

Promoting the Freedom of Association

In addition to publishing more generally on CSL, Profs Simon and Irish published the following paper (in various venues) and delivered it as a paper at Columbia University, OSI, etc. for the purpose of widely disseminating this critical information about developments on freedom of association in the European Court of Human Rights.

FREEDOM OF ASSOCIATION RECENT DEVELOPMENTS REGARDING THE "NEGLECTED RIGHT" 1[1]

by

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Introduction. Customary international law deals principally with the rights and duties of states vis à vis each other. It does not generally confer rights upon individuals. Rights have been conferred on individuals, however, under multilateral treaties.^{2[2]} This paper discusses the rights of freedom of association and assembly conferred on individuals and the organizations to which they belong under international law.

1[1] See Lawyers Committee for Human Rights, *The Neglected Right* (1997). This paper is a précis and draft of a longer paper, and it is being disseminated here for discussion and comment. The paper is also intended to serve as Appendix III for the Revised Discussion Draft of the *World Bank Handbook on Good Practices for Law Related to Nongovernmental Organizations*, prepared for the World Bank by the International Center for Not-for-Profit Law (ICNL). For a description of ICNL, see the attachment.

2[2] A comprehensive online library of human rights conventions and related documents will be found at: <http://www1.umn.edu/humanrts/hrcenter.htm>.

A. Human Rights Documents. The most important international human rights documents dealing with the freedoms of assembly and association, as well as the related right to freedom of expression, are the following:

The Universal Declaration of Human Rights, Article 20 (1948) (Universal Declaration), provides, in relevant part, that:

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.^{3[3]}

The Universal Declaration is not a treaty. It is a resolution of the General Assembly of the United Nations.^{4[4]} The Universal Declaration has had a seminal influence on the development of the international law of human rights, however, and there is an argument that its widespread acceptance and endorsement over so many decades is evidence that emerging customary international law confers the human rights of which it speaks upon individuals.^{5[5]}

Turning to treaties, the first one adopted in this area was the European Convention on the Protection of Human Rights and Fundamental Freedoms, Article 11 (ECHR) (1953), a convention that has been adopted by over 40 members of the Council of Europe, from the early 1950's to the present.^{6[6]} The ECHR provides, in relevant part, that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to

^{3[3]} For a discussion of the “negative” freedom of association (the right not to associate), see Wino J.M. Van Veen, Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 3 *Int'l J. of Not-for-Profit L.* 1 (Sept. 2000) (www.icnl.org/journal/vol3iss1/)

^{4[4]} Gen. A. Res. 217 (1948).

^{5[5]} Contemporaneously with the Universal Declaration, the American Declaration of the Rights and Duties of Man (1948) affirms the “right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, social, cultural, professional, labor union, or other nature.”

^{6[6]} See <http://conventions.coe.int/>. The ECHR was ratified by the U.K. in 1953 and by Georgia in 1999.

form and to join trade unions for the protection of his interest.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Of great importance is the fact that the ECHR established an elaborate dispute resolution mechanism, including the European Court of Human Rights, the first international court dealing solely with human rights matters.^{7[7]} The European Court has led the way in interpreting the freedom of association in recent years.

Other regional covenants have been adopted and refer to the freedom of association. For example, the American Convention on Human Rights of 1978, provides for the freedom of association in Article 16, which describes the right as follows:

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

^{7[7]} The Inter-American Court on Human Rights was established in 1992; see Statute of the Inter-American Court of Human Rights, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98, Annual Report of the Inter-American Court on Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992). The Protocol to the African Charter on Human and People's Rights establishing an African Court on Human and People's Rights was promulgated in 1997; see OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

The African Charter on Human and People's Rights of 1981 provides somewhat more ambiguous support for this freedom in Article 10, which reads as follows:

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

There are no similar regional covenants that cover Asia or the Middle East.

The most important international human rights treaty dealing with freedom of association and assembly and the related right to freedom of expression is the International Covenant on Civil and Political Rights, Article 22 (ICCPR) (1976). It is closely patterned on the ECHR, and it has been ratified or acceded to by over 140 countries. The ICCPR provides, in relevant part, that:

1. Everyone shall have the right of freedom of association with others, including the right to form and join trade unions for the protection of his interest.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interest of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this Article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Thus, the ICCPR speaks quite unambiguously about the freedom of association, and its provisions are binding on the states that are party to it.

