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**STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)**

**Analysis on the impact of current national legislation, policies and practices
on the activities of civil society organisations, Human Rights defenders and
national institutions for the promotion and protection of Human Rights**

(as adopted by the CDDH at its 87th meeting, 6-9 June 2017)

Introduction

1. In the course of the biennium 2016-2017, the Steering Committee for Human Rights (“CDDH”) is tasked by the Committee of Ministers to conduct a study on the impact of current national legislation, policies and practices on the activities of civil society organisations, human rights defenders and national institutions for the promotion and protection of human rights, and to identify the best examples thereof;

2. This document contains the draft study prepared by the CDDH-INST Chairperson, Ms Krista OINONEN (Finland), who is also the Rapporteur. It was first considered by the CDDH-INST at its meeting of 12-14 October 2016 (corrections appear in track changes). It will be finalised by the CDDH-INST at its second meeting of 8-10 March for transmission to the CDDH.

3. This study sets out and analyses the impact of national, European and other regional and international standards and tools on the activities of civil society organisations (CSOs), human rights defenders (HRDs) and national institutions for the promotion and protection of human rights (NHRIs). While a great spectrum of standards and tools exist to support the work of civil society, human rights defenders and NHRIs, this preliminary draft study points to many challenges that remain before one can achieve a thriving and vibrant civil society space. These challenges exist because a conducive political and public environment requires more than the mere implementation of legislation. Concretely, this study is intended to assist in identifying gaps in the protection of activities of CSOs, HRDs and NHRIs and to point to a number of standards and good practices of Council of Europe member States which can be used to address them.

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List of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CDCJ	European Committee on Legal Co-operation
CDDG	European Committee on Democracy and Governance
CDDH	Council of Europe Steering Committee on Human Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil society organisation
ECHR	European Convention on Human Rights and Fundamental Freedoms (ETS No. 5)
ECtHR	European Court of Human Rights
ENNHRI	European Network of NHRIs
EU	European Union
FRA	EU Agency for Fundamental Rights
GANHRI	Global Alliance of National Human Rights Institutions
HRC	UN Human Rights Council
IACHR	Inter-American Commission for Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
INGO	International non-governmental organisation
NGO	Non-governmental organisation
NHRI	National human rights institution
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the UN High Commissioner for Human Rights
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
GANHRI	Global Alliance of National Human Rights Institutions
SCA	Sub-committee on Accreditation of the GANHRI
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNDHRD	UN Declaration of Human Rights Defenders

1. Introduction

1. While the primary responsibility for the implementation of human rights lies with states (further section 1.3), **civil society organisations (CSOs)**, **human rights defenders (HRDs)** and **national human rights institutions (NHRIs)** perform important functions in democratic societies in order to ensure continuing progress towards the fulfilment of human rights. They are important on two levels: for the direct benefits their activities bring to individuals whose rights might be violated, and through the secondary benefit of contributing to an environment where there is respect for human rights, democracy and the rule of law. CSOs, HRDs, and NHRIs each play important roles in furthering the respect of human rights across CoE member states (see section 1.1 for definitions of each of the actors). They advise and assist the state in advancing the implementation of human rights and should be provided the liberty to take critical stances when states' human rights obligations are not met.¹

2. States have obligations to refrain from violating the rights of HRDs, including those working within CSOs and NHRIs (so-called negative obligations), and obligations to ensure their rights and the rights of those they help are fully respected by maintaining an enabling environment in which these human rights actors can operate (so-called positive obligations). CSOs and NHRIs could be considered HRDs (*see diagram below*, S. 1.2).

3. **Civil society organisations (CSOs)** contribute to an environment of active respect for human rights, democracy and the rule of law. It can play a vital role in “promoting rights-based approaches, in shaping development policies and partnerships and in overseeing their implementation”² and can act as a “social watchdog”³ by holding governments to account for failing to meet their human rights commitments.⁴ Civil society can also mobilise non-state actors – including business, individuals and other members of civil society – by promoting and raising awareness of the importance of human rights, democracy and the rule of law. Finally, a rich and active civil society is seen as an important prerequisite for long-term poverty reduction, democratisation and the promotion of inclusiveness and cohesion in society.⁵ Civil society can also directly supply government services where the State is unwilling or unable to do so.

4. This enabling effect has been recognised by the international community. The European Consensus on Development, for example, recognises the crucial role that civil society plays as a promoter of democracy, social justice and human rights and as key contributors to democratic governance and development⁶ and the Council of Europe Committee of Ministers (hereafter ‘Committee of Ministers’) has recognised “the essential contribution made by NGOs to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities.”⁷

5. The OSCE Guidelines on Human Rights Defenders, in line with the UN Declaration on Human Rights Defenders (UNDHRDs), defines **HRDs** as “anyone who, individually or with others, acts to promote or protect human rights, regardless of their profession or other status.”⁸ The

¹ EU Guidelines on Human Rights Defenders (2008) § 5; Paris Principles etc.

² The Busan Partnership for Effective Development Cooperation, signed at the Fourth High-level Forum on Aid Effectiveness in Busan in November 2011, § 2.

³ Animal Defenders International v the United Kingdom, § 103.

⁴ UNDP (2012), p.6.

⁵ UNDP (2012).

⁶ UNDP (2012), p.9.

⁷ CM/Rec(2007) 14, preamble.

⁸ OSCE Guidelines on HRDs, §5.

distinctive feature is not who HRDs *are* but rather what they *do* or what cause or group they *represent*.⁹ The Universal Declaration of Human Rights only makes one requirement, namely that their activities be conducted by peaceful means and respecting the universal nature of human rights for all, “without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁰ Human rights defenders provide direct services, such as legal advice and representation in respect of human rights claims.

6. **NHRIs** are independent institutions with a broad constitutional or legal mandate to promote and protect human rights.¹¹ Within their mandates, NHRIs perform a variety of functions, including human rights monitoring, advising government and parliament, reporting to international human rights mechanisms, complaints handling, and promoting a culture of rights through awareness raising and human rights education.¹² NHRIs are often responsible for acting as an arbiter in human rights disputes or for providing advice on draft legislation on human rights issues.¹³ NHRIs in compliance with the Paris Principles and other independent state bodies dedicated to human rights (such as ombudsman institutions, equality bodies or children commissions)¹⁴ can inhabit the space between civil society and the state. NHRIs, especially those in full compliance with the Paris Principles, have also been recognized as HRDs.¹⁵ In carrying out their functions, they cooperate with both civil society and state bodies, they protect human rights defenders, and they promote a human rights environment where civil society can thrive.

7. With this context in mind, the Committee of Ministers requested the Steering Committee on Human Rights (CDDH) to “[c]onduct a study on the impact of current national legislation, policies and practices on the activities of civil society organisations, human rights defenders and national institutions for the promotion and protection of human rights, and identifying the best examples thereof”, before the end of 2016. This study is being conducted with a view to submitting, in 2017, “proposals to ensure that member States, through their legislation, policies and practices, effectively protect and promote the civil society space.”¹⁶ In preparing the draft outline for this study, the Rapporteur of CDDH-INST recalled the existence of a rich body of jurisprudence and guidance whilst emphasising the added value of evaluating national legislative and policy frameworks and identifying examples of best practice.

⁹ UN DHRD, §6.

¹⁰ UN DHRD, article 2.

¹¹ UN General Assembly Resolution 48/134, National institutions for the promotion and protection of human rights’, UN Doc. A/RES/48/134, adopted on 20 December 1993. As acknowledged by the Committee of Ministers in: Recommendation No. R(97) 14 of the Committee of Ministers on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights (Adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies), especially the preamble and § b).

¹² Further below section 1.1.4.

¹³ See UNDP and OHCHR (2010).

¹⁴ See §§ 225-229, *infra*, on NHRi typologies.

¹⁵ The UN Special Rapporteur on Human Rights Defenders dedicated a particular report to NHRIs: A/HRC/22/47 of 13 January 2013, §23: ‘The Special Rapporteur believes that national institutions which operate in compliance with the Paris Principles relating to the Status of National Institutions, and their members and staff, can be considered as human rights defenders, as they strive to promote and protect human rights.’. The OSCE, ‘Guidelines on the Protection of Human Rights Defenders’ (2014) also dedicate particular attention to NHRIs, §131: ‘In recognition of the fact that members and staff of independent NHRIs are also human rights defenders, participating States should, where required, strengthen their mandate in accordance with the Paris Principles and enable them to effectively reach out to other human rights defenders to stimulate their engagement in public debates. They should also give due consideration to the recommendations and views of independent NHRIs and other human rights defenders, even if these are critical of the government.’.

¹⁶ Committee of Ministers, Terms of Reference for the CDDH and its subordinate bodies for the biennium 2016-2017.

8. The rich set of standards by a wide range of actors demonstrates the importance attached to the topic of promoting an enabling environment for civil society. However, existing standards are by no means exhaustive, and gaps exist in the implementation of those standards. This study helps the work of CDDH-INST by identifying gaps, collecting good practices and providing concrete illustrations. In line with its terms of reference, the work of CDDH-INST will therefore best be served by producing targeting guidance and proposals regarding legislation and practices which complement and add value to existing standards.

1.1 Definitions

9. This report deals with the effects of national legislation on the activities of three distinct groups: civil society organisations (CSOs), human rights defenders (HRDs) and National Human Rights Institutions (NHRIs). They will be defined in turn.

1.1.1 Civil Society Organisations (CSOs)

10. Defining CSOs is not straightforward. A great deal of literature has been written on the subject, yet the definition still remains complex and sometimes controversial.¹⁷

11. The Committee of Ministers considers that “NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members.”¹⁸ Many States and international organisations have also adopted their own definitions, particularly in the context of their development programmes aimed at supporting CSOs.¹⁹ Although these definitions vary, they share several key elements. First, civil society is independent – principally from government but also from political life, the household, and corporate interests. Sweden’s definition, for example, mentions the “arena, separate from the state, the market and the individual household”. Secondly, civil society organisations are not profit-making entities. And thirdly, they have aim(s) or interest(s) mostly reflecting people’s priorities and concerns,²⁰ which they promote through their activities. The Norwegian definition therefore mentions people who “voluntarily associate to advance common views and interests”.

12. These three limbs represent a broad consensus of some common features of civil society. However, they are neither necessary nor sufficient and should not be interpreted strictly. Firstly, although independent from government, CSOs “should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation.”²¹ CSOs may also have profit-making arms, although these are almost exclusively to generate income for the main charitable purpose(s) of the organisation. However, as such profit-making sections tend to be registered separately as companies, there may be a temptation for governments to exclude them from protections granted to civil organisations registered as non-profit associations, even though they are not profit-making entities as such. Furthermore, for-profit businesses may engage in protected activities (such as assemblies) in the same way as CSOs. Finally, civil society organisations may not even be organisations in the sense of being registered or having a formal legal structure. International human rights law still applies to unregistered associations.²²

¹⁷ The International Center for Not-For-Profit Law and UNDP (2009), p.7.

¹⁸ CM/Rec(2007)14. See also OSCE Office for Democratic Institutions and Venice Commission of the Council of Europe (2015), p.15.

¹⁹ See UNDP (2012) for examples of State definitions. For examples of definitions of international organisations, see UNDP (2004), p.3 and World Bank (2013).

²⁰ Edwards (2004).

²¹ CM/Rec(2007)14, Article 13.

²² See §86 ff.

1.1.1.1 Activities

13. According to the Committee of Ministers, activities of CSOs cover “acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others.”²³

14. The World Bank differentiates CSOs based on the following activities undertaken:²⁴

- Representation – CSOs may act as an “aggregate of citizen voice” and pool resources to more effectively lobby governments and hold them to account regarding certain issues. Environmental interests may also be represented by CSOs.
- Advocacy and technical inputs – there are organisations which provide information and advice, as well as lobbying, on particular issues.
- Capacity building – the giving of support to governments, CSOs and other organisations, including the provision of funding.
- Service delivery – this could include, for example, the provision of health and education services. CSOs are more likely to perform these functions in contexts of crisis and fragility, but service delivery from the third sector also takes place in more stable environments.²⁵
- Social functions – organisations which foster collective recreational activities such as sports clubs.

1.1.2 Human Rights Defenders (HRDs)

15. The UN Declaration on Human Rights Defenders refers to “individuals, groups and associations ... contributing to ... the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals.”²⁶ A human rights defender is thus a person who, individually or with others, acts to promote or protect human rights.²⁷ It is the nature of their work that defines them, not membership of a particular organisation or having a particular job title.²⁸ The term can therefore best be explained through a description of their actions and some of the contexts in which they work.²⁹ Before the introduction of the UN Declaration on Human Rights Defenders, terms such as human rights “activist”, “professional”, “worker” or “monitor” were used interchangeably. Since 1998, the term human rights defender has been seen as more relevant and useful.³⁰ Human rights defenders can conduct their activities for remuneration (for example as part of their career, such as members of the legal profession) or on a voluntary basis (for example, those who help out with a human rights NGO).

1.1.2.1 Activities

16. Human rights defenders can address any human right(s) for themselves or on behalf of other individuals or groups.

²³ CM/Rec(2007)14, preamble.

²⁴ Pollard and Court (2005), p.2. See also A/HRC/RES/27/31.

²⁵ UNDP (2012), p.6.

²⁶ Fourth preambular paragraph.

²⁷ OHCHR (2004), p.2.

²⁸ OHCHR (2011), p.9.

²⁹ Protection International (2012), p. 29.

³⁰ OHCHR (2004), p.2.

17. Examples of work conducted by human rights defenders include documenting and disseminating information on human rights violations, supporting victims of human rights violations, working to secure accountability for respect for human rights standards and ending impunity through the provision of legal, psychological, medical or other support, supporting better governance and government policy, monitoring and contributing to the implementation of human rights treaties, conducting human rights education and training and mainstreaming human rights culture and information on human rights defenders at national, regional and international level.³¹

1.1.3 National Human Rights Institutions (NHRIs)

18. The Principles Relating to the Status of National Institutions (the Paris Principles)³² are the central set of international standards which frame and guide the work of NHRIs. Drafted in the context of an international seminar organised under auspices of the UN in 1991, the Paris Principles were adopted by the General Assembly in 1993. According to the Paris Principles, NHRIs are state institutions established by law, independent of government, with a broad legislative or constitutional mandate to promote and protect human rights. The breadth of this definition is necessary in light of the wide variety of structures and mandates found in NHRIs worldwide. NHRIs are periodically accredited by reference to the Paris Principles to ensure their independence, plurality, impartiality and effectiveness.³³

1.1.3.1 Activities

19. The Paris Principles define the role, composition, status and functions of NHRIs. NHRIs address the full range of human rights, including civil, political, economic, social and cultural rights.³⁴ NHRIs throughout the Council of Europe area work towards the implementation of the international human rights instruments, including the European Convention of Human Rights, the European Social Charter, the EU Charter, and other European human rights standards.³⁵ NHRIs can improve the implementation of human rights at the national and local level through promotion and awareness raising, protection and individual assistance, investigations and inquiries, monitoring, research and reporting, advising governments and parliaments, and engaging with regional and international human rights systems.³⁶ In addition, NHRIs cooperate with civil society, other national bodies and the international human rights system.³⁷ NHRIs are thus pivotal actors in the implementation of international human rights standards, as reiterated in the Interlaken, Brighton and Brussels Declarations.³⁸

20. NHRIs in different countries operate in differing circumstances, and each institution will have its own list of priorities from within its broad human rights mandate.³⁹ NHRI priorities should be

³¹ European Union (2004), p.2; OHCHR (2004), pp. 2-5.

³² Adopted by General Assembly resolution 48/134 of 20 December 1993.

³³ A periodically updated list with the accreditation status of NHRIs is available on the website of the global NHRI network (GANHRI): <http://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20.pdf>.

³⁴ Paris Principles, a) 'competence and responsibilities', 2; SCA General Observations (2013) 1.1.

³⁵ J. Wouters and K. Meuwissen (eds.), *NHRIs in Europe: Comparative, European and International Perspectives* (2013, Intersentia).

³⁶ As recognised by the Committee of Ministers in Recommendation No. R(97) 14 of the Committee of Ministers on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights (Adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies; Resolution (97)11 on Cooperation between National Human Rights Institutions of Member States and Between them and the Council of Europe of 30 September 1997.

³⁷ *Ibidem*.

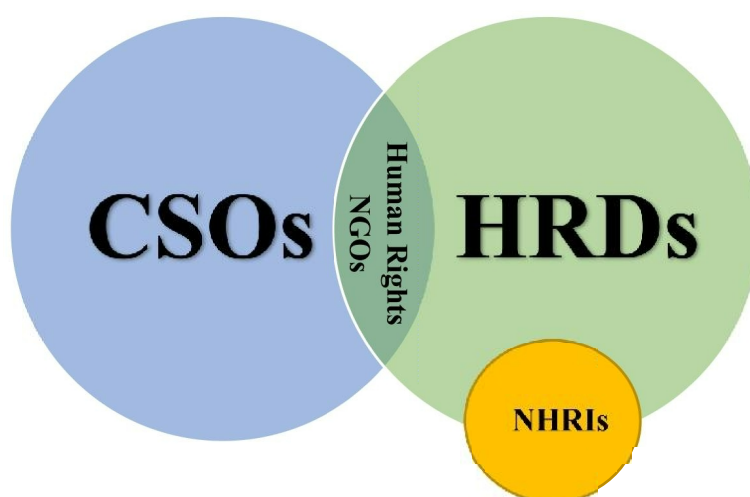
³⁸ Interlaken Declaration of 19 February 2010, at §4, a); Brighton Declaration of 20 April 2012 at §4 and 9, C (ii); Brussels Declaration of 27 March 2015, especially § 1, g); 2, a).

³⁹ Lagoutte, Kristiansen and Thonbo (2016), p.2.

determined on the basis of objective criteria and pluralistic consultation, including with civil society. Under the Paris Principles, NHRIs must report annually on their activities undertaken, and the actions taken to address key human rights concerns.⁴⁰

21. The mandates and activities of NHRIs are dealt with in some detail below (see 5.1.3).

1.2 Overlap between CSOs, NGOs, HRDs and NHRIs



22. Although civil society may be closely associated with NGOs, it should be stressed that the two concepts are not identical. Civil society is a broader term and thus encompasses some organisations which are not typically thought of as NGOs. As an illustrative example, the United Nations Development Programme (UNDP) used to employ the term “NGO” to describe all the non-state or non-business organisations it worked with. Since 1993, it now refers to such organisations as civil society organisations, as these “comprise the full range of formal and informal organisations within civil society”, such as community-based organisations, indigenous peoples’ organisations (IPOs), academia, journalist associations, faith-based organisations, trade unions, and trade associations, all or many of which would not be classed as NGOs.⁴¹ However, some international standards refer to NGOs despite their content being applicable to the full range of CSOs.⁴²

23. There is also some overlap between civil society organisations and human rights defenders. That is, some human rights defenders may be civil society organisations, for example NGOs that work with human rights.⁴³ However, most human rights defenders are probably not civil society organisations, although they may be individuals who are members of or have links with such organisations. Some human rights defenders may fall completely outside the scope of civil society. Politicians who work to promote human rights could correctly be referred to as human rights defenders,⁴⁴ but would not be classed as belonging to a civil society organisation. Some CSOs such as

⁴⁰ SCA General Observations (2013) 1.11 ‘Annual reports of National Human Rights Institutions’.

⁴¹ UNDP (2004), p.3.

⁴² See, for example some Council of Europe standards such as CM/Rec(2007)14 and the Fundamental Principles on the Status of Non-Governmental Organisations in Europe;

⁴³ OHCHR (2004), p.6.

⁴⁴ See OHCHR (2004), p.17.

sports organisations may not be thought of as human rights defenders. Additionally, NHRIs are neither CSOs nor NGOs and are recognised as human rights defenders.⁴⁵

24. Human rights defenders have enjoyed separate attention at the intergovernmental level, for example through the UN Declaration on Human Rights Defenders and the establishment of a Special Rapporteur on the situation of human rights defenders.⁴⁶

1.3 Challenges including the shrinking democratic space

25. In theory, the opportunities for human rights defenders, civil society organisations and national human rights institutions to contribute to democratic societies have increased. Over the past 15 years, the number of democracies has doubled, there have been substantial reductions in violent conflict, economies became increasingly open, governments are decentralising, the impact of social networking services and other social media services is increasing,⁴⁷ and the rapid development of information and communication technologies has transformed access to and use of information.⁴⁸

26. However, in part as a reaction to the increased power that these opportunities have brought CSOs, the available democratic space has been shrinking, resulting in “an environment of reduced opportunities for CSOs [...] to undertake a wide range of public actions.”⁴⁹ Democratically-elected politicians have a broad mandate to represent society as a whole. CSOs on the other hand may provide a real voice for marginalised or disadvantaged groups, or bring a strong focus to a single policy issue. These competing ideals of representation and legitimacy may lead to tension. It is important to understand and respect the legitimacy of both and to support and encourage CSOs to be active in public debate, including criticism of government policy or action, while respecting the responsibility of democratic governments to make decisions in the interests of society as a whole. Even in countries where civil society is flourishing, this may be despite, not thanks to, the national government and state authorities.⁵⁰ The work of CSOs can be particularly adversely impacted by the rise of populist narratives, and consequent creation of an atmosphere inimical to the operation of independent and critical voices. Their work has also been affected in recent years by the reduction of State funding for the voluntary and community sector in many States due to austerity measures. Within that general reduction in funding availability, advocacy and community-based organisations have suffered disproportionately due to the focus of remaining funding lines being on service delivery.

27. In addition, when discussing challenges, the role of social media is important. Although a precise and comprehensive definition of social media remains a challenge at international level, in this digital age, social media platforms/networks have become an all-encompassing and essential part of modern society. People around the world have been using these internet-based platforms to communicate, organize, and exchange information that directly impacts their lives. These platforms do not just constitute a useful information and communication tool for the general public, but also for the state and other authorities. However, while facilitating freedom of expression on the one hand, the lack of an appropriate regulatory framework bears the risk of negatively impacting many of its users, including human rights defenders, journalists, members of marginalized communities, activists, civil society organizations and even state and other authorities, through (mis)use and (ab)use. The easy and rapid spread of hate speech across these platforms is a pertinent example, an occurrence which is

⁴⁵ Report of the UN Special Rapporteur on Human rights Defenders of 13 January 2013, A/HRC/22/47 and OSCE Guidelines on the Protection of Human Rights Defenders 2014, p. 25, §7.

⁴⁶ E/CN.4/RES/2000/61.

⁴⁷ CM/Rec(2012)4 on the protection of human rights with regard to social networking services, §2. See also more generally the OSCE 2013 Social Media Guidebook.

⁴⁸ Court and others (2006), p.13.

⁴⁹ ACT Alliance (2011), p.12.

⁵⁰ Tibbett (2009), p.13.

becoming all the more alarming amidst a growing trend in populist ideas and environments, and hence remains a great concern and challenge, not least due to the potential of a negative impact beyond the virtual world. While state authorities and social media platforms have responded to this threat by developing numerous positive security enhancements, more can be done to achieve a high quality regulatory framework and obtain a balance between the protection of “digital human rights” on the one hand, and enhanced digital security as part of the general human rights protection and rule of law agenda, on the other.

28. Further complex challenges have been brought about by the on-going refugee/migrant crisis. There are alarming trends in the treatment of asylum seekers and refugees, as well as regular and irregular migrants in all parts of Europe by different actors – individuals, groups and even state actors. Human Rights Defenders and CSOs face many challenges in their interaction with certain member states’ authorities, as well as the general public or various interest groups/individuals. In this context, the media, notably the social media, has played a role, and there is grave concern over the profound and negative impact hate speech can have. The CoE member States, along with CSOs, HRDs and NHRIs⁵¹, as well as the media generally, must remain committed to promoting the rights of refugees/migrants as part of the universal human rights protection system and must jointly work on creating an environment and legal framework that will address all the stakeholder’s concerns simultaneously, in line with the positions of the CoE Commissioner for Human Rights,⁵² the New York Declaration for Refugees and Migrants,⁵³ (an outcome of the historic UN Summit and follow up to the first-ever World Humanitarian Summit in 2016 in Istanbul), and the UN Agenda for Humanity.⁵⁴

29. Attention has been drawn to the shrinking democratic space on repeated occasions by various organs of the Council of Europe. PACE, for example, has noted that “in certain Council of Europe member States the situation of civil society has dramatically deteriorated over the last few years, in particular following the adoption of restrictive laws and regulations”⁵⁵ and the Secretary General has noted that “there is a trend among an increasing number of member States towards a more restrictive approach to freedom of association”.⁵⁶ In 2016, the Conference of INGOs hosted a conference on the shrinking civil society space.⁵⁷ In 2017, NHRIs, ombudsmen institutions and national equality bodies adopted the Zagreb Declaration on ‘Reclaiming human rights in Europe: how to enhance the

⁵¹ ENNHRI has a working group addressing asylum and migration which includes a focus on monitoring of migrant detention, rooted in the Belgrade declaration on the Protection and Promotion of the Rights of Refugees and Migrants (2015) and highlighted in the GANHRI Statement on the occasion of the United Nations Summit for Refugees and Migrants New York (September 2016).

⁵² Commissioner for Human Rights – Positions on the Rights of migrants in an irregular situation: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2955067&SecMode=1&DocId=1607900&Usage=2>; Commissioner for Human Rights – Positions on the right to seek asylum:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2954128&SecMode=1&DocId=1595140&Usage=2>

⁵³ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1

⁵⁴ One humanity, shared responsibility: Report of the Secretary- General for the World Humanitarian Summit <https://consultations.worldhumanitariansummit.org/bitcache/e49881ca33e3740b5f37162857cedc92c7c1e354?vi d=569103&disposition=inline&op=view>; Outcome of the World Humanitarian Summit: Report of the Secretary-General <https://www.worldhumanitariansummit.org/sites/default/files/media/A-71-353%20-%20SG%20Report%20on%20the%20Outcome%20of%20the%20WHS.pdf>

⁵⁵ Resolution 2096 (2016), §4.

⁵⁶ Secretary General of the Council of Europe (2016), p.9.

⁵⁷ <https://www.coe.int/en/web/ingo/-/only-a-matter-for-politicians-civil-society-money-and-political-activities>

democratic space’,⁵⁸ reaffirming also their commitment to cooperate with all relevant human rights actors, including CSOs and the Council of Europe, to support democratic space in Europe.⁵⁹

30. Like other human rights defenders, NHRIs also face the negative implications of shrinking democratic space. In the course of their work, NHRIs can come under threat in a variety of manners, including through: reduction in formal independence; political pressure; reduction in mandate; reduction and/or the removal of funding; arrest or attacks of NHRI representatives. UN and European organisations have called upon states to recognize that members and staff of independent NHRIs must be fully protected, -as all other human rights defenders-, from undue pressure and abuse.⁶⁰ The European Network of NHRIs (ENNHRI) has elaborated guidelines on how it supports NHRIs under threat.⁶¹

31. Some government measures may not target human rights defenders (including CSOs and NHRIs) directly but may nevertheless have an adverse impact on their activities. In particular, some human rights, for example the rights of freedom of expression and opinion and assembly, have in some cases been severely restricted as part of a general heightening of security and anti-terror measures following the events of 11 September 2001. Adverse effects have been reported in particular for organisations which monitor human rights violations and which take a critical stance of government actions and policies.⁶² Measures which seek to restrict legitimate protests for security reasons may have a particular effect on organisations that carry out advocacy work (see 3.1.1.2).

