a right to strike should be seen as an inherent aspect of freedom of association[159].

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154 Eg, where its own land was being compulsorily acquired for the development.

155 The only open right of access to justice (ie, without special standing) that is recognised in the Aarhus Convention is in respect to the fulfilment of duties regarding disclosure of information (Article 9).

156 *Swedish Engine Drivers Union v. Sweden*, 6 February 1976; this concerned a refusal by the National Collective Bargaining Office to enter into a collective agreement with the applicant union despite doing so with the large trade union federations and some independent unions. Although this refusal appeared to have had an adverse effect on the size of the union's membership, there was a rational and objective basis for the differential treatment of unions in this matter and so there was also no violation of Article 11 when coupled with the prohibition of discrimination in Article 14. This approach was followed by the European Commission in Appl No 9792/82, *A Union v Federal Republic of Germany*, 34 DR 173 (1983) and also endorsed by the Court in *Schettini and Others v Italy*, 9 November 2000, *Unison v United Kingdom*, 10 January 2002 (Admissibility Decision) and in *Wilson and Others v United Kingdom*, 2 July 2002.

157 *National Union of Belgian Police v Belgium*, 27 October 1975; this concerned the failure of the government to recognise the applicant union as one of the representative organisations to be consulted under a statutory provision concerning various aspects of employment in the public service. The fact that three large trade union organisations were so recognised was seen as a proper means of attaining the legitimate aim of consultation on matters that were not just of interest to those in the police forces that the union represented and thus there was also no violation of Article 11 when coupled with the prohibition of discrimination in Article 14.

158 Appl No 7361/76, *X v Belgium*, 14 DR 40 (1978). The issue of membership of the council was important because it could affect the ability of a union to take part in negotiating committees with the employers of the public servants that it represented. Thus the case was also actually about the right to take part in collective bargaining – which, as in the *Swedish Engine Drivers* case, was not considered to be an inherent part of freedom of association – but a similar conclusion would certainly have been reached if the representation on the council concerned matters other than negotiating employment terms. It was also found that the restriction of membership on the council was not contrary to Article 11 combined with Article 14 as the aim was to prevent the fragmentation of trade union organisations and as the council was neither restricted in membership to private sector unions nor was barred from obtaining views from unions not represented on it.

159 *Schmidt & Dahlstrom v Sweden*, 6 February 1976; this concerned the denial of certain benefits to members of certain unions that had been involved in selective strikes. This denial, notwithstanding that the applicants had not actually been involved in the strikes organised by their unions, was not found to be a violation of Article 11 coupled

However, in reaching the conclusion that such rights could not be regarded as being secured by freedom of association, considerable emphasis has always been laid on the ability of the unions concerned to pursue their interests through other means than the ones they had claimed under Article 11. Thus it has been repeatedly suggested in particular that it followed from the reference in Article 11 to the joining of trade unions 'for the protection of his interests' that a trade union should still be heard, even if this guarantee did leave a State a free choice of

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with the prohibition on discrimination in Article 14 as it was considered reasonable for the government to stress the solidarity between union members when selective action was being undertaken. Similarly in *S v Federal Republic of Germany*, 39 DR 237 (1984), the imposition of a disciplinary penalty on a teacher and leading union member because he had voted for a strike was not considered to affect freedom of association because the punishment was not for his trade union membership but for the encouragement of teachers to strike despite a prohibition on their striking. The European Commission did, however, leave open the question of whether a general failure to recognise the right to strike could be consistent with Article 11 and in Appl No 28910/95, *National Association of Teachers in Further and Higher Education v United Kingdom*, 93 DR 63 (1998) it considered whether a requirement that a union divulge to the employer the names of its members who are to be included in a ballot on whether to strike or who are involved in the strike itself was compatible with the right of a trade union to protect the occupational interests of its members. In finding that there was no such incompatibility, emphasis was placed on both the protection under the law against victimisation as a result of trade union activity and the absence of any pressure from the particular employer, as well as the fact that no real administrative difficulty was faced by the union in producing the list of members and that there was nothing inherently secret about membership of a trade union. A less absolute approach can also be seen in *Unison v United Kingdom*, 10 January 2002 (Admissibility Decision); it was accepted by the European Court that the prohibition of a strike by a hospital employees over proposals to transfer them to a new (private sector) employer restricted the union's power to protect the interests of its members and was thus a restriction on freedom of association, albeit one that had the legitimate aim of protecting a hospital's ability to carry out its functions effectively, including the securing of contracts with others. However, the complaint with respect to Article 11 was found to be manifestly ill-founded as there was still some possibility of taking strike action (both against the hospital in respect of dismissals and against the new employer generally) and so the union was not entirely deprived of the possibility of effective action in the future to defend their members. See also the conclusion by the UN Human Rights Committee in Comm No 118/1982, *J B, P D, L S, T M, D P, and D S v Canada*, Admissibility Decision, 18 July 1986 that the right to strike was not included within the scope of freedom of association in Article 22 of the International Covenant. However, several members (Higgins, Lallah, Mavrommatis, Opsahl and Amos Wako) did consider that the question of whether the right to strike was a necessary element in the protection of the interests of the authors of the complaint should actually be examined as a question on the merits, ie, whether the restriction being imposed in the case was justifiable under Article 22 as 'paragraph 2 [of that article] deals with the extent of the exercise of the right [of freedom of association] which necessarily includes the means which may be resorted to by a member of a trade union for the protection of his interests' (para 9). In addition see the European Court's conclusion in *Federation of Offshore Workers' Trade Unions and Others v Norway*, 27 June 2002 (Admissibility Decision) that the imposition of compulsory arbitration to bring to an end a strike that had lasted for 36 hours was a proportionate measure in the interests of public safety and for the protection of both health and the rights and freedoms of others where a suspension of oil and gas production would have had 'immediate and very serious repercussions on the international distribution network affecting countries, particularly in Europe, dependent upon that supply at the relevant time, and where significant damage to technical installations and the environment were foreseeable if there was a complete halt in activities for a lengthy period '. Nonetheless the Court emphasised the significance of the impugned measure not being implemented for purely economic reasons and that 'its decision should not be taken as meaning that a system of compulsory arbitration for bringing lawful strikes to an end would be considered proportionate in all cases in which economic pressure was being exerted'

means as to how this was to be effected[160]. Although the European Court has in the past always been persuaded that some such means of protecting the interests of trade union members existed when rejecting claims for particular rights, it had no hesitation in finding in *Wilson and Others v United Kingdom*[161] that there was a violation of Article 11 when it saw that an employer was effectively allowed by the law to undermine or frustrate a trade union's ability to protect its members' interests. This situation arose because employers were entitled to use financial incentives to induce employees to surrender important union rights, such as the termination of a collective bargaining arrangement[162]; those employees who did this by signing new contracts were awarded substantial pay rises and this was clearly 'a disincentive or restraint on the use by employees of union membership to protect their interests'[163]. It is, however, unlikely, that any treatment of union members that is less favourable than that of other employees will be regarded

160 In all the cases cited in the preceding four footnotes reference was made to the other means available for the unions concerned to represent their members – such as the ability to strike, hold demonstrations and undertake other forms of campaigning action – and the apparent concern of the European Court in *Unison v United Kingdom*, 10 January 2002 about a total prohibition on the right to strike is significant in this regard. See also the emphasis placed by the European Commission, when finding the complaint in *Hoffunktionaerforeningen I Danmark v Denmark*, 72 DR 278 (1992) to be manifestly ill-founded, on the fact that the union concerned was not ignored notwithstanding the refusal of the royal household to conclude a collective bargaining agreement with it. However, although there was a refusal in Appl Nos 11567/85 and 11568/85, *Le Cour Grandmaison and Fritz v France*, 52 DR 150 (1987) to regard the preparation and distribution of leaflets alone as a manifestation of trade union activity within the meaning of Article 11, there was no institutional framework behind it; the action was being undertaken by only two conscripts calling on other soldiers to take action against being posted overseas. See also *Sanchez Navajas v Spain*, 21 June 2001 which concerned a complaint about a deduction made from the applicant's salary for time spent on trade union activities. The Court considered that it could be inferred 'from Article 11, read in the light of Article 28 of the European Social Charter (Revised), that workers' representatives should as a rule, and within certain limits, enjoy appropriate facilities to enable them to perform their functions' (para 2). However, it found that it had not been shown why time to study new legislation on union elections was strictly necessary for the effective exercise of the applicant's functions as a representative and that in any event the measure did not have sufficient gravity to have a substantial impact on the right guaranteed by Article 11.

161 2 July 2002.

162 There was no requirement to give up union membership.

163 Para 47. In reaching its conclusion that this was in violation of Article 11, the European Court took into account criticism previously made of the relevant law by the European Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association and this should sound a note of caution about assumptions that freedom of association is more extensive under social rights guarantees; the ability to pursue objectives must be equally effective where reliance is placed on civil and political rights guarantees of this freedom. The earlier case of *Schmidt & Dahlstrom v Sweden*, 6 February 1976 might be distinguished from the present one in that there was no evidence of a decline of union membership as a result of pay increases being awarded to non-union employees who had not gone on strike and that the concern underlying the case was the discouragement to strike rather than to belong to a union.

as amounting to a violation of Article 11 unless it is so significant that union membership becomes either pointless or seriously unattractive[164].

Notwithstanding the specific trade union context, the recognition that there must be some means of pursuing the collective objectives is undoubtedly also of more general significance; it is highly likely that Article 11 will have been violated if the restrictions imposed by a particular legal structure on the operation of any association (and not just a trade union) are such that it can do no more than exist[165]. There may thus be no guarantee that particular means can be employed[166] but the essence of an association is the pursuit of objectives rather than the simple union of those persons who hold them to be important. In this regard it is undoubtedly significant that instruments concerned with specific forms of association have recognised that they should be able to undertake certain forms of activity, notably, observation of trials and other

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164 The effect is what counts as the intention of the employer was not seen as material. However, the ruling is directed only to the individual treatment of employees; a right to collective bargaining is still not being read into Article 11 so that a termination of a union's recognition for this purpose would not be a violation of this provision, even though union membership might then seem less worthwhile. It should also be noted that the European Commission in Appl No 7990/77, *X v United Kingdom*, 24 DR 57 (1981) found no requirement in Article 11 that the State authorities 'actively support a union or an individual union member in a particular case' and that there was thus no requirement for prison authorities to intervene with the applicant's employer with regard to the request by the latter that he be recalled to prison from a pre-release employment scheme because of his trade union activities. It was, however, significant that the applicant still had the possibility of bringing a claim for unfair dismissal against the employer. A warning from the prison authorities about the applicant's trade union activities was not objectionable because it was merely an indication of the fact that they 'saw no possibility to intervene themselves with regard to any action taken by the employer on account of' his trade union activities (p 63).

