

# ACCEPT Association and Others v. Romania<sup>1</sup>

## Application no. 48301/08

### 1. Introduction

These written comments are submitted by ILGA-Europe pursuant to leave granted by the President of the Chamber in accordance with Rule 44 ¶ 3 of the Rules of the Court.<sup>2</sup> ILGA-Europe's interest and expertise is set out in its Application for leave to submit written comments of 30 July 2013.

This present case arises from the requirement by the authorities that ACCEPT Association ("ACCEPT") provide details of its new members (*inter alia* name, profession, and home address) for publication in the special register of associations and foundations. ACCEPT's objective is to promote the rights of lesbian, gay, bisexual and transgender persons in Romania.

The purpose of these comments is to assist the Court by providing information on the following:

- (1) The extent to which members of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, and particularly LGBTI human rights defenders, may be at risk of hate motivated violence and other forms of discrimination in Council of Europe member states, and therefore have sound reasons for wishing to protect their privacy.
- (2) International and comparative precedents that protect the rights to freedom of association, privacy and freedom from discrimination of members of human rights organisations.

### 2. Sexual orientation and gender identity hate motivated violence and discrimination and the need to protect the privacy of members of LGBTI organisations

2.1 In recent years there has been increasing awareness among international human rights institutions of the extent of sexual orientation and gender identity motivated violence and discrimination. In November 2011 a report of the UN High Commissioner for Human Rights noted:

"In all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include – but are not limited to – killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education."<sup>3</sup>

The Council of Europe has seen a number of initiatives arising from this concern, including the adoption by the Committee of Ministers of a Recommendation on combating discrimination on the grounds of sexual orientation or gender identity ("the Committee of Ministers Recommendation"), the inclusion of sexual orientation and gender identity in the non-discrimination article of the Convention on preventing and combating violence against women and domestic violence,<sup>4</sup> the publication in 2011 by the Commissioner for Human Rights of a report, "Discrimination on grounds of sexual orientation and gender identity in Europe", and resolutions by the Parliamentary Assembly in 2010 and 2013.<sup>5</sup> In the latter, the Assembly expressed regret that

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<sup>1</sup> ILGA-Europe would like to thank Michael Ruthenberg-Marshall of the Sexuality and Gender Law Clinic at Columbia Law School, New York City, USA, for his legal research and his assistance in drafting these comments.

<sup>2</sup> Letter of the Section Registrar dated 27/9/2013.

<sup>3</sup> *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* - Report of the United Nations High Commissioner for Human Rights. – 17/11/2011.

<sup>4</sup> Article 4.3.

<sup>5</sup> Resolutions 1728 (2010) and 1948 (2013).

“prejudice, hostility and discrimination on the grounds of sexual orientation and gender identity remain a serious problem, affecting the lives of tens of millions of Europeans. They manifest themselves in hate speech, bullying and violence..... Violence against LGBTs is a problem everywhere in Europe. With the effects of the economic crisis in full sway, and the ensuing radicalisation and strengthening of extremist groups, there has been an increase in acts of verbal or physical abuse against minorities, including LGBT people, in many Council of Europe member States.”<sup>6</sup>

While much of the violence directed against LGBTI people in general is opportunistic, that against members of organisations working to defend the rights of LGBTI people (“LGBTI human rights defenders”) is usually targeted at specific events or individuals by extremist groups. The increasing strength of these groups in many countries is therefore of particular concern to LGBTI organisations and their members.

2.2 Some indication of the effects of this hostility can be gained from a survey into hate crimes and discrimination experienced by LGBTI people in the (then) 27 EU member states and Croatia published in 2013 by the EU Fundamental Rights Agency and based on some 93,000 responses to an on-line questionnaire.<sup>7</sup> 47% of all respondents reported that they had been discriminated against or harassed in the previous 12 months on the grounds of their sexual orientation (Romania 54%). This experience of discrimination affected their behaviour significantly. For example:

- 50% avoided certain places or locations for fear of being assaulted, threatened or harassed (Romania 61%)
- Only 23% were always open about their LGBT identity at work (Romania 7%)

While this data relates to the “EU 28”, there is no reason to believe that it is unrepresentative of the situation in the other Council of Europe member states, and indeed in many it is likely to be worse.

