

HOW TO STRENGTHEN SOFT POWERS FOR PRESS FREEDOM: NATIONAL HUMAN RIGHTS INSTITUTIONS

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This report contains the opinions and proposal made by the expert but it does not aim to represent the views of the Council of Europe on the subject.

1. Introduction: towards a wide and comprehensive notion of article 10 of the European Convention on Human Rights

Article 10 of the European Convention on Human (the Convention) provides a detailed and comprehensive protection of the rights of freedom of expression and freedom of information. It also establishes the margin that States have in order to delineate the limits of such rights, as well as the boundaries that need to be respected in any case when States engage in such tasks:

“Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The Council of Europe (CoE) has established in the course of the last decades a solid framework and very detailed standards regarding different and relevant aspects of the exercise of the rights established in article 10 of the Convention. It has also set a series of principles and parameters regarding the duties and responsibilities that such rights entail as well as vis-à-vis the responsibilities of member States when it comes to guaranteeing their proper exercise. Such standards cover areas like defining media in the digital world, protecting journalists’ sources, guaranteeing the independence and adequate functioning of regulatory authorities in the broadcasting sector, protecting media pluralism and content diversity or defining the role of public service media, among others¹.

These standards are also accompanied by a very extensive and complete case-law doctrine established by the European Court of Human Rights (ECtHR), which includes very important statements, criteria and parameters consolidated in the course of the last four decades².

¹ See a compilation of such standards here: <http://www.coe.int/en/web/media-freedom/committee-of-ministers>

² An updated and commented summary of such doctrine can be found in this recent booklet published by the European Audiovisual Observatory: <http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+-+Vol+III+-+Ed+2015+EN.pdf/2f3d578d-2e05-442f-8326-917beab7626d>

All this being said, it should also be noticed the fact that in the recent times both CoE institutions and the ECtHR have been paying particular attention to the need to effectively protect journalists and other media actors and therefore to monitor and promote the creation of real and material conditions for a proper exercise of the rights included in article 10 of the Convention³. In other words, the notion of freedom of expression and freedom of information now being upheld by such institutions does not only compel States to not to interfere in the exercise of such rights but also stresses particularly the need to create a favorable environment and engage in positive actions.

In this particular area two relevant CoE documents need to be outlined.

The first one is the Declaration on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers (CM) on 30 April 2014. The Declaration observes the growing tendency of journalists “being harassed, intimidated, deprived of their liberty, physically attacked and even killed” because of their work, and the even more worrying fact that States quite often fail to properly investigate such attacks, which is leading to what is described as a “culture of impunity” (para. 1).

The Declaration also observes and declares the fact that these attacks constitute not only a violation of individual’s rights (including, but not only, freedom of expression) but also have very direct restrictive effects regarding public debate and access to information, which are the core of pluralist democracy (para. 5).

Para. 7 describes the scope for protection of the rights included in article 10 of the Convention as “expansive” and reminds the positive obligations being progressively established in different rulings of the ECtHR, particularly regarding the duty of States to put in place “an effective system of protection”.

Para. 8 of the Declaration stresses the need to count on proper means and institutions to guarantee that all attacks will be “vigorously investigated in a timely manner and the perpetrators prosecuted”. Para. 10 refers to what can be broadly defined as legal safety, and refers to the need to avoid any form of abuse in the sphere of legal and other forms of State intervention. Areas where an excessive intervention from the State should be properly prevented include the application of the law (particularly when it includes broad and vague provisions), the exercise of judiciary’s powers, the right to free access to information, the protection of journalists’ sources and, last but not least, the protection against surveillance of journalists and other media actors.

This Declaration includes a series of directives regarding actions to be urgently undertaken by States, in line with the efforts also put in place by several international organizations and other actors. One of these actions was the creation of an expert Committee on protection of

³ As it will be shown below, in several cases of attacks, harassment or abusive treatment of journalists the Court has declared the violation of the rights included in article 10 of the Convention, but also the infringement of others, including article 2 (right to life), article 3 (prohibition of torture), article 5 (right to liberty and security), article 6 (right to a fair trial), article 8 (right to respect for private and family life), and article 13 (right to an effective remedy).

journalism and safety of of journalists (known as the MSI-JO⁴), tasked with the responsibility of drafting a Recommendation following and developing the principles and criteria established in the Declaration.