165 Although in Appl No 6094/73, *Association X v Sweden*, 9 DR 5 (1977) it was stated that Article 11 did not 'give any specific contents to freedom of association except, to a certain extent, as regards trade unions' (p 6), it is perhaps more significant that the European Commission stated that 'Freedom of association is a general capacity for the citizens to join without interference by the State in associations in order to attain various ends. However, a right to the successful attainment of such ends is not guaranteed by Art. 11' (p 7). This clearly recognises the importance of being able to pursue common objectives, whatever the outcome may be. The applicant was a students' organisation and had complained that had not been given the status of a students' union which would enable it to participate in the administration of the university. The denial of this status was not seen as precluding the applicant from striving to protect its members' interests. Furthermore the fact that another body – to which all students were compelled to belong - did have the status of a student union was not a form of unjustified discrimination as this was seen as being in the interests of the proper administration of the university; as to the compulsion to belong, see 'Concept of association' above. The importance of access to facilities for the pursuit of an association's objectives is implicitly recognised in Appl No 33489/96, *Anderson v United Kingdom*, 91 DR 79 (1997), in which no issue was found to arise under Article 11 in respect of the indefinite exclusion from a shopping centre only because there was no history of the applicants using it for any form of organised association.

166 Some may, of course, be assured through other treaty obligations; eg, see European Social Charter, Article 6.

proceedings[167], participation in public affairs and criticism of governmental actions[168], promotion of human rights ideas[169], provision of advice[170], provision of information to international organisations[171] and seeking information[172].

It is, however, improbable that the ability for associations to undertake trading activities, let alone the possibility of being able to do so on some preferential basis vis-à-vis the business community generally or the granting of other kinds of privilege (such as some exemption from taxation), could normally be regarded as essential for the pursuit of objectives and thus an implied aspect of freedom of association[173]. Nevertheless it should always be borne in mind that the international guarantees for this freedom are imposing only minimum obligations[174] and there can be little doubt that the promotion of associations through this capacity can serve wider interests; such an empowerment of associations will not only benefit the development of civil society but is also likely to facilitate the achievement of many social objectives which would not be so readily accomplished through governmental structures[175].

It may be, of course, that benefits are conferred on some but not other associations and it should not be overlooked that this could always be open to challenge on the basis that it is unjustified discrimination, invoking Article 14 of the European Convention to expand the

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167 Article 9(3)(b) of the UN Declaration on Human Rights Defenders and para 43 of the Document of the OSCE Moscow, 1991 Meeting.
168 Articles 6-8 of the Aarhus Convention, Article 1.8 of the European Charter on the Statute for Judges, Article 8 of the UN Declaration on Human Rights Defenders, para 43 of the Document of the OSCE Moscow Meeting, 1991 and principle 74 of the Fundamental Principles.
169 Article 7 of the UN Declaration on Human Rights Defenders.
170 Article 9(3)(c) of the UN Declaration on Human Rights Defenders.
171 Article 9(4) of the UN Declaration on Human Rights Defenders.
172 Article 4 of the Aarhus Convention.
173 Although this is a conclusion that could be affected by the precise funding environment in the country concerned.
174 Thus principle 13 of the Fundamental Principles provides that 'An NGO with legal personality may engage in lawful economic, business or commercial activities in order to support its non-profit-making activities without there being any need for special authorisation, but always subject to any licensing or regulatory requirements applicable to the activities concerned.
175 Article 3(4) of the Aarhus Convention requires States Parties to provide 'appropriate support' for bodies promoting environmental protection and principle 6 of the Fundamental Principles provides that the national legal and fiscal framework applicable to non-governmental organisations should 'permit and encourage' the initiative of

protection afforded by Article 11[176]. On the other hand there is no barrier to a State choosing to grant some advantages to some forms of association so long as any differentiation between these forms has a rational and objective basis[177].

Penalties for membership

One positive obligation that the right to freedom of association imposes on States that ought not to be overlooked is that improper sanctions should not be imposed on persons merely because of their membership of an association[178]. Thus there ought to be remedy for anyone dismissed because of his or her trade union activities[179] and the same principle would also be applicable to dismissal because of the activities and objectives of any other form of association[180] and indeed to any other forms of sanction[181] – apart from the refusal to associate with someone[182] – that are imposed simply because of the person concerned's membership of an association[183]. There is also a need to provide protection against even more aggressive forms of action taken

those establishing them.

176 Or comparable provisions such as Article 26 of the International Covenant, Article 2 of the African Charter and Article 1 of the American Convention.

177 Principle 57 of the Fundamental Principles stipulates that 'There should be clear, objective standards for any eligibility of NGOs for any form of public support'. Support for particular candidates or parties, the nature of the activities undertaken and the provision of public benefit are identified as relevant considerations for the provision of public support in principles 12 and 58. As the cases discussed in notes 156-159 indicate, differential treatment will not always be lacking a rational and objective justification but see the significance attached to the use of exceptional criteria in determining an application for recognition of a church in *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001.

178 This is specifically recognized in principle 23 of the Fundamental Principles.

179 See Appl No 7990/77, *X v United Kingdom*, 24 DR 57 (1981) and *Frederiksen v Denmark*, 56 DR 237 (1988) in which such protection was considered to have been provided.

180 Including political; see *Vogt v Germany*, *supra*.

181 A sanction for this purpose could include disincentives to belong to an association such as loss of eligibility for certain benefits or posts; see *Wilson and Others v United Kingdom*, 2 July 2002 (ineligibility of union members for certain pay increases) and *Grande Oriente D'Italia di Palazzo Giustiniani v Italy*, 2 August 2001 (ineligibility of members of Masonic lodges for appointment to certain posts).

182 This is an inevitable consequence of the freedom not to associate; see 'The right to found and belong' above and 'Regulation … Protecting members' rights' below. This is, however, subject to the application of guarantees against discrimination.

183 Thus the deportation of someone because of his or her association with others would be a violation of freedom of association unless the nature of the association or the activities pursued were legitimately impermissible; see Appl No 7729/76 *Agee v United Kingdom*, 7 DR 164 (1976) in which it was found that Article 11 could not be interpreted as forbidding the deportation of an alien because of his contact with foreign intelligence officers.

against persons on account of their membership of an association, namely, harassment, intimidation and the use of violence, although the failure to do so could also engage responsibility for violations of other rights such as life, liberty and security and the prohibition of torture and inhuman and degrading treatment[184].

The only exception admissible to the prohibition on sanctions would be where membership of the association is clearly incompatible with performance of the employee's responsibilities or with other obligations[185]. An example of such an incompatibility in the former context can be seen in *Van der Heijden v The Netherlands*[186] where no objection was taken to the termination of the contract of the regional director of a foundation which promoted the interests of immigrants and provided them with advice because he was a member of the bureau of a party which advocated a policy of repatriating immigrants. In the circumstances of the case the European Commission considered not only that it was reasonable for the employer to have some discretion concerning the composition of its staff but that also, in view of the applicant's professional duties and the specific nature of his work, the employer

> could reasonably take account of the adverse effects which his political activities might have on the

184 Eg, Comm No 52/1979, *Saldías de López v Uruguay*, Views of the UN Human Rights Committee, 29 July 1981, in which Article 22 of the International Covenant was found to be violated because of the harassment of someone on account of his trade union activities. In addition see the Committee's concern in respect of Belarus 'about reports of cases of intimidation and harassment of human rights activists by the authorities, including their arrest and the closure of the office of certain non-governmental organisations' (CCPR/C/79?Add.86, 19 November 1997, para 19) and its similar concern about intimidation and harassment of human rights defenders by the authorities in Ukraine (CCPR/CO/73/UKR, 12 November 2001, para 21), as well as its noting of 'the assurances given by the delegation that human rights defenders who have submitted information to the Committee will not be harmed by Togo' (CCPR/CO/76/TGO, 28 November 2002, para 19). See also the acceptance that threats and harassment by non-State actors against a legal adviser to several trade unions and peoples' and peasants' organisations which had led him to flee, which had resulted in a violation of the right to remain in, return to and reside in his own country under Article 12 of the Covenant, had also had a negative impact on the author's enjoyment of other rights such as those under Article 22; Comm No 859/1999, *Jiménez Vaca v Colombia*, Views of the UN Human Rights Committee, 25 March 2002. The need for a State to take action to deal with all these forms of pressure on human rights defenders is required by Article 3(8) of the Aarhus Convention and is also recognised in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Para 11 and the UN Declaration on Human Rights Defenders, Article 12(2).

185 This could possibly include a conflict of interest arising from membership of two association's that are effectively in competition with each other, with the result that the person concerned is required to make a choice between them.

186 Appl No 11002/84, 41 DR 264 (1985).

Foundation's reputation, particularly in the eyes of the immigrants whose interests it sought to preserve[187]
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This was a situation in which there was a very public contradiction between the two aspects of an individual's life; the same outcome might not be appropriate where the employee had no direct responsibilities regarding the either the direction of the foundation or the provision of advice but was, for example, only responsible for cleaning its centre and had no direct contact with those coming to it for advice[188]. Certainly the imposition of a sanction for membership will not be considered justified where there is no direct evidence of incompatibility but it is only a matter of supposition. Thus a violation of Article 11 was found by the European Court in *Grande Oriente D'Italia di Palazzo Giustiniani v Italy*[189] when persons belonging to Masonic lodges were disqualified from appointment by a regional authority to various positions in public and private bodies[190]; this was an inappropriate response to a generalised concern about the Masonic influence over public decision-making when there was nothing actually reprehensible in someone belonging to a lodge[191].

Regulation

There is, of course, a certain inevitability about the consideration given by governments to the need for some form of regulation whenever any kind of activity is undertaken and such consideration in which those establishing and running associations are involved is certainly not

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187 *Ibid*, p 271. It was emphasised that there were no complaints against the applicant personally.
188 In addition, the high profile nature of Van der Heijden's political role was undoubtedly significant and mere membership of a party or organisation might also be less likely to give rise to problems of compatibility. However, this may not be so where the employee concerned works for a public body; see 'Public employees' below.
189 2 August 2001.
190 Candidates for the posts had to declare that they did not belong to any such lodges.
191 See also the European Court's refusal in *Kiiskinen and Kovalainen v Finland*, 1 June 1999 (Admissibility Decision), to rule on whether the Masonic link between a judge and a party was of itself sufficient to lead to a lack of impartiality for the purposes of Article 6 of the European Convention; no such link was established in that case. Proceedings in which disciplinary action has been taken against judges because of their Masonic links have led to findings of violations of Article 11 of the European Convention because the offences were not sufficiently precise and so the merits of a prohibition on such links was not addressed; *N F v Italy*, 2 August 2001 and *Maestri v Italy*, 17 February 2004 [GC].

an exception in this regard. Furthermore, given both the possible concern about objectives already discussed and the desirability of conferring certain advantages on at least some forms of associations[192], there is no *a priori* basis for objecting to the fact of regulation. Nevertheless the very fact that the European Convention and other international human rights treaties recognise freedom of association as a right which must be respected necessarily entails some limits on the degree of regulation to which the establishment and operation of associations can be subjected. Indeed the presumption must actually be against the need for regulation and, although there are some interests which can legitimately be invoked to restrict this freedom, the burden of proving that certain limitations are required is undoubtedly on those who would impose them. The very essence of freedom of association is the ability of those belonging to a body to decide how it should be run; this necessitates both a minimalist approach to regulation and very close scrutiny of attempts to interfere with the choices which associations and their members make about the organisation of their affairs.