The most recent United Nations document dealing with the freedom of association is the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized

Human Rights and Fundamental Freedoms.^{8[8]} This “Declaration of the Rights of Human Rights Defenders” provides in Article 5 that –

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

- (a) To meet or assemble peacefully;
- (b) To form, join and participate in non-governmental organizations, associations or groups;
- (c) To communicate with non-governmental or intergovernmental organizations.

Although this Declaration is a resolution of the General Assembly rather than a convention or treaty, it provides a sound basis for gauging the consensus of considered opinion on the meaning of the rights conferred under applicable multilateral treaties, such as ICCPR and the regional conventions.

B. Human Rights Case Law. The rights created by the treaty provisions discussed above apply by their terms to individuals, not to legal entities. Thus, although individuals enjoy the right to freedom of association, it has not been entirely clear whether legal entities, such as NGOs, enjoy the same rights. There is one important exception: trade unions. Under a series of multilateral treaties negotiated under the auspices of the ILO, not only do individuals have a right to form and join trade unions, but trade unions themselves also have rights.^{9[9]} A key question with respect to other non-governmental organizations, accordingly, has been whether and how the protections of these human rights treaties can be extended to NGOs.

Early precedents were not supportive of a broad right to form associations,^{10[10]} and the right to freedom of association received scant

^{8[8]} G.A. res.53/144, annex, 53 U.N. GAOR Supp., U.N. Doc. U.N. Doc. A/RES/53/144 (1999).

^{9[9]} See [Freedom of Association and Protection of the Right to Organize Convention \(ILO No. 87\)](#), 68 U.N.T.S. 17, entered into force July 4, 1950; [Right to Organize and Collective Bargaining Convention \(ILO No. 98\)](#), 96 U.N.T.S. 257, entered into force July 18, 1951; [Workers' Representatives Convention \(ILO No. 135\)](#), 883 U.N.T.S. 111, entered into force June 30, 1973; [Labor Relations \(Public Service\) Convention \(ILO No. 151\)](#), 1218 U.N.T.S. 87, entered into force Feb. 25, 1981

^{10[10]} E.g., [M.A. v. Italy, Human Rights Committee No. 117/1981](#). M.A. was imprisoned under an Italian penal law making it a crime to “reorganize the dissolved fascist party,” without regard

attention in the intervening years.¹¹[11] All this changed in 1998 and 1999. Groundbreaking decisions of the European Court of Human Rights have now firmly established that there is a right under international law to form legally registered associations and that, once formed, these organizations are entitled to broad legal protections.¹²[12]

The fundamental breakthrough occurred in United Communist Party of Turkey and Others v. Turkey¹³[13] (“UCP”), decided in January 1998. In holding that Turkey could not dissolve a political party that had engaged in no illegal activities simply because the national authorities regarded it as undermining the constitutional structures of the State, the Court said, among other things:

[T]he Convention [the ECHR] is intended to guarantee rights that are not theoretical or illusory, but practical and effective. . . . The right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since

to whether the new fascist organization was democratic and non-violent. The Committee concluded that, “the acts of which M.A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant [the ICCPR] by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of article 18(3), 19(3), 22(2) and 25 of the Covenant.” (¶ 13.3)

See also J.B. et al v. Canada, Human Rights Committee No. 118/1982 (July 18, 1986). In this case, however, a strong dissent argued that the right to freedom of association “requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes. To us, this is an inherent aspect of the right granted by article 22, paragraph 1.” (Dissenting op. of Rosalyn Higgins, Rajsoom Lallah, Andrea Mavrommatis, Torkel Opsahl, and S. Amos Wako). As the text makes clear, it is this view that has prevailed.

¹¹[11] See Lawyers Committee for Human Rights, The Neglected Right (1997).

¹²[12] There have been some concurrent developments in United States case law, which have also confirmed that legal entities have a right to freedom of association. In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc. (515 US 557, 1995), the US Supreme Court upheld the right of “expressive association” of a group of parade organizers who alleged that their message would be harmed by requiring that the gay Irish-Americans be permitted to march under their own banner during the St. Patrick’s Day parade. This right was also recognized in the recent decision in Boy Scouts of America v. Dale (June 28, 2000). Similarly, in California Democratic Party v. Jones (June 26, 2000), the Supreme Court recognized the freedom of association of political parties in a decision involving the primary voting practices of the state.

¹³[13] European Court of Human Rights, (133/1996/752/951) (Grand Chamber decision, January 30, 1998) (available at <http://www.icnl.org>).

the national authorities could immediately disband the association without having to comply with the Convention. It follows that the protection afforded by Article 11 lasts for an association's entire life and that dissolution of an association by a country's authorities must accordingly satisfy the requirements of paragraph 2 of that provision. . . .