2.3 In many countries these hostile attitudes are reflected in behaviour towards LGBTI human rights defenders. In her 2006 report, the Special Representative of the UN Secretary-General on human rights defenders (“the Special Representative”) drew attention to the situation of LGBTI human rights defenders worldwide:

“Defenders have been threatened, had their houses and offices raided, they have been attacked, tortured, sexually abused, tormented by regular death threats and even killed. A major concern in this regard is an almost complete lack of seriousness with which such cases are treated by the concerned authorities.”<sup>8</sup>

In recent years the Special Representative has raised concerns regarding the treatment of LGBTI human rights defenders in a number of Council of Europe member states.<sup>9</sup>

Concern has also been expressed at the Council of Europe, where the Committee of Ministers has called on member states to take “appropriate measures to effectively protect defenders of human rights of lesbian, gay, bisexual and transgender persons against hostility and aggression to which they may be exposed, including when allegedly committed by state agents”.<sup>10</sup>

2.4 Members (or prospective members) of LGBTI organisations who face having their identity, address and employment made public are likely to be particularly concerned at the following factors:

- The extent of acts of violence and discrimination against LGBTI human rights defenders

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<sup>6</sup> *Id.*, ¶¶ 2 & 7.

<sup>7</sup> EU LGBT survey – [http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance\\_en.pdf](http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf).

<sup>8</sup> *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”*- Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, ¶¶ 95/96.

<sup>9</sup> See, e.g. Bosnia and Herzegovina: letter of allegations dated 27/11/2008; Bulgaria: urgent appeal dated 27/11/2008; Georgia: urgent appeal dated 31/12/2009; Moldova: case nos MDA 3/2011; 3/2006; Russian Federation: case no RUS 12/2011; Serbia: case no SRB 1/2011; Turkey: case no TUR 7/2011; Ukraine: case nos UKR 5/2010, 6/2010.

<sup>10</sup> *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* - ¶ 11 of the Appendix.

- Whether leading actors in society, including politicians, faith leaders, and the media, condemn such acts, or, on the contrary, remain silent or even support and encourage them
- Whether the authorities provide protection from such acts, and investigate and punish them when they occur
- To what extent extremist groups target LGBTI organisations and human rights defenders

The rest of this section sets out examples from a number of Council of Europe member states which illustrate the above concerns. They are categorised under three headings: violence or threats against public events such as pride marches; violence or threats against the premises of LGBTI NGOs; and targeted attacks on individual LGBTI human rights defenders. Some are taken from ILGA-Europe's submission for the OSCE's 2012 annual hate crimes report ("*the ILGA-Europe OSCE Hate Crimes Submission*"). This documents a wide range of sexual orientation and gender identity related hate crimes and incidents in 32 Council of Europe member states.

### **Violence and threats directed against public events such as pride marches**

**Romania:** In Bucharest in 2006, 6 gay pride participants were beaten in the metro by a group of young men, who had identified them on the march. They provided pictures of the perpetrators to the police and even identified two of them. Despite repeated enquiries, the police made no progress with the case. Then, in August 2011 the police advised that it had become time-barred.<sup>11</sup>

**Bosnia and Herzegovina:** On 24/9/2008, after weeks of public hate speech, the opening event of the Queer Sarajevo Festival was attacked, resulting in eight casualties and the Festival's cancellation. One of the organisers was granted asylum. She had been under constant threat of death or rape. Her private address had been publicised on websites. Her organisation was compelled to discontinue its activities. In a 2010 country visit report, the Council of Europe Commissioner for Human Rights expressed particular concern at statements by parliamentarians and religious leaders supporting the attackers and noted that investigations had not resulted in any prosecutions.<sup>12</sup>

**Serbia:** The September 2010 Belgrade Pride march took place under tight police protection. Some 6000 members of right-wing organisations and football hooligan groups simultaneously attacked the police and official buildings and vandalised cars and shops in the city centre.<sup>13</sup> 140 persons were reported injured, including 124 policemen. There were more than 200 arrests.<sup>14</sup>

**Ukraine:** In Kiev, on 20/11/2010, 10 men wearing masks attempted to enter a building where a candlelight vigil, film exhibition and discussion were being held to promote the Transgender Day of Remembrance for those killed because of their transgender status in Ukraine. The organiser of the event prevented their entrance, but he was attacked, beaten and sprayed with teargas. He was subsequently hospitalised and diagnosed with internal injuries and chemical burns to his face. The attack was characterised by the police only as "hooliganism".<sup>15</sup>

**Russia:** On 20/1/2013 in Voronezh 6 activists protesting against the federal "propaganda of homosexuality to minors" bill were attacked by a mob. A few days earlier they had begun receiving death threats, after announcing their demonstration on social media. They called on the police to protect them. About 200

<sup>11</sup> *Report on implementation of the Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity by Romania* - page 31. ACCEPT Association. See also M.C. and A.C. v. Romania (Application No. 12060/12).

<sup>12</sup> *Queer Sarajevo Festival - Narrative Report* - Organization Q, Sarajevo, BiH; and Report by Thomas Hammarberg, Commissioner for Human Rights, following his visit to Bosnia and Herzegovina on 27 – 30/11/2010 – ¶¶ 44 – 47.