32. The economic crisis which Europe and the world have experienced in past years has created challenges for the protection of civil and political as well as social and economic rights, the rule of law, democracy, political stability and social cohesion in Europe.⁶³ Austerity measures have limited the resources available for the promotion and protection of human rights across CoE member States, which has negative implications for human rights defenders, civil society organisations and NHRIs active in the region.⁶⁴

33. Smear campaigns against human rights defenders and civil society organisations whose human rights’ work challenges the policy of the government require effective measures. According to OSCE guidelines, “[s]tate institutions and officials must refrain from engaging in smear campaigns, negative portrayals or the stigmatization of human rights defenders and their work. This includes the negative labelling of human rights defenders, discrediting human rights work and human rights defenders or defaming them in any way.”⁶⁵ Smear campaigns have been condemned by UN and Council of Europe bodies. In 2001, the Special Representative of the UN Secretary General on human rights defenders reported that “smear campaigns against human rights defenders have become a tool increasingly used to discredit their work”⁶⁶. PACE has also called on member states to “refrain from

⁵⁸ Available at www.ennhri.org

⁵⁹ Note also that NHRIs in compliance with the Paris Principles are internationally accepted as an indicator of UN Sustainable Development Goal 16 to ‘Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.

⁶⁰ A/HRC/22/47 of 16 January 2013, especially §§ 77-83; OSCE Guidelines (2014) § 40.

⁶¹ Guidelines on ENNHRI Support to NHRIs under Threat, March 2016, available on the ENNHRI website: <http://ennhri.org/NHRIs-under-threat>.

⁶² A/64/226 § 51.

⁶³ CDDH Feasibility Study, ‘The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe’ (2015) § 5.

⁶⁴ Further: CDDH Feasibility Study, ‘The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe’ (2015), for e.g. § 39, referring to the attention of the CoE Commissioner for Human Rights for the problem of budget and staff cuts in some Council of Europe member States in the aftermath of the economic crisis, which ensued in the closure of regional offices of NHRIs.

⁶⁵ ODIHR, Guidelines on the Protection of Human Rights Defenders, on: <http://www.osce.org/odihr/119633?download=true>, ODIHR, Warsaw, 2014, p. 62.

⁶⁶ Cited in ODIHR, Guidelines, op. cit., p. 62

conducting smear campaigns against human rights defenders and condemn such campaigns conducted in the media or by other non-State actors; “⁶⁷ It is essential that law enforcement bodies take effective action to protect freedom of speech and safety of Human rights defenders.

34. NHRIs undertake advocacy to create a conducive work environment for human rights defenders, including civil society organisations-, and undertake protective functions when human rights defenders are under threat.⁶⁸ The Committee of Ministers has in particular recommended CoE member states to establish or strengthen the competence of NHRIs to receive, consider and make recommendations for the resolution of complaints by human rights defenders about violations of their rights.⁶⁹

1.4 National frameworks as the main reference frameworks

35. The primary responsibility to protect human rights lies with the State. Human Rights need to be respected, protected and fulfilled. At national level the responsibility for these tasks rest primarily on the shoulders of the state, for everyone on their territory and subject to their jurisdiction. This task rests in particular with the legislature, government and administrative bodies, and the judiciary. Although international human rights instruments, supplemented by the jurisprudence and guidance of human rights mechanisms, set out agreed human rights standards relevant to the protection of civil society and the promotion of its work, national legislation is required to put those standards into practice. As recognised by UN and European organisations – including the CoE’s Committee of Ministers – NHRIs established and operating in accordance with the Paris Principles play a particular role by continuously monitoring existing legislation and informing the state of its impact on human rights and the activities of human rights defenders, and by making concrete recommendations in this respect.⁷⁰

36. National frameworks may be particularly complex and span many spheres of law. This study identifies some of those frameworks, including those that may be considered best practice, placing them in the context of international standards.

2. International Standards

2.1 Existing Council of Europe standards and tools

2.1.1 Case Law of the European Court of Human Rights (ECtHR)

37. Many of the obligations to foster an enabling environment for civil society derive from human rights obligations, including from the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court of Human Rights.

38. Article 5 protects arbitrary deprivation of liberty. Cases have come before the ECtHR on the arbitrary deprivation of the liberty of human rights defenders for carrying out their activities,

⁶⁷ See § 6.5 PACE Resolution 2095 (2016) Strengthening the protection and role of human rights defenders in Council of Europe member States. See also 2016 Report by the Secretary General of the CoE, p. 65.

⁶⁸ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, A/HRC/22/47 of 16 January 2013.

⁶⁹ Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities of 6 February 2008, §2, v. Similarly: OSCE Guidelines (2014) §94.

⁷⁰ Declaration of Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities of 6 February 2008, §2, v. Also: OSCE Guidelines on Human Rights Defenders (2014) §48, making reference also to the recognition in this regard by the UN HRC.

including the arrest of founders of associations for failing to meet restrictive and arbitrary criteria regarding registration (see s. 4.1.1.2).⁷¹

39. Article 10 ECHR guarantees freedom of expression. In particular, the ECtHR has laid down criteria regarding the protection of whistle-blowers (see s. 4.1.2) and access to information (see s. 3.3).

40. Article 11 ECHR guarantees the freedoms of assembly and association. Regarding the former, the Court has laid out a detailed set of requirements and in particular has expanded on the positive obligations required under Article 10, including the various measures which comprise the positive duty to facilitate peaceful assemblies (see 3.1.1.2). In the context of freedom of association, the ECtHR has heard complaints from associations in Council of Europe member States who have been unfairly denied access to legal status or who have faced particular obstacles in their operation, and has therefore developed jurisprudence on the modalities of registering associations and the compatibility of any restrictive measures with the ECHR (see s. 3.1.1.1.2).

41. Cases have also come before the ECtHR regarding ombudsman institutions with a quasi-judicial role to handle individual complaints (some of which may have an NHRI mandate), and in particular whether they are able to provide an effective domestic remedy (see s. 5.1.3.3).

2.1.2 Other Council of Europe treaties

42. Article 5 of the European Social Charter (revised) (ETS No. 163) states that “[a]ll workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.” The Collective Complaints procedure introduced by an Additional Protocol in 1995 aimed at increasing the effectiveness, speed and impact of the implementation of the Charter. The collective complaints procedure has strengthened the role of the social partners and non-governmental organisations by enabling them to directly apply to the European Committee of Social Rights for rulings on possible non-implementation of the Charter in the countries concerned, namely those States which have accepted its provisions and the complaints procedure.⁷² In the 2008 Declaration on Human Rights defenders, the Committee of Ministers called on member states to “(x) consider signing and ratifying the 1995 Additional Protocol to the European Social Charter and to consider recognising the right of national NGOs fulfilling the criteria mentioned therein to lodge collective complaints before the European Committee of Social Rights;” The Conference of INGOs plays a proactive role in the promotion and implementation of the Revised Social Charter, namely with its coordination committee for the Turin process. Many of its INGO members are habilitated to launch collective complaints and make a good use of this right. NHRIs work towards the ratification and implementation of the European Social Charter and its Protocol and use, in turn, the decisions of the European Committee on Social Rights to promote human rights in various areas of their work. ENNHRI has collated examples of this work, and facilitates the exchange of good practices among European NHRIs in this area.⁷³

43. Article 7 of the Framework Convention for the Protection of National Minorities (ETS No. 157) states that “[t]he Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion”.

⁷¹ *Rasul Jafarov v. Azerbaijan* (violation of Art. 18 in conjunction with Art. 5).

⁷² Language from <http://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1>

⁷³ Further: ENNHRI Statement of Support for the Turin Process to strengthen Social Rights in Europe (2016) with good practice examples in Annex of the Statement.

44. Under Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144), States Parties undertake to guarantee the rights to freedom of expression, freedom of peaceful assembly and freedom of association on the same terms as to its own nationals.

45. The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS No. 124) builds on the work of the Committee of Ministers on this subject and is discussed in more detail in 3.1.1.1.

2.1.3 Recommendations and resolutions of the Committee of Ministers

46. The Committee of Ministers has been active for a long time in the field of civil society. It has recognised that the actions of civil society align with the aims and values of the Council of Europe and has thus sought to develop standards to help foster an enabling environment in which they may work.

47. As early as 1997, the Committee of Ministers has recognised the relevance of NHRIs for the promotion and protection of human rights across Council of Europe member states, including through engagement with public authorities and civil society.⁷⁴ Accordingly, the Committee of Ministers has supported the regular engagement between NHRIs and the Council of Europe,⁷⁵ and has called upon CoE member states to establish independent and effective NHRIs, taking account of the Paris Principles.⁷⁶

48. In 2002, a recommendation on the Fundamental Principles on the Status of Non-Governmental Organisations in Europe, along with an explanatory memorandum, was adopted by the Committee of Ministers of the Council of Europe. The Fundamental Principles cover a wide range of NGO modalities including establishment, legal personality, membership, management, property and fund-raising, transparency and accountability, supervision and liability. In 2007, a resolution was adopted building on and updating these Fundamental Principles.⁷⁷

49. In 2008, the Committee of Ministers adopted a Declaration on ‘Council of Europe action to improve the protection of human rights defenders and promote their activities’.⁷⁸ deplored “that human rights defenders, including journalists, are all too often victims of violations of their rights, threats and attacks, despite efforts at both national and international levels”, and considered “that human rights defenders merit special attention, as such violations may indicate the general situation of human rights in the state concerned or a deterioration thereof”. The Committee of Ministers acknowledged that “whereas the prime responsibility and duty to promote and protect human rights defenders lie with the state, the Council of Europe shall also contribute to creating an enabling environment for human rights defenders and protect them and their work in defending human rights”. The Committee condemned all attacks on and violations of the rights of human rights defenders in Council of Europe member states or elsewhere,⁷⁹ and suggested a range of measures to be taken by CoE member states to create an environment conducive to the work of human rights defenders and to effectively protect, promote and respect human rights defenders and ensure respect for their

⁷⁴ Resolution (97)11 of 30 September 1997, preamble, § 4; Recommendation No. R(97) 14 of 30 September 1997, especially § d).

⁷⁵ Resolution (97)11 on Cooperation between National Human Rights Institutions of Member States and Between them and the Council of Europe of 30 September 1997.

⁷⁶ Recommendation No. R(97) 14 of the Committee of Ministers on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights (Adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers’ Deputies), especially § b).

⁷⁷ CM/Rec(2007)14.

⁷⁸ Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities (Adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers’ Deputies). The Russian delegation noted that it did not fully associate with the Declaration of the Committee of Ministers.

⁷⁹ Declaration of the Committee of Ministers (2008), § 1(i).

activities.⁸⁰ The Committee of Ministers further called on “all Council of Europe bodies and institutions, to pay special attention to issues concerning human rights defenders in their respective work. This shall include providing information and documentation, including on relevant case law and other European standards, as well as encouraging co-operation and awareness-raising activities with civil society organisations and encouraging human rights defenders’ participation in Council of Europe activities”⁸¹ The Committee further invited the Commissioner for Human Rights “to strengthen the role and capacity of his Office in order to provide strong and effective protection for human rights defenders”⁸². Finally, the Committee of Ministers agreed to “keep under review the question of further Council of Europe action in this field.”⁸³ The Committee of Minister’s Declaration also specifically highlighted the potential role of NHRIs in the formulation of recommendations to resolve complaints by human rights defenders about violations of their rights.⁸⁴

50. In 2014, a recommendation and explanatory memorandum was adopted regarding the protection of whistle-blowers. The recommendation provides a comprehensive framework of best practices in this regard and is dealt with in more detail in 4.1.2.

2.1.4 Resolutions, reports and activities of the Parliamentary Assembly (PACE)

51. Resolutions on many aspects relevant to civil society are regularly adopted by the Parliamentary Assembly of the Council of Europe (PACE). Resolutions have been passed regarding the urgent need to prevent human rights violations during peaceful protests,⁸⁵ and a resolution on freedom of association detailing how inappropriate restrictions on NGO activities in Europe can be prevented was adopted.⁸⁶

52. PACE has also actively promoted the role of human rights defenders and their safety, including through a 2016 resolution on strengthening the protection and role of human rights defenders in Council of Europe members States.⁸⁷ The Václav Havel Human Rights Prize is also awarded by the PACE every year to human rights defenders or NGOs who have “made a real difference to the human rights situation of a given group, been instrumental in uncovering systemic violations on a large scale, or have successfully mobilised public opinion or the international community for a given cause.”⁸⁸ In 2007, a resolution entitled “Towards the decriminalisation of defamation”⁸⁹ was passed. PACE is also active on the subject of national security and access to information.⁹⁰

53. In 2010, resolution 1729 dealing with the protection of whistle-blowers, offering guiding principles for their protection, was adopted. A recommendation was adopted shortly afterwards calling on the Committee of Ministers to draw up a set of guidelines on the subject. These guidelines were adopted by the Committee of Ministers in 2014 (see above) and welcomed by PACE.⁹¹

⁸⁰ *Ibidem*, § 2(ii)–(xi).

⁸¹ § 3.

⁸² § 4.

⁸³ § 5.

⁸⁴ *Ibidem*, § 2, v).

⁸⁵ PACE Resolution 2116 (2016).

⁸⁶ PACE Resolution 2096 (2016).

⁸⁷ PACE Resolution 2095 (2016).

⁸⁸ http://website-pace.net/en_GB/web/apce/vaclav-havel-human-rights-prize

⁸⁹ Resolution 1577 (2007).

⁹⁰ Resolution 1954 (2013) and Recommendation 2024 (2013).

⁹¹ Resolution 2060 (2015) and Recommendation 2073 (2015).

54. In 2009, a report on the situation of human rights defenders in the Council of Europe's member States was presented by the Committee on Legal Affairs and Human Rights.⁹² An updated report on the subject was presented in 2012.⁹³

55. PACE has also repeatedly recognised the role of NHRIs across the Council of Europe and has acknowledged the Paris Principles as the 'internationally accepted benchmark for core minimum standards for the role and functioning of independent NHRIs'.⁹⁴ PACE dedicates specific attention to the potential of fostering cooperative relationships between NHRIs and national parliaments across CoE member states, in line with the 2012 Belgrade Principles on the relationship between NHRIs and parliaments.⁹⁵ In 2014, PACE has adopted a resolution with recommendations on how to improve cooperation between NHRIs and parliaments in addressing equality and non-discrimination issues.⁹⁶

2.1.5 Conference of INGOs

56. The international non-governmental organisations (INGOs), which enjoy participatory status with the Council of Europe, are known collectively as the Conference of INGOs of the Council of Europe. In July 2016, the Committee of Ministers, "recognising the important role of the Conference of INGOs as the representative body of all of the INGOs", adopted a resolution on participatory status, in which it outlines new rules pertaining to such a status.⁹⁷

57. In January 2008, the INGO Conference established an Expert Council on NGO Law⁹⁸ with a mandate to contribute to the creation of an enabling environment for NGOs by examining national NGO laws and their implementation and providing advice on alignment with Council of Europe standards and best practice from its member States.⁹⁹ Detailed thematic studies have been produced by the Expert Council on various aspects of NGO legislation in Europe, including those that regulate political activities of NGOs¹⁰⁰, their establishment, and their internal affairs, all with illustrative country case studies. The Expert Council has also issued several reports on NGO legislation and its implementation in Azerbaijan and in the Russian Federation.

58. A Code of Good Practice for Civil Participation covering, amongst other things, mechanisms for NGO participation in decision-making processes and involvement in public policy has been prepared by the INGO Conference and is available in more than 20 languages. The INGO Conference has organized fact-finding visits to the Member States with focus on the participation of NGOs in the decision-making process and on the existence of an enabling environment for the NGOs. Discussions and exchange of experiences during the visits are part of a wider analysis.¹⁰¹ The Conference is also engaged in on-going efforts with a view to creating an "interaction mechanism" between the

⁹² Doc. 11841. See Resolution 1660 (2009).

⁹³ Doc. 12957. See Resolution 1891 (2012).

⁹⁴ Parliamentary Assembly, Resolution 1823(2011) 'National parliaments: guarantors of human rights in Europe', adopted by the Assembly on 23 June 2011, § 4.

⁹⁵ *Ibidem*. Resolution 1998(2014) 'Improving co-operation between national human rights institutions and parliaments in addressing equality and non-discrimination issues', 23 May 2014, §3.

⁹⁶ Parliamentary Assembly, Resolution 1998(2014) of 23 May 2014, §§ 6-8.

⁹⁷ CM Resolution (2016)3, § 12.

⁹⁸ <https://www.coe.int/en/web/ingo/ngo-legislation>

⁹⁹ See CONF/PLE(2012)DECISION1.

¹⁰⁰ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680640fc2>

¹⁰¹ Example of a visit report to Bulgaria :

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593e7d>

Committee of Ministers and civil society. Texts on the protection of human rights defenders have also been adopted by the Conference¹⁰²

2.1.6 Guidelines and opinions of the European Commission for Democracy through Law (Venice Commission)

59. The Venice Commission provides legal advice to its member States, in particular in relation to the alignment of national legal and institutional structures with European standards and international experience in the fields of democracy, human rights and the rule of law.

60. Along with the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE), the Venice Commission has published Guidelines on Freedom of Peaceful Assembly, with the second edition being released in 2010.¹⁰³ The comprehensive guidelines and explanatory notes lay out jurisprudence and best practices regarding peaceful assemblies, including in the context of non-governmental organisations and civil society. The two organisations have also published Joint Guidelines on Freedom of Association.¹⁰⁴

61. Opinions on laws regulating NGOs and freedom of association have been produced by the Commission. Notably, opinions on the compatibility with human rights standards of the legislation on NGOs of Azerbaijan,¹⁰⁵ of the Belarusian criminal code affecting non-registered associations,¹⁰⁶ of the law on non-commercial organisations of Kyrgyzstan,¹⁰⁷ and of various NGO laws in the Russian Federation¹⁰⁸ have been produced. These opinions recall relevant regional and international human rights standards before analysing national legislation in the light of such standards. A compilation of such opinions was updated by the Commission in 2014.¹⁰⁹

62. The Venice Commission promotes the creation and strengthening of ombudsman institutions with a mandate encompassing dedicated attention for the protection of human rights.¹¹⁰ The Venice Commission has adopted opinions on the legal framework for the operation of ombudsman institution in a number of countries including Armenia, Azerbaijan, Bosnia and Herzegovina, Kazakhstan, Luxembourg, Montenegro, the Republic of Moldova, Serbia and “The Former Yugoslav Republic of Macedonia”,¹¹¹ as well as in Kosovo*.¹¹² In 2011, the Commission published a compilation of its opinions on ombudsman institutions which has been updated in 2016.¹¹³ Governments can request the

¹⁰² For example, CONF/PLE(2016)REC1 on the protection of human rights defenders in the Transnistrian Region, CONF/PLE(2014)DEC1 on “Protection of Human Rights Defenders in Europe” and CONF/PLE(2012)REC2 on “The protection of Human Rights Defenders in the Russian Federation”.

¹⁰³ CDL-AD(2010)020E.

¹⁰⁴ CDL-AD(2014)046E.

¹⁰⁵ CDL-AD(2011)035.

¹⁰⁶ CDL-AD(2011)036; CDL(2011)060.

¹⁰⁷ CDL-AD(2014)030.

¹⁰⁸ See e.g. CDL-AD(2014)025.

¹⁰⁹ Venice Commission CDL-PI(2014)004.

¹¹⁰ A separate webpage of the Venice Commission is dedicated to ‘ombudsman institutions’: http://www.venice.coe.int/WebForms/pages/?p=02_Ombudsmen&lang=EN. Note that no academic literature is available assessing the work of the Venice Commission in relation to ombudsman institutions.

¹¹¹ *Ibidem*.

¹¹² All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

¹¹³ European Commission for Democracy through Law (Venice Commission) ‘Compilation on the Ombudsman Institution’ CDL(2011)079 of 1 December 2011; European Commission for Democracy through Law (Venice Commission) ‘Compilation of the Venice Commission Opinions Concerning the Ombudsman Institution’ CDL-PI(2016)001 of 5 February 2016.

Venice Commission for its opinion on whether constitutional/legislative proposals comply with the Paris Principles¹¹⁴.

2.1.7 Guidelines of the European Committee on Democracy and Governance (CDDG)

63. The European Committee on Democracy and Governance (CDDG) is responsible for implementing the Council of Europe's intergovernmental work in the field of democratic governance. A joint working group of the CDDG and the Conference of INGOs prepared draft Guidelines for meaningful civil participation in political decision-making.¹¹⁵ These draft Guidelines were adopted at the CDDG's meeting in May 2017 and are currently before the CM Rapporteur Group on Democracy (GR-DEM).¹¹⁶

2.1.8 Work of the European Committee on Legal Co-operation (CDCJ)

64. The European Committee on Legal Co-operation (CDCJ) oversees the Council of Europe's work in the field of public and private law and advises the Committee of Ministers on all questions within its areas of competence, taking due account of relevant transversal perspectives. Within these terms of reference, the CDCJ prepared Recommendation CM/Rec(2014)7 on the protection of whistleblowers, which was subsequently adopted by the Committee of Ministers on 30 April 2014 and, most recently, Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making, adopted by the Committee of Ministers on 22 March 2017.¹¹⁷

2.1.9 Statements and reports by the Commissioner for Human Rights

65. The Commissioner for Human Rights also regularly releases statements and reports on the importance of civil society and in particular the importance of the work and safety of human rights defenders and has organised various round tables with human rights defenders.¹¹⁸ The office of the Commissioner also regularly engages in country work on this topic of priority and raises cases of those who are at risk through his dialogue with authorities as well as publicly, including through the media. Importantly, the Commissioner has intervened before the European Court of Human Rights in a number of cases concerning human rights defenders.¹¹⁹ Additionally, the Commissioner periodically addresses the importance of NHRIs' work in human rights comments and issue papers,¹²⁰ and includes engagement with NHRIs, where they exist, in the context of country visits. The

¹¹⁴ Venice Commission, Armenia, Opinion on the Draft Constitutional Law on the human rights defender, opinion no.866/2016, 12 December 2016.

¹¹⁵ See

<http://www.coe.int/en/web/ingo/-/guidelines-for-meaningful-civil-participation-in-political-decision-making?desktop=true>

¹¹⁶ The intention is that they will be part of a CM recommendation to be adopted by mid-July 2017.

¹¹⁷ See CDCJ website: <http://www.coe.int/en/web/cdcj>

¹¹⁸ See for example the Human Rights Comment on protecting human rights while countering terrorism (6 December 2016) and the issue paper on Safeguarding human rights in times of economic crisis (4 December 2013).

¹¹⁹ The cases in which the Commissioner intervened before the Court with third party interventions are: *Svetlana Estemirova v. the Russian Federation* (Application No. 42705/11); *Leyla Yunusova and Arif Yunusov v. Azerbaijan* (Application No. 68817/14), *Rasul Jafarov v. Azerbaijan* (Application No. 69981/14), *Anar Mammadli v. Azerbaijan* (Application no. 47145/14), *Intigam Aliyev v. Azerbaijan* (Application No. 68762/14), *Hilal Mammadov v. Azerbaijan* (Application No. 81553/12); See also: Round-tables with human rights defenders organised by the Office of the Council of Europe Commissioner for Human Rights: <http://www.coe.int/en/web/commissioner/human-rights-defenders>.

¹²⁰ See for example the Human Rights Comment on protecting human rights while countering terrorism (6 December 2016) and the issue paper on Safeguarding human rights in times of economic crisis (4 December 2013)

Commissioner consults and cooperates with ENNHRI on common topics of concern, including asylum and migration, counter-terrorism or the role of NHRIs in conflict and post-conflict situations.

2.1.10 Reports and activities of the Secretary General

66. Regarding freedom of assembly and freedom of association, the Secretary General devotes a distinct chapter to these rights in his annual report on the *State of democracy, human rights, and the rule of law*, the Secretary General, thus identifying the topic as a principal challenge in Europe.¹²¹

2.2 Other relevant international and regional standards and tools

2.2.1 The core international human rights treaties

67. The provisions, aims and objectives of the core international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and International Convention for the Protection of All Persons from Enforced Disappearance (CED) are relevant to the protection of human rights defenders and the exercise of the right to defend human rights.¹²²

68. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Article 13), the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Article 4) and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Article 11) have particular provisions on reprisals against individuals or groups for communicating with the respective Committees.

69. The Chairpersons of the UN treaty bodies, ten international committees of independent experts that monitor States parties' implementation of the core international human rights treaties and their optional protocols, have adopted and endorsed the Guidelines against Intimidation or Reprisals, known as the San José Guidelines, at their annual meeting from 22 to 26 June 2015.¹²³ The Guidelines enhance protection of those at risk, reminding States of their responsibility "to avoid acts constituting reprisals and to prevent, protect against, investigate and ensure accountability for acts of reprisals."¹²⁴

2.2.2. Resolutions, declarations and reports of the United Nations

70. Resolutions concerning civil society and the importance of an enabling environment are regularly passed by the General Assembly.

71. One of the most important texts for the protection of human rights defenders is the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (the UN Declaration on Human Rights Defenders) which was adopted by the General Assembly in 1998 by consensus.¹²⁵

¹²¹ See Annual Report 2016, Chapter 3, p. 53ff.

¹²² The core international human rights instruments and their monitoring bodies at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

¹²³

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI/MC/2015/6&Lang=en.

¹²⁴ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16154&LangID=E>.

¹²⁵ A/RES/62/152.

The General Assembly also remains active on the situation of human rights defenders and regularly adopts follow-up resolutions to the Declaration.¹²⁶

72. The General Assembly is also active on the subject of NHRIs. The GA dedicates biennial resolutions to NHRIs and calls for the establishment of NHRIs in compliance with the Paris Principles, underlining the important role NHRIs play in the promotion and protection of all human rights and fundamental freedoms to all.¹²⁷

73. Reports have been produced by the Special Rapporteur on freedom of opinion and expression, on, amongst other subjects, the protection of sources and whistle-blowers,¹²⁸ the right to access information,¹²⁹ and the protection of journalists and media freedom.¹³⁰

74. The Special Rapporteur on the rights to freedom of peaceful assembly and of association reports annually to the Human Rights Council on matters of relevance to civil society. Previous topics have included the ability of associations to access financial resources as a vital part of the right to freedom of association¹³¹ and challenges faced by groups most at risk when exercising or seeking to exercise the rights to freedom of peaceful assembly and/or of association.¹³²

75. The Special Rapporteur on the situation of human rights defenders (and its preceding mandate, the Special Representative of the Secretary-General on the situation of human rights defenders) has produced reports on the protection of human rights defenders,¹³³ ensuring an enabling environment¹³⁴ and on groups at particular risk.¹³⁵ The Special Rapporteur has also produced reports on meeting the standards of the right to freedom of association and an analysis on NGO laws,¹³⁶ and on the role of NHRIs in the promotion and protection of human rights and as protectors of human rights defenders.¹³⁷

76. Resolutions are regularly adopted by the Human Rights Council concerning civil society, NHRIs¹³⁸ and human rights defenders. Secretariats of UN agencies also publish useful guides and tools concerning civil society, for example the handbook of the Office of the UN High Commissioner for Human Rights (OHCHR) on NHRIs and the UNDP guide to cooperation with NHRIs.