Formation

In many instances the first problem confronted by an association is its very coming into existence and, in particular, the degree of control exercised over this process by State institutions. Although it has been indicated that there is an obligation on States to provide for the possibility of an association acquiring legal personality[193], a State is not generally entitled to insist on this being acquired by those who wish to form association; if a group of individuals prefer a relatively informal status then it would be difficult to justify compulsion for them to

192 These might range from concessions with respect to taxation to the award of grants from public funds; see further 'Legal Personality and other rights'.
193 See 'Legal personality and other rights' above.

establish something with a more formal character [194]. However, no objection could be raised with respect to a requirement that an association have a formal status where either that is seen as essential for the pursuit of pursuing certain activities (such as a trade union or a religious organisation) or that is a prerequisite to acquiring certain benefits (such as tax privileges)[195] as the essential obligation under the right to freedom of association in this connection is to be able to exercise certain legal capacities rather than to be a particular type of legal person[196]. Nevertheless, even in such cases, there will still be a need to ensure that the degree of regulation is not unduly oppressive.

Although in some countries the acquisition of legal personality can be the automatic consequence of forming an association and thus not be subject to any further formalities[197], it is in principle compatible with freedom of association to insist that an entity go through some form of recognition or registration process before such legal personality is achieved[198]. Such a process can, as has already seen from the discussion of objectives, involve an assessment of whether the objectives and proposed activities of particular associations are either contrary to the constitution or are in some other respect unlawful. Where this is found to be the case – bearing in mind the limited extent to which it is possible to make such a judgement at this stage – it will be admissible for recognition or registration to be refused. This is certainly not a matter in which all room for judgement can be excluded but, apart from those cases where there had been some genuine misjudgement in the approach to drawing conclusions about activities or objectives, it

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194 Unless the acquisition of a degree of legal personality is, as it is in some countries, the automatic consequence of the decision of the founders to establish an association.
195 See text at n 150.
196 See 'Legal personality and other rights' above. However, note the stipulation in principle 36 of the Fundamental Principles that 'Decisions on qualification for financial or other benefits to be accorded to an NGO should be taken separately from those concerned with its acquisition of legal personality and preferably by a different body'.
197 Unless certain exceptional benefits or capacities are being sought.
198 It is the nature of the process rather than the term used for it that is significant. However, there is a need to keep in mind the stipulation in principle 30 of the Fundamental Principles that 'Any fees that may be charged for an application for legal personality should not be set at a level that discourages applications'.

is evident that in some countries the process is in reality being used as a means of exercising an entirely unfettered discretion with regard to the conferring of a formal status on a grouping of individuals and such an abuse of the regulatory power is clearly incompatible with provisions such as Article 11 of the European Convention[199]. In order to minimise the risk of this occurring and to facilitate the exercise of judicial control over an allegedly improper refusal of recognition or registration, the grounds for taking such a decision – which should be for one of the legitimate aims identified in the limitation clauses on guarantees of freedom of association - must be stated with an appropriate degree of precision and be such as to permit objective assessment of their observance. As a consequence it is not only improbable that broadly framed criteria will be regarded as acceptable[200] but it is also most likely that they will encourage improper refusals of recognition or registration[201].

Other than in those situations in which the objectives and activities of an association are properly found to be contrary to the constitution or the law[202], there are likely to be only a

199 See, eg, the concern of the UN Human Rights Committee 'at reported obstacles imposed [in Azerbaijan] on the registration … of non-governmental human rights organisations' (CCPR/CO/73?AZE, 12 November 2001, para 23), as well as its concern about 'the restrictions placed by Egyptian legislation on the foundation of non-governmental organisations' (CCPR/CO/76/EGY, 28 November 2002, para 21), 'the restrictions that can be placed [in the Syrian Arab Republic] on the establishment of private associations and institutions … including independent non-governmental organisations and human rights organisations' (CCPR/CO/71/SYR, 24 April 2001, para 26), and 'reports that non-governmental human rights organisations have been unable to register [in Togo]' (CCPR/CO/76/TGO, 28 November 2002, para 19).

200 Restrictions must also be sufficiently precise to enable those affected to foresee the consequences which a given act or omission may entail and to regulate their conduct accordingly. For instances where this did not exist, see *Hasan and Chaush v Bulgaria*, 25 October 2000 (discussed in n 227) and the cases of *N F v Italy*, 2 August 2001 and *Maestri v Italy*, 17 February 2004 [GC] (discussed in n 270). However, the Court has recently emphasised that such foreseeability is not negated by the need for clarification of doubtful points and for adaptation to particular circumstances when it concluded in *Gorzelik and Others v Poland*, 17 February 2004 [GC] that the concept of 'national minority' being used in a registration procedure was sufficiently precise.

201 See the concern of the UN Human Rights Committee about the fact that Lithuania had 'overly broad prohibitions' on the activities of non-governmental organizations (CCPR/C/79?Add.87, 19 November 1997, para 20) and that in the case of the Russian Federation 'the definition of "extremist activity" in the federal law of July 2002 "On Combating Extremist Activities" is too vague to protect individuals and associations against arbitrariness in its application … [leading it to encourage a revision of the definition so that it would 'exclude any possibility of arbitrary application and to give notice to persons concerned regarding actions for which they will be held criminally liable' (CCPR/CO/79/RUS, 1 December 2003, para 20). The need for objectively framed criteria is emphasised in principle 26 of the Fundamental Principles.

202 Although the European Court accepted in *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 that a refusal of recognition could have had the legitimate aim of protecting public order and public

limited number of circumstances in which a refusal of recognition or registration might be justified. They would certainly include such a refusal in cases where the proposed name of the association belonged to that of another body or could be confused with it or was in some other way damaging to it[203] or could in some way be genuinely regarded as misleading to the public[204]. However, no matter how well-intentioned, the process of approval should not generally be used to impose constraints on the ability of associations to draw up their own rules, to administer their own affairs or to make links with other bodies as these are essential elements of freedom of association[205]. Any interference with that freedom would be admissible only if it was capable of being justified under the limitation clause, such as the imposition of requirements that are

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safety, the consequence for the applicant church's freedom of religion – an ability to organise itself or operate, as well as intimidation – could not be regarded as proportionate to it.

203 As regards the former, see Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) (in which it was found that a refusal of registration under the national designation – as opposed to an absolute refusal - could be regarded as necessary in a democratic society for the prevention of disorder and the protection of the rights and freedoms of others where a third person might confuse the applicant association's name with that of a chamber of commerce and another body responsible for bilateral trade relations between Switzerland and Australia; the body 'lacked the necessary integration into national foreign trade policy' (p 49)) and Appl No 28973/95, *Basisan for 'Liga Apararii Drepturilor Omului Din Romania' v Romania*, 91 DR 29 (1997) (in which the only difference between the name of the applicant association and the already existing 'League for the Defence of Human Rights' was the addition of 'in Romania' and the European Commission considered that, having regard to the possibility of confusion, the refusal of registration could be viewed as unreasonable). An instance of both considerations can be seen in *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v Hungary*, 31 August 1999 (Admissibility Decision), in which the Court did not consider there to be an excessive interference with freedom of association in the refusal of a request for a registration by an association whose name in English was the Alliance of APEH's Persecutees (APEH being the abbreviated name of the Hungarian Tax Authority) when there was no obstacle to the formation and registration of an association to promote taxpayers' interests other than the choice of a name that implied a risk of confusion and that was defamatory; it is, however, questionable whether anyone might have imagined a body with such a name was an official one and the ready acceptance of the defamation objection is possibly at odds with the protection given to value judgements under Article 10. The body concerned need not be one that is already recognized or registered as the freedom of association of those belonging to an association without legal personality could also be harmed by the usurpation of its name.

204 See *Gorzelik and Others v Poland*, 17 February 2004, in which it was accepted that an application by the 'Union of People of Silesian nationality' could be rejected because its memorandum of association referred to it as being an 'organisation of a national minority' which was a concept found in the parliamentary elections law governing participation in the distribution of seats and thus gave the misleading impression that the association and its members would enjoy certain 'electoral privileges to which they were not entitled' (para 103). It was significant that such doubts could have been dispelled by only a slight change in the association's memorandum of association and without having any harmful consequences for its existence as an association or preventing the achievement of its objectives. In such circumstances the restriction could hardly be regarded as disproportionate to the legitimate aim being pursued. In the Chamber judgment the requirement of a slight change in the association's name as a condition for registration was also considered unobjectionable but this issue was not specifically addressed in the Grand Chamber. Only the grounds cited above, together with the failure to submit 'all clearly prescribed documents' are recognised in principle 31 of the Fundamental Principles.

205 See further 'Controls over management' below.

necessary to preclude unjustified discrimination or to protect the legitimate interests of members[206].

However, well-formulated criteria will never be an absolute guarantee against the refusal of recognition or registration for reasons not permitted under guarantees of freedom of association[207] and that is why there is a need not only to give those making these decisions appropriate training[208] but also to ensure that there is effective judicial scrutiny of any such refusal, as regards both the interpretation of the law and its application to the particular facts of the case. Furthermore, in order to facilitate such scrutiny there should always be a reasoned decision where recognition or registration has been refused and this must, of course, be adequate[209]. In addition, given the potential significance of such decisions for associations and those forming them, the possibility of bringing a legal challenge to a refusal must be something that can be speedily pursued. If these conditions are not met then it is likely that there will be not

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206 Appl No 10550/83, *Cheall v United Kingdom*, 42 DR 178 (1985) in which it was considered that the State could protect an individual against exclusion or expulsion from a trade union where the membership rules 'were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship such as job loss because of a closed shop [ie where union membership was obligatory]' (p186).

207 See the finding that the refusal to recognise the applicant church in *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 because it was not a new denomination involved a failure of the government to discharge its duty of neutrality and impartiality. Note also the European Court's finding that 'when the authorities recognised other liturgical associations they did not apply the criteria which they used in order to refuse to recognise the applicant church and that no justification has been put forward by the Moldovan Government for this difference in treatment' (para 129). See also the observation of the UN Human Rights Committee about Lebanon that 'the legislation governing the incorporation and status of associations is on its face compatible with article 22 of the Covenant … [but that] The delegation itself conceded that the practice of denying that registration took place is unlawful'; CCPR/C/79/Add.78, 5 May 1997, para 27.