<sup>13</sup> *The honouring of obligations and commitments by Serbia* – Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) - Doc. 12813 – 9/1/2012.

<sup>14</sup> *Police clash with anti-gay protesters in Belgrade* - B92 – 10/10/2010 - [http://www.b92.net/eng/news/politics.php?yyyy=2010&mm=10&dd=10&nav\\_id=70196](http://www.b92.net/eng/news/politics.php?yyyy=2010&mm=10&dd=10&nav_id=70196) - accessed 14/10/2013.

<sup>15</sup> *Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya* - Addendum - Summary of cases transmitted to Governments and replies received - A/HRC/16/44/Add.1 - ¶¶ 2325 to 2331.

counter-protesters, some of them masked, blocked the protest. Several of the activists were attacked and injured. Police at the scene did not intervene to stop the assaults.<sup>16</sup>

**Romania:** On 6/11/2012 in Bucharest 7 young women and men were assaulted by a group of 10 people wearing hoods after attending an academic debate about the history of homosexuality. During the assault the attackers claimed they were opposing the “organisation of gay events”.<sup>17</sup>

**Georgia:** On 17/5/2013 in Tbilisi a crowd of thousands led by priests broke through police cordons and attacked a group of 50 LGBTI rights demonstrators. Police evacuated them in buses, which then came under attack. Approximately 20 people were injured. Earlier, the leader of the Georgian Orthodox Church compared homosexuals to drug addicts and called the rally a “violation of the rights of the majority” of Georgians.<sup>18</sup> Four days later, an NGO reported to ILGA-Europe: “they are still “hunting” our activists..... Several people were beaten up on the street, one had his hair set on fire, and a girl was even bitten... As for the girls, three of them have brain concussion; one has an injury on her head. I’m not saying anything about the psychological distress. Our psychologist is working non-stop...”<sup>19</sup>

*The ILGA-Europe OSCE Hate Crimes Submission* lists 18 other incidents of varying severity in Albania, Armenia, Bulgaria, Finland, Georgia, Hungary, Latvia, Montenegro, Russia, Slovakia and Ukraine.

### **Violence and threats against the premises of LGBTI NGOs**

**Serbia:** In 2011 the offices of the Novi Sad Lesbian Organisation were attacked more than 10 times. There were no prosecutions, even though the police had access to photographs of the attackers on the video surveillance system.<sup>20</sup>

**Armenia:** On 8/5/2012 in Yerevan a group of self-described fascists threw Molotov cocktails into a bar owned by an LGBT activist destroying the interior. The police had not responded to the owner’s reports of death threats. The owner took refuge abroad. Two men were arrested. The spokesperson for Armenia’s ruling Republican Party and Parliament’s Deputy Speaker said “I find the rebellion of the two young Armenian people against homosexuals ..... completely ... right and justified”.<sup>21</sup>

**Macedonia:** On its opening day on 23/10/2012 the new LGBTI Support Centre in Skopje was attacked by several masked assailants, who broke the front window. Since then, the Centre has been attacked four more times, including two arson attacks. In June 2013, when 40 persons were inside for the opening of Pride, some 30 people, masked and armed with stones, glass bottles, and steel pipes, attacked the Centre. The windows were broken and two persons suffered injuries.<sup>22</sup>

**Russia:** 2/11/2013: Two masked men armed with baseball bats and airguns burst into an LGBTI social event in St Petersburg, attacking and injuring two participants, one of whom may lose the sight in one eye. LGBTI activists believe this is the first pre-planned attack on such a private event.<sup>23</sup>

The *ILGA-Europe OSCE Hate Crimes Submission* documents 4 similar incidents in Italy and Kosovo.

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<sup>16</sup> Human Rights Watch – 27/1/2013 – *Russia: Reject Homophobic Bill – Investigate Threats, Attacks, on peaceful protests* <http://www.hrw.org/news/2013/01/26/russia-reject-homophobic-bill> (accessed 18/10/2013).

<sup>17</sup> *ILGA-Europe OSCE Hate Crimes Submission* - Romania – Case 1.

<sup>18</sup> [http://www.nytimes.com/2013/05/18/world/europe/gay-rights-rally-is-attacked-in-georgia.html?hpw&\\_r=0](http://www.nytimes.com/2013/05/18/world/europe/gay-rights-rally-is-attacked-in-georgia.html?hpw&_r=0) – accessed 18/10/2013.

<sup>19</sup> E-mail to ILGA-Europe from the Women's Initiative Support Group, 21/5/2013.

<sup>20</sup> *Report on implementation of the Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity in Serbia* – Labris – page 34.