Recommendation CM/Rec (2016) 4, adopted by the CM on 13 April 2016, reiterates most of the main elements included in the Declaration, but it also refers to a series of concrete elements that need to be stressed. First of all, para. 2 is particularly clear and descriptive about the existence of a growing negative trend regarding the fact that journalists and other media actors “are often specifically targeted on account of their gender, gender identity, sexual orientation, ethnic identity, membership of a minority group, religion, or other particular characteristics which may expose them to discrimination and dangers in the course of their work”. More in particular “(f)emale journalists and other female media actors face specific gender-related dangers, including sexist, misogynist and degrading abuse; threats; intimidation; harassment and sexual aggression and violence. These violations are increasingly taking place online”. The increasing harassment of female journalists, particularly in the online world, has become a very important topic linked to this broader vision of the rights covered by article 10 of the Convention. However, there is still a lot to be done beyond these serious concerns raised by the CoE and other international organizations⁵, particularly at the national level, where it is still difficult to find a comprehensive and effective plan to directly deal with this issue.

Para. 3 of the Recommendation insists on the “chilling effect” that insufficient efforts by States authorities in the proper investigation and prosecution of crimes against journalists may cause. In particular, this paragraph warns against the negative effects that this may have “on the public watchdog role of journalists and other media actors and on open and vigorous public debate, all of which are essential in a democratic society” and the risk to “undermine public trust in the rule of law”.

Para. 4 of the Recommendation includes an important reminder, in line with general international standards regarding the notion of journalism and media activities, stating that “the definition of media actors has expanded as a result of new forms of media in the digital age. It therefore includes others who contribute to public debate and who perform journalistic activities or fulfil public watchdog functions”.

The central matter of the responsibilities of States in creating a favorable environment for freedom of expression through a range of positive obligations “to be fulfilled by the executive, legislative and judicial branches of governments, as well as all other State authorities, including agencies concerned with maintaining public order and national

⁴ More information on the tasks and terms of reference of the Committee can be found here: <http://www.coe.int/en/web/freedom-expression/msi-jo>.

⁵ See the report “Violence and harassment against women in the news media: a global picture”, published by the International Women’s Media Foundation and the International News Safety Institute in 2014: <https://www.iwmf.org/wp-content/uploads/2014/03/Violence-and-Harassment-against-Women-in-the-News-Media.pdf> . See also the different initiatives undertaken by the Representative on Freedom of the Media at the Organization for Security and Cooperation in Europe (OSCE) in this area: <http://www.osce.org/fom/179486>

security, and at all levels” is particularly stressed in para. 6. This part of the Recommendation is also the foreword to an appendix with a series of Guidelines. These Guidelines refer to a broad range of issues regarding safety of journalists and other media actors, divided into the general areas of “prevention”, “protection”, “prosecution” and “promotion of information, education and awareness raising”. Several elements included in such Guidelines will be developed and further considered below, in connection with the possible role of NHRIs in this area.

2. The role of NHRIs in the improvement of the protection of freedom of expression and freedom of information in the CoE area

2.1. The different models and attributions of NHRI in the CoE area

Most of the CoE member States have incorporated into their respective political systems bodies that are formally recognized as the main human rights institutions, and entrusted with a series of responsibilities in this area. These responsibilities include, as it will be shown, a very wide array of possible attributions, from academic and research activities to awareness raising or handling individual complaints.

The precedents of the NHRIs as we currently know them appeared in Europe much before the creation of the Council of Europe and even before the establishment of a universal system recognizing and protecting human rights. These precedents can be found in the ombudsmen models created in the Nordic countries two centuries ago. The original focus of their activities was dealing with maladministration issues, but these institutions progressively broadened up their attributions and covered more general areas of rule of law and human rights monitoring, flourishing in Europe and other parts of the world during the second half of the last century.

One remarkable element here is the fact that these institutions were adopted by several post-authoritarian regimes (and here we are talking about both post-communist countries in Central and Eastern Europe, and post-fascist systems in Southern Europe) in order to count on a body with specific competences to protect and promote human rights by monitoring the activities of the “traditional” bodies and institutions of the State. Most of these countries are now part of the Council of Europe and they have been a very important factor in the expansion of NHRI.