208 Emphasizing in particular the value of associations and the need not to imagine the worst of their objectives and activities. The need for appropriately qualified staff is specifically stipulated in principle 34 of the Fundamental Principles. Furthermore the impartiality of the bodies concerned must be assured; as the European Court observed in a comparable context, 'where the exercise of the right to freedom of religion or of one of its aspects is subject under domestic law to a system of prior authorisation, involvement in the procedure for granting authorisation of a recognised ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9', in *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001, para 117. However, principle 33 of the Fundamental Principles does not insist on the body being a court.

209 See, eg, *Sidiropoulos v Greece*, 10 July 1998, in which the European Court held that a refusal of registration based on mere suspicion about activities in which the association concerned might engage was a disproportionate response to the country's legitimate concern about secession. See also the friendly settlement of the petition about the unreasoned refusal to register a religious association in Appl No 28626/95, *Khristiansko Sdruzhenie 'Svideteli Na Iehova' (Christian Association Jehovah's Witnesses) v Bulgaria*. 92 DR 44 (1998), pursuant to which the association would be registered. The need for reasons is stipulated in principle 35 of the Fundamental Principles.

only a violation of the right to freedom of association but also, in many instances, violations of the rights to a fair hearing and to an effective remedy[210].

However, it is also important that the actual process of dealing with an application for recognition or registration - where this is required - takes place in a reasonably speedy manner so that delay does not become a means of frustrating the pursuit of an association's objectives. A useful point of comparison in judging what is reasonable might be the time taken to register corporations or businesses. These also have objectives which need to be checked and in most countries these can still be registered in a matter of days rather than of months. There is, therefore, no clear need for a significantly longer period to be needed for the process of recognising or registering an association and it is undoubtedly the sort of yardstick that the European Court and other international tribunals would taken into account when dealing with any complaints about undue delay in reaching a decision[211].

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210 See, eg, *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v Hungary*, 5 October 2000, where Article 6(1) was held applicable to non-contentious court registration proceedings and a violation was found because of the failure to provide the applicants with the intervening prosecution authority's submissions and the consequent failure to respect the 'equality of arms' principle. Although registration was treated as a matter of public law in Hungary, the national classification of proceedings is never decisive as to whether a 'civil right or obligation' is involved for the purpose of making Article 6 applicable. In the European Court's view it followed from the fact that the association could obtain its legal existence only through registration that 'an unregistered association constitutes only a group of individuals whose position in any civil-law dealings with third parties is very different from that of a legal entity. For the applicants, it was consequently the applicant association's very capacity to become a subject of civil rights and obligations under Hungarian law that was at stake in the registration proceedings' (para 36) and thus these were concerned with its civil rights and obligations. In *Sidiropoulos and Others v Greece*, 10 July 1998 there was unfairness regarding the evidence on which registration was refused but, as the Court considered that Article 11 was to be seen in the light of Article 6 and that it was thus not necessary to address the fair hearing issue separately. However, while civil rights and obligations would be affected by a refusal of recognition or registration in the case of most associations, this provision appears to be inapplicable in the case of a political party as the right involved in the registration process will be seen as primarily a 'political' one; see *Vatan (People's Democratic Party) v Russia*, 21 March 2002 (Admissibility Decision), which concerned the suspension of the applicant party's activities for six months. Nevertheless such a party, as well as any association, should also have an effective remedy to challenge a refusal of registration considered improper in order to meet the requirements of Article 13. The 'civil rights' qualification does not apply to the fair hearing guarantee in Article 14 of the International Covenant, Article 7 of the African Charter and Article 8 of the American Convention and principle 9 of the Fundamental Principles stipulates that 'Any act or omission by a governmental organ affecting an NGO should be subject to administrative review and be open to challenge in an independent and impartial court with full jurisdiction' and this would include all decisions affecting registration.

Protecting members' rights

There is a legitimate interest in a State undertaking some regulation of associations in order to secure the rights of others and this would justify, and indeed require, legal provisions designed to protect members from any abuse of an association's dominant position. This might entail establishing a means of redress to prevent members from being expelled contrary to the association's rules[212] or from being subjected to certain disadvantages that could be regarded as amounting to considerable hardship, or even to prevent the adoption of rules that could be construed as wholly unreasonable or arbitrary[213]. In such cases appropriate protection would generally be satisfactorily afforded by some legal basis for the member concerned to challenge the matter in the courts; there would rarely be any need for a State entity actually to intervene on his or her behalf.

As freedom of association is primarily the right of the individuals belonging to the entity, there will also be some obligation to ensure that they are not being unduly coerced into joining. This recognition of a negative dimension to freedom of association has led in the trade union context to any requirements that individuals forego their objections to membership in order that they retain their job or can continue to pursue their livelihood being found unacceptable[214].

211 The need for a prescribed time-limit is stipulated in principle 35 of the Fundamental Principles.

212 Expressly required by principle 22 of the Fundamental Principles.

213 See, for example, Appl No 10550/83 *Cheall v United Kingdom*, 42 DR 178 (1985) which concerned the expulsion of the applicant from a union pursuant to an arrangement between unions that there should first be an inquiry about a person's status in his or her former union before being granted membership. Such an arrangement was intended to prevent inter-union disputes and was not considered unreasonable. It was also significant that the effect of the expulsion did not lead to the applicant losing his job as union membership was not obligatory. See also Appl No 13537/88, *Johansson v Sweden*, 65 DR 202 (1990) where the inability to opt out of the collective home insurance arranged for the members of a trade union was not considered unreasonable.

214 See *Young, James and Webster v United Kingdom*, 13 August 1981 (which concerned the applicants being required, if they wished to keep their jobs, to belong to one of three unions under an agreement concluded between the latter and their employer) and *Sigurdur A Sigurjónsson v Iceland*, 30 June 1993 (which concerned a requirement to belong to a taxi drivers' association as a condition of being granted a licence to be a taxi-driver). See also the friendly settlements of similar complaints in Appl No 9520/81 *John C Reid v United Kingdom*, 34 DR 107 (1983), Appl No 8476/79-8481/79, *Eaton and Others v United Kingdom*, 39 DR 11 (1984), Appl No 10061/82, *Conroy v United Kingdom*, 46 DR 66 (1986) and Appl No 11518/85, *Chauhan v United Kingdom*, 65 DR 41 (1990). See also the *Cheall* case referred to in the preceding note, in which a lack of union membership as a result of restrictions on changing the union to which one belonged could not lead to dismissal.

However, it is a concern that is equally applicable outside the trade union context. Thus the European Court has upheld a complaint by small landholders being required to belong to a hunting association and allow hunting on their land despite their being opposed to hunting[215]. It does not matter whether the constraints imposed on someone belong to an association are directly imposed by the law or are merely facilitated by it[216]. However, they are less likely to be seen as objectionable where they do not involve deeply-seated objections to membership being overridden[217] or entails no more than the exercise of legitimate forms of trade union activity[218].

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215 *Chassagnou and Others v France*, 29 April 1999. It was not significant that the applicants had very much a formal membership which arose from their ownership of the land and which imposed no obligation to take an active part in the activities of the association since this membership still facilitated the attainment of objectives of which they disapproved. There was also a violation of Article 11 in conjunction with Article 14 as the obligation was imposed on small but not large landholders. See also Comm 633/1995, *Gauthier v Canada*, Views of the UN Human Rights Committee, 7 April 1999 which concerned the denial to a journalist of full access to the press facilities in Parliament because he was not a member of the Canadian Press Gallery Association. The ability of a private organisation to control access to facilities through an accreditation scheme that was not transparent, specific, fair and reasonable was found to violate the right to freedom of expression but a claim regarding freedom of association was found not to be substantiated, the applicant not having established that he met the criteria for membership of the gallery. However, in the dissenting opinion of Colville, Evatt, Medina Quiroga and Yrigoyen it was stated that freedom of association implied that in general no one may be forced by the State to join an association and that, where needed to engage in a profession or calling or sanctions exist for failing to be a member, there is a need to show that compulsion is necessary in a democratic society in pursuit of an interest authorised by the International Covenant. They considered that it had not been shown in the present case why membership of a particular organisation is needed in order to limit access to the press gallery and that there was thus a violation of Article 22. Bhagwati, Kretzmer and Lallah gave opinions to similar effect. See also the discussion of the Inter-American Court of Human Rights's Advisory Opinion of 13 November 1985, No OC-5/85, *Compulsory membership in an association prescribed by law for the practice of journalism*, (1986) 7 *HRLJ* 74 at n 57. Compulsion to belong to a union where there is no possibility of subscribing to a 'non-political membership' is to be considered in *Sørensen v Denmark*, 20 March 2003 (Admissibility Decision).

216 *Chassagnou and Others v France* and *Sigurdur A Sigurjónsson v Iceland* are examples of the former whereas in all the others referred to in n 213 the requirement to be a member arose from agreements with employers that could lawfully be concluded by the unions concerned,

217 Whether this objection to membership be philosophical or religious as in the trade union cases (n 213), ethical as in *Chassagnou and Others v France* (in which the applicants had deep-seated convictions against hunting) or political as in *Sigurdur A Sigurjónsson v Iceland* (in which the applicant disagreed with the limitations on taxicab licences espoused by the association). See, eg, *Sibson v United Kingdom*, 20 April 1993 where the applicant had no specific convictions regarding trade union membership and was not faced with losing his job by failing to become a member but only moving his workplace to a different (but nearby) depot operated by his employer.

218 *Gustafsson v Sweden*, 25 April 1996 (Revision, 30 July 1989) and Appl No 15533/99, *Englund v. Sweden*, 77 DR 10 (1994), both of which concerned industrial action – the stopping of deliveries to a restaurant and of the collection of refuse from it - against the first applicant (who employed the applicants in the second case) for refusing to be bound by a collective agreement. No violation of Article 11 was found in the former because, although there was pressure to join an employers' federation as an indirect way of becoming bound by the collective agreement, the applicant's fundamental objection was seen as being to the collective bargaining system and, notwithstanding some economic damage, the pressure on him to enter a collective agreement did not significantly affect his freedom of association. It should, however, be noted that the European Court was divided 11-8 on this point. In the case of the employees the European Commission found no violation of Article 11 because the industrial action did not have

Moreover the mere fact that there may be tax or other advantages in joining an association will not in itself make the incentive impermissible[219]. Furthermore, as has already been seen, there has not so far been any objection to a requirement that individuals join a professional association[220]. However, although the individual interest in freedom of choice is undoubtedly offset to some extent by the public interest in regulation, it has been a feature of all the cases concerned with such associations that there was no restriction on the members setting up their own organisation in addition to the one which they were obliged to join[221]; in other words they were still in a position to voice their opinions in their own way. Any compulsion to belong to professional associations[222] is thus likely to be viewed much less favourably if these associations were the only means through which their members could express an opinion in the relevant sphere and if the structure of them was such that the coerced members did not even have a genuine opportunity to influence the policy-making process.