The right of individuals to register legally recognized associations that are not political parties was addressed directly a half year later in Sidiropoulos and Others v. Greece,^{14[14]} ("Sidiropoulos"). In holding that Greece could not refuse to register an association named the "Home of Macedonian Culture," the stated purposes of which were exclusively to preserve and develop the traditions and folk cultures of the Florina Region, the Court said, among other things:

[T]he right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. . . . Certainly, States have a right to satisfy themselves that an association's aims and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review of by the Convention institutions. (§ 40)

Most recently, in Freedom and Democracy Party (ÖZDEP) v. Turkey,^{15[15]} the Court, in a Grand Chamber decision, not only reaffirmed its decision in UCP but extended it to a political party that had the express aim to recognize rights of the Kurdish minority in Turkey (holding that it did not intend to harm democracy by so doing - see discussion of this issue under "legitimate aims," below). In addition, the Court affirmed the nexus between the freedom of association and the freedom of speech (guaranteed under Article 10 of the ECHR). The Court stated that -

[N]otwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in light of Article 10. The

^{14[14]} European Court of Human Rights (57/1997/841/1047) (Chamber decision, July 10, 1998) (available at <http://www.icnl.org>).

^{15[15]} European Court of Human Rights, (93 1998/22/95/784) (Grand Chamber decision, December 8, 1999) (available at <http://www.icnl.org>).

protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and democracy.

By finding in Sidiropoulos that the right to form legally registered associations was “inherent” in the right of individuals to freedom of association, the Court avoided the disputes over whether legal entities themselves enjoy the right to freedom of association. By finding in UCP and ÖZDEP that the protection of Article 11 extends throughout the life of an association, the Court has effectively conferred the protections of the right to freedom of association on legal entities.

The opinions of the court in Sidiropoulos, UCP, and ÖZDEP are lengthy and complex. From these opinions, however, comes a clear line of analysis that can be used to determine, in any particular case, whether there has been an impermissible restriction placed upon the internationally protected right to freedom of association. A step-by-step analysis of the facts in a given case must proceed as follows:

1. Has a condition or restriction been placed on the right to freedom of association?
2. Is the condition or restriction reasonable, or is it an “interference” with the right to freedom of association?
3. If there has been an “interference” –
 - a. Was it “prescribed by law”?
 - b. Does it have a “legitimate aim”?
 - c. Is it “necessary in a democratic society”?
4. In deciding whether an “interference” has a “legitimate aim,” it must be justified –
 - a. In the interests of national security or public safety,
 - b. For the prevention of disorder or crime,
 - c. For the protection of health or morals, or
 - d. For the protection of the rights and freedoms of others.

5. In deciding whether a particular “interference” is “necessary in a democratic society” to achieve the “legitimate aim,” the state party must show that the “interference” was proportionate to the aim pursued.¹⁶[16]

It is difficult to overstate the importance of these three cases. In the strongest terms they have made it clear that an individual’s right to freedom of association includes the right to form a legally recognized association and that such an association, once formed, in effect enjoys the full protection in the exercise of the freedom of association that an individual has. Although there are grounds upon which the right to freedom of association may be limited or circumscribed, they are limited and the state bears a heavy burden in seeking to impose them.

C. Analysis of the Case Law. The following discussion helps to illuminate the current state of international human rights law in regard to the freedom of association. Although the three leading cases resolve some fundamental issues, they raise others.

What is an “interference”? Do we know when a condition or restriction becomes an “interference”? As demonstrated by the facts in Sidiropoulos, it is clear that the refusal to register an association can be an “interference.” At the same time, however, it is surely permissible for national authorities to refuse to register an association that has filed an incomplete application, chosen a name already in use, or one whose declared purposes are to engage in illegal activities.

Under the facts of UCP and ÖZDEP it is clear that the involuntary dissolution of an association can be an “interference.” But it is surely permissible for national authorities to force the dissolution of a bankrupt association or one that has been in repeated and serious breach of generally applicable laws.

In order for a violation of the freedom of association to arise there must have been an “interference” with the right. It seems apparent that many of the ordinary requirements imposed as a condition of establishing an association or continuing it would ordinarily not be regarded as an “interference.” For example, it is difficult to imagine questioning a requirement that there must be at least 3 (5 or 7) members to form an association, that a board of directors must have at least 3 members, or that there must be a meeting of the general assembly

¹⁶[16] In ÖZDEP the Court states that the “interference in issue was “radical..., involving as it did, the dissolution of the party before it even began its activities. It also notes that the party was “penalised solely for exercising its freedom of expression.”

of members at least once a year. Failure to comply with seemingly legitimate requirements such as these would not seem to constitute an “interference.”