<sup>21</sup> *Armenia – No Space for Difference* – Amnesty International – EUR 54/002/2013; see also *Armine Oganezova v. Armenia* - (71367/12).

<sup>22</sup> Message to ILGA-Europe - LGBTI Support Centre of the Macedonian Helsinki Committee for Human Rights - 20/8/2013.

<sup>23</sup> *Russian LGBT activists prepare for new wave of violence following brutal attack* – BuzzFeed - 5/11/2013 <http://www.buzzfeed.com/lesterfeder/russian-lgbt-activists-prepare-for-new-wave-of-violence-foll> - accessed 7/11/2013.

## Attacks or threats targeted at individuals identified as LGBTI human rights defenders

**Ukraine:** On 20/5/2012 the Kiev Pride organisers announced at a press conference that they were cancelling the march scheduled for that day following police claims that they could not protect participants from potential violence by extreme nationalist groups. Just after the press conference, five men beat two of the Pride organisers. The authorities failed to identify the suspects despite the existence of video recordings of the attack. They also failed to record the attacks as hate crimes.<sup>24</sup>

**Ukraine:** In June 2012 an unidentified man approached Kiev Pride head Taras Karasiichuk near his home, asked his sexual orientation, and beat him, breaking his jaw and giving him concussion. In December 2012 Karasiichuk was approached by groups of men who warned him against organising Kiev Pride and threatened to beat him.<sup>25</sup>

**Montenegro:** On 9/9/2012 in Podgorica the director and actor in the first Montenegrin video promoting LGBT rights were attacked and badly beaten by members of a local sports fan club, who had earlier abused them verbally during a concert. The following month the actor noticed a group of individuals waiting for him in front of his home. They started to chase him shouting homophobic insults. He managed to get into the building and call the police..<sup>26</sup>

**Moldova:** On 11/2/2013, during legal proceedings designed to compel the City of Bălți to rescind an ordinance forbidding promotion of LGBT rights, some 15 individuals subjected the representative of the LGBTI organisation, GenderDoc-M, and of the Office of the UN High Commissioner for Human Rights to verbal and physical violence. The police are pursuing the case as “hooliganism”.<sup>27</sup>

**Poland:** On 15/6/2013 Robert Biedron, the first openly gay MP in Poland, was relaxing in a cafe after the Warsaw Pride when a stranger recognised him, spat in his face and kicked him in the stomach.<sup>28</sup>

**Poland:** On 27/8/2013 the first openly transgender Polish MP, Anna Grodzka spoke of how neo-Nazi groups targeted her: “I’ve been .... called names on the street, there has been numerous death threats..... [These groups] aim of ... removing LGBT people from public life. They have numerous attacks on my parliamentary office by breaking windows, by tearing off the plaque or drawing Nazi symbols on the door”. She recalled a meeting when a neo-fascist group threw smoke grenades into the room.<sup>29</sup>

**Russia:** 2/11/2013: a teacher of Spanish, who is also an active member of the Straight Alliance for LGBT Equality, is reported to have been denounced to the St Petersburg Government’s Education Committee for “promoting homosexuality among minors”. Her head teacher is also accused of employing “collaborators of perverts whose public demonstrations spit onto the psyches of children and trample on the morally ethical values of the majority of citizens of the Russian Federation”.<sup>30</sup>

The *ILGA-Europe OSCE Hate Crimes Submission* documents 20 similar incidents in Albania, Bosnia and Herzegovina, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Macedonia, Montenegro, Russia, Serbia, Turkey, and Ukraine.

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<sup>24</sup> Human Rights Watch open letter to the President of the European Council – 21/2/2013.

<sup>25</sup> *id.*

<sup>26</sup> *ILGA-Europe 2012 OSCE Hate Crimes Submission* – Montenegro – cases 12 and 24.

<sup>27</sup> E-mail from GenderDoc-M to ILGA-Europe dated 31/7/2013.

<sup>28</sup> *Gay politician beaten, spat on at Poland Pride* – Gay Star News – 17/6/2013. Mr Biedron is the Parliamentary Assembly's General Rapporteur on the rights of LGBT people.

<http://www.gaystarnews.com/article/gay-politician-beaten-spat-poland-pride170613#> - accessed 15/10/2013.

<sup>29</sup> *Poland's trans MP Anna Grodzka: 'I've had numerous death threats'* – Gay Star News – 27/8/2013

<http://www.gaystarnews.com/article/poland's-trans-mp-anna-grodzka-'i've-had-numerous-death-threats'270813#> - accessed 15/10/2013.

<sup>30</sup> *Russia: persecuted for her beliefs – one of our activists targeted* – Straight Alliance for LGBT Equality, 2/11/2013 – <https://www.facebook.com/straights.for.equality/posts/427412864026959> - accessed 7/11/2013.