Controls over management

Concern about regulation should also extend to the uses to which a State might try to put a particular association. It is certainly not uncommon to find what might be thought to be State

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the effect of preventing them from remaining unorganised employees or changing their conditions of employment. There was thus no failure on Sweden's part 'to actively provide protection … against interference with their negative freedom of association' (p 19).

219 Appl No 9926/82, *X v The Netherlands*, 32 DR 274 (1983), in which it was found that it did not follow from the fact that a particular association benefited from a part of the proceeds of a tax 'that there is any de facto obligation to join this association by virtue of the fact that payment of the tax amounts to a contribution to the association' (p 280); there was no suggestion that one association was being unduly favoured and thus no issue of the application of Article 14 arose. See also *Kajanen and Tuomalaa v Finland*, 19 October 2000 (Admissibility Decision) in which the European Court found no appearance of a violation of Article 11 in a complaint by civil servants who were not union members and so could not bring legal action concerning a salary disagreement arising from a collective agreement before the courts. They had never been directly forced to belong to the trade union which had negotiated the collective agreement and the indirect effect of the hardship to which they were subjected was not seen as comparable to that in the *Sigurjónsson* case (n 213). The restriction on access to the courts had in fact been removed by the time the case came before the Court.

220 See 'Concept of association' above.

221 See cases cited in n 52.

222 As well as other bodies to which there may be compulsion by law to belong, such as chambers of trade, student unions and works councils.

objectives being secured with the assistance of private bodies, whether commercial entities or private associations with an objective common to that of the State and whether by means of some kind of partnership, contractual arrangement or other form of delegation. There can be no objection to this and indeed, as has already been noted, this is one of the very reasons for encouraging civil society to develop; the non-governmental sector can often provide greater flexibility in responding to some problems and the fact that it is often much more closely linked to those in need of assistance can make it much better equipped to judge where efforts can most usefully be applied.

However, while it would be foolish not to draw upon such a useful resource, attention will always need to be paid lest this results in attempts by the State to take over particular associations and effectively make them agencies working under its control. In these circumstances the entity concerned will have lost the freedom to organise its own affairs and, insofar as this is not voluntary, there will be a violation of the right to freedom of association[223]. An instance of this happening can be seen in the attempt to use a taxi association as a way of administering the provision of taxi services in Iceland[224]. The regulation of such services was undoubtedly in the public interest and might well be a sufficient basis for requiring membership of a public law body[225] but the co-option of what was a private association in this case meant that the latter was no longer in a position to run its own affairs, which is one of the principal elements of freedom of association[226].

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223 Thus principle 1 of the Fundamental Principles states that 'NGOs are essentially voluntary self-governing bodies and are not therefore subject to direction by public authorities'. Principles 76 and 77 further provide that consultation should not be seen by 'government as a vehicle to co-opt NGOs into accepting their priorities, or by NGOs as an inducement to abandon or compromise their goals and principles' and that government bodies 'can work with NGOs to achieve public policy objectives, but should not attempt to take them over or make them work under their control'.
224 *Sigurdur A Sigurjónsson v Iceland*, 30 June 1993.
225 As to which see 'Concept of association' above.
226 See the concern of the UN Human Rights Committee that in Tunisia 'the Associations Act may seriously undermine the enjoyment of the freedom of association under article 22, particularly with respect to the independence of human rights non-governmental organisations. In this connection, the Committee notes that the act

For the same reason it would be very difficult to justify attempts (whether at the registration stage or subsequently) to prescribe in detail how an association should organise its affairs - whether it ought to have this or that management structure[227] – and there should certainly not be attempts to interfere with the choice of its representatives[228].

Furthermore, although public accountability will be a relevant consideration where an association is working with public authorities and/or enjoys some public benefits, this should certainly not permit unimpeded access to the way in which particular choices are being made by an association and in the first instance is likely to extend only to the provision of relevant

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has already had an adverse impact on the Tunisian League for Human Rights'; CCPR/C/79/Add.43, 23 November 1994, para 12.

227 Although some such requirements could be an acceptable condition for obtaining certain benefits, such as exemption from taxation. However, they would have to be voluntarily accepted and there should also be the freedom to surrender the benefits and to cease being bound by those requirements.

228 See *Hasan and Chaush v Bulgaria*, 26 October 2000, in which a violation of Article 9 - in this case a specific application of Article 11 - was found when there was a redesignation of the leadership of a religious community, without any criteria or procedural safeguards, at the behest of a breakaway group. The effect of this was to favour that group, 'granting it the status of the only official leadership, to the complete exclusion of the hitherto recognised leadership. The acts of the authorities operated, in law and practice, to deprive the excluded leadership of any possibility of continuing to represent at least part of the Muslim community and of managing its affairs according to the will of that part of the community' (para 82). This interference was found not to be prescribed by law 'in that it was arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability' (para 86). The European Court thus did not have to consider whether an interference with the religious community that had a sounder legal basis could be justified but this seems improbable in the particular circumstances of the case; as the Court observed in that case and in both *Serif v Greece*, 14 December 1999 and *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001 (in which a prosecution for having usurped the functions of a minister of a 'known religion' and a failure to recognise a church were respectively found not to be necessary in a democratic society), the State did not need to take measures to ensure that religious communities are brought under a unified leadership. It is equally improbable that a State would be regarded as justified in interfering with the management of associations, notwithstanding that it might be more convenient for the authorities if they did not have to deal with a multitude of bodies. For proceedings in which the breakaway group allege a violation of Article 9 on account of the re-recognition of the original leadership in the *Hasan and Chaush case*, see *Supreme Holy Council of the Muslim Community v Bulgaria*, 13 December 2001 (Admissibility Decision). It should be noted that interference in the internal affairs of associations could also have implications for observing the respect due to property rights under Article 1 of Protocol 1; this issue was not pursued in the *Hasan and Chaush* case. See also the Court's observation in both *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999 (para 26) and *Refah Partisi (The Welfare Party) and Others v* Turkey, 31 July 2001 (para 78) that the decisions of party leaders should be 'made freely … if they are to be recognised under Article 11 (endorsed by the Grand Chamber in the latter case in the judgment of 13 February 2003, at para 115; in these cases it found that decisions in favour of voluntary dissolution and disciplinary actions against members respectively were taken only to avoid enforced dissolution (which was harsher in its effects than a voluntary one) and thus could not be used to prevent the party in the first case from claiming to be a victim of the enforced dissolution or to negate the support of the second party for the remarks made by the members concerned. See also the call by the UN Human Rights Committee that in the Libyan Arab Jamahiriya 'Urgent steps should be taken by the State party to allow the free operation of independent non-governmental human rights organisations'; CCPR/C/79?Add.101, 6 November 1998, para 21. The points made above are also reflected in principles 43-45 and

information[229]. Thus it would be entirely legitimate for an association's decision-making to be taken in closed meetings but there could be a requirement that a proper record be kept of the proceedings. Nevertheless the State will have responsibility for ensuring that both its interests and the rights of others are protected; this would justify requirements for financial reporting and independent auditing of accounts[230]. It would also justify an obligation that those responsible for decision-making in the association should be clearly identified; there may be instances when this gives rise to legal liabilities and private bodies or the State will need to know against whom proceedings should be brought. However, there is no need for this to be subject to oppressive regulation and while it could be a matter of notifying the authority responsible for recognition or registration, there are undoubtedly other ways in which this objective could be achieved in various ways; for example, a record at the association's bank of those authorised to take decisions on its behalf would undoubtedly be as effective.

In contrast to a State having a legitimate need to know the executive officers of an association, there is no obvious justification for requiring disclosure to it of the names of members; individuals have a right to respect for private life under provisions such as Article 8 of the European Convention and indeed disclosure might also be a discouragement to joining and, therefore, an unacceptable inhibition on freedom of association[231].

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47 of the Fundamental Principles.

229 See further principles 60-63 of the Fundamental Principles.

230 This is recognised in principle 64 of the Fundamental Principles.

231 Thus in Appl No 28910/95, *National Association of Teachers in Further and Higher Education v United Kingdom*, 93 DR 63 (1998) the European Commission 'accepted that there might be specific circumstances in which a legal requirement of an association to reveal the names of its members to a third party could give rise to an unjustified interference with the rights under Article 11 or other provisions of the Convention' (p 71). These did not exist in this case – which concerned an obligation of a union to disclose the names of members who would be involved in industrial action – as it was not considered likely to impair the union's ability to protect its members, the employer was in any event aware of the names of most members through payroll deduction of membership fees and there was nothing inherently secret about membership of a union.

Policing

There may, of course, be instances where associations do engage in improper activities and this may require some intervention by the State. However, it ought to proceed on the same assumption that applies to individuals, namely, that what someone is doing is lawful in the absence of contrary evidence[232]. There ought not, therefore, to be any power to search the association's premises and seize documents and other material there without there being objective grounds for taking such measures. Furthermore the authorisation for them ought to be given by a judge and the terms of an warrant ought to be precise; there must be clear identification of what the search is in connection with and no permission can be given for a general trawl in the hope of finding something interesting. A judge also ought to be prepared to refuse authorisation for a search where no evidence justifying one is provided. This is all well-established in the case law under Article 8 of the European Convention and it applies whether or not the object of the source is an individual or an association[233]. It should also be noted that monitoring of an association's activities or members through surveillance techniques such as the interception of communications must also be capable of justification in accordance with the requirements of Article 8; in the absence of this there would be legitimate grounds for complaint about non-observance of this or other comparable provisions[234].

Where, however, there is good justification for taking action against an association,

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232 This is underpinned by the presumption of innocence in Article 14(2) of the International Covenant, Article 7(1) of the African Charter, Article 8(2) of the American Convention and Article 6(2) in the European Convention and is specifically reaffirmed as the appropriate approach in principle 66 of the Fundamental Principles.