77. A unique process by the Human Rights Council is the Universal Period Review (UPR), in which 193 UN Member States' human rights records are examined equally at a regular interval. The UPR allows states both to declare actions taken to improve the human rights record but also to share best practices at global level. Paris Principles-compliant NHRIs have participation rights, with the right to speak immediately following the state¹³⁹, and accredited CSOs can speak at the end of the

¹²⁶ For example, A/RES/64/163.

¹²⁷ For example, A/RES/68/171 and A/RES/70/163.

¹²⁸ A/70/361.

¹²⁹ A/68/362. See also A/HRC/11/4, A/HRC/7/14, E/CN.4/2005/64, E/CN.4/2004/62, E/CN.4/2003/67 and E/CN.4/2000/63.

¹³⁰ A/HRC/20/17. See also A/HRC/14/23, A/HRC/11/4, A/HRC/7/14, A/HRC/4/27, E/CN.4/2006/55 and E/CN.4/2005/64.

¹³¹ A/HRC/23/39.

¹³² A/HRC/26/29.

¹³³ A/HRC/31/55, A/70/217, A/65/223. A/HRC/13/22 and A/56/341.

¹³⁴ A/HRC/25/55. See also A/62/225 (the right to protest in the context of freedom of assembly), A/68/262 (large-scale development projects and human rights defenders) and A/61/312 (freedom of assembly)

¹³⁵ See A/HRC/19/55 (journalists and media workers, defenders working on land an environment issues, and youth and student defenders) and A/HRC/16/44 (women human rights defenders and those working on women's rights or gender issues).

¹³⁶ A/64/226. See also A/59/401 (meeting the standards of the right to association).

¹³⁷ A/HRC/22/47.

¹³⁸ See for example A/HRC/17/L.18, A/HRC/20/L.15, A/HRC/RES/23/17, A/HRC/27/L.25.

¹³⁹ A/HRC/RES/16/21.

UPR session. Each of the UN treaty bodies has expressly incorporated modalities for NHRI interaction in their institutional frameworks; be it in rules of procedure, working methods or general comments and statements of the committees. The UN treaty bodies have been called upon to harmonise their regulation concerning NHRIs which would facilitate efficient contribution of NHRIs to the UN treaty body procedures.¹⁴⁰

2.2.3 Reports of OSCE / ODIHR

78. A document outlining challenges and practices for human rights defenders in the OSCE region was produced by ODIHR. Although the report covers the period from April 2007 to April 2008, its findings have not lost their relevance and it contains useful information on the obstacles faced by human rights defenders in Europe and good practices for overcoming these barriers. The report also contains responses received to a questionnaire that was sent to States regarding their practices to protect human rights defenders. In 2014, Guidelines on the Protection of Human Rights Defenders, which cover both the physical integrity, liberty and security and dignity of human rights defenders, as well as a safe and enabling environment conducive to human rights work, were published by ODIHR.

79. Since 1990, the establishment/ strengthening of independent NHRIs had become part of the OSCE participating states' human dimension commitments.¹⁴¹ Attention has been dedicated to NHRIs in a number of OSCE human dimension meetings, including a 2006 meeting specifically dedicated to human rights defenders and NHRIs¹⁴² and the Human Dimension Seminar on the role of national human rights institutions (NHRIs) in promoting and protecting human rights in the OSCE area held in Warsaw on 1-3 June 2015. Two OSCE chairmanships (Lithuania in 2011 and Serbia in 2015) have prioritised NHRIs as specific issue-item on the OSCE human dimension agenda. OSCE human dimension seminars/meetings have been organised with participation of OSCE member states, civil society organisations and NHRIs addressing how to ensure the effectiveness and independence of NHRIs across the OSCE region, and how NHRIs across the OSCE area can fruitfully cooperate with government authorities and civil society with a view to further the promotion and protection of human rights.¹⁴³

2.2.4 Guidelines and other reports of the European Union (EU)

80. In 2014, the EU Human Rights Guidelines on Freedom of Expression Online and Offline were published by the Council of the European Union. These include guidelines on the protection of whistleblowers and the right to privacy.

¹⁴⁰ See, for example: Report for the 27th Annual Meeting of Treaty Body Chairpersons, A/70/302, §87 available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/70/302&Lang=en

¹⁴¹ Document of the Second Conference on the Human Dimension of the CSCE, Copenhagen, 5 June-29 July 1990, § 27.

¹⁴² The issue of NHRIs has been discussed at a number of human dimension events, including in 2006 at the Supplementary Human Dimension Meeting (SHDM) entitled Human Rights Defenders and NHRIs: Legislative, State and Non-State Aspects, in 2007, at the SHDM on Protection and Promotion of Human Rights: Responsibilities and Effective Remedies, and in 2008 on the Role and Mandate of National Institutions against Discrimination in Combating Racism and Xenophobia with a Special Focus on Persons Belonging to National Minorities and Migrants. See: Background to Supplementary Human Dimension Meeting on National Human Rights Institutions (Ombuds-Institutions, Commissions, Institutes and Other Mechanisms) 14-15 April 2011, Vienna, Annotated Agenda.

¹⁴³ Supplementary Human Dimension Meeting on National Human Rights Institutions (Ombuds-Institutions, Commissions, Institutes and Other Mechanisms) 14-15 April 2011, Vienna, PC.SHDM.GAL/5/11 of 20 May 2011 (report including recommendations). From 1-3 June 2015, an OSCE Human Dimension seminar was organised on 'The Role of National Human Rights Institutions (NHRIs) in Promoting and Protecting Human Rights in the OSCE Area', Warsaw, 1-3 June 2015.

81. A policy document regarding Europe's Engagement with Civil Society in External Relations (2012) was released by the European Commission.

82. The European Union Guidelines on Human Rights Defenders, issued in 2004 and revised in 2008, provide information on the EU's external human rights policy in relation to human rights defenders, including recommendations to EU organs and representations in third countries to protect human rights defenders.

83. The EU Parliament has been calling on EU member states to establish an NHRI in compliance with the Paris Principles.¹⁴⁴ Two reports on NHRIs were produced by the EU Agency for Fundamental Rights (FRA): an initial mapping of NHRIs in EU Member States in 2010¹⁴⁵, and a Handbook dedicated to the establishment and accreditation of NHRIs in accordance with the Paris Principles in 2012¹⁴⁶. In the context of its external human rights policy, the EU provides substantial political and financial support for the establishment and strengthening of Paris Principles compliant NHRIs and their networks across the world.¹⁴⁷

3. Civil Society Organisations (CSOs)

3.1 Supportive legal regulatory framework at domestic level

84. Article 11 ECHR provides that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” Almost every major international¹⁴⁸ and regional¹⁴⁹ human rights instrument also protects the rights of freedom of peaceful assembly and association, it being an “essential right in a democracy”¹⁵⁰ that is an “essential prerequisite for other fundamental freedoms”.¹⁵¹ Article 5 of the UN Declaration on Human Rights Defenders states that “[f]or 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 [...] to form, join and participate in non-governmental organizations, associations or groups.”

85. Since the right to association is “a general capacity for the citizens to join without undue interference by the State in associations in order to attain various ends,”¹⁵² if it is not guaranteed, the very existence of civil society may come under threat. Indeed, freedom of association serves “as a barometer of the general standard of the protection of human rights and the level of democracy in the

¹⁴⁴ European Parliament, Resolution P6_TA(2005)0208, §16. This call was repeated in: Resolution of 14 January 2009 on the Situation of Fundamental Rights in the European Union 2004-2008, A6-0479/2008, § 16.

¹⁴⁵ European Union Agency for Fundamental Rights, publication on National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU I, 2010.

¹⁴⁶ European Union Agency for Fundamental Rights, Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union, 2012.

¹⁴⁷ The 2015-2019 EU Action Plan on Human Rights and Democracy sets out EU strategic actions with a view to support the capacity of NHRIs in line with the Paris Principles and their networks. See: Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019, 10897/15 of 20 July 2015, Annex, Action 1. The 2014 EIDHR Work Programme allocates funds to ‘strengthen the capacities of National Human Rights Institutions (NHRIs) and the cooperation with their regional and international networks in promoting and protecting human rights in line with the UN Paris Principles’: EIDHR Work Programme 2014, Annex 5, § 2.1.

¹⁴⁸ See Article 20 UDHR; Article 21 ICCPR; Article 8 ICESCR; Article 5(d)(ix) ICERD; Article 7(c) CEDAW; Article 15 CRC; Article 29(b)(i) CRPD.

¹⁴⁹ See Article 10 ACHPR; Article 15 ACHR; Articles 24 and 35 of the revised Arab Charter on Human Rights.

¹⁵⁰ PACE Resolution 2116 (2016), §2.

¹⁵¹ CDL-AD(2011)035, Opinion on the compatibility with human rights standards of the legislation on nongovernmental organisations of the Republic of Azerbaijan, § 45 and CDL-AD(2014)046, European Commission for Democracy Through Law (Venice Commission), OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), Joint Guidelines on Freedom of Association, § 8.

¹⁵² CM/Monitor(2005)1-Vol, 11 October 2005, § 1.b.4.

country.”¹⁵³ Ways in which national legislation can affect the right to association include matters such as initial and continuing registration requirements, effective participation in decision making and access to resources, including funding. These are discussed in more detail below.

3.1.1 Standards and regulation at domestic level

3.1.1.1 Freedom of association

86. As the ECtHR has stated, “[t]he right to form an association is an inherent part of the right set forth in art 11. [...] 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.”¹⁵⁴ CSOs “come into being through the initiative of individuals or groups of persons. The national legal and fiscal framework applicable to them should therefore permit and encourage this initiative.”¹⁵⁵

3.1.1.1.1 Promotion of self-regulation

87. The Committee of Ministers have stated that CSOs are “voluntary, self-governing bodies” of “like-minded people who come together to pursue a common interest”¹⁵⁶ which the democratic State has no inherent interest in regulating.¹⁵⁷ The Committee of Ministers has therefore recommended that CSOs should not be subject to direction by public authorities¹⁵⁸ and that there should be a presumption in favour of the lawful formation, objectives and activities of associations.¹⁵⁹ The ECtHR has stated that Article 11 “safeguards associative life against unjustified State interference.”¹⁶⁰ More specifically, the Joint ODIHR / Venice Commission Guidelines of Freedom of Association state:

Founders and members of associations shall be free in the determination of the objectives and activities of their associations, within the limits provided for by laws that comply with international standards. In pursuing their objectives and in conducting their activities, associations shall be free from interference with their internal management, organisation and affairs. Associations have the freedom to determine the scope of their operations, meaning that they can determine whether or not they wish to operate locally, regionally, nationally or internationally. Associations shall also be free to be members of other associations, federations and confederations, whether national or international.¹⁶¹

88. Article 8 ECHR protects the right to privacy which imposes an obligation on States not to, amongst other things, condition any decisions and activities of the association, reverse the election of board members, request associations to submit annual reports in advance and to enter an association’s premises without advance notice.¹⁶²

¹⁵³ CDL-AD(2011)035, Opinion on the compatibility with human rights standards of the legislation on nongovernmental organisations of the Republic of Azerbaijan, § 41.

¹⁵⁴ *Sidiropoulos and Others v. Greece* (26695/95) 10 July 1998.

¹⁵⁵ Fundamental Principles on the Status of Non-governmental Organisations in Europe, § 6.

¹⁵⁶ CM/Rec(2007)14, §1.

¹⁵⁷ See also A/70/266, § 23.

¹⁵⁸ CM/Rec(2007)14, §6.

¹⁵⁹ CM/Rec(2007)14, §67.

¹⁶⁰ *Fernández Martínez v. Spain* [GC] (56030/07) 12 June 2014.

¹⁶¹ ODIHR and Venice Commission (2015), § 29.

¹⁶² A/20/27, § 65.

89. The Conference of INGOs of the Council of Europe has produced a report on the Internal Governance of Non-Governmental Organisations,¹⁶³ and civil society members have provided their own guidelines to self-regulation.¹⁶⁴

3.1.1.1.2 Registration modalities, acquisition of legal personality

90. The promotion of self-regulation is important. However, the ECtHR has emphasised that “genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere. [...] Accordingly, it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas they are seeking to promote.”¹⁶⁵

91. An important part of guaranteeing the proper functioning of a CSO is ensuring that modalities concerning registration and acquisition of legal personality are in line with international human rights standards.

92. Best practice is that associations should not be required to register or obtain legal personality or recognition in order to carry out legal activities.¹⁶⁶ Freedom of association should therefore also cover de facto associations¹⁶⁷ or “informal bodies or organisations”.¹⁶⁸ Thus, “all persons [...] shall be free to establish an association, with or without legal personality,”¹⁶⁹ and the activities of the latter should not be criminalised.¹⁷⁰ Legislation in France,¹⁷¹ Norway¹⁷² and Switzerland¹⁷³ explicitly allows for the existence of unregistered associations. However, the ECtHR has made it clear that Article 11 does not seek to protect a mere gathering of people desirous of “sharing each other’s company” and therefore some kind of institutional structure is required, even with de facto organisations.¹⁷⁴

93. However, many associations may desire registration or legal recognition in order to enjoy a number of benefits. These include the ability to hold a bank account, to employ staff, to have assets in its own name, and to provide limited legal personality for the board members and staff of the organisation.¹⁷⁵ It is important to note that registration and legal personality are two separate concepts, and that many European states do not require prior registration for informal groups to receive recognition as a legal person.¹⁷⁶ Many Member States impose higher reporting and corporate governance standards on NGOs that wish to register as charities. As charitable status gives additional credibility to fund-raising with the general public, and may give tax advantages, these higher regulatory requirements are reasonable as long as the State does not seek to limit the independence of charities.

¹⁶³ OING Conf/Exp (2010) 1.

¹⁶⁴ See the CIVICUS Guide to Self-Regulation, available at <http://civicus.org/index.php/resources/2001-accountability-for-civil-society-by-civil-society-a-guide-to-self-regulation-initiatives>

¹⁶⁵ *Ouranio Toxo and Others v. Greece* (74989/01) 20 October 2005, §37.

¹⁶⁶ OSCE (2013), p14. See also A/59/401, § 82 (a), International Center for Not-for-Profit Law (2006) and Venice Commission CDL-AD (2011)035, §58.

¹⁶⁷ A/64/226, §19.

¹⁶⁸ Recommendation CM/Rec(2007)14, Article I(3).

¹⁶⁹ ODIHR and Venice Commission (2015), § 28.

¹⁷⁰ A/64/226, § 60.

¹⁷¹ Law of Associations 1901, Article 2.

¹⁷² <http://www.ohchr.org/Documents/Issues/Defenders/Answers/States/Norway.pdf>

¹⁷³ Swiss Civil Code, Article 60.

¹⁷⁴ CM/Monitor(2005)1-Vol, 11 October 2005, §1.b.4.

¹⁷⁵ The International Center for Not-For-Profit Law and UNDP (2009), p. 20.

¹⁷⁶ For example, Germany, Denmark, Portugal and Sweden. See: OSCE (2013), pp. 27-28.

94. The UN Special Rapporteur on the situation of human rights defenders considers that CSOs should have the right to register as legal entities.¹⁷⁷ Best practice recommends a system of “declaration” or “notification” whereby NGOs are automatically granted legal personality upon receipt by the authorities of notification by the founders that an organisation was created.¹⁷⁸

95. If authorisation is not automatic, international standards lay down a set of basic safeguards, namely that the registration procedure:¹⁷⁹

- is not burdensome and lengthy;¹⁸⁰
- is clear and simple;¹⁸¹
- is based on rules that are widely published;¹⁸²
- is not discriminatory;¹⁸³
- is overseen by an independent and impartial organ that is adequately staffed with competent professionals;¹⁸⁴
- does not charge fees at a level that discourages applications,¹⁸⁵ and is ideally free of charge;¹⁸⁶
- results in a decision that is communicated to the applicant, with any refusal including written reasons and subject to appeal to an independent and impartial court;¹⁸⁷
- does not require renewal on a periodic basis;¹⁸⁸ and
- does not require more than two founders to form an association.¹⁸⁹

3.1.1.1.3 Responsibilities of organisations and restrictions to the freedom of association

96. The Committee of Ministers has noted that “the operation of NGOs entails responsibilities as well as rights.”¹⁹⁰ Restrictions to the freedom of association may therefore in certain cases be justified, and States are not precluded from “laying down rules and requirements on corporate governance and management and from satisfying themselves that they [are] observed.”¹⁹¹

97. However, outright prohibition of an association will rarely be proportionate to any legitimate aim being pursued. For example, in one case, the ECtHR found that refusal to register an association

¹⁷⁷ A/64/226, p.16.

¹⁷⁸ see A/59/401, § 51.

¹⁷⁹ See also regarding these criteria the Expert Council on NGO Law First Annual Report on “Conditions of Establishment of Non-Governmental Organisations” (OING Conf/Exp (2009) 1).

¹⁸⁰ OSCE (2013), p.14. See also A/64/226 And CM/Rec(2007)14, 37 and Venice Commission CDL-AD(2010)054, §68. The ECtHR has further stated that “significant delays in the registration procedure, if attributable to the Ministry of Justice, amounts to an interference with the exercise of the right of the association’s founders to freedom of association.” (*Ismayilov v. Azerbaijan* (4439/04) 17 January 2008, §48) and that if the process is overly lengthy, it may be considered a de facto refusal of registration and therefore a violation of Article 11 (see *Ramazanova and Others v. Azerbaijan* (44363/02) 1 February 2007, §§56-68.) See also *Church of Scientology of St Petersburg and Others v. Russia* (47191/06) where the Court found that an unreasonably lengthy waiting period prior to obtaining legal personality could not be considered necessary in a democratic society. While not strictly relating to CSO, see also by analogy, *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, no. 40825/98, 31 July 2008, (§§ 77-82, 106-117).

¹⁸¹ OSCE (2013), p. 14 and CM/Rec(2007)14,29.

¹⁸² CM/Rec(2007)14, 29.

¹⁸³ OSCE (2013), p. 14. See also CM/Rec(2007)14, §76.

¹⁸⁴ International Center for Not-for-Profit Law (2006); CM/Rec(2007)14, 36.

¹⁸⁵ CM/Rec(2007)14, 33.

¹⁸⁶ A/HRC/20/27, § 57.

¹⁸⁷ CM/Rec(2007)14, 38.

¹⁸⁸ CM/Rec(2007)14, 41.

¹⁸⁹ OSCE (2013).

¹⁹⁰ CM/Rec(2007)14, preamble.

¹⁹¹ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (37083/03) 8 October 2009.

even before it had commenced operations, because the authorities disagreed with the association's aims of drawing attention to miscarriages of justice in the courts system, was disproportionate to the aim pursued.¹⁹² In another case, the Court found a violation where an association was liquidated due to its engagement in religious activity, contrary to its founding document.¹⁹³ Decisions that disregard the provisions of applicable federal legislation, and decisions that involve a requirement for which no legal basis exists, will also lead to a violation of Article 11.¹⁹⁴

98. The ECtHR has indicated that, very rarely, the refusal to grant an association registration or legal personality, removal of these statuses or dissolution of the group may be justified. One example might be groups directly calling on individuals to commit acts of violence,¹⁹⁵ or an association whose activities amounted to widespread racist intimidation of a group.¹⁹⁶ States may also restrict organisations that distribute profits from registering, although such organisations would naturally be entitled to register as a corporation. The ECtHR has found that refusal to register organisations that are better classed as public law organisations, or branches of existing organisations, may not necessarily be disproportionate.¹⁹⁷ As such, the Court did not find a violation regarding a restriction on a group of self-employed farmers registering as a trade union where the relevant legislation only permitted public servants and employees to do so.¹⁹⁸

99. There may also be legitimate requirements during the registration process. Legislation may insist that CSOs with legal personality should normally have statutes, comprising certain important information regarding the establishment and operation of the organisation.¹⁹⁹ However, the Human Rights Committee found a violation of Article 22(2) ICCPR in relation to one country for refusing to register a human rights association because, *inter alia*, the Ministry of Justice had not been provided with a list of its founders and the record of its constituent assembly had not been signed by the chair. Where requirements during the registration process interfere with the freedom of association, they must be justified,²⁰⁰ i.e. be prescribed by law, be necessary in a democratic society and be proportionate to the aim pursued.

100. The Recommendation of the Committee of Ministers on the legal status of NGOs in Europe imposes certain responsibilities on CSOs once they are registered.²⁰¹ CSOs "should not distribute any profits which might arise from their activities to their members or founders but can use them for the pursuit of their objectives."²⁰² They must not misuse tax benefits, for example utilising property

¹⁹² *Association of Victims of Romanian Judges and Others v. Romania* (47732/06) 14 January 2014. See also *Socialist Party and Others v. Turkey* (26482/95) 12 November 2003 and *Gorzelik and others v. Poland* (44158/98), 20 December 2001. It has reached a similar conclusion in *House of Macedonian Civilization and Others v. Greece* (1295/10) 9 July 2015. See also *Zhechev v. Bulgaria* (57045/00), 21 June 2007.

¹⁹³ On dissolution, see also *Islam-Itihad Association and Others v Azerbaijan* (5548/05) 13 November 2014.

¹⁹⁴ *Church of Scientology of St Petersburg and Others v. Russia* (47191/06) 2 October 2014.

¹⁹⁵ OSCE (2013), p.27.

¹⁹⁶ *Vona v. Hungary* (35943/10) 9 July 2013.

¹⁹⁷ *Union of Jehovah's Witnesses of Georgia and Others v. Georgia* (72874/01) 21 April 2015.

¹⁹⁸ *Manole and "Romanian Farmers Direct" v. Romania* (46551/06) 16 June 2015.

¹⁹⁹ CM/Rec(2007)14, 18-20. See also International Center for Not-for-Profit Law (2006).

²⁰⁰ *Korneenko et al. v. Belarus*, communication No. 2153/2012.

²⁰¹ Council of Europe bodies have taken note of the NGO laws in the Russian Federation. The Expert Council on NGO Law, an organ of the Council of Europe Conference of INGOs, released a report focusing particularly on the concept, contained within the laws, of "undesirable" organisations and their "undesirable" activities (Opinion of November 2015. The Opinion was endorsed by the INGO Conference in its Recommendation CONF/PLE(2015)REC4). The Venice Commission has further stated that the label given to NGOs who receive foreign funding as "foreign agents" is unfortunate as, given the historical context of the term, "representatives of state institutions will very likely be reluctant to co-operate with them" and therefore the qualification cannot be deemed "necessary in a democratic society." (Venice Commission CDL-AD(2014)025). The Council of Europe Commissioner for Human Rights has also expressed his concern at various aspects of the legal framework (CommDH(2015)17).

²⁰² CM/Rec(2007)14, § 9.

acquired on a tax-exempt basis for a non-tax-exempt purpose.²⁰³ Organisations, in particular those who have received any form of public support, submit (usually annual) reports and that they are audited.²⁰⁴ All reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality, and foreign NGOs should be subject to the reporting requirements only in respect of their activities in the host country.²⁰⁵ In line with UN standards, such reporting requirements should also not inhibit the functional autonomy of associations and should not discriminatorily impose restrictions on potential sources of funding.²⁰⁶ Finally, such requirements should not be more onerous than similar requirements imposed on businesses.²⁰⁷

101. Sanctions for breach of these restrictions can, in principle, be directed to the CSO concerned, those who have founded it and those who direct, work for or belong to it.²⁰⁸ The sanctions must be foreseeable, in order to be regarded as “prescribed by law”²⁰⁹ and must observe the principle of proportionality.²¹⁰

3.1.1.1.4 Privileges encouraging civil society activity to the public interest

102. The Committee of Ministers, as well as international bodies, have recommended that national legislation assists CSOs “in the pursuit of their objectives through public funding and other forms of support.”²¹¹ In particular, this may involve tax relief or exemption on the following activities:

- exemption from income taxation on value received from donations (including from government organs and international organisations) as well as on membership dues (if applicable);
- income tax benefits (such as deductions or credits) should also be made available on donations of individuals and business entities;
- tax benefits on the economic activities of the CSO, including income from investments, rent, royalties, economic activities and property transactions;
- preferential treatment to CSOs under VAT regimes and regarding other tax regimes and customs duties; and
- tax incentives as well as other policies that encourage the formation and maintenance of endowments.²¹²

103. Aside from legal and fiscal privileges, states may also foresee other forms of privileges for CSOs, which may vary in their scope and nature. Any such form of public support for NGOs should be governed by clear and objective criteria,²¹³ and subject to compliance with normal corporate governance requirements (transparency and taxation) and the terms, where applicable, of government funding agreements. The Committee of Ministers also noted that NGOs may only be subjected to the

²⁰³ CM/Rec(2007)14, § 54.

²⁰⁴ CM/Rec(2007)14, § 65. Ideally, the onerousness should be proportionate to the size of the organisation or the amount of the funding received (The International Center for Not-For-Profit Law and UNDP (2009), p21-22).

²⁰⁵ CM/Rec(2007)14, §§ 64 & 66.

²⁰⁶ HRC resolution 22/6 (adopted on 21 March 2013).

²⁰⁷ A/70/266, §§ 52-53.

²⁰⁸ Expert Council on NGO Law, Third Annual Report on Sanctions and Liability in Respect of NGOs (OING Conf/Exp (2011) 1, p10

²⁰⁹ See *NF v Italy* (37119/97) 2 August 2001 and *Maestri v Italy* [GC] (39748/98) 17 February 2004.

²¹⁰ Conf/Exp (2011) 1, p.12. For examples of questions related to sanctions in ECtHR case law, see also : Expert Council report on NON-GOVERNMENTAL ORGANISATIONS: REVIEW OF DEVELOPMENTS IN STANDARDS, MECHANISMS AND CASE LAW 2013-2015, starting p.42 OING Conf/Exp (2015) 2.

²¹¹ CM/Rec(2007)14, § 57.

²¹² CM/Rec(2007)14. See also International Center for Not-for-Profit Law (2006).

²¹³ CM/Rec(2007)14, § 58. See also §§ 61-63.

same administrative, fiscal, civil and criminal law obligations and sanctions as applicable to all legal persons. For transparency reasons, NGOs, which have been granted any form of public support can be required to submit financial reports and an overview of their activities to a designated supervisory body.²¹⁴ The Special Rapporteur on human rights defenders recommends that ‘states should prohibit extensive scrutiny by tax authorities and abuse of fiscal procedures.’²¹⁵

104. Governments may encourage the activities of CSOs in other ways, for example by enacting provisions to allow CSOs to receive cash or in-kind donations from abroad, by encouraging employers to permit employees to have time off to engage in voluntary work for CSOs, and enacting legislation (including public procurement legislation where appropriate) to encourage partnership between government and CSOs and providing for government financing of projects carried out by CSOs, through grants and contracts (see 3.5).²¹⁶

3.1.1.2 Freedom of assembly

105. Freedom of association is intimately connected with freedom of assembly: since the right to assemble presumes the active presence of others for its realisation, restrictions of freedom of association will often undermine the right to assemble.²¹⁷ The Venice Commission defines as assembly as “the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose.”²¹⁸ Freedom of assembly is thus essential for CSOs in two main ways. Firstly, a simple meeting of the CSO (which are often open to the public and may therefore meet the “in a public place” criteria) would likely constitute an assembly. Secondly, it has been seen that one of the common activities of CSOs is advocacy, lobbying and awareness-raising, which will often involve an assembly. The ECtHR has noted that the right to assemble is vital as it is an inexpensive means of expression, it can lead to valuable publicity and attention and it demonstrates strength of feeling.²¹⁹

106. Freedom of assembly may be governed by specific legislation detailing the scope and implementation of the right. Other areas of national law will also be relevant, such as the rules governing police procedure, in particular the use of force.