## 2.5 Conclusions

In many Council of Europe member states LGBTI human rights defenders are at particular risk. They face a general climate of hostility, with widespread homophobic and transphobic behaviour, and a situation in which the authorities may fail to provide the necessary protection, or, worse still, condone or even encourage such behaviour. The growth of extremist groups intent on targeting violence and threats against them makes disclosure of private information such as their home address or their employment particularly dangerous.

Against this background the mandatory disclosure of such information by LGBTI advocacy organisations would act as a strong deterrent to potential members. It would also threaten their effectiveness, since the size of their membership is important for their public credibility, for the number of volunteers they can deploy, and for their financial viability. It would therefore constitute a serious restriction on the right to freedom of association.

These concerns are highly relevant in Romania. A report prepared for the EU Fundamental Rights Agency noted that “European surveys show that Romania has the most negative attitudes towards homosexuality in the EU”,<sup>31</sup> a factor reflected, for example, in the very low number of LGBT people who are open about their sexual orientation in the workplace (see ¶ 2.2 above). Moreover, as the examples of homophobic violence in Romania recorded in ¶ 2.4 illustrate, the dangers are real.

## 3 International and comparative precedents that protect the rights to freedom of association, privacy and freedom from discrimination of members of human rights organisations.

### 3.1 Freedom of Association

The right to freedom of association is guaranteed by every major human rights treaty, including the European Convention on Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR).<sup>32</sup>

This Court has confirmed that freedom of association protects the right of citizens to join together in advocacy organisations.<sup>33</sup> Restrictions on advocacy organisations thus amount to restrictions on freedom of association. One such restriction occurs when states force organisations to hand over their membership lists without compelling justification, particularly when the organisation in question advocates for unpopular points of view.<sup>34</sup> This is because people are less likely to join controversial organisations when they fear opprobrium or oppression—or even violence—as a result of their membership.<sup>35</sup>

This principle was illustrated clearly in a United States Supreme Court case involving the National Association for the Advancement of Colored People (NAACP), the most prominent African-American civil rights

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<sup>31</sup> *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Romania - March 2009* - Danish Institute For Human Rights.

<sup>32</sup> European Convention on Human Rights Article 11 (1) (“Everyone has the right to freedom of peaceful assembly and to freedom of association with others...”); Universal Declaration of Human Rights Article 20 (“Everyone has the right to freedom of peaceful assembly and association.”). See also International Covenant on Civil and Political Rights Article 22, American Convention on Human Rights Article 16, African Charter on Human and People’s Rights Article 10, International Labour Organization Convention No. 87 (Freedom of Association and Protection of the Right to Organize), United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Article 5 (A/RES/53/144).

<sup>33</sup> See, e.g., *Case of Sidiropoulos and Others v. Greece*, ECHR (57/1997/841/1047), July 10, 1998.

<sup>34</sup> See, e.g., Erik Denters and Wino J.M. van Veen, *Voluntary Organizations in Europe: The European Convention on Human Rights*, 1 *Int. J. of Not-for-Profit Law* (1998), available at [http://www.icnl.org/research/journal/vol1iss2/art\\_3.htm](http://www.icnl.org/research/journal/vol1iss2/art_3.htm). (“[O]bjections can arise against obligations to supply government authorities with (possibly) confidential data, such as names and addresses of donors of the organization, or a list of members. Obviously, obligations of this nature may be, in a climate of political unrest, particularly detrimental to organizations with (unpopular) advocacy purposes. The former obligation may effectively inhibit making contributions to such “suspect” organizations for fear of getting into trouble. The latter chills the willingness to become a member of such an organization for exactly the same reason. Requirements of this nature therefore are objectionable in relation to the freedom of expression, the freedom of association, and also infringe on the right of privacy of the donors, and respectively, the members.”)

<sup>35</sup> *Id.*

organisation in the U.S. In that case, heard at the beginning of the civil rights movement in the American South, the state of Alabama sought to compel the NAACP to reveal its membership list.<sup>36</sup> The state sought this information on the grounds that the NAACP, a non-profit, membership-based corporation from New York, had failed to register as a foreign corporation in Alabama.<sup>37</sup> The NAACP resisted the disclosure of its membership list, although it handed over a number of less sensitive records.<sup>38</sup> It based its resistance on the right of its members to freedom of association, and pointed out that earlier revelations of the identity of NAACP members had led to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”<sup>39</sup>

The Supreme Court held unanimously for the NAACP, marking the first time that the American courts had acknowledged the freedom of association.<sup>40</sup> In doing so, the Court recognised that confidentiality of membership lists was one of the critical components of the right to freedom of association. Because of the violence and discrimination that threatened known NAACP members, the Court realised that confidentiality was critical to the NAACP’s ability to gather like-minded individuals in free association.<sup>41</sup> The general principle established by the Court was that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>42</sup> The same principle was extended to the confidentiality of donors shortly thereafter,<sup>43</sup> and U.S. courts continue to follow this case.<sup>44</sup>