What would the Court say, however, if there must be 20 or 50 members to form an association, if the Government has a right to a seat on the board of directors, or if the Government has the right to nullify any resolution passed by the general assembly of members? Any of these rules might have such a chilling effect upon the formation or operation of associations as to constitute an “interference” with the right to freedom of association. So far, however, there is no judicial guidance on issues such as these.

What does it mean to be “prescribed by law”? Once it has been determined that there has been an interference, it is then necessary to determine whether it is “prescribed by law.” Only an “interference” that has been “prescribed by law” can possibly be justified. Thus, an unauthorized interference by government officials in the activities or operations of an association could never be justified under international law.

In ÖZDEP, UCP, and Sidiropoulos the national authorities acted pursuant to specific legal provisions, stated in written laws.^{17[17]} Accordingly, these cases provide the opportunity to explore the question of what might or might not constitute being “prescribed by law.” On general principles, it would seem reasonable to presume that an interference is only “prescribed by law” if it derives from any duly promulgated law, regulation, decree, order, or decision of an adjudicative body. By contrast, acts by governmental officials that are *ultra vires* would seem not to be “prescribed by law,” at least if they are invalid as a result. The discussions in the cases seem to confirm this point.

What are “legitimate aims”? The next issue that must be resolved in the line of analysis established by the European Court of Human Rights is what constitute “legitimate aims.” As indicated above, the only grounds upon which an interference with the freedom of association that is prescribed by law can be justified is if the interference in question is in pursuance of “legitimate aims,” which require that it be--

- (i) in the interests of national security or public safety,

^{17[17]} In Sidiropoulos the European Court refused to uphold a decision of the Greek courts prohibiting registration of an association. The provision of the Greek Civil Code requiring registration before an association acquired legal personality seems flatly inconsistent with Article 12 of the Greek Constitution, which prohibits any form of prior authorization for the formation of nonprofit associations, but the Court did not rely on this point.

- (ii) for the prevention of disorder or crime,
- (iii) for the protection of health or morals, or
- (iv) for the protection of the rights and freedoms of others.

Both under the ECHR and the ICCPR, these four “legitimate aims” are exclusive.

In UCP the Court stated that a legislative provision precluding the use of the word “communist” in the name of a political party could never be justified under any of these “legitimate aims.” (§ 40) In UCP the Court also stated that if a political party was openly pursuing the creation of a separate Kurdish nation, which would require re-drawing the boundaries of Turkey, that would affect the national security of Turkey and would be a “legitimate aim.” (§ 40)

One year later, in ÖZDEP, the issue of the dissolution of a party that advocated rights of the Kurdish minority in Turkey came before the Court. There the Court looked carefully at the party in question and held that it could not be dissolved in pursuance of the admittedly “legitimate aim” of ensuring national security. The important distinction it drew was that ÖZDEP’s statement of aims could not be “considered a call for the use of violence, and uprising, or other form of rejection of democratic principles.” (§ 40). The Court went on to make clear that espousing unpopular opinions does not, by itself, constitute a defensible reason to dissolve a political party:

In the Court’s view, the fact that such a political project is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided they do not harm democracy itself. (§ 41)

In Sidiropoulos the Court stated that upholding Greece’s cultural traditions and historical and cultural symbols could not be a “legitimate aim” that could justify an interference with the right to freedom of association of an organization intended to preserve and foster Macedonian culture. (§’s 37-38) At the same time, the Court in Sidiropoulos accepted that attempts to undermine the territorial integrity of Greece could affect national security and public order and therefore could be “legitimate aims” for an interference with the right to freedom of association. (§ 39)

One of the interesting but unresolved questions that now arises is whether it will be considered to be a “legitimate aim” to forbid the registration of a fascist political party, such as the one considered in the UN Human Rights Committee case of M.A. v. Italy. Although it would seem inconsistent with UCP and ÖZDEP to refuse to register a political party unless it sought the violent overthrow of the government, it can be argued that legitimate state interests in protecting the “rights and freedoms of others” or the *ordre public* might justify such an interference in countries like Italy and Germany, based on their peculiar histories. But whether this is so awaits future litigation in the ECHR. The resolution of this issue may well depend on the answer to the next question.