233 See, eg, *Niemietz v Germany*, 16 December 1992. It is reaffirmed in principle 67 of the Fundamental Principles.

234 Article 17 of the International Covenant and Article 11 of the American Convention. See, eg, Appl No 23413/94, *L C B v United Kingdom*, 83 DR 31 (1995) , in which it was found that the applicant had not adduced sufficient evidence to demonstrate a reasonable likelihood of the interception of the communications of persons belonging to an association that was campaigning for compensation for servicemen exposed to experimental nuclear explosions. The applicant had alleged that the interception was an interference with his freedom of association and expression but the complaint was dealt with by the European Commission under the right to respect for correspondence under Article 8 as the *lex specialis*. The alleged surveillance of a Jehovah's Witness was raised in *Tsavachidis v Greece*; the Commission found a violation of Article 8 but not of freedom of religion, with no separate issue arising in respect of Article 11. The case was subsequently resolved by a friendly settlement; 21 January 1999.

whether because it has not observed some of the requirements concerning recognition or registration or because it has engaged in other conduct which is impermissible, the appropriate powers can then be exercised by the State. However, in such cases a sense of proportion is still required; technical failings should not have serious consequences for either the association or the individuals concerned. Thus consideration should first be given to whether the matter can be adequately handled through the issue of some form of directions[235], whereby only subsequent non-compliance will give rise to sanctions, rather than the immediate institution of criminal proceedings[236]. The latter does, of course, have the inherent safeguard of judicial supervision and it is important that any administrative measures are also subject to this condition. The mere fact that the administration asserts that an impropriety has occurred does not mean that this is correct; the assertion may be based on a mistaken interpretation of the law or there may have been some misunderstanding or incomplete information which led to it being made. In either event it is imperative that the association be in a position to challenge the position adopted by the State before an independent judge with full jurisdiction over these matters. If this is not possible then there will undoubtedly be violations of the rights to a fair hearing and an effective remedy[237]. Furthermore where the validity of any requirement that an association should desist from a particular activity is in dispute, it should be possible to apply to have this suspended until the outcome of the relevant proceedings; there would have to be very grave circumstances for this to be denied and it would be essential that any such refusal should itself subject to prompt judicial challenge. Without the latter safeguard an allegedly 'urgent' suspension of an association's activities could be used as a pretext for stopping its pursuit of entirely legitimate

235 Whether to desist from certain activity or to take specific action.
236 It is essential, therefore, that such an option be specifically provided in the legal framework governing associations.
237 Even if disputes relating to the competence of an association do not always concern civil rights and obligations for the purpose of the European Convention (see n 210), Article 6 of that instrument will certainly be applicable whenever criminal proceedings are involved.

ones[238].

Dissolution

In most instances the appropriate sanction against an association for not observing the legal requirements applicable to it will merely be the requirement to rectify its affairs, some form of civil liability and/or the imposition of an administrative or criminal penalty on it and on any individuals directly responsible. The application of such penalties should, of course, always observe the principle of proportionality as otherwise they are likely to be an indirect inhibition on freedom of association[239].

However, there may be circumstances where the conduct of the association would warrant its enforced dissolution[240]. These are likely to be very rare indeed and would probably cover only situations in which the association undertook anti-constitutional activities, failed to desist from other illegal conduct after appropriate warnings and opportunities to rectify such failings or had such prolonged inactivity that it was necessary to intervene to ensure that its funds were properly applied[241].

The need for an extremely well-founded basis for such a drastic action as dissolution has been repeatedly emphasised by the European Court[242]. Thus in *United Communist Party of Turkey and Others v Turkey*[243]*,* which concerned the dissolution of this political party by the constitutional court after the former had sought a ruling from the latter, with a view to taking part

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238 This is recognised in principle 69 of the Fundamental Principles.

239 This is expressly stipulated in principle 70 of the Fundamental Principles.

240 The freedom of members to decide whether they wish to continue to associate clearly entitles them to decide to dissolve an association on a voluntary basis. See principle 25 of the Fundamental Principles.

241 The latter would probably apply only when no use was being made of funds that had been obtained for the public benefit, particularly if this had been on a tax-exempt basis.

242 The European Commission found that the need for it in respect of political parties and trade unions had not been established in *The Greek Case*, 12 *Yb bis* 172 but complaints about the dissolution of political parties and other restrictions on freedom of association were the subject of a friendly settlement in Appl Nos 9940-9944/82, *France, Norway, Denmark, Sweden and the Netherlands v Turkey*, (1985) 6 *HRLJ* 331.

in an election, as to the compatibility of its objects with the constitution, the Court made it clear that the protection afforded by Article 11 was not limited to the mere formation of an association but lasted for its entire life and that, while there was a need for rigorous supervision of all restrictions on freedom of association, especially where political parties are concerned

> such scrutiny is all the more necessary where an entire political party is dissolved and [as also occurred in this case] its leaders banned from carrying on any similar activity in the future[244].

It may be that the scrutiny will not be quite as strict in cases where the association being dissolved is not a political party – although it is unlikely that there would be a significant difference in the approach in respect of such a party and an association whose objectives might be seen as political in a non-party sense – but the fundamental requirements are the same for all associations; these are that a measure such as dissolution must not only be proportionate to the legitimate aim being pursued – dissolution must remain an exceptional step - but the reasons for it also have to be clearly "relevant and sufficient"[245].

In the *United Communist Party of Turkey* case it was particularly significant that the party had been dissolved even before it had been able to start its activities and that the dissolution was therefore ordered solely on the basis of the party's constitution and programme. The two grounds derived from these by the constitutional court were that, contrary to a provision in the criminal code making it an offence to carry on political activities inspired by communist ideology, the party had included the word 'communist' in its name and that it sought to promote separatism and the division of the Turkish nation. In the European Court's view a political party's choice of name could not in principle justify such a drastic measure as dissolution, without there also being other relevant and sufficient circumstances. However, these were clearly

243 30 January 1998.
244 *Ibid*, para 46.
245 Principle 71 of the Fundamental Principles states that 'In exceptional circumstances and only with compelling evidence, the conduct of an NGO may warrant its dissolution'.

lacking; the formalistic approach of the Turkish constitutional court – which proceeded on the assumption that the use of the name automatically triggered the application of the provision in the code – was undermined by the fact that by the time of the dissolution this offence had been repealed and the constitutional court had itself found that the party, notwithstanding its name, was not seeking

> to establish the domination of one social class over the others, and that, on the contrary, it satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics[246].

In these circumstances the choice of name could not support a conclusion that this party had opted for a policy that represented a real threat to either Turkish society or the Turkish State and so this was insufficient to justify its dissolution[247]. Although the second ground invoked by the constitutional court, namely, an inadmissible objective, would undoubtedly be capable of justifying such a drastic measure as dissolution, it is still necessary to demonstrate that this exists and, as has already been seen[248], the Court's examination of the party's constitution and programme – which took into account the difficulties associated with the fight against terrorism in Turkey – failed to disclose anything that could be regarded as objectionable in what was being proposed. It did concede that the party's programme might conceal objectives and intentions but it added that these could be verified only by comparing that programme with its actions and the positions that it defended and that this was impossible given the peremptory dissolution of the party after its formation. Given the latter consideration, such drastic action was understandably seen as a disproportionate measure to protect the constitutional order and thus a violation of Article 11. Indeed dissolution at such a stage is always going to very difficult to justify since, as in the case of a refusal of recognition or registration because of what an association's

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246 *Ibid*, para 55.
247 A choice of name is unlikely ever to be a basis for dissolution where this is a matter considered at the time of a recognition or registration process but, in any event, problems with names are generally going to be matters that require only some slight modification and not the termination of the bodies concerned; see 'Formation' above.

objectives or activities are thought might entail[249], there will so little basis to substantiate the need for such action.

The absence of any concrete action by the body being dissolved was also important in *Socialist Party and Others v Turkey*[250] . In this case the party – which, unlike the party previously considered, had been in operation for some time[251] - had been dissolved because of various public statements which the constitutional court considered to constitute evidence that was binding on it even though the person making them had ceased to be its chairman. As has already been seen[252], the European Court found nothing in those statements that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles; it noted on the contrary that he had in fact stressed the need for democratic change, even if strong language had been used in the statements. Furthermore the latter had to be read in their context, so that references to self-determination and secession had to be understood in terms of the need for any federal system that might be adopted in Turkey being based on the freely given consent of the Kurds[253]. There was thus nothing anti-democratic in the statements and, in the absence of anything that would belie the sincerity of the speaker, action was effectively being taken against the party for conduct that was no more than a legitimate exercise of freedom of expression. As a result its dissolution, notwithstanding the legitimate aim of the protecting national security, could only be regarded as disproportionate and thus unnecessary in a democratic society[254].

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248 See 'Objectives' above.
249 *Ibid*.
250 25 May 1998.
251 Although there had been an earlier unsuccessful attempt to have it dissolved.
252 See 'Objectives' above.
253 It was also significant that the speaker had been acquitted in criminal proceedings brought against him in respect of the impugned speeches.
254 See to similar effect, *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999, where again the party was dissolved after just coming into existence and without any opportunity to engage in any activities; Turkey had affirmed that ÖZDEP bore 'a share of the responsibility for the problems caused by terrorism in Turkey ... [but]

However, it can still be possible to substantiate a case for dissolution, as is evident from the ruling in *Refah Partisi (The Welfare Party) and Others v Turkey*[255]. In the European Court's view there was a sufficient basis in the remarks and policy statements of the party's leaders to conclude that its objective was anti-secular and thus anti-democratic, in that they had advocated setting up a plurality of legal systems, the introduction of discrimination between individuals on the ground of their religious beliefs and the operation of different religious rules for each religious community, in which sharia would be the applicable law for the Muslim majority of

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The Government nonetheless fail to explain how that could be so as ÖZDEP scarcely had time to take any significant action. It was formed on 19 October 1992, the first application for it to be dissolved was made on 29 January 1993 and it was dissolved, initially at a meeting of its founding members on 30 April 1993 and then by the Constitutional Court on 14 July 1993. Any danger there may have been could have come only from ÖZDEP's programme, but there, too, the Government have not established in any convincing manner how, despite their declared attachment to democracy and peaceful solutions, the passages in issue in ÖZDEP's programme could be regarded as having exacerbated terrorism in Turkey' (para 46). The concern had been that the party's programme tended to undermine the territorial integrity of the State and the unity of the nation because it was supposedly based on the assumption that there was a separate Kurdish people in Turkey with its own culture and language. In addition it was suggested that by advocating the abolition of the government Religious Affairs Department in its programme (on the ground that religious affairs should be under the control of the religious institutions themselves), ÖZDEP had undermined the principle of secularism. However, the European Court found nothing in the programme that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles; indeed the need to abide by democratic rules had been stressed. Furthermore the reference to a right to self-determination of the "national or religious minorities" was to be taken as encouraging not separation but the need for reform to be underpinned by the freely given, democratically expressed, consent of the Kurds. Similarly the mere advocacy of a political change, such as the proposed abolition of the Religious Affairs Department, could hardly be objectionable in a democracy. The latter point also weighed heavily in both *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002 and *Socialist Party of Turkey (STP) and Others v Turkey*, 12 November 2003, in which it was found that the party's policies were not aimed at undermining the democratic regime in Turkey and that its dissolution because of them could not, therefore, be necessary. Similarly in *Selim Sadak and Others v Turkey*, 11 June 2002 dissolution of a party on such a basis that led to the applicants losing their parliamentary seats was found to entail a violation of Protocol 1, Article 3 but, in view of that, there was held to be no need to determine the Article 11 complaint. The dissolution measure could probably also be regarded as lacking proportionality in that it was based particularly on speeches by the former president of the party while abroad 9 para 36). The latter conclusion was actually reached in *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002, in which the potential impact of inflammatory remarks by a party's president were mitigated by the fact that they were made abroad in a foreign language of party leaders. Speeches by other leaders invoked to justify dissolution were found not to be anti-democratic. A similar approach to that in these cases seems likely to be taken by the UN Human Rights Committee in view of its ruling in Comm 628/1995, *Park v Korea*, Views of 20 October 1998, which concerned the imposition on the author of a year's suspended imprisonment and one year's suspension of exercising his profession for a conviction for breach of the national security law which was based on his membership and participation in the activities of an American organisation composed of young Koreans with the aim to discuss issues of peace and unification between North and South Korea. The case could not be examined as regards freedom of association because of a reservation but the Committee found a violation of freedom of expression. It noted that 'the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the

the country and/or the ordinary law. Furthermore they had given the impression that it did not exclude the possibility of recourse to force in certain circumstances in order to oppose certain political programmes, or to gain power and retain it. In these circumstances, it considered that a State might

> reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime[256].