The European Commission of Human Rights (the Commission) implicitly endorsed the logic of the U.S. position in *The National Association of Teachers in Further and Higher Education v. The United Kingdom*.<sup>45</sup> In that case, the Commission acknowledged that in specific cases, “a legal requirement on 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.”<sup>46</sup> That case involved a teachers’ union in the United Kingdom resisting disclosure of its membership list to a British college. The Commission did not find a violation of Article 11 in that case, but only because the Commission did not believe that revealing the membership list to the employer would have “an adverse effect on the applicant union’s right to act to protect its members’ interests.”<sup>47</sup> Significantly, the only union members whose names would remain unknown to the employer in the event of a strike would be “members who do not wish their names to be

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<sup>36</sup> NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958). On the importance of this case, see Dale E. Ho, NAACP v. Alabama and False Symmetry in the Disclosure Debate, 15 N.Y.U. J. of Legislation and Public Policy 405 (2012), and Anita Allen, Association Privacy and the First Amendment: NAACP v. Alabama, Privacy and Data Protection, 1 Alabama Civil Rights and Civil Liberties Law Review 1 (2011).

<sup>37</sup> *Id.* at 451. The NAACP was of the view that the statute did not apply to it at all, but this issue was not before the Supreme Court.

<sup>38</sup> *Id.* at 454.

<sup>39</sup> *Id.* at 462. Alabama pointed out that, if those actions occurred in this case, they would be the result of “private community pressures” and not the actions of Alabama itself. The case does not address the question of how, if the membership lists were produced only to the government of Alabama, the resulting discrimination would be accomplished without the state’s cooperation. In any event, the Court rejected this argument, recognizing that “it is only after the initial exertion of state power represented by the production order that private action takes hold.”

<sup>40</sup> *Id.* at 462.

<sup>41</sup> *Id.* at 462-3. (“Under these circumstances, we think it apparent that compelled disclosure of petitioner’s Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”)

<sup>42</sup> *Id.*

<sup>43</sup> Bates v. City of Little Rock, 361 U.S. 516 (1960).

<sup>44</sup> See, e.g., Marshall v. Stevens People & Friends for Freedom, 669 F.2d 171 (4th Cir. 1981) (identities of members of a labor advocacy group protected from subpoena); Ex parte Lowe, 887 S.W. 2d 1 (Tex. 1994) (protecting right of Ku Klux Klan (KKK) to confidentiality in its membership lists). There is, of course, a security exception. Thus, in an earlier case involving the KKK, disclosure of the membership list was found acceptable because the Klan was devoted to “acts of unlawful intimidation and violence.” NAACP v. Alabama, 357 U.S. at 465, discussing People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

<sup>45</sup> The National Association of Teachers in Further and Higher Education v. The United Kingdom, 28910/95, European Commission of Human Rights (First Chamber), 16/04/1998.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

revealed, who would vote against a strike and then would not be involved in a strike,” and there was no evidence pointing to the existence of any such members.<sup>48</sup> In addition, the Commission found “nothing inherently secret about membership of a trade union.”<sup>49</sup> Had these factors not been present, suggested the Commission, it would have intervened to protect the Article 11 rights that would have been at stake. Unlike the situation in *NAACP v. Alabama*, and unlike the current situation with ACCEPT, there was no showing that the revelation of the membership list would *actually* restrict freedom of association. This logic compels the conclusion that, where an organisation *does* rely on confidentiality, and where an organisation’s ability to gather like-minded individuals *is* threatened by the disclosure of its membership lists, there is a violation of Article 11.

This Court has recognised the unique importance of freedom of association to those who, like ACCEPT and like the NAACP, advocate for the rights of minorities or hold unpopular views. “The Court recognises that freedom of association is particularly important for persons belonging to minorities... Indeed, forming an association in order to express and promote [minority] identity may be instrumental in helping a minority to preserve and uphold its rights.”<sup>50</sup>

The British government also recognises that forced disclosure of membership lists can, in certain circumstances, violate the ECHR. In a proposed bill on transparency in lobbying, the British government included a requirement that trade unions make membership lists available to government inspectors, who would be bound by strict confidentiality.<sup>51</sup> Against vigorous protests that the requirement violated the freedom to association and the right to privacy contained in the ECHR,<sup>52</sup> the British government countered that the requirement was legal *because* it would not dissuade membership in trade unions.<sup>53</sup> The government thereby accepted the reasoning of the Commission in *National Association of Teachers and the U.S. Supreme Court in NAACP v. Alabama ex. rel. Patterson*, recognizing that, if a membership-disclosure requirement causes reluctance to join an organisation, then it burdens freedom of association.