What is “necessary in a democratic society”? Clearly it is going to be difficult in many cases to determine whether there is a “legitimate aim” that can justify an interference with the right to freedom of association. In considering this criterion, however, it is important to bear in mind that what may constitute a “legitimate aim” is limited by the requirement that the interference intended to achieve that aim must also be “necessary in a democratic society.” The language of the Court in UCP is instructive:

The Convention was designed to maintain and promote the ideals and values of a democratic society. . . . Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is “necessary in a democratic society.” The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from “democratic society.” Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it. (UCP § 45)

Both UCP and ÖZDEP make clear that ideas that “offend, shock, or disturb” are protected under the right of freedom of expression. Thus, associations that take controversial positions or criticize the government in ways that “offend, shock or disturb” are fully protected under the Convention. In short, associations in effect enjoy fully the freedom of expression. This is a crucial part of what is required for a “democratic society” to exist.

More generally, any otherwise “legitimate aim” that has the effect of restricting or limiting the full free exercise of democracy and democratic rights should in almost every case be impermissible as a justification for an interference

with the right to freedom of association. Ordinarily, no such interference could or would be “necessary in a democratic society.”¹⁸[18]

Democracy under the ICCPR. The link to democracy is even stronger under the ICCPR than under the ECHR. In addition to limiting in Article 22(2) any justified interference’s with the right to freedom of association to those that are “necessary in a democratic society,” Article 25 of the ICCPR provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

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

Since virtually every state party to the ECHR is also a state party to the ICCPR, it is appropriate to read these provisions into the concept of democracy that is to be used in applying the standards of both treaties. Under this robust concept of democracy, the protection of the rights to freedom of association and expression will receive broad and vigorous protection. Attempts by governments to invoke any of the “legitimate aims” as grounds for curtailing these freedoms will be difficult to justify under international law.

Procedural standards. Nearly as important as the substantive limits placed on the ability of governments to curtail the freedom of association are the procedural and evidentiary requirements that must be met to ensure that that an interference is “necessary in a democratic society.” In every case the government will bear the burden of demonstrating to the satisfaction of the Court that, with respect to any particular interference with the freedom of association –

¹⁸[18] It is conceivable, of course, that ordinary democratic rights might have to be suspended temporarily because of war, civil insurrection, or other calamitous event in order to preserve a democratic society in the long run. Such arguments can easily be misused, however, and any invocation of them should be scrutinized with utmost care.

1. That it has construed strictly the legitimate aims it is pursuing (UCP §46; Sidiropoulos, § 40; ÖZDEP § 44);
2. That its has adduced only convincing and compelling reasons to justify restrictions (UCP § 46; Sidiropoulos § 40; ÖZDEP § 44);
3. That it has exercised its discretion reasonably, carefully, and in good faith (UCP § 47; Sidiropoulos § 40);
4. That the interference is proportionate to the legitimate aim pursued (UCP § 47; Sidiropoulos § 40; ÖZDEP § 43);
5. That the reasons adduced to justify the interference are relevant and sufficient (UCP § 47; Sidiropoulos § 40);
6. That it has applied standards which are in conformity with the principles embodied in Article 11 (UCP § 47; Sidiropoulos § 40); and
7. That it has based its decision on an acceptable assessment of the relevant facts (UCP § 47; Sidiropoulos § 40; ÖZDEP § 39).

In sum, in the landmark decisions of UCP, Sidiropoulos, and ÖZDEP the European Court of Human Rights – the longest-functioning international court with special jurisdiction to interpret the rules applicable to freedom of association – has set forth clear and tough standards that must be satisfied before any interference with the freedom of association can be justified. Moreover, that freedom includes the right to establish a legally recognized association. Finally, once established, that association, by derivation from its members, enjoys the freedom of association.

Accordingly, in order to comply with these norms, a state party must adopt and implement a legal regime that permits the registration and operation of legal entities under rules and conditions that are reasonable and that do not unreasonably restrain or restrict the right of individuals to pursue their lawful interests through these legally recognized organizations. This is the principle that must inform any analysis of laws affecting NGOs, for if those laws unreasonably impede the establishment or operation of NGOs, they should be regarded as invalid under international law.