107. The ODIHR / Venice Commission Guidelines of Freedom of Assembly state that national legislation regulating this right needs to be well-drafted, i.e. clear, precise and certain.²²⁰ They should also be adopted through a broad, inclusive and participatory process (see below) and subject to regular review.²²¹

3.1.1.2.1 Scope of the right

108. Article 11 ECHR protects only assemblies that are peaceful. Assemblies which are violent or during which weapons are carried are not protected.²²²

²¹⁴ CM/Rec (2007)14, §§ 7 & 62.

²¹⁵ p. 100, 07/11.

²¹⁶ International Center for Not-for-Profit Law (2006).

²¹⁷ Venice Commission and ODIHR (2010) Many international human right instruments, such as the ECHR, list the two rights in the same article.

²¹⁸ Venice Commission and ODIHR (2010), § 1.2

²¹⁹ *Ezelin v France* (11800/85) 26 March 1991.

²²⁰ ODIHR and Venice Commission (2015), p18. See also *Vyerentsov v. Ukraine* (20372/11) 11 July 2013.

²²¹ ODIHR and Venice Commission (2015), p. 18.

²²² See OSCE (2010), section 1.3

109. Consistent with Article 14 ECHR, the right should also be applied 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.²²³

3.1.1.2.2 Prior approval

110. A system of prior approval before assemblies can take place is not appropriate.²²⁴ While the ECtHR has held that States have the right to require authorisation,²²⁵ it has made clear that criminal²²⁶ or administrative²²⁷ sanctions for those who have organised or participated in unapproved assemblies are contrary to Article 11, in particular because of the resulting chilling effect.²²⁸

111. The majority of European states have in place a system of notification where the active approval of public authorities is not required.²²⁹ Such a system does not encroach upon the essence of Article 11.²³⁰

112. The ECtHR has elaborated requirements to ensure that the notification procedure does not present a “hidden obstacle” to the right.²³¹ It should be employed only to ensure the peaceful nature of the meeting²³² and there should be a presumption in favour of assemblies.²³³ The notification period must be as short as possible, while still allowing sufficient preparation time for the assembly: a maximum of several days, ideally within 48 hours.²³⁴

113. Many cases before the court deal with the issue of disruption to daily life. In one case,²³⁵ the Court reiterated that “any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption to traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings” if Article 11 is “not to be deprived of all substance”. This only seems to apply if the disruption is incidental to the protest: the Court was less tolerant in another case where protestors had deliberately blocked roads with tractors.²³⁶ Where the authorities banned a march because, amongst other reasons, the proposed location (a park) was too small for the protest, the Court considered that “it was the authorities’ duty to reflect on the possible alternative solutions and propose another venue to the organisers.”²³⁷ In

²²³ Venice Commission and ODIHR (2010), §2.5. Non-discrimination clauses are also found in ICCPR Article 2(1) and ICESCR Article 2(2). The 1993 Vienna Declaration and Programme of Action further states that “[a]ll human rights are universal, indivisible and interdependent and interrelated.” See also *Baczowski and Others v. Poland* (1543/06) 26 September 2007.

²²⁴ See, e.g., A/68/299 §24. For example, the Constitutional Court of Georgia has held that part of a law requiring a permit procedure was unconstitutional (*Georgian Young Lawyers’ Association Zaal Tkeshelashvili, Lela Gurashvili and Others v. Parliament of Georgia* (5 November 2002) N2/2/180-183.)

²²⁵ *Ziliberberg v. Moldova* (61821/00) 4 May 2004.

²²⁶ *Navalnyy and Yashin v. Russia* (76204/11) 4 December 2014. See also *Nemtsov v. Russia* (1774/11) 31 July 2014 and *Uzunget and Others v. Turkey* (21831/03) 13 January 2010.

²²⁷ *Kasparov and Others v. Russia* (21613/07) 3 October 2013; *Kakabadze and Others v. Georgia* (1484/07) 2 October 2012; *Gasparyan v. Armenia* (35944/03) 13 January 2009.

²²⁸ *Yılmaz Yıldız and Others v. Turkey* (4524/06) 14 October 2014.

²²⁹ OSCE (2008b), p.30.

²³⁰ *Éva Molnár v. Hungary* (10346/05) 7 January 2009.

²³¹ *Eva Molnar v Hungary* (10346/05) 7 January 2009, § 37.

²³² *Rassemblement Jurassien Unité Jurassienne v. Switzerland* (8191/78) 10 October 1979.

²³³ A/HRC/31/66, § 28.

²³⁴ A/HRC/31/66, § 28. See *Shmushkovych v. Ukraine* (3276/10) 14 November 2013.

²³⁵ *Kuznetsov v. Russia* (10877/04) 23 October 2008 § 44. See also *Saska v. Hungary* (58050/08) 27 November 2012, *Oya Ataman v. Turkey* (74552/01) 5 March 2007 and *Alekseyev v. Russia* (4916/07, 25924/08 and 14599/09) 21 October 2010, § 75.

²³⁶ *Kudrevičius and Others v. Lithuania* [GC] (37553/05) 15 October 2015.

²³⁷ *Primov and Others v. Russia* (17391/06) 12 June 2014.

another case, the arrest of protestors for refusing to accept a change of venue did not breach Article 11.²³⁸

114. Even where the authorities require notification, allowances should be made for spontaneous assemblies,²³⁹ which are important for CSOs challenging on-going or time-critical events. States should not disperse an assembly merely because the notification requirements have not been complied with.²⁴⁰ In Germany, the duty to register outdoor assemblies, as stipulated in the law on assemblies, is interpreted as not being applicable to spontaneous assemblies.²⁴¹

115. Similarly, approval of assemblies should not be made conditional on organisation by a registered association. As the ECtHR has stated, “while past findings of national courts which have screened an association are undoubtedly relevant in the consideration of the dangers that its gatherings may pose, an automatic reliance on the very fact that an organisation has been considered anti-constitutional – and refused registration – cannot suffice to justify under Article 11(2) of the Convention a practice of systematic bans on the holding of peaceful assemblies.”²⁴²

3.1.1.2.3 Facilitating the assembly

116. Under Articles 2 and 3 ECHR, law enforcement agencies are required to refrain from using excessive force on protestors.²⁴³ However, PACE has expressed concern regarding the frequent use of excessive force against peaceful demonstrators, including the systematic and inappropriate use of tear gas and other “less-lethal” weapons.²⁴⁴

117. Under Council of Europe standards, States are under “a positive duty to take reasonable and appropriate measures to enable lawful demonstrations to take place without participants fearing physical violence.”²⁴⁵ Where such violence does occur, the Convention requires an effective investigation.²⁴⁶ International standards on the conduct of law enforcement officials require such officials to protect all persons against illicit acts and to protect the human rights of all.²⁴⁷

118. Consistent with ECtHR case-law, crowd management techniques may legitimately involve temporary deprivations of liberty so long as they are proportionate.²⁴⁸ Law enforcement agencies and officials should take all reasonable steps to communicate with assembly organisers and/or participants regarding the policing operation and any safety or security measures.²⁴⁹ Facilitating the assembly may also require the issuance of travel permits to allow individuals to travel to attend peaceful assemblies²⁵⁰ and facilitating assemblies to take place on private land.²⁵¹

²³⁸ *Berladir and Others v. Russia* (34202/06) 10 July 2012.

²³⁹ *Bukta v. Hungary* (25691/04) 17 July 2007. See also *Tatar and Faber v. Hungary* (26005/08 and 26160/08) 12 September 2012.

²⁴⁰ *Bukta v. Hungary* (25691/04) 17 July 2007.

²⁴¹ OSCE (2008b).

²⁴² *United Macedonian Organisation ILINDEN v. Bulgaria* (29221/95 and 29225/95) 2 October 2001, § 92.

²⁴³ See *Balçık and Others v. Turkey* (25/02) 29 November 2007 and *Biçici v. Turkey* (30357/05) 27 May 2010, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and OSCE (2008a) §§ 65-74.

²⁴⁴ PACE Resolution 2116 (2016), § 5.

²⁴⁵ Venice Commission and ODIHR (2010), p56. See also *Ozgur Gundem v. Turkey* (23144/93) 16 March 2000, §§ 42-43; *Promo Lex and Others v the Republic of Moldova* (42757/09) 24 February 2015.

²⁴⁶ See *Identoba and Others v Georgia* (73235/12) 12 May 2015; Other security measures needed should also be provided free of charge: Venice Commission and ODIHR (2010), pp. 29-30.

²⁴⁷ See the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), in particular Principles 9, 13 and 14 and Code of Conduct for Law Enforcement Officials (34/169)(1979).

²⁴⁸ See *Austin and Others v. the United Kingdom* [GC] (39692/09, 40713/09 and 41008/09) 15 March 2012.

²⁴⁹ See *Frumkin v. Russia* (74568/12) 5 January 2016 §§ 127-128.

²⁵⁰ *Adali v. Turkey* (38187/97) 31 March 2005; *Djavit AN v. Turkey* (20652/92) 9 July 2003.

119. States may adopt special regulations to enable a secure working environment for media representatives who are participating in the assemblies due to their work. This will ensure additional guarantees for media representatives to be treated properly during the assemblies by the law enforcement agencies.

120. In March 2016 the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association compiled a series of practical recommendations oriented around 10 guiding principles applicable to the proper management of assemblies. The recommendations were based on consultations with over 100 experts and more than 50 UN Member States.²⁵²

121. In 2016 the OSCE Office for Democratic Institutions and Human Rights, published a comprehensive Human Rights Handbook on Policing Assemblies.²⁵³ Another useful resource are the 2015 Amnesty International guidelines for the implementation for the UN Basic Principles on the Use of Force and Firearms by law enforcement officials²⁵⁴

3.1.1.2.4 Restrictions to the right

122. National legislation may restrict the right to freedom of assembly in certain circumstances. Article 11(2) ECHR states that restrictions must be “prescribed by law” and “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”.²⁵⁵ Such restrictions must conform to the principles of legality, necessity and proportionality.

123. Article 11(2) ECHR also states that it 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.” As the ECtHR has stated, “in view of the essential nature of freedom of assembly and its close relationship with democracy there must be convincing and compelling reasons to justify an interference with this right.”²⁵⁶ Even where assemblies are banned to prevent clashes and human casualties, the Court will examine whether the measures taken “proportionate to the aim pursued” and whether the reasons adduced by the national authorities are “relevant and sufficient.”²⁵⁷ Restrictive laws must be precise, certain and foreseeable, in particular in the case of provisions that grant discretion to state authorities.²⁵⁸

124. In line with UN standards, where restrictions are proposed by the authorities, they must never entirely extinguish the right nor deprive it of its essence and should be put in writing, justified and communicated to the organisers within a time frame prescribed by law.²⁵⁹ Those exercising their right to assemble have a duty to comply with the lawful restrictions of the government as well as not to infringe the rights of others.²⁶⁰

²⁵¹ *Appleby and Others v. United Kingdom* (44306/98) 6 May 2003.

²⁵²²⁵² A/HRC/31/66.

²⁵³ see <http://www.osce.org/odihr/226981>.

²⁵⁴ See [://www.amnesty.org/en/latest/news/2015/09/amnesty-international-releases-new-guide-to-curb-excessive-use-of-force-by-police/](http://www.amnesty.org/en/latest/news/2015/09/amnesty-international-releases-new-guide-to-curb-excessive-use-of-force-by-police/)

²⁵⁵ Article 22 ICCPR states that restrictions are permissible only when “prescribed by law and [...] necessary in a democratic society in the interests 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.”

²⁵⁶ *Helsinki Committee of Armenia v. Armenia* (59109/08) 30 June 2015, § 46.

²⁵⁷ *Ibidem*. §47. See also on striking a fair balance, *Patyi and Others v. Hungary*, (5529/05) 7 October 2008 and *Cisse v. France* (51346/99) 9 April 2002.

²⁵⁸ *Hasan and Chausch v. Bulgaria* [GC] (30985/96) 26 October 2000, § 84.

²⁵⁹ A/HRC/31/66, § 36.

²⁶⁰ See OHCHR (2011), p. 52.

3.1.2 Mechanisms at domestic level offering protection and redress

3.1.2.1 Access to effective remedy for CSOs affected by acts or omissions by public authorities

125. Article 13 ECHR states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”²⁶¹ The ECHR allows “any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation” to submit an application to the Court after meeting the admissibility criteria.²⁶² Indeed, the Court has, by way of hearing appeals by CSOs regarding denial of their rights under Articles 10 and 11 ECHR,²⁶³ recognised that CSOs should be able to obtain redress for violations of their rights.

126. The above modalities lack meaning if their application is not accompanied by access to an effective remedy. The majority of European countries therefore offer recourse to administrative review bodies or judicial procedure if registration is refused or discontinued.²⁶⁴ The administration of justice is also enhanced by well-drafted laws regarding the registration process that include safeguards such as a reasonable, fixed time period for governmental review of registration applications (where appropriate), a rule of presumptive registration if the government fails to act within the fixed time period, clear, objective grounds for denial of registration, and the requirement of written notice to the applicant on decision of denial.²⁶⁵

127. National human rights institutions can also play a role in receiving and investigating allegations of human rights violations and abuses (see 5.1.3).²⁶⁶

3.2 Conducive political and public environment

128. PACE has noted that “despite an appropriate legal framework, certain NGOs such as human rights defenders and watchdog organisations are stigmatised.”²⁶⁷ The HRC has therefore urged States to “create and maintain, in law and in practice, a safe and enabling environment in which civil society can operate free from hindrance and insecurity.”²⁶⁸

129. One way to ensure an enabling environment is to ensure a supportive legal framework, as described above. However, this framework must be implemented to be effective, in tandem with a political and public environment that recognises and supports the value that CSOs bring to society. Enjoyment of rights must be “practical and effective” rather than “theoretical or illusory.”²⁶⁹

²⁶¹ See also Article 2(3) of the ICCPR.

²⁶² Article 34.

²⁶³ Note that the right of organisations to bring claims is also established in other human rights systems. Article 44 of the ACHR states that “[a]ny person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State party.” NGOs with observer status may file complaints with the African Commission on Human and Peoples’ Rights. The Human Rights Committee states in General Comment No. 31 (2004) that “[a]lthough ... the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as ... the freedom of association ... may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (Article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.”

²⁶⁴ OSCE (2008b), p.29.

²⁶⁵ The International Center for Not-For-Profit Law and UNDP (2009), pp. 19-20.

²⁶⁶ A/20/27, §s 77-81.

²⁶⁷ PACE Resolution 2096(2016), § 4.

²⁶⁸ A/HRC/24/L.24, § 3.

²⁶⁹ See *Airey v. Ireland* (6289/73) 9 October 1979.

130. There are various tools which seek to evaluate the strength of civil society in a particular country by assessing how conducive the political and public environment is to such organisations. In 2013, CIVICUS published the Enabling Environment Index (EEI), which examines the conditions in which civil society works to produce a ranking of 109 countries. The indicators that CIVICUS took into account in the EEI give an idea of the environmental factors conducive to the work of civil society:

- **Socio-Economic Environment:** Participation and civic activism are supported by higher levels of education, the availability of communication channels, and equality (including gender equality). Tools, such as the UN Human Development Index and the World Bank World Development Indicators, suggest a range of factors that influence the socio-economic environment.
- **Socio-Cultural Environment:** civil society flourishes when there is a high propensity amongst the population to take part in civic activities, tolerance and cross cultural solidarity, a high level of trust, and a high involvement in giving and volunteering. These can be measured using value surveys such as the World Values Survey, the European Values Survey, the Latinobarometer, the Afrobarometer and the Asian barometer.
- **Socio-Political Environment:** civil society flourishes when there are free media outlets that report or represent the views of different sectors of society and where this diversity and freedom is valued by the institutions of the state and by political leaders.
- **Governance Environment:** indicators under this heading looked at the strength of organisation capacity, financial resources and support mechanisms for CSOs, the legal conditions allowing NGOs to operate, the openness of institutional processes to CSO inputs, corruption, as well as respect for rights and freedoms, media freedoms, and the rule of law.

3.2.1 The right to associate (de facto), advocacy ability

131. The Committee of Ministers, in its Declaration on freedom of expression and information in the media in the context of the fight against terrorism, has recognised that laws drafted to combat terrorism have sometimes resulted in restrictions to the exercise of human rights.²⁷⁰ The Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism has stressed that “States should not need to resort to derogation measures in the area of freedom of assembly and association. Instead, limitation measures, as provided for in the ICCPR, are sufficient in an effective fight against terrorism.”²⁷¹

132. Training can also be provided to administrative and law enforcement officials to encourage respect of the right to freedom of peaceful assembly.²⁷²

3.2.2 Public awareness and recognition of civil society’s work

133. In much the same way as the Human Rights Committee has recommended that States should adopt educative and other measures to raise awareness of the ICCPR amongst public officials and society at large,²⁷³ States may adopt similar measures to raise awareness of the role that civil society plays in a living democracy. This may be achieved in particular by ensuring that public officials, including law enforcement officers, the judiciary and other officials receive training on the importance of civil society and the rights afforded to its members under national and international law.

²⁷⁰ See also the Committee of Ministers Guidelines on Human Rights and the fight against terrorism and A/HRC/20/27, § 21.

²⁷¹ A/61/267, § 53.

²⁷² A/HRC/20/27, § 43.

²⁷³ General Comment No. 31, § 7.

134. The media can play an important role in shaping public attitude towards civil society. Through reporting on and lending visibility and recognition to civil society, the media can significantly highlight the importance of CSOs and help to raise awareness and rebut myths about their work. However, the media can also do significant damage, expose CSOs to risk and act to spread negative perceptions about civil society.²⁷⁴

3.3 Right to (access) information and freedom of expression

3.3.1 Right to freedom of expression and information (Art. 10) applied to civil society / Human Rights defenders

135. Article 10 ECHR states that “[e]veryone has the right to freedom of expression”. The right is also protected by the UDHR,²⁷⁵ the ICCPR,²⁷⁶ the ACHPR²⁷⁷ and the ACHR.²⁷⁸ Generally, the right to hold an opinion is protected, as is the right to receive or have access to information (see below). Importantly for civil society, the right covers information or ideas that may be regarded as critical or controversial by the authorities or by a majority of the population, including ideas or views that may “shock, offend or disturb.”²⁷⁹

136. As the Expert Council on NGO Law has stated, “[a]s with individual citizens, NGOs and associations have the fundamental right to peacefully disagree with governmental policies, and to peacefully express their opinions, without being muzzled by the authorities – the very authorities who should be accountable to their citizens for protecting and promoting citizens’ liberties.”²⁸⁰ The right covers commentary on public affairs, discussion on human rights and journalism, and is therefore particularly crucial for CSOs and human rights defenders. Such groups often criticise official bodies or call attention to issues in a way that may lead the targets of this criticism, or the general public, to find disturbing.²⁸¹

137. According to the Court’s case law, any measures²⁸² imposed under defamation, insult and libel laws should be based on principles of proportionality and necessity and that in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account²⁸³. While addressing the issue, PACE²⁸⁴ and other bodies, such as the OSCE

²⁷⁴ See OHCHR (2011), pp. 31-32.

²⁷⁵ Article 19.

²⁷⁶ Article 19.

²⁷⁷ Article 9. However, the Article does not expressly include a right to receive ideas or to impart information. Note further that the Article does not contain any express restrictions; rather it is subject only to the general restrictions provided for in Article 27-29. See also the Declaration of Principles on Freedom of Expression in Africa (2002).

²⁷⁸ Article 13. Unprecedentedly, paragraph 3 expressly prohibits, both by private persons and government, indirect methods of restricting expression such as unfair allocation of newsprint or broadcasting frequencies.

²⁷⁹ *Handyside v. the United Kingdom* (5493/72) 7 December 1976, §49. See also, in the context of assemblies, *Gul and Others v. Turkey* (4870/02) 8 September 2010.

²⁸⁰ Opinion of November 2015 of the Expert Council on NGO Law concerning the "Federal Law on introduction of amendments to certain legislative acts of the Russian Federation".

²⁸¹ OSCE (2008b), p. 34.

²⁸² According to the Court’s case law, in view of the margin of appreciation left to Contracting States, a criminal measure as a response to defamation cannot as such be considered disproportionate to the legitimate aim pursued (see e.g. *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, §59, ECHR 2007-IV;).

²⁸³ See, among other authorities, see *Ceylan v. Turkey* [GC], no. [23556/94](#), § 49, ECHR 1999-IV; *Skalka v. Poland*, no. 43425/98, 27 May 2003, *Weigt v. Poland* (dec.), no. 74232/01.

²⁸⁴ Resolution 1577 (2007).

representative on the freedom of the media,²⁸⁵ have repeatedly recommended that, criminal defamation, insult and libel laws should not exist in national legislation and have articulated their strong preference that any such laws should be based in civil law only and be based on the principles of proportionality and necessity. Nevertheless, CSOs are targeted by criminal libel and insult provisions that punish and individual after publication, often using factual errors as an excuse. The Council of Europe Commissioner for Human Rights has stated that “factual errors, even minor ones, have sometimes been used to prove that such defenders are irresponsible or act in bad faith. This is not an attitude which promotes a serious dialogue. To require that the reporting of non-governmental human rights organisations must be flawless is not reasonable – considering their limited resources and the fact that governments themselves are sometimes less than forthcoming with basic information. Evidence shows that most such groups are very serious in their reporting.”²⁸⁶ Currently, a majority of Council of Europe member States have criminal defamation laws, but there appears to be a trend towards abolition of such laws and in those states that have not moved to repeal of such laws, a lightening of sentences in general²⁸⁷.

138. Because journalists who monitor and report on human rights may act as human rights defenders, and with CSOs often playing a social or public watchdog role equivalent to the press, media freedom and pluralism are also essential aspects of freedom of expression (see 4.3.1).

3.3.2 Free access to official data, reports, initiatives, decisions

139. Freedom of expression, as guaranteed by Article 10 ECHR, includes freedom “to receive and impart information and ideas without interference by public authority and regardless of frontiers.” The ECtHR has stated that “the notion of ‘freedom to receive information’ embraces a right of access to information”²⁸⁸ and that the right “basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.”²⁸⁹ The Council of Europe Convention on Access to Official Documents²⁹⁰ states that “[e]ach Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities”.²⁹¹ The UN Declaration on Human Rights Defenders under Article 6 also provides that human rights defenders have the right, individually or in association with others, to “[t]o know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems”.

140. The Council of Europe Convention on Access to Official Documents states that each Party shall “take the necessary measures in its domestic law” to give effect to the Convention’s provisions on access to information. Public authorities may be required to publish pro-actively, even in the absence of a request, a range of information of public interest and systems should be put in place to increase, over time, the amount of information subject to such routine disclosure. Where information is not already in the public domain, comprehensive legislation should be enacted, such as Freedom of

²⁸⁵ Paris Recommendations on Libel and Insult Laws. See also Council of Europe, ‘Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality’ CDMSI(2012)Misc11.

²⁸⁶ “Human Rights Defenders must be able to criticise”, Council of Europe commissioner for human rights, 12 November 2006, http://www.coe.int/t/commissioner/Viewpoints/061113_en.asp

²⁸⁷ Council of Europe, ‘Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality’ CDMSI(2012)Misc11

²⁸⁸ *Társaság a Szabadságjogokért (TASZ) v. Hungary* (37374/05) 14 April 2009, § 35.

²⁸⁹ *Gillberg v. Sweden* [GC] (41723/06) 3 April 2012, § 74.

²⁹⁰ Note that this Convention will enter into force upon the tenth ratification (there are eight ratifications as of 13th July 2016).

²⁹¹ Article 2(1).

Information Acts, that are based on the principle of maximum disclosure and which establish a presumption that all information is accessible subject only to a narrow system of exceptions. The process of requesting and accessing information should be simple, rapid and free or low-cost, be subject to a narrow, carefully-tailored system of exceptions to protect overriding public and private interests (such as privacy) and should be subject to an appeal to an independent body with full powers to investigate and resolve complaints.²⁹²

141. An important case before the ECtHR was heard regarding the right of civil society to access public information.²⁹³ In that case, an NGO requested information from the state's intelligence agency regarding its use of electronic surveillance measures. The agency refused the request even after the state's Information Commissioner ordered that the information be disclosed. The Court found that, as the applicant was "obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate" the refusal to provide the information interfered with the NGO's right to freedom of expression. The refusal (on the "unpersuasive" grounds that the agency did not possess the information) did not come within the scope of permissible restrictions as it was in defiance of domestic law and "tantamount to arbitrariness."²⁹⁴ The case built upon a previous finding that "when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press"²⁹⁵ and should therefore receive similar Convention protection to that afforded to the media. The Court has stated, regarding an association involved in human rights litigation with various objectives, including the protection of freedom of information, that such an NGO may be characterised, like the press, as a social watchdog.²⁹⁶ 124. The case also illustrates that "national security" should not be used as a reason to arbitrarily or excessively restrict access to information. In this regard, the Global Principles on National Security and the Right to Information (the Tshwane Principles) outline best practices in this area, including rules regarding the classification and declassification of information.

3.4 Effective participation in decision-making

142. The Committee of Ministers has stated that "[g]overnment and quasi-government mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people's opinions as to the functioning of society."²⁹⁷ Article 8(1) of the UN Declaration on Human Rights Defenders states that: "[e]veryone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs."²⁹⁸ However, the Secretary General of the Council of Europe has noted that in some countries "the model and the institutions for public consultation and participation lack effectiveness and often exist as a

²⁹² Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of December 2004.

²⁹³ *Youth Initiative for Human Rights v Serbia* (48135/06), 25 June 2013.

²⁹⁴ §§ 25-26.

²⁹⁵ *Animal Defenders International v. the United Kingdom* (48876/08) 22 April 2013, § 103; *Vides Aizsardzības Klubs v. Latvia* (57829/00) 27 May 2004, §, 42.

²⁹⁶ *Társaság a Szabadságjogokért v. Hungary* (37374/05) 14 April 2009, § 27.

²⁹⁷ CM/Rec(2007)14, § 76.

²⁹⁸ See also the Council of Europe 12 principles for good governance at local level, with tools for implementation; OSCE (2013) pp15-16; Article 6 of the Inter-American Democratic Charter and § 8 of the Human Right Committee General Comment No. 25.

formality.”²⁹⁹ He therefore recommended the development of new guidelines “to ensure meaningful civil participation in political decision making”. Subsequently, the Committee of Ministers mandated the European Committee on Democracy and Governance (CDDG) to prepare these guidelines. A joint working group of representatives nominated by the CDDG and the Conference of INGOs, taking into account contributions received during a public consultation, finalised the draft, which was adopted at the CDDG meeting in May 2017.³⁰⁰ The Guidelines are currently under review by the Rapporteur Group on Democracy (GR-DEM). The intention is to adopt them as part of a CM Recommendation in mid-July 2017.