Academics and advocacy organisations have made this point as well. For example, Erik Denters and Wino J.M. van Veen take the position that requiring membership lists available to the government is a burden on the freedom of association,<sup>54</sup> a position backed by environmental law practitioners as well.<sup>55</sup> The International Center for Non-Profit Law has condemned several countries for such requirements.<sup>56</sup> Denters and van Veen note, in accord with this Court and the U.S. Supreme Court, that the burden is “particularly detrimental to organizations with (unpopular) advocacy purposes.”<sup>57</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Case of *Gozelik and Others v. Poland*, Application No. 44158/98, 17 Feb 2004, Para. 92.

<sup>51</sup> Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill (draft bill) § 36 (“Duty to provide membership audit certificate”, available at <http://services.parliament.uk/bills/2013-14/transparencynonpartylobbyingandtradeunionadministration.html>).

<sup>52</sup> See, e.g., “FDA Response to BIS Consultation on Certification of Trade Union Membership Details, available at [www.fda.org/oc/nmsruntime/saveasdialog.aspx?IID=6487&SID=8351](http://www.fda.org/oc/nmsruntime/saveasdialog.aspx?IID=6487&SID=8351)”; Keith Ewing, “Transparency of Lobbying Bill etc.—A Note on Potential Human Rights Implications,” The Institute of Employment Rights, available at <http://www.ier.org.uk/sites/ier.org.uk/files/Transparency%20of%20Lobbying%20Bill%20etc%20A%20Note%20on%20Potential%20Human%20Rights%20Implications.pdf>.

<sup>53</sup> Explanatory Notes to the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill ¶¶ 187-9, available at <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0097/en/14097en.htm>.

<sup>54</sup> See Denters and van Veen, *supra* note 34.

<sup>55</sup> Jennifer M. Gleason and Elizabeth Mitchell, Will the Confluence Between Human Rights and the Environment Continue to Flow? Threats to the Rights of Environmental Defenders to Collaborate and Speak Out, 11 *Oregon Review of International Law* 267, 277 (2009). (Laws that “require NGOs to provide officials with membership lists” can be a “tactic used by domestic governments to hinder NGOs.”)

<sup>56</sup> Alison Kamhi, The Russian NGO Law: Potential Conflicts with International, National, and Foreign Legislation, [http://www.icnl.org/research/journal/vol9iss1/art\\_6.htm](http://www.icnl.org/research/journal/vol9iss1/art_6.htm); NGO Law Monitor Kenya, available at <http://www.icnl.org/research/monitor/kenya.html>; NGO Law Monitor Ecuador, available at <http://www.icnl.org/research/monitor/ecuador.html>.

<sup>57</sup> Denters and van Veen, *supra* note 34.

Of course, like many rights, the right to freedom of association is not absolute. The treaties that guarantee the right, including the ECHR, generally specify that the right can only be derogated from in specific situations: in the ECHR, restrictions are limited to those that are “prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”<sup>58</sup> Thus, to restrict the right of the members of ACCEPT to associate, Romania must demonstrate why the restriction is (1) legal and (2) necessary in a democratic society to achieve one of the enumerated goals.

### 3.2 Right to Privacy

The right to privacy is guaranteed in Article 8 of the ECHR and Article 12 of the Universal Declaration of Human Rights, as well as by other human rights treaties.<sup>59</sup> The right to privacy is not confined to natural persons; it extends to legal persons, including non-governmental organisations, as well.<sup>60</sup> This position is in line with that of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, who has also recognised the importance of NGO privacy rights.<sup>61</sup>

When individuals share names, addresses, and other identifying details with advocacy organisations, they are entitled to have their right to privacy honoured, and should be able to expect that those identifying details will not be shared. In many cases, the organisation itself is under a legal duty to safeguard that information.

Names and other identifying details of members of NGOs are protected by the privacy guarantees of Article 8 of the ECHR and its analogues in Australia and the United Kingdom. The British government has explicitly recognised that the names and addresses of trade union members constitute personal information protected by Article 8(1) of the ECHR.<sup>62</sup> An Australian case similarly recognised that membership lists of political parties contain personal information entitled to confidentiality, and accordingly protected them from disclosure.<sup>63</sup>

Data protection laws, including the European regime, also recognise that names and other identifying details contained in membership lists are personal information protected by the right to privacy. The European Data Protection Directive ensures the right to privacy by mandating that those collecting personal data recognise that that data is protected.<sup>64</sup> Similar British data protection legislation supported criminal prosecution against a member of the British National Party who posted the membership list of his organisation online.<sup>65</sup> Data protection laws protecting the names and other identifying details of those who join NGOs are not confined to Europe. For example, in Canada, both British Columbia and Quebec have enacted data

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<sup>58</sup> European Convention on Human Rights Article 11 (2).