It was important, however, that the danger posed by such political aims was not something that was merely theoretical or illusory but was achievable since such drastic action as dissolution could only be justified where there is a genuine and immediate threat to public order. Such a threat was considered to exist in the present case because the party had significant influence - through holding more than a third of the seats in the national assembly and through its increasing success in local elections – and because of the success that other political movements based on religious fundamentalism had had in the past in seizing political power and then setting up the societal model which they advocated. Furthermore the action was not seen as disproportionate in its effect since, apart from the dissolution, only five of the party's leaders temporarily forfeited their parliamentary office and their role as leaders of a political party[257]. Nevertheless the very thorough examination of the various remarks and policy statements demonstrates that dissolution

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arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19' (para 10.3).

255 13 February 2003.

256 A statement made at para 81 of the Chamber judgment of 31 July 2001 which was endorsed by the Grand Chamber in its judgment of 13 February 2003 at para 102.

257 However, the fact that the 152 remaining MPs continued to sit in parliament and were able to pursue their political careers normally might suggest that the anticipated danger was not really that serious and thus call into question the propriety of the dissolution. In the circumstances it is not surprising that the European Court in the Chamber judgment was closely divided (4-3) in this ruling and the dissenting judges understandably placed some emphasis on the lack of action taken against those making the remarks and statements used to justify the dissolution, as well as on the need to pay more attention to the party's formal programme than to the views of individual leaders. Nonetheless the Grand Chamber ruling was unanimous. *Cf* the finding of a violation of Protocol 1, Article 3 in *Selim Sadak and Others v Turkey*, 11 June 2002 when dissolution of a party led to thirteen members of parliament losing their seats.

remains an extremely difficult measure to justify and that it is not something that should be lightly undertaken[258].

Where dissolution does appear to be justified, it is a measure that must be subject to effective judicial supervision in order to remain valid; without this there would be no effective remedy against a possible interference with freedom of association and thus there would be a violation of provisions such as Article 13 of the European Convention[259]. Furthermore it would be only in the most exceptional case that the effect of a dissolution decision would not be suspended until the outcome of any challenge to its validity; one of the factors in leading to the conclusion that dissolution was disproportionate in those cases where a violation of Article 11 was found was the 'immediate' effect of the measure[260] and its drastic character would undoubtedly be mitigated if the possibility of suspending it existed.

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258 See also Appl No 23892/94, *A C R E P v Portugal*, 83 DR 57 (1995) in which the European Commission found nothing objectionable in the dissolution of an association which claimed the power to award medals, honours and titles under what it called 'the revived monarchical laws'. In this finding it was significant that not only was the association claiming prerogatives which are normally the exclusive domain of States but it was also intending to carry out its activity under a previous (monarchical) constitution without regard to the one now in force; it was thus pursuing an aim that could not be considered compatible with Portuguese public policy. In addition see the upholding in Appl No 8652/79, *X v Austria*, 26 DR 89 (1981) of a prohibition of an association that was continuing the illegal activities of another dissolved association that had been founded by the applicant; this was seen as necessary for the prevention of disorder.

259 However, the Court in *Refah Partisi (The Welfare Party)and Others v Turkey*, 3 October 2000 (Admissibility Decision), *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002 and *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002, did not consider the right to a fair hearing to be applicable to the dissolution decision itself on the basis that no civil right or obligation was being determined and thus Article 6 was not applicable. The issue of the application of Article 6 was not considered necessary to be addressed in *Socialist Party and Others v Turkey*, 25 May 1998 and *Selim Sadak and Others v Turkey*, 11 June 2002 and it was not raised in *United Communist Party of Turkey and Others v Turkey*, 30 January 1998 and *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999. It is not entirely clear whether the conclusion on Article 6 in the first two cases is limited to their specific context of the cases - dissolution of political parties by a constitutional court – but if it is not then there would appear to be a possible inconsistency with the view that a dispute over the grant of legal personality to an association is a matter concerned with its civil rights and obligations; see n 154. However, the ruling in *Vatan (People's Democratic Party) v Russia*, 21 March 2002 (Admissibility Decision) suggests the former is more likely as it was held that Article 6 was not applicable to the proceedings in which the activities of a regional branch of the association were suspended for six months as those affected were exclusively political. Although dissolution can have economic consequences for an association (see below), this would not be sufficient to turn this process into the determination of civil rights where a political party is involved where this is merely an incident of it; see the admissibility decision in the *Refah Partisi* case.

260 *United Communist Party of Turkey and Others v Turkey*, 30 January 1998, *Socialist Party and Others v Turkey*, 25 May 1998, *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999, *Selim Sadak and Others v Turkey*, 11 June 2002 and (only implicitly) *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002.

In the all the cases of dissolution just considered, one of the automatic consequences of it was the transfer of the assets of the associations concerned to the State. This may well be an appropriate approach where anti-constitutional activity is involved but it will also be a factor which could contribute to the possibility of the measure being seen as disproportionate[261]. Certainly such a transfer would probably not be justifiable where the dissolution is based on other considerations, such as the prolonged inactivity of the association. In such a case there is no reason why this should lead to a windfall for the State; appropriate respect for the objectives of those giving property to the association would be to ensure it was transferred on to a body with similar objectives[262]. In addition to the violation of Article 11 in respect of the association and its members, a failure to do this would probably violate the rights of the donors to control the use of their property under Article 1 of the First Protocol[263].

Public employees

The last phrase of Article 11 of the European Convention speaks directly to the scope of the freedom of association that can be enjoyed by certain persons in that the guarantee is expressed not 'to prevent the imposition of lawful restrictions on the exercise of these rights by

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261 As was found in the cases cited in the preceding footnote, although such assets did not figure in the amounts claimed for pecuniary loss in them. Furthermore the fact that it was not alleged that the transfer of assets did not result in pecuniary damage to either the party or its members was a factor in the finding that the dissolution in *Refah Partisi (The Welfare Party) and Others v Turkey*, 13 February 2003 was not disproportionate.

262 Indeed this would be the only approach consistent with the rationale underlying enforced dissolution in these circumstances. Where dissolution is based on the repeated illegal activities of an association, the transfer of its assets to the State would also be inappropriate insofar as these involved funds comprised funds obtained for entirely legitimate objectives. Principle 55 of the Fundamental Principles stipulates that assets should normally go to 'an NGO with compatible objectives, but the State should be the successor where either the objectives, or the activities and means used by the NGO to achieve those objectives, are found to be unlawful'.

263 This issue was not pursued by any donors in any of the cases just considered and, after having determined the Article 11 complaint in them (with the exception of *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002, in which it was not raised), the European Court did not consider it necessary to deal with the application of Protocol 1, Article 1 in respect of the parties themselves. There is no guarantee of property rights in the International Covenant but they are guaranteed by Articles 14 and 21 of the African Charter and the American Convention respectively.

members of the armed forces, of the police or of the administration of the State'[264]. Whereas it will be relatively clear who falls within the first two categories[265], the reach of the third may be more problematic because of the varying approaches taken by States with regard to the organisation of the public sector. Nevertheless it is a category which the European Court has indicated should be 'interpreted narrowly'[266] and it is unlikely that the fact that someone is paid out of public funds or is formally categorised as a public servant will be decisive. The Court has left open the question of whether it applies to teachers, notwithstanding the domestic designation of them as public servants[267] and in a different set of proceedings other public servants were only brought within the limitation because the purpose of the institution in which they worked resembled that of the armed forces and the police[268]. Furthermore in *Grande Oriente D'Italia di Palazzo Giustiniani v Italy* the Court was not prepared to regard appointees by a regional authority to membership of various public and private bodies as coming within the scope of the limitation since their link with that authority was seen as even less close that of the teacher in the *Vogt* case with her employer[269]. It is thus possible that the term 'administration of the State' will ultimately come to be regarded as applying only to higher-ranking officials, with restrictions being held appropriate because of the level and nature of their responsibilities[270] but nonetheless

264 There is a limitation in similar terms in Article 8(2) of the International Covenant on Economic, Social and Cultural Rights but those in the Convention Concerning Freedom of Association and the Right to Organise, Article 9 and in the International Covenant on Civil and Political Rights, Article 22(2) apply only to the armed forces and the police.
265 However, it remains to be determined whether these categories would embrace private security services working under contract to, or otherwise working with the authorisation of, the State.
266 *Vogt v Germany*, 26 September 1995, para 67 and *Grande Oriente D'Italia di Palazzo Giustiniani v Italy*, 2 August 2001, para 31.
267 *Ibid*, para 68. However, see the UN Human Rights Committee's concern that in the Republic of Korea 'restrictions on the right to freedom of association of teachers and other public servants do not meet the requirements of article 22, para 2'; CCPR/C/79/Add.114, 1 November 1999, para 19.
268 Appl No 11603/85, *Council of Civil Service Unions and Others v United Kingdom*, 50 DR 228 (1987) which concerned persons working at an institution which had the function of ensuring the security of military and official communications and of providing signals intelligence to the government.
269 2 August 2001.
270 This functional approach was fundamental to certain restrictions being found proportionate in *Ahmed and Others v United Kingdom*, 2 September 1998 (see below), although the ruling did not discuss whether local authority employees were part of the administration of the State. *Cf* the European Court's use in *Pellegrin v France*, 8

it is still likely to cover a wide range of people.

In imposing limitations on the freedom of association on those who do fall within the scope of this clause, it is clear that these must always have a basis in law[271], be for one of the purposes identified in the second paragraph of Article 11 and observe the principle of proportionality, even if they may be more extensive than the restrictions that would be considered acceptable in respect of anyone else[272]. Thus in *Vogt v Germany* the dismissal of a language teacher because of her membership and active involvement in the communist party was found to be a disproportionate measure to protect constitutional democracy when the party had itself not been banned and the applicant had not only asserted her belief in the constitutional order but had also never promoted the party ideology in the classroom[273]. On the other hand in *Ahmed and Others v United Kingdom* – where the limitation clause was not actually invoked - the European Court upheld restrictions which prevented certain local authority employees from being active in an organisational and administrative capacity in political parties or from being

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December 1999 of a functional criterion to determine whether disputes about a public servant's employment came within the conception of 'civil rights and obligations' for the purpose of attracting the fair hearing guarantee in Article 6. In its view this provision was inapplicable only to disputes involving those 'public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities' (para 66) and the armed forces and the police were specifically instanced as examples of persons falling within this functional definition. The acceptance in principle 23 of the Fundamental Principles that 'membership of an NGO may be incompatible with a person's position or employment' also reflects a functional approach to this issue.