143. These Revised Draft Guidelines define civil participation as “the engagement of individuals, NGOs and civil society at large in decision-making processes by public authorities. Civil participation in political decision-making is distinct from political activities in terms of direct engagement with political parties and from lobbying in relation to business interests.”³⁰¹ The Revised Draft Guidelines state that “[p]articipation by all individuals and groups of civil society in decision-making at all levels of government is one of the prerequisites for the improved and proper functioning of democratic society and for guaranteeing democratic security”³⁰² and that “[t]he right to civil participation in political decision-making should be secured to individuals, NGOs and civil society at large.”³⁰³ The Conference of INGOs of the Council of Europe has also developed a Code of Good Practice for Civil Participation in the Decision-Making Process,³⁰⁴ which emphasises that NGOs can participate at all six stages of the decision-making process, from setting the agenda, to drafting the policy, adopting it, and reformulating it based on results from monitoring.

144. The Revised Draft Guidelines set out factors for an enabling environment and prerequisites for meaningful civil participation which include considerations outlined elsewhere in the present document (see 4.2).³⁰⁵ They then set out several stages of civil participation:

- Provision of information, all appropriate information, including key documents and information, should be clear and easily comprehensible, in an appropriate/accessible format, and, in principle, free of charge, without restrictions on analysis/re-use;³⁰⁶
- Consultation, to allow public authorities “to collect the views of individuals, NGOs and civil society at large within an official procedure on a specific policy or topic.”

.³⁰⁷ Consultations can take place through meetings in person, public hearings, focus groups, surveys and questionnaires, digital tools). Publicly available feedback should be provided on the outcome of the process, including information on reasons for decisions ultimately taken. .

- Dialogue, which is described as a “structured long-lasting, results-oriented process which is based on mutual interest in exchange of opinions between public authorities, individuals, NGOs and civil society at large.”³⁰⁸

²⁹⁹ Secretary General of the Council of Europe, State of Democracy, Human Rights and the Rule of Law in Europe. A shared responsibility for democratic security in Europe, 2015.

³⁰⁰ See http://www.coe.int/t/dgap/localdemocracy/News/2016/consultation0716_en.asp

³⁰¹ §2(a).

³⁰² Foreword, §1.

³⁰³ §5.

³⁰⁴ CONF/PLE(2009)CODE1.

³⁰⁵ See also Recommendations on enhancing the participation of associations in public decision-making processes from the participants to the civil society forum organized on the margins of the 2015 Supplementary Human Dimension meeting on freedoms of peaceful assembly and association, Vienna, 15-16 (morning) April 2015.

³⁰⁶ §§20-21.

³⁰⁷ §22.

³⁰⁸ §25.

- Active involvement refers to “opportunities for civil participation in the decision-making process provided by public authorities to individuals, NGOs and civil society at large that extend beyond the provision of information, consultation or dialogue”.³⁰⁹

145. Finally, the Revised Draft Guidelines set out a number of principles for ensuring meaningful civil participation in practice by calling on member States ensuring “to make the widest possible use of these guidelines and ensure their dissemination in order that the public authorities can take awareness raising measures and themselves further widely disseminate the guidelines, where necessary in their official language(s).³¹⁰ 146. A related issue is lobbying, and in this regard the Recommendation of the Committee of Ministers on the legal regulation of lobbying activities in the context of public decision-making, based on a text prepared by the CDCJ, was adopted in March 2017,³¹¹ and serves as a useful tool in this area. Other helpful tools are the “Recommendation of the Council on Principles for Transparency and Integrity in Lobbying” of the Organisation for Economic Co-operation and Development (OECD) as well as certain other Council of Europe instruments.³¹²

147. NGOs may also collaborate with international organisations when the latter sets standards. In a review of cooperation of NGOs with the Council of Europe, it was concluded that “NGOs clearly add value to the CoE’s intergovernmental work by contributing to the validity and adequacy of standards and of monitoring outputs” and that “in some important specialised domains, their professional expertise is an indispensable asset to standards setting and monitoring.”³¹³

3.5 Resources and long-term support

148. CSOs need funding in order to carry out their work. Vibrant civil society therefore depends on legislation and policies that facilitate and encourage the soliciting and transfer of funds. The Venice Commission / ODIHR Guidelines on Freedom of Association state that CSOs should “have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities.” Similarly, Article 13 of the UN Declaration on Human Rights Defenders provides specifically that “everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means in accordance with Article 3 of the present Declaration”.³¹⁴

149. The Venice Commission has stated that national legislation may legitimately regulate access to funding for reasons of customs, foreign exchange, the prevention of money laundering and terrorism, as well as those concerning transparency and the funding of elections and political parties, to the extent that these requirements are themselves consistent with international human rights standards.³¹⁵ They should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work.³¹⁶

150. The importance of fiscal benefits has already been discussed. In addition, States themselves may, directly or indirectly, offer funds to support the work of CSOs and human rights defenders. This

³⁰⁹ §27.

³¹⁰ § 30.

³¹¹ [CM/Rec\(2017\)2](#), 22 March 2017.

³¹² For example, the Criminal Law Convention on Corruption (ETS No. 173), the Civil Law Convention on Corruption (ETS No. 174), Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials, and the work of the Group of States against Corruption (GRECO),

³¹³ Co-Operation of (I)NGOs with the Council of Europe in Standard Setting and Monitoring, p. 35.

³¹⁴ See also Article 6(f) of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, A/HRC/23/39 and General Assembly Resolution 36/55

³¹⁵ ODIHR and Venice Commission (2015), § 32. See also Venice Commission CDL-AD(2013)023 §§ 40 and 43.

³¹⁶ A/HRC/20/27, § 70.

may be done, for example, by providing programmes which offer financial support either of a general nature or for the organisation of specific activities.³¹⁷ Care should be taken to ensure that reliance on government funding does not compromise the independence of civil society organisations and human rights defenders. An active Community and Voluntary sector contributes to a democratic, pluralist society, provides opportunities for the development of decentralised and participative structures and fosters a climate in which the well-being of society is enhanced through positive participation by citizens in providing for social needs and in political discourse.

4. Human Rights Defenders (HRDs)

151. Human rights defenders are in need of special protection because their work often involves criticism of government policies and actions,³¹⁸ for example by documenting and drawing attention to situations where States have committed human rights violations.³¹⁹

152. Highlighting human rights violations and abuses and failures by states to address them is part of what makes the work of human rights defenders an “investment in the rule of law and democracy.”³²⁰ However, making human rights violations and abuses more visible comes with risks, and reprisals against human rights defenders have been documented all over the world. The Committee of Ministers has deplored the fact that “human rights defenders, including journalists, are all too often victims of violations of their rights, threats and attacks, despite efforts at both national and international levels.”³²¹ Restrictions to freedom of association and freedom of assembly have been dealt with elsewhere in this study (see 3.1.1). This chapter will focus on threats to, and attacks on, physical integrity and restrictions placed on the right to liberty and freedom.

153. The Council of Europe Commissioner for Human Rights has observed that the situation and work of human rights defenders are negatively affected by various trends in Europe. Obstacles may take the form of: legal and administrative restrictions impeding the registration of human rights organisations and their access to funding; burdensome financial and reporting requirements; judicial harassment; smear campaigns, threats and intimidation; abusive control and surveillance; confiscation and destruction of working materials; unlawful arrest or detention; ill-treatment; enforced disappearance and death. The absence of effective investigations into violations committed by state and non-state actors against human rights defenders targeted because of their human rights work remains a major problem.³²² PACE has expressed concern regarding “public attacks, threats to release material that is allegedly compromising to prominent human rights defenders, and physical attacks, pressure and intimidation against lawyers, including lawyers working on politically sensitive cases”³²³ as well as the deterrent effect that reprisals have on the work of human rights defenders.³²⁴ The

³¹⁷ OSCE (2008b), p. 38.

³¹⁸ European Union (2004), p3

³¹⁹ Norwegian Ministry of Foreign Affairs, p5. See also, OING Conf/Exp (2015) 2, Section on Human Rights Defenders p.17.

³²⁰ Norwegian Ministry of Foreign Affairs, p.5.

³²¹ Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, 6 February 2008.

³²² Round-Table with human rights defenders on missing persons and victims of enforced disappearance in Europe organised by the Office of the Council of Europe Commissioner for Human Rights Strasbourg, 30 June and 1 July 2016, Report CommDH(2017)4, §46.

³²³ PACE Resolution 2095 (2016), § 4 For more information on the situation of human rights defenders in Europe, see the explanatory memorandum of the resolution, available at <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnNvZGlzL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjMwOSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIyMzA5>

³²⁴ PACE Resolution 1571 (2007), §7. See also A/HRC/18/19 and Inter-American Commission for Human Rights, ‘IACHR Deplores Reprisals Against Individuals who Come Before the Inter-American Commission’, 4 November 2011.

Commissioner for Human Rights was invited by the Committee of Ministers to “intervene in the manner the Commissioner deems appropriate, (...) specially in serious situations where there is a need for urgent action and he has done so in multiple occasions”³²⁵ NHRIs face similar challenges, and the UN Special Rapporteur on the situation of human rights defenders has noted that “in a number of countries, they face significant challenges and are exposed to attacks and threats, as well as intimidation, harassment, arrest and detention in connection with their human rights activities”³²⁶ ENNHRI’s guidelines for support to NHRIs under threat include a non-exhaustive list of threats to NHRIs.³²⁷

4.1 Supportive regulatory framework

154. Article 3 of the UN Declaration on Human Rights Defenders states that domestic law consistent with international human rights obligations is the “juridical framework” within which human rights should be implemented and enjoyed, including the right to defend human rights. The OSCE has stated that such legislation should be well-crafted through a broad and inclusive consultative process,³²⁸ and the HRC has stressed that States should “ensure that all legal provisions and their application affecting human rights defenders are clearly defined, determinable and non-retroactive in order to avoid potential abuse.”³²⁹ The institutional framework must guarantee the fundamental principle of fairness and due legal process.³³⁰

155. The OSCE Guidelines on the Protection of Human Rights Defenders (2014) identify a wide range of guiding principles to protect human rights defenders’ physical integrity, liberty, dignity and security, as well as creating a safe and enabling environment conducive to human rights works. The guidelines identify as general principles the “accountability of non-states actors”, “equality and non-discrimination”, as well as the “legality, necessity and proportionality of limitations on fundamental rights in connection with human rights work”. The institutional and administrative framework should also be sufficiently precise to ensure legal certainty, and as aforementioned, guarantee the fundamental principle of fairness and due legal process.³³¹

156. The Special Rapporteur on the situation of human rights defenders has recommended that domestic laws are harmonised with the UN Declaration on Human Rights Defenders and that States review their national laws and abolish legal or administrative provisions impeding the work and activities of defenders.³³² However, it appears that relatively few States have moved to fully incorporate its provisions into domestic law. A number of States maintain that defenders’ rights are adequately protected under more general measures, constitutional or otherwise, ensuring the security and equality of everyone.³³³ In such States, the absence of specific laws or regulation is born of a deep-seated conviction that the State should not have the right to limit such civil liberties and that legislation is therefore unnecessary and possibly counter-productive.³³⁴ In States with a different legal tradition, however, the absence of specific laws may make the realisation of these rights much less likely.³³⁵

³²⁵ § 4(iii) CM Declaration on Human Rights Defenders, 2008.

³²⁶ A/HRC/22/47 at page 6, §23.

³²⁷ See <http://ennhri.all2all.org/IMG/pdf/guidelines.support.nhris.threat.march16.pdf>.

³²⁸ OSCE (2013), p. 38.

³²⁹ A/HRC/RES/22/6, §11.

³³⁰ OSCE (2013), p.3.

³³¹ OSCE, Guidelines on the Protection of Human Rights Defenders, 2014.

³³² A/HRC/13/22 p.12.

³³³ A/HRC/13/22.

³³⁴ A/HRC/13/22.

³³⁵ Human Rights Committee, General Comment 31, §13.

157. In view of the above in June 2016 the International Service for Human rights launched a Model Law for the Recognition and Protection of Human Rights Defenders which provides authoritative guidance to States on how to implement the UN Declaration on Human Rights Defenders at the national level by giving technical guidance to States to develop laws, policies and institutions at the national level to support the work of defenders and protect them from reprisals and attacks. The Model Law was developed in consultation with over 500 defenders from every region, and settled and adopted by 28 of the world's leading human rights experts and jurists, including the UN Special Rapporteur on Human rights Defenders and a former President of the European Court of Human Rights.³³⁶

4.1.1 Protection from threats, attacks and other abuses

158. Articles 2 and 3 ECHR protect every person present on a State's territory, including human rights defenders, from the arbitrary deprivation of life and from torture. Article 12(3) of the UN Declaration on Human Rights Defenders provides that States "shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration."

159. However, as mentioned above, the security of human rights defenders can be under threat. PACE considers that the primary responsibility for the protection of human rights defenders rests with the State.³³⁷ It has therefore been recommended that States adopt practices that focus on strengthening the security of defenders in a holistic manner.³³⁸ Defenders have been encouraged to integrate security more comprehensively into their work. To this end, Protection International³³⁹ and Front Line Defenders³⁴⁰ have developed tools which may be useful.

4.1.1.1 Abuse of criminal provisions and judicial harassment

160. PACE has called on member States to "put an end to any administrative, fiscal or judicial harassment of human rights defenders."³⁴¹ Council of Europe bodies (including PACE and the Commissioner for Human Rights) have also cited examples of judicial harassment in Europe.³⁴²

161. In light of this occurrence, the HRC has called on States to ensure that the "judiciary is independent, impartial and competent to review effectively legislation and its application affecting the work and activities of human rights defenders."³⁴³ Abuse of legal proceedings or judicial harassment, even when they do not result in the actual closure of human rights organisations, places serious strain on human rights defenders' time and the organisation's financial and human resources.³⁴⁴ Furthermore, fair trial guarantees are often not respected in trials against human rights defenders.³⁴⁵

162. An on-going challenge is a balanced regulation of the whistle-blowers at the national level, aiming to ensure simultaneously that no one should be harassed and that no one is above the law.

³³⁶ See https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf

³³⁷ See Doc. 13943. See also OSCE (2013), p.1.

³³⁸ A/HRC/31/55, p.9.

³³⁹ Protection International (2009).

³⁴⁰ Front Line (2011).

³⁴¹ See also OSCE (2013) and A/HRC/RES/22/6, §§ 6 and 11(a).

³⁴² PACE Res. 2095(2016) "Strengthening the protection and role of human rights defenders in Council of Europe member States", §4.

³⁴³ A/HRC/RES/22/6, § 11(b).

³⁴⁴ A/59/401, §74.

³⁴⁵ A/59/401, §§ 15-17.

Individuals can report waste, fraud, and abuse, which is in the public interest, while their official duty to protect classified national security information remains. A general maxim *nulla poena sine lege certa* should be fully respected.

163. National criminal legislation, if drafted poorly or with insufficient consideration for human rights, can have a significant negative impact on the work and rights of human rights defenders. In many countries, defenders face criminal proceedings for charges such as “forming criminal gangs”, “obstructing public roads”, “inciting crime”, “creating civil disobedience” or “threatening the State security, public safety or the protection of health or morals.”³⁴⁶ Ambiguous security laws are used to arrest and detain human rights defenders, often without charge.³⁴⁷ Civil and criminal defamation laws are used to silence defenders, often resulting in crippling fines.³⁴⁸

4.1.1.2 Arbitrary deprivation of liberty

164. Article 5 ECHR guarantees to all persons, including human rights defenders, the right to liberty and security of the person. Nevertheless, arbitrary arrest, “sometimes followed by the misuse of the law to detain, prosecute and imprison human rights defenders”, was the single most common violation recorded by the Special Representative of the Secretary General on the situation of human rights defenders.³⁴⁹ The Council of Europe Committee of Experts on the protection of journalism and safety of journalists (MSI-JO) has expressed alarm at the increase of arbitrary deprivation of journalists across Europe,³⁵⁰ and the Council of Europe has recorded in particular deprivations of liberty of human rights defenders in South East Europe.³⁵¹

165. A country’s political environment may influence considerations of whether detention of human rights activists is arbitrary. In one case before the ECtHR, a civil society activist and human rights defender was arrested and charged with “illegal entrepreneurship”, “large-scale tax evasion”, “abuse of power” and “high-level embezzlement” after his NGO unsuccessfully attempted to obtain legal entity status with the authorities and he helped to prepare various reports, including in the context of the work of international bodies, relating to human rights issues in the state concerned.³⁵² The ECtHR stated that in assessing whether there was a violation of Article 5 of the Convention, the Court had “regard to all the relevant circumstances”, which in this case included the “increasingly harsh and restrictive” legislative environment regarding the operation of CSOs and statements of high-ranking officials.

166. The Court has also made it clear that allegations of arbitrary deprivation of liberty, and in particular misconduct by the authorities during that deprivation, must be investigated expeditiously and thoroughly.³⁵³

³⁴⁶ A/HRC/13/22, p.7.

³⁴⁷ A/HRC/13/22 p.7.

³⁴⁸ A/HRC/13/22 p.7.

³⁴⁹ A/59/401, p.6.

³⁵⁰ MSI-JO(2014)09rev2.

³⁵¹ <https://wcd.coe.int/ViewDoc.jsp?p=&id=1873645&direct=true>. See also OSCE (2013), p.6.

³⁵² *Rasul Jafarov v. Azerbaijan* (69981/14) 17 March 2016.

³⁵³ See, in the context of human rights defenders, *Hilal Mammadov v Azerbaijan* (81553/12) 4 February 2016, and in relation to journalists *Emin Huseynov v Azerbaijan* (59135/09) 7 May 2015; see also further cases: *Assenov and Others v. Bulgaria*, (90/1997/874/1086), 28 October 1998, see in particular §§ 102-106; *Labita v. Italy* [GC], no. 26772/95, 6 April 2000, see in particular §§ 131-136; *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, 3 June 2004, see in particular §§ 133-149; *Kopylov v. Russia*, no. 3933/04, 29 July 2010, see in particular §§ 133-142.

4.1.1.3 Privacy

167. According to the OSCE Guidelines, “States have a duty to refrain from any unlawful or arbitrary interference with privacy, family life, home or correspondence of human rights defenders, including with their electronic communications, and to protect them from such interference by others through legislative and other measures. Any interference with privacy, family, home or correspondence must be provided for by law, necessary to achieve a legitimate aim in accordance with international human rights standards and proportionate to that aim.”³⁵⁴ They also recommend that States “acknowledge that human rights defenders have a special need for protection from undue interference in their private life due to the nature of their work.”³⁵⁵

4.1.1.4 Particularly vulnerable groups

168. Certain groups may find themselves at particular risk of attacks and threats of attacks. For example, women defenders are most likely to be subjected to certain forms of violence and other violations, prejudice, exclusion, and repudiation than their male counterparts, especially since they frequently work on specific issues that challenge established customs or norms and are therefore often culturally sensitive.³⁵⁶ The ECtHR has stated that gender-based violence is a form of discrimination under the Convention and has issued judgments dealing with preventing and combating violence against women.³⁵⁷ The Council of Europe Commissioner of Human Rights has urged member States to remove obstacles to the work of women’s rights defenders, *inter alia*, by ratifying relevant international instruments, adopting and implementing laws prohibiting discrimination on the basis of sex and gender and promoting solidarity and cooperation among human rights defenders.³⁵⁸

169. In addition, the Commissioner for Human Rights has noted that those working for the rights of lesbian, gay, bisexual and transgender (LGBTI) people are often at heightened risk.³⁵⁹ This is despite the fact that human rights are to be applied without discrimination under Article 14 ECHR and that Article 7 of the UN Declaration on Human Rights Defenders states that “everyone has the right, individually and in association with others to develop and discuss new human rights ideas and principles and to advocate their acceptance.” The European Court of Human Rights has found several violations of freedom of assembly, association and expression and the prohibition of discrimination in cases of LGBTI human rights defenders.³⁶⁰

170. Also vulnerable are individuals or groups engaged in issues involving major economic interests and those working for the rights of minorities and indigenous peoples,³⁶¹ including Roma, and Sinti/Manush.³⁶² Defenders may also be attacked simply by virtue of defending rights relating to

³⁵⁴ OSCE (2013), p. 17.

³⁵⁵ OSCE (2013), p. 18.

³⁵⁶ A/HRC/13/22, p.9. See also A/HRC/16/44, p.9, A/RES/62/152, A/RES/64/163 A/HRC/RES/13/13.

³⁵⁷ See http://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf. See also Article 7 CEDAW

³⁵⁸ http://www.coe.int/en/web/commissioner/-/remove-obstacles-to-the-work-of-women-s-rights-defenders?redirect=http://www.coe.int/en/web/commissioner/news?p_p_id=101_INSTANCE_easZO4kHrFrE&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1. See also A/HRC/RES/13/13.

³⁵⁹ See Council of Europe Commissioner for Human Rights, “Discrimination on grounds of sexual orientation and gender identity in Europe” (2011).

³⁶⁰ See for example *Identoba and others v. Georgia, Kaos GL v. Turkey; Gender Doc v. Moldova, Alexeyev v. Russia*, etc. See the factsheet of the Court on LGBTI for further case law: http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf

³⁶¹ Norwegian Ministry of Foreign Affairs, p.17.

³⁶² See in this context, the work done by the “Operational Platform for Roma Equality” (OPRE), which brings together the Council of Europe, and the FRA with members of the European Network of Equality Bodies (EQUINET) and the European Network of National Human Rights Institutions (ENNHRI).

land, defence of the environment and corporate responsibility, combating corruption and impunity and being lawyers working to promote and protect human rights.³⁶³

4.1.2 Legislation to protect whistle-blowers

171. PACE has recognised “the importance of whistle-blowers – concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk – as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors.”³⁶⁴ It has thus set out several “guiding principles” relating to the protection of whistle-blowers,³⁶⁵ which were elaborated upon by the Committee of Ministers,³⁶⁶ and has subsequently called for further improvements, including calling states to “enact whistle-blower protection laws also covering employees of national security or intelligence services and of private firms working in this field”.³⁶⁷ The UN Special Rapporteur on freedom of opinion and expression has also developed best practices, and in 2013, the Organisation of American States developed a Model Law on protecting whistle-blowers.³⁶⁸ In addition, the 2014 EU Guidelines on Freedom of Expression Online and Offline provide that the EU will “support the adoption of legislation that provides adequate protection for whistleblowers and support reforms to give legal protection to journalists’ right of nondisclosure of sources”.³⁶⁹ Further, international agreements and treaties on anti-corruption including the Council of Europe Criminal Law Convention on Corruption³⁷⁰ and UN Convention against Corruption³⁷¹ include requirements that states adopt legislation that provides adequate protection for whistle-blowers. It seems a general consensus has been established that states should adopt specific legislation on the whistle-blowers.

4.1.2.1 Scope of protection

172. PACE considers that whistle-blower protection measures should cover all individuals who denounce wrongdoings which place fellow human rights at risk of violations of their rights protected under the ECHR, and regrets that some such measures exclude disclosures of information related to national security.³⁷² In this regard, and as recalled in PACE Resolution 2060(2015), in its Resolution 1954(2013) and Recommendation 2024(2013) on national security and access to information PACE supported the Global Principles on National Security and the Right to Information (the “Tshwane Principles”) “to improve the balance between the public’s right to know and the protection of legitimate national security concerns”.³⁷³ In particular, PACE “encourage[d] member States of the Council of Europe to take [them] into account [...] in modernising their legislation and practice”.³⁷⁴

³⁶³ A/70/217, pp. 14-15.

³⁶⁴ PACE Resolution 1729 (2010), §1.

³⁶⁵ PACE Resolution 1729 (2010), §6.

³⁶⁶ The Council of Europe recommendations have been analysed by a rapporteur for PACE in a report on improving the protection of whistle-blowers. See PACE Doc. 13791 of 19 May 2015.

³⁶⁷ PACE Resolution 2016 (2015), ss. 10.1.1 and 10.1.2. See also the [report](#) of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression, David Kaye, submitted in accordance with Human Rights Council resolution 25/2, 08.09.15.

³⁶⁸ Model Law to Facilitate the Reporting of Acts of Corruption and to Protect Whistle-blowers and Witnesses (2013).

³⁶⁹ <https://ec.europa.eu/digital-single-market/en/news/eu-human-rights-guidelines-freedom-expression-online-and-offline>

³⁷⁰ See Articles 20 and 22.

³⁷¹ See Articles 32 and 33.

³⁷² PACE Resolution 2060(2015).

³⁷³ PACE Resolution 2060 (2015), §3. See <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=20190>

³⁷⁴ PACE Recommendation 2024 (2013), §1.3. See <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=20194&lang=EN>

The “Tshwane Principles” contain a number of provisions seeking to ensure effective protection of whistle-blowers in matters related to national security, provisions which have been referred to by PACE in its resolution on improving the protection of whistle-blowers.³⁷⁵

173. The Committee of Ministers considers that protection should include at a minimum disclosures relating to “violations of law and human rights, as well as risks to public health and safety and to the environment.”³⁷⁶ In terms of personal scope, the Committee recommends that protection be extended to “all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not”,³⁷⁷ including situations where the work-based relationship ended, and possibly also where it has yet to begin.³⁷⁸

174. The ECtHR has found violations in situations where a medical specialist was dismissed for expressing concerns about the quality of medical care given to patients,³⁷⁹ prosecution on charges of breaching official secrecy for disclosing the unlawful interception of the communications of a large number of journalists, politicians and businessmen by the national intelligence service,³⁸⁰ and the dismissal of a journalist of a State television company for publishing a book criticising the employer for alleged censorship by a director of the company.³⁸¹

4.1.2.2 National framework

175. The Committee of Ministers considers that the “national normative, institutional and judicial framework, including, as appropriate, collective labour agreements, should be designed and developed to facilitate public interest reports and disclosures by establishing rules to protect the rights and interests of whistle-blowers”.³⁸² The normative framework “should reflect a comprehensive and coherent approach to facilitating public interest reporting and disclosures”³⁸³ and restrictions and exceptions should be no more than necessary. The national framework “should foster an environment that encourages reporting or disclosure in an open manner” where individuals feel safe to freely raise public interest concerns.³⁸⁴

4.1.2.3 Reporting channels

176. Workplaces may have internal whistleblowing procedures. If the internal process lacks effective redress and protection, external oversight mechanisms such as a government-wide ombudsman or oversight institution should be made accessible.³⁸⁵

177. In the absence of ineffective internal and external channels, public disclosures should be protected and promoted.³⁸⁶ The ECtHR uses six factors to assess the legitimacy of restrictions imposed on those who make public disclosures:

³⁷⁵ PACE Resolution 2060 (2015), §9. See <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21931&lang=EN>

³⁷⁶ CM/Rec(2014)7, §7.

³⁷⁷ CM/Rec(2014)7, §9.

³⁷⁸ Note that the UN Special Rapporteur recommends a broader definition than that of the Council of Europe, covering persons coming into contact with public interest information even when outside the context of their work-based relationship.

³⁷⁹ *Sosinowska v. Poland* (10427/09) 18 October 2011.