<sup>59</sup> European Convention on Human Rights Article 8(1) (“Everyone has the right to respect for his private and family life, his home and his correspondence.”); Universal Declaration of Human Rights Article 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”). See also International Covenant on Civil and Political Rights Article 17; American Convention on Human Rights Article 11.

<sup>60</sup> See, e.g. Halford v. United Kingdom (20605/92) [1997] ECHR 32 (25 June 1997); Niemietz v. Germany (13710/88), 16 Dec. 1992.

<sup>61</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/20/27) ¶ 65. (“Authorities must also respect the right of associations to privacy as stipulated in Article 17 of the [ICCPR]... [authorities] must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk.”)

<sup>62</sup> Explanatory Notes to the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill ¶¶ 190, available at <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0097/en/14097en.htm>.

<sup>63</sup> Fishing Party v. Australian Electoral Commission, Administrative Appeals Tribunal of Australia May 9, 2008, ¶ 16. (“In this case, the membership lists of the Lifestyle Party contain personal information about persons who are not parties to the proceeding. In addition to disclosing political affiliations, which could be considered confidential in themselves, the lists contain the residential addresses of a large number of members, and disclose not only their general location but also give details of telephone numbers, email addresses and the date on which they joined the party. In addition, the applications for membership require disclosure of work telephone numbers and dates of birth... Considered in the present context, I find that this information is confidential.”)

<sup>64</sup> Directive 95/46/EC.

<sup>65</sup> See Griffin v. Smith, High Court of Justice Chancery Division Newcastle upon Tyne District Registry, Case No. 8LV 30015, Dec, 2010, 2010 WL 5183027, [2010] EWHC 3414 (Ch) ¶ 11.

protection laws that bind NGOs to a general duty of nondisclosure of membership information.<sup>66</sup> In addition, a prominent expert on NGO law has endorsed the view that membership disclosure requirements violate the right to privacy.<sup>67</sup>

### 3.3 Indirect Discrimination

Forced disclosure of membership lists can violate a third right guaranteed by the European Convention and other international human rights treaties: the right to be free from discrimination.<sup>68</sup>

A requirement that membership in an organisation be public has different effects on different organisations. For example, this Court has found that there is “nothing inherently secret about membership of a trade union,” so the revelation of that membership was not as problematic as it would be in other contexts.<sup>69</sup> In civil society groups that do not attract controversy, such as community sports leagues or neighborhood associations, members may be indifferent as to whether or not the fact of their membership is public or not. Similarly, a member of a dominant religion or an advocate of a popular point of view may not fear discrimination or violence if her membership or views are brought to light. That is not the situation when an organisation advocates for a persecuted minority or an unpopular viewpoint, as ACCEPT does here and as NAACP did in Alabama in the 1950s.

A seemingly neutral requirement that organisations make membership lists public is not neutral at all: it discriminates against people who have cause to fear violence and discrimination for their beliefs. It leaves most vulnerable those whom human rights seek most to protect.<sup>70</sup> In direct opposition to the ECHR, the requirement uniquely penalises minority groups and unpopular views.

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<sup>66</sup> British Columbia Personal Information Act; An Act Respecting the Protection of Personal Information in the Private Sector (Quebec).

<sup>67</sup> See, e.g., Jeremy McBride, *International Law and Jurisprudence in Support of Civil Society*, at 47, in *Enabling Civil Society: Practical Aspects of Freedom of Association*, Public Interest Law Initiative. (“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. Indeed, disclosure might also be a discouragement to joining and, therefore, an unacceptable inhibition on freedom of association.”); OSCE Final Report of Supplementary Human Dimension Meeting on Freedom of Assembly and Association at 15. (“States should refrain from... obligations to supply confidential data (such as membership lists), which may constitute violations of international law.”) Available at <http://www.osce.org/odihr/98264>.

<sup>68</sup> European Convention on Human Rights Article 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”) See also Universal Declaration on Human Rights Article 7; International Covenant on Civil and Political Rights Article 26; and American Convention on Human Rights Article 24.

<sup>69</sup> *The National Association of Teachers in Further and Higher Education v. The United Kingdom*, 28910/95, European Commission of Human Rights (First Chamber), 16/04/1998.

<sup>70</sup> This Court has recognised the unique importance that rights such as freedom of association have to minority groups. See *Case of Gorzelik and Others v. Poland*, Application No. 44158/98, 17 Feb 2004, Para. 92. (“The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, “a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity”. Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights.”).