271 See *N F v Italy*, 2 August 2001 and *Maestri v Italy*, 17 February 2004 [GC] in which prohibitions on members of the judiciary belonging to a Masonic lodge were found to be a violation of Article 11 because their terms were not sufficiently clear to allow even persons as well-informed as the applicants to realise that he could face disciplinary action as a result of joining, or remaining a member of, one. Judges Bonello, Strážnická, Jungwiert and Del Tufo dissented in *Maestri* on the issue of foreseeability but did not express any view as to the necessity in a democratic society of judges being barred from belonging to Masonic lodges. Judges Loucaides and Bîrsan dissented not only on the former issue but also, implicitly accepting that the restriction was compatible with Article 11, found that there was no violation of the Convention in this case.

272 The acceptance that the restrictions might be more extensive than the application of the general restrictions in Article 11(2) was implicit in the consideration of whether the 'administration of the State' limitation was applicable after first finding in *Grande Oriente D'Italia di Palazzo Giustiniani v Italy*, 2 August 2001 that the impugned restriction was not 'necessary in a democratic society' (see text at n 189). Although in *Rekvényi v Hungary*, 20 May 1999 the European Court had previously left open the question of whether 'lawfulness' was the only condition governing restrictions where this clause was applicable, no limitation has yet been upheld where a legitimate aim did not exist and the principle of proportionality was not invoked. However, a restriction is unlikely to be regarded as 'lawful' if it is in some way arbitrary in its character or effect and it is unlikely that one which has no clear link to the performance of the responsibilities of those affected could ever be considered unacceptable.

office-holders in such parties as justified in order to maintain a longstanding tradition of political neutrality on the part of those advising and guiding elected members of the authority. In so doing the Court attached particular significance to the relatively precise functional definition of those covered by the restrictions[274] and the fact that they did not preclude either membership of a political party or involvement in all the activities of such a party275.

In *Rekvényi v Hungary*[276] the European Court accepted that a complete prohibition on members of the police even belonging to a political party, as well as engaging in various forms of political activity, could be justified on account of 'the desires to ensure that 'the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers'. In this regard it saw as particularly significant that Hungary was in transition from a totalitarian regime which had greatly relied on the direct commitment of the police to the ruling party – the aim was that 'the public should no longer regard the police as a supporter of the totalitarian regime but rather as a guardian of democratic institutions'[277] - but, as the *Ahmed* case indicated, political neutrality is of importance for all democratic societies and it is unlikely that a similar restriction could be justified merely because the recent political history of the society concerned was not similar to that of Hungary. However, in upholding this restriction, the Court emphasised that considerable scope was still left to police officers to engage in political parties so that it could not be regarded as disproportionate in its effect on either freedom of association or expression[278].

273 26 September 1995.
274 It sought to catch those who were involved in the provision of advice to a local authority or who represented it in dealings with the media but it also made provision for certain categories of employees identified for this purpose to seek exemption where they were not actually involved in these functions.
275 For an attempt to suggest that parliamentarians are in an analogous position to the public employees covered by the restriction in Article 11, see *Zdanoka v Latvia*, 6 March 2003 (Admissibility Decision).
276 20 May 1999.
277 *Ibid*, para 44.
278 They could still 'sometimes subject to restrictions imposed in the interest of the service, expound election programmes, promote and nominate candidates, organise election campaign meetings, vote in and stand for elections

Global and regional protection of the guarantee

It has already been noted that the right of individual petition under the European Convention extends to non-governmental organisations[279]. This means that those associations (and not just their members) whose rights under Article 11 - as well as under its other relevant provisions - are apparently being infringed[280] can have recourse to the European Court in Strasbourg in the event that there is no effective remedy available to them within the country where this is happening. It will be of no consequence in this regard that the association either has not yet acquired legal personality or has lost it through dissolution, not least since these may be

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to Parliament, local authorities and the office of mayor, participate in referenda, join trade unions, associations and other organisations, participate in peaceful assemblies, make statements to the press, participate in radio or television programmes or publish works on politics' (para 49). See also Appl No 18598/91, *Sygounis, Kotsis and Union of Police Officers v Greece*, 78 DR 71 (1994), in which no interference with the right to form and join trade unions was found to have been caused by a circular from the justice ministry to police departments asking them to appeal against any court decision establishing and association by members of the police because this had had no practical effect in dissuading police officers from joining; the association had been lawfully entered in the register of associations, its lawfulness had never been disputed and it had some 33,000 members. It was, however, also significant that an earlier circular prohibiting membership of the union and forbidding the latter from representing the interests of police officers had been suspended. In the light of all the case just discussed it seems unlikely that the upholding in Appl No 11603/85, *Council of Civil Service Unions and Others v United Kingdom*, 50 DR 228 (1987) of the complete prohibition of union membership for persons working at an institution which had the function of ensuring the security of military and official communications and of providing signals intelligence to the government would now be seen as proportionate, notwithstanding the national security dimension. This especially so since the prime concern was industrial action which could have been addressed by the less drastic measure of a prohibition on strikes. It should also be noted that the Freedom of Association Committee of the Governing Body of the ILO found this ban to be in breach of the ILO Convention (Case No 1261) and that it has since been revoked.

279 See n 32.

280 Note in this regard the European Commission's recognition in Appl No 7805/77 *X and Church of Scientology v Sweden*, 16 DR 68 (1979) that it was mistaken in previously considering that a church (and thus undoubtedly an association) was protected through the rights granted to its members; 'a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members' (p 70). However, not all action taken against members of an association will necessarily entail a violation of Article 11 in respect of the association itself; see, eg, Appl No 22954/93 *Ahmed and Others v United Kingdom*, Admissibility Decision, 12 September 1995, in which restrictions on the political activities of public servants were found not to have had any direct effect on the union to which they belonged. *Cf* Appl No 11603/85, *Council of Civil Service Unions and Others v United Kingdom*, 50 DR 228 (1987) and *Wilson and Others v United Kingdom*, 2 July 2002, in which where a ban on union membership and pay incentives to cease being a union member respectively were considered to affect the union itself. On the other hand an association will be able to claim to be the direct victim of a violation of Article 11 where action is taken against its very existence, as in the case of dissolution, or where its ability to pursue its objectives or to act on behalf of its members is in some way constrained (see, eg, the cases referred to in n 106). It remains to be seen whether either the failure of Article 11 generally to guarantee a right to strike (see n 159) or the possibility that it grants of imposing additional restrictions on the exercise of association by public employees will be sufficient to prevent the dissolution of a public workers' association from being found contrary to the Convention; *Çinar v Turkey*, 13 November 2003 (Admissibility Decision).

the matters which are being challenged[281]. This provides an assurance that the European standards with respect to freedom of association are observed in practice and not just in theory. However, in the case of the International Covenant it would appear that only members of associations who are natural persons can complain under its First Optional Protocol about interferences with freedom of association and its allied rights since legal persons – whether members or the association – are not regarded as 'individuals' for the purpose of Article 1 of the latter instrument, notwithstanding that this restriction does not apply to the substantive rights guaranteed[282]. Nevertheless this still provides a means of seeking a remedy for those situations in which the international guarantee of freedom of association is not properly respected by the members of the associated affected. The avenue of proceedings on behalf of members by natural persons is also the only possibility of redress under the African Charter and the American Convention as the substantive guarantees are restricted to such persons[283].

Conclusion

There is still little specific provision for non-governmental organisations in international

281 In the case of the former, it was the founders rather than the association refused registration that complained about the refusal of registration in *Sidiropoulos and Others v Greece*, 10 July 1998 and *Gorzelik and Others v Poland*, 17 February 2004 [GC] but cases have certainly been brought by unregistered associations and the European Commission and the Court have not considered this to be improper, at least where either domestic law actually allows such bodies to function and pursue their activities (Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997) and Appl No 29225/95, *Stankov and United Macedonian Organisation 'Ilinden' v Bulgaria*, 94 DR 68 (1998)) or they have been implicitly recognized in proceedings in domestic courts (*Canea Catholic Church v Greece*, 16 December 1997). The issue of competence to complain has not generally been raised in the dissolution cases but there was a reluctance on the part of the Court in *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999 to accept a loss of victim status as result of a party's decision to dissolve itself before an enforced dissolution. It did not consider this to be a truly voluntary act (see n 165) but in any event under Turkish law a party dissolving itself remained in existence for the purpose of dissolution proceedings against it in the constitutional court. The issue of whether an association has sufficient interest to complain about the suspension of one of its branches which has a discrete legal personality will be addressed in *Vatan (Peoples' Democratic Party) v Russia*, 4 September 2003 (Admissibility Decision).

282 See the admissibility decisions of the United Nations Human Rights Committee in *S M v Barbados* (502/1992, 31 March 1994) and *Singer v Canada* (455/1991, 26 July 1994). This would not be an obstacle to reliance on the Covenant in domestic proceedings.

283 See n 61. However, this does not preclude the bringing of complaints before the relevant supervisory bodies for these instruments *by* non-governmental organisations.

human rights instruments that are legally binding but their entitlement to exist is certainly now well-founded on the extensive guarantees that many of them afford to freedom of association. Furthermore such guarantees ensure the legitimacy for their pursuit of an extremely wide range of objectives, with the only limits to this being set by the need to maintain democracy, human rights and the rule of law. However, although the right to pursue these objectives is especially assisted by the right to enjoy legal personality wherever this is considered desirable, the scope of the particular capacities that should come with this personality continues to be in the process of elaboration. Nonetheless the guiding principle in such elaboration is undoubtedly one of ensuring the essential effectiveness of non-governmental organisations and indeed there is increasing recognition of the need for States to establish legal and financial environments that will facilitate their work. The latter has particular implications for the regulatory structure and approach governing the existence and operation of non-governmental organisations. Thus, while the permissibility of regulation cannot be questioned, it ought not to be unduly cumbersome or bureaucratic and should certainly never embody an inherently hostile or oppressive attitude to the existence or activities of these bodies. Rather regulation should always be founded upon a full appreciation that non-governmental organisations are an essential constituent of any society committed to democracy, human rights and the rule of law. The positive attitude required of governmental entities in respect of non-governmental organisations should also extend to their members, including those in the public service, with restrictions only being imposed where there is a fundamental incompatibility between membership and some other role or obligation that is itself admissible. Although there is often still a substantial discrepancy between the rights accorded to non-governmental organisations and their observance in practice, greater respect for the former will undoubtedly make a significant contribution to both the realisation of all human right and the safeguarding of a democratic society.