³⁸⁰ *Bucur and Toma v. Romania* (40238/02) 8 January 2013.

³⁸¹ *Matúz v. Hungary* (73571/10) 21 October 2014.

³⁸² CM/Rec(2014)7, §1.

³⁸³ CM/Rec(2014)7, §7.

³⁸⁴ CM/Rec(2014)7, §12.

³⁸⁵ PACE Resolution 1729(2010), § 6.2.3.

1. Whether the whistle-blower had available any “competent authority” to which he or she could make disclosure, or “any other effective means of remedying the wrongdoing”;³⁸⁷
2. The public interest in the information, which “can sometimes be so strong as to override even a legally imposed duty of confidence”;³⁸⁸
3. The authenticity of the information, requiring a person to “carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable”;³⁸⁹
4. The damage that the public institution may suffer by public disclosure, including whether it outweighs the public’s interest in knowing the information;³⁹⁰
5. The motive and good faith of the whistle-blower, which could implicate the “level of protection” available;³⁹¹ and
6. An evaluation of the proportionality of the penalty imposed upon the whistle-blower.³⁹²

4.1.2.4 Duty to protect

178. The Committee of Ministers recommends prompt investigation of the concerns raised, and that whistle-blowers “be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer.” PACE recommends that whistle-blowing legislation focus on “providing a safe alternative to silence”, for example through protecting good faith whistle-blowers from retaliation regardless of whether they have used internal or external procedures. It also recommends that it is the responsibility of the employer to establish beyond a reasonable doubt that any measures taken to the detriment of a whistle-blower were motivated by reasons other than the action of whistle-blowing.

179. The UN Special Rapporteur on freedom of opinion and expression considers that potential whistle-blowers should not be required to “undertake precise analyses of whether the perceived wrongdoing merits penalty under existing law or policy”; nor should the whistle-blower’s motivations at the time of disclosure be taken into account when making an assessment of his or her protected status.³⁹³

180. Finally, whistle-blowers should be guaranteed confidentiality and the possibility of anonymity in their reporting. For these reasons states must establish a mechanism or a system, which provides protection and from retaliation or the threat thereof. In Slovakia, for example, those who make anonymous disclosures and who are later exposed still receive whistle-blower protections.³⁹⁴

4.1.2.5 Other measures

181. PACE has also called on States to “grant asylum, as far as possible under national law, to whistle-blowers threatened by retaliation in their home countries, provided their disclosures qualify

³⁸⁶ See in this context:

[https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf)

³⁸⁷ *Guja v. Moldova* (14277/04) 12 February 2008, §73.

³⁸⁸ *Fressoz and Roire v. France*, no. 29183/95, 21 January 1999; *Radio Twist, a.s. v. Slovakia*, no. 62202/00, 19 December 2006.

³⁸⁹ *Fressoz and Roire v. France*, see in particular § 54.

³⁹⁰ *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, §45; and *Stoll v. Switzerland*, ([GC], no. 69698/01, 10 December 2007), § 130.

³⁹¹ *Guja v. Moldova*, §77; *Bladet Tromsø and Stensaas v. Norway [GC]*, no. 21980/93, 20 May 1999, see in particular § 65.

³⁹² *Bucur and Toma v. Romania* (40238/02) 1 August 2013, § 66; *Heinisch v. Germany* (28274/08) 21 July 2011; *Guja v. Moldova*, §§ 73-78; *Fuentes Bobo v. Spain*, no. 39293/98, 29 February 2000, § 49.

³⁹³ According to the Norwegian Working Environment Act, bad faith does not rule out lawful reporting.

³⁹⁴ See Slovakia, Act No. 307/2014 Coll. on Certain Measures Related to the Reporting of Antisocial Activities and on Amendments to Certain Acts (2015).

for protection under the principles advocated by the Assembly.”³⁹⁵ Under the PACE framework, the implementation and impact of relevant legislation should be monitored and evaluated at regular intervals by independent bodies.³⁹⁶ Such legislation “must be accompanied by a positive evolution of the cultural attitude towards whistle-blowing”, and the important role of non-governmental organisations in this regard has been recognised.³⁹⁷ Such legislation “must be accompanied by a positive evolution of the cultural attitude towards whistle-blowing”, and the important role of non-governmental organisations in this regard has been recognised.³⁹⁸ States should protect all HRDs and others who bring abuses or failures to light and see them as important contributors to the protection of human rights and to provision of redress.

182. Finally, the Committee of Ministers recommends that the national framework “be promoted widely in order to develop positive attitudes amongst the public and professions and to facilitate the disclosure of information in cases where the public interest is at stake”.³⁹⁹

4.2 Conducive political and public environment

183. The Committee of Ministers has called on member States to “create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the ECHR.”⁴⁰⁰

184. A fundamental requirement for an enabling environment is a conducive legal, institutional and administrative framework.⁴⁰¹ However, even such a framework can be abused to create a disabling environment: investigations may be improperly carried out, and public officials may lack awareness and training of the importance and work of human rights defenders, for example. On the other hand, a conducive environment can help to heal the deficiencies in an inadequate legal framework.⁴⁰² The Special Rapporteur has noted that popular support has in many situations provided a barrier against repression.⁴⁰³ Very often, firm public stands in support of human rights defenders can transform a situation of vulnerability for defenders into one of empowerment.⁴⁰⁴

185. One element ensuring a conducive public environment can be education about the important role of human rights defenders. Highlighting this, the Special Rapporteur has noted that in all educational sectors, successful human rights education bridges the gap between the knowing and the doing ... and bringing defenders “into the classroom” can be a rewarding experience for both.⁴⁰⁵

4.2.1 Stigmatisation, marginalisation and the right to privacy

³⁹⁵ PACE Resolution 2060 (2015), §10.1.2.

³⁹⁶ PACE Resolution 1729 (2010), § 6.4.

³⁹⁷ PACE Resolution 1729 (2010), §§ 7-8.

³⁹⁸ PACE Resolution 1729 (2010), §§ 7-8.

³⁹⁹ CM/Rec(2014)7, §27.

⁴⁰⁰ Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities (2008), §2(i). See also Guidelines p. 8.

⁴⁰¹ A/HRC/25/55.

⁴⁰² General Assembly Report of the Special Rapporteur on the Situation of Human Rights Defenders on Human Rights Defenders (14 August 2008) UN Doc A/63/288, Annex §7.

⁴⁰³ General Assembly Report of the Special Rapporteur on the Situation of Human Rights Defenders on Human Rights Defenders (1 October 2004) UN Doc A/59/401, §33.

⁴⁰⁴ General Assembly Report of the Special Rapporteur on the Situation of Human Rights Defenders on Human Rights Defenders (14 August 2008) UN Doc A/63/288 Annex § 7.

⁴⁰⁵ Report of the Special Rapporteur on the situation of human rights defenders, 1 February 2016, United Nations, A/HRC/31/55; www.ohchr.org/EN/HRBodies/HRC/.../Session31/.../A%20HRC%2031%2055_E.docx.

186. Article 16 ICCPR includes protection against unlawful attacks on one's reputation and honour, and whilst the ECHR does not explicitly include such protection, the ECtHR has stated that "[t]he right to protection of reputation is a right which is protected by Article 8 of the Convention", in relation to particularly serious attacks on reputation which interfere with the right to private life.⁴⁰⁶

187. Nevertheless, human rights defenders are often stigmatised through the reactions and attitudes of public officials towards their work.⁴⁰⁷ PACE has expressed concern that "defenders face defamation campaigns aimed at discrediting them or are accused of being unpatriotic, traitors, 'spies', or 'extremists' in a number of the organization's member States."⁴⁰⁸

188. The UN Special Rapporteur on the situation of human rights defenders has therefore encouraged States to "refrain from portraying human rights defenders and their activities as dangerous, illegal or a threat to the security of the State" and PACE has called on member States to "refrain from conducting smear campaigns against human rights defenders and condemn such campaigns conducted in the media or by other non-State actors".⁴⁰⁹ Instead, States have been encouraged to publicly praise "their important role and efforts in the promotion, protection and the full enjoyment of human rights by all"⁴¹⁰ as well as to "take measures to raise awareness and promote knowledge about human rights defenders' work and its recognition by society."⁴¹¹

189. International organisations can also help in this regard, for example through the awarding of human rights prizes. PACE awards the Václav Havel Human Rights Prize, "which aims to reward outstanding civil society action in defending human rights in Europe and beyond."⁴¹² The Council of Europe Raoul Wallenberg Prize is awarded every two years "in order to reward extraordinary humanitarian achievements by a single individual, a group of individuals or an organisation" and the European Parliament's annual Sakharov Prize honour individuals and groups dedicated to the defence of human rights.⁴¹³

190. The OSCE Guidelines recommend that States conduct "training and awareness-raising programmes targeted at relevant professional groups, as well as broader human rights education, in order to shape attitudes and behaviours and raise the profile of human rights defenders in society, thereby increasing their protection."⁴¹⁴

191. Such support is being provided for example through face-to-face and online training courses, workshops, seminars and conferences, accompaniment, mentoring and collaboration, and the development of databases, manuals, handbooks and tools. Where there is insufficient information available, research partnerships between scholars, practitioners and defenders have contributed to identifying and filling critical gaps in knowledge on the security and protection of defenders and have facilitated critical reflection.⁴¹⁵

192. States can also extend a standing invitation for a country visit of the Special Rapporteur on the situation of human rights defenders (examining the enabling environment, including freedom of expression, peaceful assembly and association, etc.). States may also wish to respond promptly to

⁴⁰⁶ *Axel Springer AG v. Germany* [GC] (39954/08) 7 February 2012, §83.

⁴⁰⁷ A/HRC/13/22 p. 6.

⁴⁰⁸ PACE Resolution 1660 (2009) on the situation of human rights defenders in Council of Europe member States, adopted 28 April 2009, § 4.

⁴⁰⁹ PACE Resolution 2095 (2016) § 6.5.

⁴¹⁰ *Ibidem*.

⁴¹¹ PACE Resolution 2095 (2016) §6.7. See also A/HRC/RES/22/6, preamble and A/HRC/24/L.24, § 4.

⁴¹² <http://website-pace.net/web/apce/vaclav-havel-human-rights-prize>.

⁴¹³ <http://www.europarl.europa.eu/sakharovprize/en/home/the-prize.html>

⁴¹⁴ OSCE (2013), p.5.

⁴¹⁵ See Special Issue, *Journal of Human Rights Practice*, vol. 5, No. 3 (2013), and *International Journal of Human Rights*, vol. 19, No. 7 (2015).

communications on cases raised by the Special Rapporteur and give due consideration to the recommendations made in their reports.⁴¹⁶

4.2.2 Protection mechanisms

193. The Committee of Ministers, in its 2008 Declaration on Human Rights Defenders, condemned “all attacks on and violations of the rights of human rights defenders in Council of Europe member states or elsewhere, whether carried out by state agents or non-state actors”. It further called on member states to “(xi) provide measures for swift assistance and protection to human rights defenders in danger in third countries, such as, where appropriate, attendance at and observation of trials and/or, if feasible, the issuing of emergency visas; and (4) invited the Commissioner for Human Rights to strengthen his role and capacity to provide strong and effective protection for human rights defenders. PACE considers that an enabling environment includes “appropriate infrastructures and assistance programmes for defenders at risk”.⁴¹⁷ The OSCE Guidelines recommend that States “develop, in consultation with civil society and with technical advice from relevant international agencies, appropriate protection policies, programmes and mechanisms to ensure the safety and security of human rights defenders at risk. These should include the provision of physical protection, temporary relocation and other protection measures and support services as may be required.”⁴¹⁸

194. The Committee of Ministers has also recommended that States “consider giving, or where appropriate, strengthening, the competence and capacity to independent commissions, ombudspersons, or national human rights institutions to receive, consider and make recommendations for the resolution of complaints by human rights defenders about violations of their rights.”⁴¹⁹ As highlighted at several occasions in the UN system, NHRIs play a vital role in the protection of human rights defenders.⁴²⁰ Several reports of UN Special Rapporteur on the situation of human rights defenders (Special Rapporteur) lay out their role in this regard.⁴²¹ It has been identified, for example, that strong, independent and effective NHRIs contributed to the safe and enabling environment for human rights defenders.⁴²² In 2013, the Special Rapporteur categorised the role of national human rights institutions in the protection of human rights defenders as including: formal complaints mechanisms and protection programmes; advocacy in favour of a conducive work environment for defenders; interaction with international and regional mechanisms; public support in cases of violations against human rights defenders; visits to prisons and detention centres and provision of legal assistance; conflict mediation; and capacity strengthening for human rights defenders.⁴²³

195. Within the scope of the Vienna Conventions on Diplomatic Relations and on Consular Relations, State embassies may also provide protection to human rights defenders, where appropriate.⁴²⁴ States may also grant emergency visas to human rights defenders facing difficulties as well as granting them residence permits,⁴²⁵ and indeed PACE has called upon member States to “establish humanitarian visa schemes or take any other appropriate measure for human rights

⁴¹⁶ OHCHR (2004), pp. 30-31; see in this context, reports by the UN Special Rapporteur on the situation of Human Rights Defenders at: http://ap.ohchr.org/documents/dpage_e.aspx?m=70&m=166.

⁴¹⁷ PACE Resolution 1891 (2012), § 5.4.

⁴¹⁸ OSCE (2013), p.4. See also A/RES/64/164.

⁴¹⁹ Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, 6 February 2008, §2(v).

⁴²⁰ See for example General Assembly, Resolution 17 December 2015 on the report of the Third Committee A/70/489/Add.2 (70/163).

⁴²¹ See, for example, A/68/262.

⁴²² A/HRC/25/55, pp. 77-83.

⁴²³ A/HRC/22/47, pp. 6-18.

⁴²⁴ See Guidelines in this regard from the Swiss and Norwegian governments, as well as the EU Guidelines on HRDs.

⁴²⁵ OSCE (2013), p.16.

defenders facing imminent danger or in need of respite as a consequence of persistent persecution in third countries, or at least facilitate the issue of emergency visas for them in such situations.”⁴²⁶

196. Protection mechanisms can be established by civil society and human rights defenders themselves. In the Europe region, the South Caucasus Network of Human Rights Defenders was established in July 2009 and unites 30 human rights NGOs in Armenia, Azerbaijan and Georgia. The network seeks to facilitate the creation of a safer and enabling environment for human rights defenders in the South Caucasus, and to strengthen their voices in the region and internationally. Similarly, national human rights institutions can be established to receive information from human rights defenders on the violations they are addressing in their work or violations targeting them personally.⁴²⁷

197. International organisations and human rights mechanisms are also seen as protection mechanisms.⁴²⁸ The Council of Europe Commissioner for Human Rights has been encouraged by the Committee of Ministers to “strengthen the role and capacity of his Office in order to provide strong and effective protection for human rights defenders, by continuing to act on relevant information received, continuing to meet with a broad range of defenders and reporting publicly on their situation, intervening with competent authorities as appropriate, and working in close cooperation with other intergovernmental organisations and institutions. Under Rule 39 of its Rules of Court, the ECtHR can grant provisional measures, which may lead to direct protection of human rights defenders facing significant risks. States parties are bound to co-operate with the Court⁴²⁹ and not to hinder the exercise of the right of individual application.⁴³⁰ The Council of Europe has also established an Internet platform aimed at protecting journalism and promoting the safety of journalists. Certain NGOs can use the platform to issue alerts concerning threats to media freedom and bring them to the attention of the Council of Europe’s institutions.⁴³¹ The European Instrument for Democracy and Human Rights⁴³² (EIDHR) provides dedicated financial assistance to organisations providing support to the work of human rights activists, and also operates an emergency fund for human rights defenders.⁴³³ In his most recent report, the Secretary General of the Council of Europe has recommended, following the suggestions of other Council of Europe organs, that the organisation establishes “a mechanism strengthening the protection of human rights defenders; the new mechanism will focus on reprisals against human rights defenders related to their interaction with the Council of Europe.”

4.2.3 Lack of proper investigations

198. Under Article 9(5) of the UN Declaration on Human Rights Defenders, States have a duty to “conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedom has occurred in any territory under its jurisdiction.” However, impunity is one of the biggest problems facing human rights defenders.⁴³⁴ PACE has deplored the fact that some of the most serious attacks on human rights defenders in some countries, including murders, abductions and torture, have still not been properly investigated.⁴³⁵ Human rights defenders have reported to the OSCE that complaints of

⁴²⁶ PACE Resolution 1660 (2009), § 13.2.

⁴²⁷ OHCHR (2004), pp. 30-31.

⁴²⁸ OHCHR (2004), pp. 30-31.

⁴²⁹ Article 38 ECHR.

⁴³⁰ Article 34 ECHR.

⁴³¹ www.coe.int/fom.

⁴³² <http://www.eidhr.eu/human-rights-defenders>.

⁴³³ http://eeas.europa.eu/human_rights/defenders/index_en.htm.

⁴³⁴ A/HRC/25/55, § 73.

⁴³⁵ Resolution 1891 (2012).

abuses are not taken seriously, threats against them are underestimated or there is a general unwillingness to conduct thorough investigations into such allegations.⁴³⁶

199. The Committee of Ministers has therefore called on member States to “take effective measures to prevent attacks on or harassment of human rights defenders, ensure independent and effective investigation of such acts and to hold those responsible accountable through administrative measures and/or criminal proceedings.” It has remarked that “impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations. In these circumstances, faults might be observed within state institutions, as well as at each stage of the judicial or administrative proceedings.”⁴³⁷ The OSCE/ODHIR practical guide to Hate Crime Laws may serve as a useful tool in this regard.⁴³⁸

200. Any investigation must be in accordance with the requirements laid down by the ECtHR: it should be adequate, thorough, impartial and prompt, and with a sufficient element of public scrutiny to ensure accountability.⁴³⁹

4.3 Right to information and freedom of expression

4.3.1 Freedom of the media

201. The ECtHR has stated that:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁴⁴⁰

202. Article 6 of the UN Declaration on Human Rights Defenders recognises the right of journalists and media workers to obtain and disseminate information relevant to the enjoyment of their rights. Journalists and the media are also protected by the human rights relating to freedom of opinion and expression discussed elsewhere in this study.⁴⁴¹

203. The OSCE Guidelines state that “[t]he media environment – including the printed media, radio, television and the Internet – should be conducive to the participation of human rights defenders in public debates in order to help develop new ideas towards improving the protection of human rights and meeting new human rights challenges. States should therefore take measures to create a strong and pluralistic media and to improve the access of human rights defenders to the media.”⁴⁴² In order to promote freedom of the media, the OSCE established in 1997 the Representative on Freedom of the

⁴³⁶ OSCE (2013), §70.

⁴³⁷ “Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations”, section I. The need to combat impunity, §2. See also OSCE (2013), p.4.

⁴³⁸ OSCE/ODIHR, “Hate Crime Laws – A Practical Guide”, 2009. See also Committee of Ministers Recommendation No. R (97) 20 on hate speech, INGO Conference Decision on hate speech (CONF/PLE(2014)APP1).

⁴³⁹ In relation to Art. 2 (right to life), see e.g. *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98 (§§ 110-113) and *Makaratzis v. Greece*, no. 50385/99, 20 December 2004 (§§ 73-79); On the difference between the procedural obligations under Articles 2 and 3 (prohibition of torture) see for e.g. *Ilhan v. Turkey*, no. 22277/93, 27 June 2000, (§§ 91-92). On Articles 3 and 5 see for e.g. *Kurt v. Turkey*, (15/1997/799/1002), 25 May 1998, §§ 139-142 (Article 3) §124 (Article 5).

⁴⁴⁰ *Castells v. Spain* (11798/85), 24 April 1992, §43. See also Council of the European Union (2014), p.1 and HRC, General Comment 34, §13.

⁴⁴¹ See also Articles 55 and 66 of the Treaty of ECOWAS (1975).

⁴⁴² OSCE (2013), p.10.

Media, which has an early warning function and provides rapid response to serious non-compliance with regard to free media and freedom of expression. The Representative is mandated to observe media developments in the participating States and to advocate and promote full compliance with the Organization's principles and commitments in respect of freedom of expression and free media.⁴⁴³ The Representative also closely collaborates with the Council of Europe Platform for the Protection of Journalism and Safety of Journalism.⁴⁴⁴

204. A free and vibrant media sector that takes its responsibilities to inform the public and promote mature debate on real issues seriously is an important protector of democracy and of civil liberties. Ensuring that the views of CSOs, minority groups and those who wish to challenge dominant narratives are given appropriate space is a critical requirement to ensure that citizens are informed and educated about the issues facing society and can participate fully in democratic decision-making.

205. However, despite these legal protections, journalists and individuals working with the media are often threatened, wounded and killed because of the potential impact on society that these individuals can have by disseminating information about human rights through a wide array of media.⁴⁴⁵ Particular threats that such individuals receive include the closure of offices and newspapers, censorship on media coverage and disruption of internet connections, prohibition to freely cover protests and demonstrations, and restrictions to their freedom of movement including deportation.⁴⁴⁶ The Special Rapporteur on the situation of human rights defenders has noted that in the Europe and Central Asia region, journalists and media workers who have been targeted focus their work mainly on monitoring demonstrations, democratic governance, investigative journalism, corruption, human rights violations committed by the State, environmental issues and minority rights.⁴⁴⁷ NHRIs address human rights concerns both through and those faced by media actors.⁴⁴⁸ The Committee of Ministers issued the Recommendation CM/Rec (2016)4 on the protection of journalism and safety of journalists and other media actors, which provides the most comprehensive list of principles related to safety of journalists, as established by the ECtHR's case-law, and urges member States to carry out independent review of whether the safeguards for the exercise of the right to freedom of expression in a given member State are robust and effective. In line with this Recommendation, NHRIs, including human rights commissions, ombudsmen or other bodies are those who are best placed to conduct this independent review.⁴⁴⁹

4.3.2 Right to access and communicate with international bodies

206. In 2008, the Committee of Ministers adopted a Declaration (endorsed by the Parliamentary Assembly Committee on Legal Affairs and Human Rights in 2009)⁴⁵⁰ calling on member States to "ensure the effective access of human rights defenders to the European Court of Human Rights" and other human rights protection mechanisms. Article 9(4) of the UN Declaration provides that "everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms."⁴⁵¹ The UN and other

⁴⁴³ www.osce.org/fom.

⁴⁴⁴ See for example <https://www.coe.int/en/web/media-freedom/news>.

⁴⁴⁵ A/HRC/19/55, p.7.

⁴⁴⁶ A/HRC/19/55, p.9.

⁴⁴⁷ A/HRC/19/55, p.11.

⁴⁴⁸ Paris Principles, a) 'competence and responsibilities'

⁴⁴⁹ Appendix to Recommendation CM/Rec(2016)4, § 4.

⁴⁵⁰ Resolution 1660.

⁴⁵¹ See also OSCE (2013), p.18.

regional mechanisms have similarly called on free access to their bodies without fear of reprisal,⁴⁵² and many Optional Protocols allowing for the examination of individual complaints by treaty bodies commit State parties to ensure the protection of individuals submitting such communications or otherwise cooperating with the treaty body.⁴⁵³ In October 2016 the Secretary General of the United Nations, gave Assistant Secretary General, Andrew Gilmour, the special mandate to receive, consider and respond to allegations of intimidation and reprisals against human rights defenders and other civil society actors engaging with the UN due to growing concern of governments preventing human rights defenders from engaging with the UN or punishing and even imprisoning them when they do so.

207. The OSCE has recommended that legislation should not restrict the rights of defenders to travel abroad to attend formal and informal meetings with international bodies, or from meeting with international delegations when conducting country visits.⁴⁵⁴ Instead, legislation can also take proactive steps, such as actively disseminating information in the country's local languages about international human rights mechanisms, related human rights instruments, recommendations, decisions and jurisprudence of human rights mechanisms, including the Special Rapporteur on the situation of human rights defenders.⁴⁵⁵

5. National Human Rights Institutions (NHRIs)

208. In light of their broad mandates to promote and protect all human rights in a country, regular and constructive engagement with a wide range of relevant stakeholders is essential for NHRIs. NHRIs need to cooperate with other state authorities and with civil society organisations and human rights defenders. With a view to enhancing the promotion and implementation of international human rights norms and standards in a country, NHRIs also regularly engage with international organisations, including United Nations and regional organisations.

209. While regular and constructive working relationships with state authorities, civil society organisations and human rights defenders are of essential importance for NHRIs, such relations should be construed with due regard for NHRIs' independence. Their independence from government is a vital characteristic that should give NHRIs freedom to comment on – and criticise – government action, policies and legislation alongside civil society.⁴⁵⁶ This unique position gives rise to particular challenges and opportunities.⁴⁵⁷ That they are established and funded by government gives them authority and permanence, but also risks compromising that freedom. A large part of the Paris Principles is therefore devoted to balancing both unique characteristics. That they are a bridge between government and civil society has allowed them to develop important relationships with and offer valuable assistance to the latter.

210. The importance of NHRIs in promoting and protecting human rights at both the international and national levels has been repeatedly highlighted by the General Assembly⁴⁵⁸ and the HRC.⁴⁵⁹ In the Brighton Declaration, Council of Europe member States expressed their determination to ensure the

⁴⁵² See International Service for Human Rights (2013), p. 5; Resolution 196 of 2011 of the African Commission on Human and People's Rights; UN HRC Resolution 12/2, § 1.

⁴⁵³ See, e.g., Article 15 of the Optional Protocol to the Convention against Torture (OPCAT), Article 11 of the Optional Protocol to the ICESCR (OPICESCR), and Article 4 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3CRC).

⁴⁵⁴ OSCE (2013), § 91.

⁴⁵⁵ OSCE (2013).

⁴⁵⁶ See, for example, GA Res 63/169, 63/172, 70/163.

⁴⁵⁷ A. Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' *Human Rights Quarterly* 28 (2006), pp. 904-946; K. Meuwissen, 'NHRIs and the State: New and Independent Actors in the Multi-Layered Human Rights System?' *Human Rights Law Review* 15 (2015), pp. 441-484.

⁴⁵⁸ Resolution A/C.3/66/L.49/Rev.1, 16, Resolution A/RES/66/169, Resolution A/RES/66/254.

⁴⁵⁹ Resolution 20/14.

effective implementation of the ECHR by considering the establishment, if they have not already done so, of an independent NHRI, and to work in a spirit of cooperation with civil society and NHRIs. Similarly, the Brussels declaration emphasised the role of NHRIs in assisting the primary role played by national authorities in guaranteeing human rights.⁴⁶⁰

5.1 Supportive regulatory framework

5.1.1 Competence and responsibilities

211. Whether the source be constitutional or legislative, the NHRI must be established with sufficient detail to ensure a broad human rights mandate and independence.⁴⁶¹ Crucially, the Paris Principles state that NHRIs must have “as broad a mandate as possible” which should include both “the promot[ion] and protect[ion] of [all] human rights.”⁴⁶² As a “national” human rights institution, the NHRI should, in principle, have jurisdiction across all of a State’s territory, including having effective jurisdiction in federal states.⁴⁶³ NHRIs, including in federal states, are encouraged to cooperate with sub-national bodies dedicated to human rights.⁴⁶⁴

5.1.2 Composition and guarantees of independence and pluralism

212. NHRIs should be independent from state authorities as well as from private organisations, including civil society organisations. There are numerous ways to ensure the greatest degree of independence possible. The Paris Principles provide key requirements to ensure the structural and functional independence of NHRIs and are elaborated on in SCA General Observations⁴⁶⁵ (1.8).