Legal entities. Having established this much, it is important to note that many other questions remain. For example, do we know to which kinds of legal

entities the protections of the right to freedom of association are extended? In Sidiropoulos “associations” were within the protection of the right to freedom of association. In UCP and ÖZDEP political parties, a particular kind of association, were held to come within the protection of the right to freedom of association. In addition, under the language of Article 11(1) of the ICCPR, the right to freedom of association seems clearly to extend to “trade unions.” It is thus clear that the freedom of association is not limited to organizations called “associations.” Presumably the protection of the right to freedom of association also extends to other organizations that are like associations, such as “societies,” “not-for-profit corporations,” “companies limited by guarantee,” and other typical not-for-profit legal entities that have a membership or associational structure.

There is a question, here, however, whether the right to freedom of association extends only to the right to form and operate membership organizations, or whether it extends as well to non-membership legal forms, such as a foundation in civil law. Both membership and non-membership forms of organizations are well-established in the leading legal systems of the world. Each kind of organization is used by citizens to pursue their collective interests. In either form there is a group of individuals charged with the purposes and affairs of the organization. The form chosen by any group of individuals depends upon their preferences in terms of type of internal governance, not on any attribute fundamental to the freedom of association itself. Accordingly, the better view would seem to be that any of the traditional forms of not-for-profit organization is fully protected under international law.¹⁹[19]

Presumably the protection of the right to freedom of association is not limited to secular organizations. It should also extend to “churches,” “temples,” “mosques,” and other religious organizations. Otherwise there would be serious questions raised that such a restriction might violate the right to freedom of religion as well as the freedom of association.²⁰[20]

¹⁹[19] It may be a different question whether a state, having enacted a satisfactory legal regime for one kind of organization (e.g., associations) must make other kinds of organizations (e.g., not-for-profit companies) available as well. Giving individuals a choice between well-crafted laws permitting either a membership or a non-membership form of operation is, however, clearly good policy. Whether the protection extends to situations in which there are no associates (e.g., a foundation formed pursuant to a will or a charitable trust set up by one settlor) is not clear. Here again, however, the better argument seems to be that it does.

²⁰[20] See Kathryn Bromley, *The Definition of Religion in Charity Law in the Age of Fundamental Human Rights*, 3 *Int'l J. of Not-for-Profit L.* 1 (Sept. 2000) (www.icnl.org/journal/vol3iss1/)

Perhaps more challenging is the question whether the right to freedom of association extends to “cooperatives” and “mutuals,” to which the non-distribution constraint may not apply and which may or may not be engaged principally in economic activities. Further, does the right to freedom of association extend to “employers’ trade associations,” “professional societies,” or similar organizations that are formed to pursue the economic interests of employers, doctors, lawyers, etc.? Finally, does the protected right extend to “corporations,” “partnerships,” and other legal entities, where individuals come together to pursue for-profit activities on a collective basis? The right to associate in order to pursue profit-making interests is not ordinarily considered part of the right to freedom of association, but it is not clear why it should be excluded.²¹[21]

Application of ECHR precedents to the ICCPR. Because the language of Article 22 of the ICCPR is virtually identical to the language of Article 11 of the ECHR, a strong argument can be made that Article 22 of the ICCPR must be interpreted in the same way that Article 11 of the ECHR has been interpreted. Although similar language in different treaties is not necessarily interpreted the same in all cases, here the argument for identical treatment is very strong. The two treaties deal with the same subject matter and are congruent if not identical in most provisions. Many provisions of the ICCPR, including those dealing with the freedom of association, were consciously modeled on the language of the ECHR. Thus, although UCP, Sidiropoulos, and ÖZDEP are not direct precedents outside the countries in the Council of Europe, there would have to be very strong arguments to justify another court in departing from the settled judgments of the this court, which is the oldest international court with expertise and jurisdiction exclusively in the area of human rights.

This is an issue of great practical importance. Many of the countries that belong to the Council of Europe and that are bound by the ECHR already demonstrate generous support for the freedom of association. The ICCPR, on the other hand, has been ratified by over 140 countries, not all of which have fully respected the right to freedom of association, as articulated in UCP, Sidiropoulos, and ÖZDEP.

²¹[21] Although the related Covenant on Economic, Social, and Cultural Rights does not directly support a linkage with the ICCPR on this point, it is arguable that it could be so interpreted. Article 6 of the Covenant guarantees the right to work, while Article 8 guarantees the right to form trade unions, which are just one form of association. See the International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

Although the European Court on Human Rights has emphatically clarified that individuals have the right to establish NGOs and that such NGOs are in effect protected by international law during their existence, there are many questions that will be answered only over time. The Handbook tries to indicate possible issues and answers to some of these questions in various parts of the text. 22[22]

22[22] For further information about the Handbook, please contact the authors at irish@law.edu and simon@law.edu.