5.1.2.1 Constitutional / legislative base

213. NHRIs are necessarily “creatures of the law” – they depend on national laws for their existence and to authorise their actions.⁴⁶⁶ Across the Council of Europe member states, most NHRIs have a constitutional and legislative basis, while others have only a legislative basis.⁴⁶⁷

214. Both NHRIs that are created by constitution and those created by primary legislation are compliant with the Paris Principles. However, establishment by constitution may be preferable as it is generally very difficult to amend a constitutional basis.⁴⁶⁸ NHRIs that are established by executive order or other mechanisms that do not require approval of the country’s elected representatives do not meet international standards, as this method does not sufficiently ensure permanency and

⁴⁶⁰See also Recommendation No. R (97) 14 of the Committee of Ministers to member States on the establishment of independent national institutions for the promotion and protection of human rights, 30 September 1997.

⁴⁶¹ SCA (2013) G.O. 1.1.

⁴⁶² Section A.2.

⁴⁶³ Amnesty International (2001), p.4. One exception is the situation in the UK where three A-status NHRIs co-exist: the NHRIs of Northern Ireland, Scotland and Great Britain. This exceptional situation respects the international peace agreement on Northern Ireland, which included the establishment of an NHRI.

⁴⁶⁴ SCA GO 1.5 ‘cooperation with other national human rights bodies’. Note, in this respect, the SCA Report (2013) on the Russian NHRI: ‘NHRIs should develop, formalize and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights, including sub-national statutory human rights institutions, thematic institutions, as well as civil society and non-governmental organizations. In this respect, the SCA acknowledges the existence of the Coordination Council and the [Russian NHRI’s] cooperation with the regional human rights institutions of the Russian Federation and civil society organisations, to which it concerns human rights issues.’ See also: SCA GO 1.10: ‘Where possible, accessibility should be further enhanced by establishing a permanent regional presence’.

⁴⁶⁵ GANHRI General Observations on Paris Principles, last updated in May 2013.

⁴⁶⁶ UNDP and OHCHR (2010), p.5.

⁴⁶⁷ From the 41 ENNHRI member NHRIs, 22 have a constitutional and legislative basis and 19 have a legislative basis.

⁴⁶⁸ UNDP and OHCHR (2010), p.4.

independence⁴⁶⁹ and it is easier to abolish NHRIs or to limit powers which are necessary to their effective functioning.⁴⁷⁰ Many NHRIs are established in the constitution, with organisational structures developed in primary legislation.⁴⁷¹ The combination of these, and associated administrative regulations, can fulfil the requirements of the Paris Principles.⁴⁷²

215. An NHRI must be able to carry out its functions without interference or obstruction from any branch of government or any public or private entity.⁴⁷³

5.1.2.2 Selection, appointment, tenure and dismissal of members

216. Section B.1 of the Paris Principles states that “[t]he composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights.”⁴⁷⁴

217. The Sub-committee on Accreditation (SCA) of the Global Alliance of NHRIs (GANHRI) has interpreted the reference to “an election or otherwise”, together with the reference to “broad participation”, as requiring a “clear, transparent, merit-based and participatory selection and appointment process”. The duration of the appointment should be clearly set out in the founding legislation.⁴⁷⁵

218. The SCA has laid out certain criteria which may ensure a credible appointment process.⁴⁷⁶ Firstly, it recommends that the process be “under the control of an independent and credible body and involve open and fair consultation with NGOs and civil society.” Secondly, it recommends that vacancies are advertised broadly, in order to maximise the potential number of candidates and thereby promote pluralism. Thirdly, the application, screening, selection and appointment process should be on the basis of pre-determined, objective and publicly available criteria and should involve broad consultation and participation. Criteria should be subject to consultation with all stakeholders, including civil society, and not unduly narrow and restrict the diversity and plurality of the NHRI membership.⁴⁷⁷ Members should be selected to serve in their own individual capacity rather than on behalf of any particular organisation. Finally, the SCA recommends that the process be formalised in relevant legislation, regulations or binding administrative guidelines as appropriate. Amnesty International recommends that strong leadership qualities are vital amongst NHRI members, as well as proven expertise of practical human rights work.⁴⁷⁸ It is important that the recruitment process is independent and high-quality because NHRIs “stand or fall by the quality of their personnel – especially those at the top.”⁴⁷⁹

⁴⁶⁹ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (SCA) (2013) General Observation 1.1.

⁴⁷⁰ Amnesty International (2001), p.3.

⁴⁷¹ For example, NHRIs from Albania, Armenia, Bosnia and Herzegovina, Croatia, Hungary, Lithuania, “The Former Yugoslav Republic of Macedonia”, Poland, Portugal and Slovenia.

⁴⁷² SCA (2013) G.O. 1.1 and 1.8.

⁴⁷³ Centre for Human Rights (1995), p10 SCA (2013) G.O. 1.2, 1.8, 1.9.

⁴⁷⁴ The section gives examples of groups that may be represented.

⁴⁷⁵ Centre for Human Rights (1995), p.11.

⁴⁷⁶ SCA (2013) G.O.2.2; (G.O. 1.8, process can be formalised in regulations / binding administrative guidelines).

⁴⁷⁷ SCA (2013) G.O. 1.7.

⁴⁷⁸ Amnesty International (2001), p5 SCA (2013) G.O. 1.8. G.O. 1.8 (d) 'assess applicants on the basis of predetermined, objective and publicly available criteria'.

⁴⁷⁹ International Council on Human Rights Policy (2004), p.77.

219. The founding legislation should also detail the circumstances under which a member may be dismissed, as well as an independent and objective dismissal process, similar to that accorded to members of other independent State agencies. “The grounds for dismissal must be clearly defined and appropriately confined to only those actions which impact adversely on the capacity of the member to fulfil their mandate.” In addition, “dismissal should not be allowed based solely on the discretion of appointing authorities” and must be made “in conformity with all the substantive and procedural requirements as prescribed by law.”⁴⁸⁰

220. Representatives of government agencies should not, in general, be represented on the governing body of an NHRI.⁴⁸¹ Should they do so, section B.1 of the Paris Principles states that they should participate “only in an advisory capacity.” The SCA further recommends that the NHRI’s rules of procedure establish practices “to ensure that such persons are unable to inappropriately influence decision-making by, for example, excluding them from attending parts of meetings where final deliberations and strategic decisions are made.” As Amnesty International points out, NHRIs should also be cautious of applicants who view membership of the NHRI to a position within government and may therefore be less willing to criticise the executive.⁴⁸²

5.1.2.3 Financial independence

221. The Paris Principles state that NHRIs shall have adequate funding so as to “enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.”⁴⁸³ Nevertheless, as NHRIs are state-funded entities, questions may arise as to how independence can be assured. One way is for national legislation or policies to ensure that the reason for and amount of funding should not be decided by one ministry alone.⁴⁸⁴ Other options include listing the institution’s funding as a separate item on the annual budget legislation, and introducing a right of the NHRI’s representatives to be consulted when the final decision is made on the annual funding in the legislature.⁴⁸⁵ In any case, the source and nature of an NHRI’s funding should be specific in its founding legislation where possible⁴⁸⁶ and it should be at an appropriate level in order to guarantee the NHRI’s independence and its ability to freely determine its priorities and activities. It must also have the power to allocate funding according to its priorities.⁴⁸⁷ The SCA has developed a number of recommendations regarding funding provisions.⁴⁸⁸ NHRIs should as best practice be accountable to parliament for their expenditure, rather than to the Government, in order to underline their operational independence.

5.1.2.4 Independence regarding issues addressed

222. The founding legislation should expressly guarantee that NHRI members and staff will not receive instructions from government ministers, public officials, or private entities.⁴⁸⁹ It is considered important that the enabling laws of an NHRI establish a process whereby the NHRI’s reports may be widely circulated, discussed and considered by the legislature.⁴⁹⁰ It is preferable that the NHRI has an explicit power to table reports directly in the legislature, and that procedures are in place requiring the

⁴⁸⁰ SCA (2013) G.O. 2.1.

⁴⁸¹ SCA (2013) G.O. 1.9.

⁴⁸² Amnesty International (2001), p.6.

⁴⁸³ B(2).

⁴⁸⁴ Aichele (2010), p.24.

⁴⁸⁵ Aichele (2010), p.25.

⁴⁸⁶ Centre for Human Rights (1995).

⁴⁸⁷ SCA (2013) G.O. 1.10.

⁴⁸⁸ SCA (2013) G.O. 1.10.

⁴⁸⁹ OHCHR and International Council on Human Rights Policy (2005), p.12.

⁴⁹⁰ SCA General Observation (2013) 1.11; OHCHR and International Council on Human Rights Policy (2005)12.

legislature to follow-up the recommendations made by the NHRI.⁴⁹¹ Beyond formal structures, a culture of independence and functional independence in an NHRI's day to day work is required for the effective promotion and protection of human rights. 'Whatever structural guarantees exist, an institution will quickly become known, both nationally and internationally, for what it does',⁴⁹².

223. Pluralism, a diverse and broad representation of national society decision-making and staff body, facilitates the NHRI's appreciation of, and capacity to engage on, all human rights issues affecting the society in which it operates, and promotes the accessibility. Consideration must be given to ensuring pluralism in the context of gender, ethnicity or minority status through, for example, the appointment procedures for members of the decision-making body, structures for effective cooperation with diverse societal groups (advisory committees, networks, consultations or public forums) ; or staff that are representative of the diverse segments of society.⁴⁹³

224. The SCA strongly recommends that provisions are included in national law to protect legal liability of members of NHRIs' decision-making bodies for the actions and decisions that are undertaken in good faith in their official capacity.⁴⁹⁴ Such functional immunity reinforces the independence of an NHRI, promotes the security of tenure of its decision-making body, and its ability to engage in critical analysis and commentary on human rights issues. It is acknowledged that no office holder should be beyond the reach of the law and thus, in certain exceptional circumstances, it may be necessary to lift immunity. The SCA recommends that national law provides for well-defined circumstances in which the functional immunity of the decision-making body may be lifted in accordance with fair and transparent procedures, by an appropriately constituted body such as the superior court or by a special majority of parliament.⁴⁹⁵

5.1.3 Methods of operation, models, roles and activities

5.1.3.1 Typologies

225. The Paris Principles are silent on any classification of NHRIs, and states are entitled "to choose the framework which is best suited to its particular needs at the national level".⁴⁹⁶ In reality, several main types of NHRI exist,⁴⁹⁷ each of which can fulfil the Paris Principles requirements to promote and protect all human rights.

226. Ombudsman NHRIs are the most common NHRI model in the Council of Europe.⁴⁹⁸ Aside from quasi-judicial complaints handling function, they must include a broader human rights mandate than classic maladministration.⁴⁹⁹ Where a single Ombudsman model is used, pluralism through staff that is representative of the diverse segments of society is particularly relevant.⁵⁰⁰ The Spanish *Defensor del Pueblo* model is similar to the ombudsman-type NHRI, which derived from the Scandinavian tradition. The *Defensor del Pueblo* originated in Spain and has spread to Latin America

⁴⁹¹ See CDDH-INST Guide of good practices (*currently underway*).

⁴⁹² G. De Beco and R. Murray, 'The Paris Principles, A Commentary' (Cambridge University Press, 2014) 83, referring to OHCHR (2010) 40.

⁴⁹³ SCA (2013) G.O. 1.7.

⁴⁹⁴ SCA General Observation 2.3 (2013).

⁴⁹⁵ SCA General Observation 2.3 (2013).

⁴⁹⁶ Vienna Declaration and Programme of Action, A/CONF.157/ 23, Part I, §36.

⁴⁹⁷ Aichele (2010), p.16; Wouters and Meuwissen (2013).

⁴⁹⁸ Including NHRIs from Albania, Armenia, Austria, Azerbaijan, Bosnia I Herzegovina, Bulgaria, Croatia, Cyprus, Georgia, Hungary, Latvia, Lithuania, "The Former Yugoslav Republic of Macedonia", Moldova, Poland, Portugal, Russian Federation, Serbia, Slovenia, Spain, Turkey and Ukraine.

⁴⁹⁹ SCA (2013) G.O. 1.2.

⁵⁰⁰ SCA (2013) G.O. 1.7.

(including Ecuador, Peru and Venezuela). The Latvian NHRI can also be thought of as falling into this category.⁵⁰¹

227. A Commission NHRI model is used in most Common law countries, including the UK and Ireland, and in some civil law countries. Commissions might have the power to participate in strategic litigation or intervene as *amicus curiae*, perform official investigations, and a few receive individual complaints.⁵⁰² They have multi-member decision making bodies, as is the case of consultative Commissions found in France,⁵⁰³ Greece and Luxembourg. Institute (or Centre) NHRIs are similar to the Commission model, but may include a particular focus on research, and are found in Denmark, Germany, Netherlands and Slovakia.⁵⁰⁴ An NHRI may be a “hybrid” institution, such as the Finnish NHRI, which includes both an Ombudsman Institution and a Human Rights Centre.

228. Other national bodies working on human rights with a narrower mandate than NHRIs, include classic maladministration Ombudsman, Equality Bodies,⁵⁰⁵ and other institutions addressing specific equality groups,⁵⁰⁶ types of human rights,⁵⁰⁷ or territorial areas.⁵⁰⁸ While these usually do not have a sufficiently broad mandate to be classified as NHRIs, they may (in the case particularly of Equality Bodies) have significant promotion and protection powers across a wide range of equality grounds.⁵⁰⁹ The Council of Europe Commissioner for Human Rights has given an opinion on national structures for promoting equality, including recommendations as to their establishment and functioning.⁵¹⁰ The European Union Directives⁵¹¹ provide that EU member states shall designate an independent body or

⁵⁰¹ International Council on Human Rights Policy (2004), p.4.

⁵⁰² OHCHR (2010), p.16.

⁵⁰³ It should be noted that France has two main NHRI ombudsman institutions (National Consultative Commission of Human Rights (CNCDH), and the French Defender of Rights (DDD)). In addition, it provides for a Consultative Commission/Ombudsman for detention facilities (*Contrôleur general des lieux de privation de liberté*).

⁵⁰⁴ FRA (2010), p.21.

⁵⁰⁵ Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁵⁰⁶ For example: independent national human rights institutions in the promotion and protection of the rights of the child (Committee on the Rights of the Child, General Comment No. 2 (2002)), Independent Monitoring Mechanisms (Article 33(2) Convention on the Rights of Persons with Disabilities). Presently, the European Network of Equality Bodies (Equinet) consists of 46 members deriving from 33 states, such as Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, the Netherlands, and the United Kingdom. See also www.equineteurope.org.

⁵⁰⁷ For example: National Data Protection Authorities (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data), National Prevention Mechanisms (Optional Protocol of the Convention against Torture).

⁵⁰⁸ Such as regional Ombudsman Institutions found in Italy, Spain and Russian Federation.

⁵⁰⁹ For example, presently the European Network of Ombudspersons for Children (ENOC) consists of 42 members deriving from 34 states, such as Albania, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Norway, Poland, Serbia, Slovakia, Slovenia, Spain, Sweden, the Netherlands, Ukraine and the United Kingdom, 33 of which enjoy the full member status. See also www.enoc.eu.

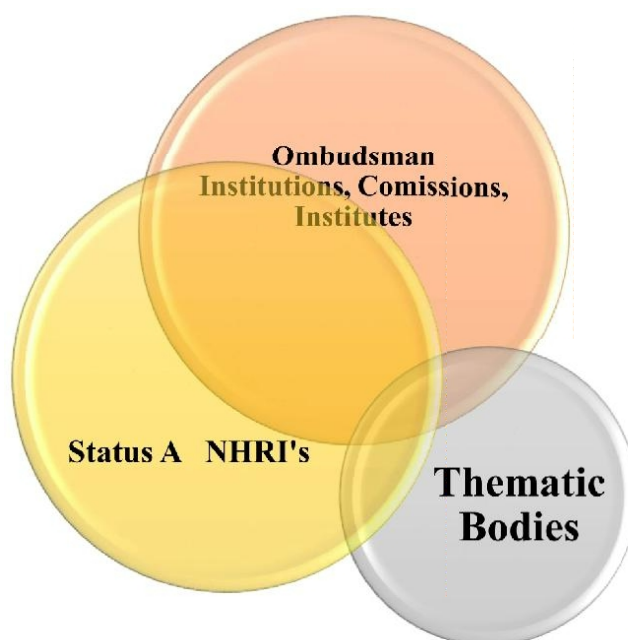
⁵¹⁰ <https://wcd.coe.int/ViewDoc.jsp?p=&id=1761031&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true>

⁵¹¹ Article 13 of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Official Journal L 180*, 19/07/2000 P. 0022 – 0026), Article 12 of the Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (*OJ L 373*, 21.12.2004, p. 37–43), Article 20 of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (*OJ L 204*, 26.7.2006, pp. 23–36).

bodies with independent competences for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, and on the grounds of sex.⁵¹² In line with a General Comment from the UN Committee on the Rights of the Child, specialised independent human rights institutions for children, ombudsmen or commissioners for children's rights are also being established in a growing number of States.⁵¹³

229. NHRIs must cooperate with all other national or subnational bodies working on human rights.⁵¹⁴ Some NHRIs might also have additional specialist mandates,⁵¹⁵ as is the case for 35 NHRIs⁵¹⁶ across Council of Europe member states (see also in this context Section 5.1.3.4). The British Equality and Human Rights Commission is an example of an NHRI in compliance with the Paris Principles, with the mandate of a national equality body required by EU Equality Directives. Where an NHRI has additional mandate(s), adequate resources are required for each mandate.⁵¹⁷

Fig.1. Possible Relationship between NHRIs in compliance with the Paris Principles and other independent national human rights bodies is shown below



⁵¹² For example, in 2016 Slovenia adopted a new Protection against Discrimination Act, which established an Advocate of the Principle of Equality as a self-governed state body. An Advocate is appointed by the Parliament upon the proposal of the President of the Republic.

⁵¹³ Committee on the Rights of the Child, General Comment No. 2 (2002), “The role of independent national human rights institutions in the promotion and protection of the rights of the child.”

⁵¹⁴ SCA (2013) G.O. 1.5, Paris Principles 1993, methods of operation (f).

⁵¹⁵ State parties should take into account the Paris Principles when designating Independent Monitoring Mechanisms (Article 33(2) UN Convention for the Rights of Persons with Disabilities) and National Preventative Mechanisms (Optional Protocol of the Convention against Torture). See also SCA (2013) G.O. 2.9

⁵¹⁶ In Council of Europe: 22 NHRIs are designated National Preventative Mechanisms (OPCAT); 20 NHRIs have an Ombudsman mandate; 19 NHRIs are designated Independent Monitoring Mechanisms (Article 33(2) CRPD); and 16 NHRIs have a National Equality Body mandate (information collected by ENNHRI in 2016).

⁵¹⁷ SCA (2013) G.O. 2.9.

5.1.3.2 Promote human rights and contribute to the application of the ECHR at domestic level

230. The SCA has interpreted “promotion” to include “those functions which seek to create a society where human rights are more broadly understood and respected”, including “education, training, advising public outreach and advocacy”.⁵¹⁸ The UN suggests that promotion work includes informing and educating about human rights, fostering the development of values and attitudes which uphold human rights, and encouraging action aimed at defending human rights from violation.⁵¹⁹ While human rights promotion is seen as fundamental to the mandate of NHRIs, it is also one of the most difficult tasks for which to prove impact.⁵²⁰

231. In particular, NHRIs can establish education campaigns and advocacy for governments, Parliaments and other stakeholders regarding human rights instruments such as the ECHR. The UN recommends that an NHRI should have at its disposal a range of information materials on human rights, including information on regional and international mechanisms and standards. Indeed, NHRIs must apply all rights set out in international, regional and domestic instruments, including economic, social and cultural rights.⁵²¹ NHRI promotion functions seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy.⁵²² It should also have the capacity to address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations.⁵²³ Promotional events such as Human Rights Day are also effective ways to raise awareness of human rights, and such events can also be run in partnership with community organisations.⁵²⁴

232. Amnesty International and the UN also recommend that specific human rights training be targeted at individuals who may have to consider and apply human rights issues in their work, such as law-makers, administrative decision-makers, judges, lawyers, the medical profession, teachers, social workers, prison officers, police officers and the armed forces.⁵²⁵

233. NHRIs can also promote human rights by helping to ensure draft legislation is in line with ECHR standards. They should be able to act as a “legislative watchdog” by reviewing the effectiveness of existing legislation or administrative provisions for their compatibility with international and regional human rights norms and make remedial recommendations if required. The Belgrade Principles on the relationship between NHRIs and national parliaments recommend that NHRIs be “consulted by Parliaments on the content and applicability of a proposed new law with respect to ensuring human rights norms and principles are reflected therein.”⁵²⁶ They may also be able to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.⁵²⁷ At the very least this should include encouraging the government to ratify international human rights instruments.⁵²⁸

⁵¹⁸ SCA (2013), G.O. 1.2.

⁵¹⁹ Centre for Human Rights (1995), § 140.

⁵²⁰ G. De Beco and R. Murray, *Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge: Cambridge University Press, 2014) 64.

⁵²¹ SCA (2013), G.O. 1.2.

⁵²² SCA (2013), G.O. 1.2.

⁵²³ Paris Principles, A. 3. (d)-(g);

⁵²⁴ Centre for Human Rights (1995), p19.

⁵²⁵ Amnesty International (2001), p.19.

⁵²⁶ §27.

⁵²⁷ Centre for Human Rights (1995), pp. 25-26.

⁵²⁸ See Carver (2010), p.16; Paris Principles (1993), Competence and responsibilities (c); and SCA (2013) G.O. 1.3.

234. NHRIs also conduct research. For example, the Committee on Economic, Social and Cultural Rights points to NHRIs “conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realised, either within the State as a whole or in areas or in relation to communities of particular vulnerability.”⁵²⁹ NHRIs not only monitor, investigate and report on the human rights situation in the country, but should also undertake rigorous and systematic follow up activities to promote and advocate for the implementation on its recommendations and findings, and the protection of those whose rights were found to have been violated. Public authorities are encouraged to respond to recommendations from NHRIs in a timely manner, and to provide detailed information on practical and systematic follow-up action, as appropriate, to the recommendations.⁵³⁰

5.1.3.3 *Protecting human rights*

235. The SCA interprets “protection” functions “as those that address and seek to prevent actual human rights violations”, such as “monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling.”⁵³¹

236. The increase in the numbers of cases being brought to regional human rights mechanisms necessitates such cases being dealt with first at the domestic level. The Brighton Declaration thus recommends the strengthening of domestic capabilities of enhancing human rights through, inter alia, the establishment of NHRIs. The ability of NHRIs to investigate abuses and provide relief to victims can act as a powerful disincentive to behaviour that results in human rights violations.⁵³²

237. NHRIs enjoy a special role under two international human rights treaties. Article 33(2) CRPD obliges States to use “independent mechanisms” to “promote, protect and monitor implementation” of the Convention. Many States⁵³³, such as Germany, have designated an NHRI as the independent mechanism under Article 33, and the European Network of NHRIs (ENNHRI) has established a CRPD Working Group to coordinate European Article 33(2) mechanisms. The OPCAT requires States Parties to establish one or more National Preventive Mechanisms, many of which are NHRIs⁵³⁴. Both CRPD and OPCAT refer to the Paris Principles.⁵³⁵

5.1.3.3.1 *Investigations*

238. Experience shows that there may be situations when authorities will be reluctant to investigate whether a human rights violation has occurred, at times due to a lack of knowledge of the substantive protections of international human rights treaties, even if those treaties have been integrated into the legal order of that country. Therefore, investigations of NHRIs can play a crucial role in providing justice in particular cases as well as revealing a broader weakness in the national system of human rights protection.⁵³⁶ The institution should develop a policy regarding which cases warrant

⁵²⁹ General Comment No. 10, §3(e).

⁵³⁰ SCA (2013) G.O. 1.6.

⁵³¹ SCA (2013) G.O. 1.2.

⁵³² Centre for Human Rights (1995), p.28.

⁵³³ In the Council of Europe, NHRIs have been designated as Independent Monitoring Mechanism under Article 33(2) in Albania, Austria, Azerbaijan, Belgium, Cyprus, Denmark, Finland, France, Georgia, Germany, UK (Great Britain, Northern Ireland and Scotland), Latvia, Luxembourg, Moldova, Netherlands, Poland and Spain.

⁵³⁴ In the Council of Europe, NHRIs have been designated as National Preventive Mechanisms: Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Georgia, Hungary, Lithuania, “The Former Yugoslav Republic of Macedonia”, Moldova, Poland, Portugal, Scotland, Serbia, Slovenia, Spain, Turkey and Ukraine.

⁵³⁵ Article 33(2) CRPD, and Article 18(4) OPCAT.

⁵³⁶ Aichele (2010), p.20.

intervention. The factors that will influence the extent to which an NHRI will be able to intervene whether it has adequate legal capacity, whether it has organisational competence, the presence of a defined and appropriate set of priorities, and whether it has the political will to pursue its work.⁵³⁷ An NHRI may also have jurisdiction to initiate investigations or inquiries into possible situations of human rights violations *suo moto*, that is to say without the need to receive a formal complaint or invitation from a government agency.⁵³⁸ Some NHRIs have the right to receive official documents and compel witnesses. For example, Article 25(3) of the law establishing the Ombudsman of Bosnia and Herzegovina states that “[a]n Ombudsman may not be denied access to any file or administrative document or to any document relating to the activity or service under investigation.”

5.1.3.3.2 Individual complaints

239. The HRC has stressed that NHRIs “in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations.”⁵³⁹

240. The Paris Principles state that:

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representatives’ organisations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

241. The Principles thus do not require that NHRIs hear complaints, and provide requirements only for those NHRIs that have a quasi-judicial mandate. If it is able to receive complaints, the NHRI will have to decide what complaints should be investigated, whether restrictions are appropriate (such as if complaints are already being dealt with by another body), who may complain, the procedure for submitting complaints, issues of confidentiality, and what happens if a complaint is rejected. Best practices regarding these issues are given by the UN in their training handbook to NHRIs.⁵⁴⁰ Amnesty International recommends that NHRIs be given the power to bring applications on behalf of those who may be unable to bring cases to protect their rights themselves (children, prisoners, those with mental health problems etc.) and should also have the legal power to challenge through the courts the legality of executive action.⁵⁴¹ The NHRI will have to choose (within the powers conferred to it) what

⁵³⁷ Centre for Human Rights (1995), p.28.

⁵³⁸ Centre for Human Rights (1995), p.34.

⁵³⁹ A/HRC/RES/5/1, §88.

⁵⁴⁰ A [Handbook](#) on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, Centre for Human Rights (1995) section V. See also a more recent manual, [UNDP-OHCHR Toolkit](#)

⁵⁴¹ Amnesty International (2001), p.10.

remedies should be made available. Again, both the UN and Amnesty International guidelines cover best practices in this regard.

242. It should be borne in mind that an NHRI cannot act as a substitute for the main organs of the State tasked with investigation, prosecution and adjudication of offences, namely the police, the prosecution services and the judiciary. Where NHRIs lack full investigatory powers, and/or if they are unable to issue binding judgments, they may not discharge a State's obligation to conduct an investigation leading to the punishment of those responsible and therefore may not be able to provide an effective remedy in accordance with Article 13 ECHR.⁵⁴²

243. NHRIs form part of an effective justice system, by raising awareness of rights and access to justice, and by providing legal assistance, being a party before the courts, or receiving individual complaints. Their quasi-judicial functions can lessen the burden on the courts, but is "not a substitute for law enforcement officials or a properly functioning judiciary"⁵⁴³

244. NHRIs can resolve individual human rights complaints in various manners, including through the quasi-judicial settling of disputes or the application of techniques such as mediation or conciliation.⁵⁴⁴ Remedies that can be offered by NHRIs vary widely, and range from statements of violations, requirements for further investigations, to the provision of compensation and others.⁵⁴⁵ In the large majority of cases, recommendations or decisions of NHRIs will not be enforceable, or will be limited to the requirement that authorities reply to the NHRI recommendations made.⁵⁴⁶ Advantages of complaints-handling by an NHRI have been pointed out to be accessibility, flexibility and cost-effectiveness.⁵⁴⁷

245. When a judicial solution to a human rights complaint is required, NHRIs can be instrumental by referring individual cases to the appropriate court. Such a referral to the judiciary may occur in the context of alternative dispute settlement undertaken by NHRIs, or through the general awareness raising role of NHRIs in providing human rights information to the public. NHRIs may also intervene in judicial proceedings.⁵⁴⁸ The intervention of NHRIs before courts is a particularly resource-intensive process, and is therefore generally undertaken within the scope of strategic litigation.⁵⁴⁹ NHRI intervention in courts cases can also be undertaken in the capacity of 'amicus curiae', in order to assist the court in its determination of a particular point of law relating to human rights, rather than with a view to obtain relief for an individual.⁵⁵⁰

⁵⁴² See *Egmez v. Cyprus* (30873/96) 21 December 2000, *Leander v Sweden* (9248/81) 26 March 1987, *Segerstedt-Wiberg and Others v. Sweden* (62332/00) 6 June 2006. However, note should be taken that these cases do not involve accredited NHRIs.

⁵⁴³ OHCHR National Human Rights Institutions: History, Principles, Roles and Responsibilities, Professional Training Series no 4 (Rev. 1), 2010, p.77.

⁵⁴⁴ See the extensive enumeration of complaints-handling functions in SCA General Observation (2013) 2.10.

⁵⁴⁵ OHCHR (2010) 111; De Beco and Murray (2014) 111.

⁵⁴⁶ When an infringement is established by the Polish Ombudsman, for example, the concerned authority must reply within 30 days on actions taken to address the situation. See: FRA (2010) 38.

⁵⁴⁷ De Beco and Murray (2014) 110; L. Lindholt and F. Kerrigan, 'General Aspects of Quasi-Judicial Competence of National Human Rights Institutions', in B. Lindsnaes, L. Lindholt and K. Yigen (eds.), *National Human Rights Institutions. Articles and Working Papers* (Copenhagen: Danish Centre for Human Rights, 2000), 95.

⁵⁴⁸ The Paris Principles 'methods of operation' do indicate that: 'Within the framework of its operation, the national institution shall: [...] (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights [...].'

⁵⁴⁹ The Irish Commission, for example, prioritises cases with significant implications, cases of urgency, or cases of particularly serious human rights violations. Similarly, the Northern Ireland Commission adopts a strategic approach to cases, and selects a number for which they offer more comprehensive legal support. FRA (2010) 38.

⁵⁵⁰ Various NHRIs and ENNHRI have made amicus curiae interventions before the ECtHR.

246. In some Member States, the NHRI role of promoting human rights (or promoting equality in the case of Bodies that are EU Equality Bodies) and providing information or assistance to persons who consider their rights have been transgressed and who wish to take a complaint, is regarded as incompatible with the adjudication of such complaints as it creates a structural conflict of interest. In such Member States, separate quasi-judicial bodies hear complaints and make binding judgments. A subsequent appeal may lie to the courts.

5.1.3.4 Cooperation with other mechanisms

5.1.3.4.1 State bodies

247. The Paris Principles state that NHRIs shall “maintain consultation with other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights” The SCA thus recommends that NHRIs “develop, formalise and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights” including sub-statutory human rights institutions and thematic institutions.⁵⁵¹

248. NHRIs cooperate with a wide-range of national bodies from their jurisdiction on various subjects related to the promotion and protection of human rights, such as Ombudsmen, Equality Bodies, National Preventive Mechanisms (NPMs), Data Protection Agencies etc. This collaboration is essential for an efficient cover of the human rights issues at the national level, as different state bodies have expertise or functions which are complementary to and reinforces NHRIs’ work.

249. More specifically, in line with Paris Principles, NHRIs are responsible to advise Government and Parliament via opinions, recommendation, proposal and reports.⁵⁵² NHRIs can do so on their own initiative ‘without higher referral’.⁵⁵³ It is essential that all the findings and recommendations of the NHRIs are publically available.⁵⁵⁴ NHRIs facilitate dialogue and cooperation in the human rights field between the executive and legislative branch and the culture of human rights is promoted even further.⁵⁵⁵ The NHRIs’ advice on ratification and implementation of international instruments including a removal of reservations plays a particularly important role within their broad human rights mandate.⁵⁵⁶

250. The Belgrade Principles on the relationship between NHRIs and national parliaments recommend that NHRIs and parliaments “agree the basis for cooperation, including by establishing a formal framework to discuss human rights issues of common interest.”⁵⁵⁷ Drawing on these principles, PACE has further recommended, inter alia, parliaments and NHRIs to “appoint an officer dedicated to co-operation between parliaments and NHRIs” and for NHRIs to “seek opportunities to meet with parliamentarians to discuss human rights concerns, including requests to brief parliamentary committees and/or individual parliamentarians.”⁵⁵⁸

⁵⁵¹ SCA (2013) G.O. 1.5.

⁵⁵² Paris Principles, a) ‘competence and responsibilities’.

⁵⁵³ Paris Principles, a) Competence and responsibilities (3).

⁵⁵⁴ G.O. 1.11 Annual reports of National Human Rights Institutions, “publication of reports”, p.30 (as updated May 2013).

⁵⁵⁵ OHCHR, 2010.

⁵⁵⁶ SCA (2013) G.O. 1.3

⁵⁵⁷ § 20.

⁵⁵⁸ PACE Resolution 1998 (2014) §8.4 and 7.7.

5.1.3.4.2 Civil society

251. The Paris Principles recommend that NHRIs “develop relations with the non-governmental organisations devoted to promoting and protecting human rights” and other specialised areas. A large majority of NHRIs have strong relationships with civil society, with examples of cooperation including the appointment of civil society members or to thematic committees, formal consultation meetings with NGOs, dedicated focal points and signing memoranda of understanding.⁵⁵⁹

252. Civil society often has significant expertise in human rights, links with government and other relevant institutions. The two groups can share information, use complementary mandates to reinforce impacts, and work together to increase each other’s access to communities and government. Civil society can also offer valuable assistance while an NHRI is being established through offering input into the founding legislation. Thereafter, civil society often acts as an advocate for NHRIs to ensure their continued independence and adequate funds. It can offer an important means of increasing the visibility of NHRIs and can allow NHRIs more victims of human rights abuses by serving as intermediaries where victims are not in a position to approach more official bodies.⁵⁶⁰ Journalists supportive of human rights can also help to develop the effectiveness and public credibility of an NHRI.⁵⁶¹ The UN Convention on the Rights of Persons with Disabilities (CRPD), for example, requires that civil society, in particular people with disabilities and their representative organizations, be involved and participate fully in the monitoring process. This has been interpreted as meaning structured participation by Organisations for persons with disabilities in the work of the independent monitoring mechanism.

253. NHRIs can also help protect civil society and other human rights defenders. Some receive complaints from civil society and other human rights defenders whilst others support their work, for example through sharing best practices, holding training workshops and presenting awards. Further investment of NHRIs is required to ensure regular and constructive engagement with civil society organisations and human rights defenders. The European Network of NHRIs (ENNHRI) supports NHRIs across Council of Europe member States to do so, for example through the organisation of a 2015 Workshop on Engagement of NHRIs with civil society organisations.

5.1.3.4.3 International mechanisms

254. The Paris Principles state that NHRIs should “cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights.”⁵⁶²

255. NHRIs are encouraged to cooperate with national institutions in other countries. The Committee of Ministers has recommended that member States “promote cooperation, in particular through exchange of information and experience, between national human rights institutions and between these institutions and the Council of Europe.”⁵⁶³ This happens through the work of the Global Alliance of NHRIs (GANHRI), based in Geneva, as well as through the many regional networks of NHRIs that have been created, including ENNHRI for the European region, based in Brussels. Such

⁵⁵⁹ 80.9% in Europe. See Survey p.36.

⁵⁶⁰ Centre for Human Rights (1995) §108.

⁵⁶¹ International Council on Human Rights Policy (2004), p.95.

⁵⁶² Principle 3(e).

⁵⁶³ Recommendation No. R (97) 14 of the Committee of Ministers to member States on the establishment of independent national institutions for the promotion and protection of human rights, 30 September 1997.

networks are credited as being extremely important in the creation and development of NHRIs.⁵⁶⁴ ENNHRI has a membership of 41 NHRIs from across wider Europe, including Ombudsman institutions, Human Rights Commissions and Institutes. It supports European NHRIs to be effective on the national level and to promote and protect human rights across wider Europe, including through engagement with Council of Europe mechanisms, ENNHRI has official observer status at the CDDH within the Council of Europe.

256. Article 44 of the ECtHR Rules of Court allow for third parties to apply to the President of a Chamber to intervene in a case before the Court and submit an *amicus curiae* brief. This is an important way for NHRIs to interact with the Council of Europe and to promote the application of ECHR standards in their country. ENNHRI has published ‘Guidance for NHRIs to support implementation of judgments from the ECtHR’.⁵⁶⁵

257. NHRIs and their networks also interact with international human rights mechanisms by participating in the reporting process required under many human rights treaties.⁵⁶⁶

5.1.4 Accreditation with the Global Alliance of National Human Rights Institutions (GANHRI)

258. The SCA reviews and accredits NHRIs regarding the extent of their compliance with the Paris Principles. “A” status institutions demonstrate compliance with the Paris Principles, “B” institutions are not fully in compliance with the Paris Principles and “C” status institutions are not in compliance with the Paris Principles. The compliance with the Paris Principles of A-status NHRIs is reviewed on a periodic basis every five years.⁵⁶⁷

259. The UN, Council of Europe and European Union have called for the establishment of A-status NHRIs in member states (see in this context the relevant paragraphs in sections 2.1 & 2.2).

260. A-status NHRIs have specific participation rights in international and regional processes and mechanisms. For example, A-status NHRIs have speaking rights immediately following their respective state in the UN Human Rights Council’s Universal Periodic Review and in the interactive debate with UN special procedure mandate holders.⁵⁶⁸ In Europe, A-status NHRIs are valued interlocutors for regional mechanisms, such as the OSCE, the Council of Europe and European Union institutions and agencies.⁵⁶⁹ A-status NHRIs have voting rights and can hold governance positions in NHRIs networks, such as ENNHRI and GANHRI.⁵⁷⁰

261. In a resolution on NHRIs adopted on 17 December 2015, the United Nations’ General Assembly “*Encourages* all relevant United Nations mechanisms and processes, in accordance with their respective mandates, (...), to further enhance the participation of national human rights institutions compliant with the Paris Principles and to allow for their contribution to these United

⁵⁶⁴ Carver (2010).

⁵⁶⁵ Available at: http://ennhri.org/IMG/pdf/ennhri_guidelines-v2_a4_web.pdf.

⁵⁶⁶ A/HRC/RES/5/1, Rule 7, see also A/HRC/RES/16/21. See also references in §77, *supra*. CRPD and OPCAT / SPT, §238; Rules of Procedure of CERD, Rule 40 (for specific speaking rights and interactive dialogue); Committee on the Rights of migrants also have specific rules, CMW A/61/48 § 20 (also interventions during interactive dialogues).

⁵⁶⁷ For a brief overview of the accreditation process, see: ENNHRI, ‘NHRI Accreditation at a Glance’ (2017), available on the ENNHRI website: http://ennhri.org/IMG/pdf/ennhri_s_at_a_glance_final_and_covers.pdf.

⁵⁶⁸ Rule 7(a) and (b), A/HRC/RES/5/1, 18 June 2007; Participation of and consultation with observers of the Council, A/HRC/RES/2005/74, §11(a).

⁵⁶⁹ Further: J. Wouters and K. Meuwissen (eds.), National Human Rights Institutions in Europe: Comparative, European and International Perspectives’ (Intersentia, 2013).

⁵⁷⁰ ENNHRI Statutes (2013) art. 6.1; GANHRI Statutes (2017) art 24.1.

Nations mechanisms and processes (...)”⁵⁷¹In line with this resolution, the Open Ended Working Group on Ageing has granted participation rights to ‘A’ status NHRIs.⁵⁷²

5.2 Conducive political and public environment, compliance in practice with Paris Principles

262. The importance of the enabling legislation means that the political climate at the time of establishing the NHRI will have a profound impact on the NHRI’s effectiveness over the long term. Whether or not to establish an NHRI will be dependent on a number of factors, including the level of political will, the strength of the existing culture of human rights, the legal context and the stability of the country.⁵⁷³ The extent to which an NHRI will conform to the Paris Principles, its mandate, power and resources will be shaped by the domestic political context.⁵⁷⁴

263. NHRIs, even those whose founding legislation is in full compliance with the Paris Principles, face many challenges ensuring that their work complies with the Paris Principles in practice. An NHRI’s effectiveness and achievements will depend to a large extent on the other mechanisms and structures in place in the jurisdiction. Ultimately, “domestic human rights bodies are only as good as the local political and economic contexts allow them to be”.⁵⁷⁵ NHRIs have reported concerns about board appointments, government influence on budgets, weakness in management structures, relationships with stakeholders and government failure to act on their recommendations.⁵⁷⁶ When accrediting NHRIs according to their compliance with the Paris Principles, the SCA also assesses the performance of NHRIs in practice and formulates recommendations in this respect.⁵⁷⁷ Some NHRIs have institutionalised the evaluation of their impact, including by taking into account recommendations from stakeholders (such as civil society organisations) on how to more effectively carry out their mandate.⁵⁷⁸

264. Challenging national contexts may threaten the independence of an NHRI. Governments unresponsive to the work of an NHRI may seek to decrease its power by seeking to influence, amongst other things, the appointment of members and budget allocation. Detailed legislation in conformity with the Paris Principles helps to mitigate this risk: discretion creates opportunities for influence. However, governments may seek to overturn or amend enabling legislation.

265. Increasing recourse to austerity measures, in particular across Europe, has also had a negative effect on the environment in which NHRIs operate. As government spending decreases, NHRIs are not being exempted from the reduction in budgets allocated to government departments. In tandem, and in part due to the successful work of NHRIs in raising awareness of human rights, increasing demands are being placed on NHRIs. As a result, NHRIs are increasingly under pressure to prioritise their work.⁵⁷⁹

⁵⁷¹ General Assembly Resolution 70/163, Official Records of the General Assembly, seventieth session.

⁵⁷² Decision of 12 December 2016.

⁵⁷³ OHCHR (2010), p. 149.

⁵⁷⁴ Spencer and Harvey (2014), p. 90.

⁵⁷⁵ Mertus (2009).

⁵⁷⁶ OHCHR (2009); Spencer and Harvey (2014), p.90.

⁵⁷⁷ SCA GO 6.7.

⁵⁷⁸ The A-status NHRI from Ukraine, for example, installed a monitoring committee composed from civil society actors which annually evaluates the work of the NHRI and formulates recommendations on how to improve its work. The ensuing evaluation report is made public on the NHRI’s website.

⁵⁷⁹ See Commissioner for Human Rights Issue Paper on Safeguarding Human Rights in Economic Crisis, p. 55.

266. The political environment may impact the working methods of the NHRI, for example, if a nation's dominant political and cultural dynamics are not always favourable to the promotion and implementation of international human rights norms.⁵⁸⁰ In complex political situations, such as in cases of coups d'états or in post-conflict situations, an NHRI is expected to conduct itself with a heightened level of vigilance and independence, and in strict accordance with its mandate.⁵⁸¹ The economic, political and cultural situation of a country may lead it to be more or less receptive to the concept and language of human rights, and an NHRI will have to adapt its approaches accordingly.⁵⁸²

267. To a certain extent, NHRIs can help create a supportive environment themselves by enhancing their public legitimacy. If they are seen to “stand up for the right of the powerless against powerful interests and act fairly in treating issues within their purview”, their public or popular legitimacy may be enhanced.⁵⁸³ By conducting human rights education, as outlined above, NHRIs can question personal attitudes and opinions and strengthen individual and institutional capacity to act vis-à-vis human rights realisation.⁵⁸⁴

268. In particularly severe cases, members of NHRIs are also subject to reprisals.⁵⁸⁵ These individuals are human rights defenders, and should thus be afforded the same protections other human rights defenders, outlined in the previous chapter.

6. Conclusion

269. This study presents an overview of the existing international and regional standards concerning civil society organisations, human rights defenders and NHRIs and presents examples of good law and practice, as well as standards of the Council of Europe, including relevant case-law of the European Court of Human Rights. Those who promote a ‘thriving and vibrant civil society space’, including civil society organisations, human rights defenders and national human rights institutions contribute to an environment of active respect for human rights, democracy and the rule of law in Europe.

270. Attention has been drawn to the shrinking democratic space on repeated occasions by various organs of the Council of Europe. PACE, for example, has noted that “in certain Council of Europe member States the situation of civil society has dramatically deteriorated over the last few years, in particular following the adoption of restrictive laws and regulations”⁵⁸⁶ and the Secretary General has noted that “there is a trend among an increasing number of member States towards a more restrictive approach to freedom of association”.⁵⁸⁷ Its human rights mechanisms have observed that in certain member States the situation of civil society has dramatically deteriorated over the last few years, in particular following the adoption of restrictive laws and regulations. Many civil society organizations have felt the consequences of austerity measures adopted in response to the economic crisis and reductions in public expenditure have had negative impacts on the work of national human rights institutions. It is crucial to note that the primary duty and responsibility to promote and protect human rights and fundamental freedoms including the rights of human rights defenders lies with the State. The provisions, aims and objectives of the core international and regional human rights treaties are relevant to the protection of all human rights defenders and the exercise of the right to defend human rights. To meet these human rights obligations under the European Convention on Human Rights and

⁵⁸⁰ De Beco and Murray (2014)25.

⁵⁸¹ SCA (2013) G.O. 2.6.

⁵⁸² Mertus (2009).

⁵⁸³ OHCHR and International Council on Human Rights Policy (2005), p.7.

⁵⁸⁴ Aichele (2010), p.20.

⁵⁸⁵ A/RES/70/163.

⁵⁸⁶ Resolution 2096 (2016), §4.

⁵⁸⁷ Secretary General of the Council of Europe (2016), p.9.

other international and regional human rights treaties is a paramount responsibility of each member State of the Council of Europe.

271. Civil society organisations, human rights defenders and national human rights institutions support legislature, government and administrative bodies, and the judiciary in the promotion of common values, such as respect for human rights, as well as a common understanding that human rights are universally applicable to all. Human rights education and training are key tools in this regard and also recognize the crucial role that all three actors play as promoters of democracy, social justice and human rights and as key contributors to democratic governance and development.

272. The rich set of standards by a wide range of actors demonstrates the importance attached to the topic of promoting an enabling environment for civil society. However, the study illustrates that existing standards are by no means exhaustive and gaps exist in the implementation of those standards. Based on this study, a **number of conclusions can be drawn**:

- A great deal of international and regional standards currently exists to aid governments support the work of civil society. Existing international and regional standards on civil society, CSOs, HRDs and NHRIs are adequate to promote and protect the activities of CSOs, HRDs and NHRIs in a changing society.
- This study is a first step in bringing coherence to international standards in the context of the fragmentation and difficulty of access to the corpus of norms and related recommendations. Such coherence is intended to help bring clarity and thereby improve implementation at the national level.
- National legislation has a wide-ranging impact on the activities of civil society organisations, human rights defenders and national human rights institutions. Civil society can be particularly affected by legislation that applies to everyone equally, for example laws on assemblies, but are also affected by frameworks that seek to regulate civil society in particular, such as laws on associations.
- Comprehensive adherence to international standards in national legislation, policies and practices leads to a positive and encouraging environment for the work of CSOs, HRDs and NHRIs.
- However, sometimes legislation is used to restrict and control the activities of civil society organisations, human rights defenders and NHRIs. While extensive guidelines exist, for example, in the fields of freedom of assembly and freedom of association, the protection of whistle-blowers and the protection of human rights defenders, Government policies and strategies do not pay enough attention to human rights defenders at particular risk and/or facing particular obstacles to their activity, including Women Human Rights Defenders, LGBTI, environmental groups, etc. Further action is needed in this regard to support the Council of Europe member States in developing and/or strengthening their legislation, policies and institutions to recognise and protect human rights defenders. The institutional and administrative framework should also be sufficiently precise to ensure legal certainty and guarantee the fundamental principle of fairness and due legal process.
- The real challenge begins when legislation ends, namely in ensuring a conducive political and public environment for the activities of CSOs, HRDs and NHRIs. Whilst legislation can help with this, in most cases it is the attitude of government officials and the public at large that can turn civil society from something that is technically permitted, but makes no tangible impact, to something that is thriving and is a vibrant part of a society with respect for human rights, democracy and the rule of law.

- At the national level, much attention is given to the role and functioning of NHRIs, with a broad mandate to promote and protect human rights, i.e. fulfilling the criteria for A Status institutions according to the Paris Principles. It is also widely recognised that NHRI in compliance with the Paris Principles helps to create a culture of respect for human rights. This culture, in addition to the direct work NHRIs conduct with civil society, provides an environment where CSOs can thrive. In turn, an aware, strong and active civil society strengthens the effective operation of national human rights institutions and the protection of human rights defenders. Creating an enabling environment is a virtuous cycle and is one that the various elements of civil society help to enhance for each other.
- Council of Europe member States have adopted many pieces of legislation on civil society that could be regarded as good practice. Guidelines from the Council of Europe and other bodies also provide good practices. However, the shrinking democratic space outlined at the beginning of this document indicates that there is still work to be done, especially as relates to the gaps in the existing national good practices regarding proper implementation of international standards. To that end, it is hoped that this study assists in identifying gaps in the protection as well as standards that can be used to address them.

273. Year 2018 will mark the 20th anniversary of the adoption of the United Nations Declaration on Human Rights Defenders and the 10th anniversary of the adoption of the Declaration of the Committee of Ministers of the Council of Europe on action to improve the protection of human rights defenders and promote their activities. In this Declaration, the Committee of Ministers acknowledged that *“whereas the prime responsibility and duty to promote and protect human rights defenders lies with the state, the Council of Europe shall also contribute to creating an enabling environment for Human Rights Defenders and protect them and their work in defending human rights”*. The Committee of Ministers further agreed to *“keep under review the question of further Council of Europe action in this field”*. Furthermore, the Secretary-General of the Council of Europe has proposed in his third annual report to establish, under his authority, a mechanism strengthening the protection of human rights defenders. The new mechanism will focus on reprisals against human rights defenders related to their interaction with the Council of Europe. The 2018 anniversary could mark the opportunity for a necessary review of the efforts by member States and by the Council of Europe.

274. An independent, diverse and pluralistic civil society is indispensable for building peaceful, prosperous and democratic societies. Very few states have moved towards fully harmonising domestic law with the UN Declaration on Human Rights Defenders. The Committee of Ministers can use this opportunity to encourage member States to do so. A Model Law for the Recognition and Protection of Human Rights Defenders launched by the International Service for Human Rights in June 2016, and endorsed by reputable experts and jurists in the matter, provides authoritative guidance to States on how to implement the Declaration on Human Rights Defenders at the national level, in particular on the development of laws, policies and institutions to support the work of defenders and to protect them from reprisals and attacks.⁵⁸⁸ This study at hand on the impact of current national legislation, policies and practices on the activities of civil society organisations, human rights defenders and national institutions provides basis to elaborate proposals to ensure that member States, through their legislation, policies and practices, effectively protect and promote the civil society space.

275. In particular, the two meetings of CDDH-INST provided an opportunity for member States and civil society to identify and propose good practices, including legislation and policies, to be adopted by member States to enable the promotion and protection of human rights by human rights defenders, civil society and NHRIs. This exercise can provide inspiration for member States to champion human rights protection and promotion at national level and also with other states. The

⁵⁸⁸ See https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf

Committee of Ministers could remain seized of a list of good practices and regularly conduct exchanges amongst its members to encourage the required changes at the national level. "Good" practices should be confirmed by those affected at the national level and / or by independent human rights bodies through their work, and be subject to national debate.

276. While identifying existing practices, the CDDH-INST addressed various gaps in the implementation of international and regional standards which aim at guaranteeing the conditions necessary for the work of HRDs, CSOs and NHRIs. Because of its authoritative and binding force, the jurisprudence of the European Court of Human Rights, relied upon significantly by the CDDH-INST in its study, requires specific attention. Many of the judgments of the Court have yet to be implemented through the adoption of general measures which seek to address systemic shortcomings for the protection and promotion of human rights and also relieve the Court of future similar applications.

277. In light of its findings, the CDDH-INST would like to propose a number of next steps:

1. The compilation of good practices shall be kept open for further submissions by member States, as well as by CSOs, HRDs or NHRIs. While the member States shall have further opportunity to complete their information or even to modify their assessments made, the CSOs, HRDs and NHRIs shall be given an opportunity to prepare their own submissions or responses to government's information, i.e. self-assessments of good practices, which should also be indicated in the information;
2. Basing itself on the CDDH-INST reference document on the Selection of relevant ECtHR case-law in this area (CDDH-INST (2017) 004), and drawing on the work of the Department for the Execution of Judgments of the European Court of Human rights, the CDDH Secretariat shall prepare a compilation of good practices regarding the general measures taken by Member States aimed at executing these Court judgments. ;
3. The Study and the Compilation of good practices may be used as a tool or a "check-list" for member States to identify the existing gaps within their legislation, policies and practices, in dialogue with CSOs, HRDs and NHRIs. A helpful method to identify gaps might be a lack of good practice in a specific field, i.e. a lack of concrete implementation of the existing international standards and recommendations;
4. A High Level Seminar could be organised to mark the anniversary for the necessary review of the efforts by member States and Council of Europe, bringing together CSOs, HRDs, NHRIs and governments to present and discuss their own gaps, i.e. a lack of good practices or rather a lack of implementation of existing international standards. This event should be prepared in close cooperation with the European Committee of Democracy and Governance (CDDG) and other relevant stakeholders, such as the United Nations, ENNHRI, etc.;
5. A Declaration on challenges and shortcomings concerning the protection and promotion of CSOs, HRDs and NHRIS shall be proposed to the Committee of Ministers for adoption. The aim is to addressing the core standards, where little or no good practice on the implementation of international standards exists and suggesting possible solutions to overcome those gaps.

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