It is also important to note the fact that NHRI are somewhat beyond traditional legal schemes as they do not tend to hold usual legally binding powers. As the title of this report outlines, NHRIs should be analyzed as “soft law” institutions, vested with powers based on their own reputation (or the reputation of their members) and the rigor and appropriateness of their public statements or actions. This is part of a governance model that needs some time and preparation in order to be properly implemented, particularly in countries where the idea of separation of powers and the existence of a diversity of checks and balances is not well understood and accepted. In other words, NHRI need to build their own strong legitimacy through a good performance, but at the same time they also need to operate within a proper political and institutional environment.

The Council of Europe has included all these elements in the 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”⁶. One of the recommendations included refers to the need to “promote co-operation, in particular through exchange of information and experience, between national human rights institutions and between these institutions and the Council of Europe”.

Another important element that needs to be outlined is the fact that NHRI have expanded worldwide and this model is accepted and used in different legal environments and traditions beyond Europe. Moreover, not only the Council of Europe has established a certain number of liaisons and strongly supported the creation and strengthening of these institutions in several member States, but this is also a very important element on the agenda of global organizations like the United Nations, particularly through the United Nations Development Programme and the Office of the High Commissioner of Human Rights. It is worth mentioning in this area the very interesting parameters and recommendations reflected in the UNDP-OHCHR Toolkit for collaboration with Human Rights Institutions⁷. The main idea behind these guidelines is the acknowledgement of the fact that NHRIs have the important and almost unique responsibility of making human rights become a reality on the ground. It also stresses that NHRIs can improve the performance of the whole UN system by collaborating with many of its agencies (UNDOC, UNIFEM, UNICEF, UNHCR, UNESCO...) in the implementation of their respective programs and tasks. Back to the European perspective, it should also be noted that the Agency for Fundamental Rights of the European Union published in 2010 a report on the issue of “Strengthening the fundamental rights architecture in the EU”, particularly focusing on types and functions of NHRIs in member States⁸. Some of the examples and experiences mentioned in this report have been used in the elaboration of this paper.

The general international standards regarding NHRIs are established by two main international documents. The first one includes the “Principles relating to the Status of National Institutions” (also known as *The Paris Principles*)⁹. The second refers to the so-called *Vienna Declaration*, Vienna Declaration, adopted by the World Conference on Human Rights in Vienna on 25 June 1993¹⁰, adopted by General Assembly resolution 48/134 of 20 December 1993. While the former establishes a series of principles and criteria regarding the mandate, composition, independence and functions of NHRIs, the latter stresses the

⁶ Adopted on 30 September 1997:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804fecf5>

⁷ Released in 2010 and available at: <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>

⁸ http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf

⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

¹⁰ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

role of NHRIs in facilitating and protecting the enjoyment by citizens of universal rights and fundamental freedoms.

The first conclusion that can be drawn from this series of international documents is the fact that NHRIs are contemplated by different international and supra-national organizations as fundamental tools in order to implement and safeguard on the ground the rights and freedoms protected by international law. The second and most important conclusion here is the fact that there is a common understanding at the international level on the fact that cooperation between NHRIs and international organizations, precisely in the area of protection and promotion of human rights, has become absolutely needed and therefore clear and stable mechanisms should be established and improved in this area. At the UN level, it is worth referring, for example, to the different existing cooperation processes between NHRI and UN human rights mechanisms mentioned in the Report by Secretary General on “National institutions for the promotion and protection of human rights” of 28 August 2015¹¹.

NHRIs include a wide panoply of bodies created, regulated and funded by the States (either at a national or a regional or local level) and entrusted (generally via constitutional or legal foundations) with the mandate of protecting and promoting human rights within a certain territory. Two key elements are the core of the notion of NHRIs: a) the fact that they perform activities that, one way or another, represent a monitoring task vis-à-vis the rest of institutions of the State apparatus, and b) the need to perform such tasks in a fully independent way.

A general overview of NHRIs in the CoE area reveals the existence of very different models. This report cannot describe in detail the different typology of existing NHRIs, but it is important to outline the existence of such diversity, and therefore to accept that behind the notion of NHRIs we can find very different types of bodies.

In a nutshell, we find examples of ombudsman-like, single-membered NHRIs institutions (like the Office of the Public Defender in Georgia, or the Human Rights Defender in Armenia), commission bodies with different members (like the Equality and Human Rights Commission in the United Kingdom, the Scottish Human Rights Commission, or the Northern Ireland Human Rights Commission), and hybrid institutions combining the classic role of ombudsmen with human rights protection (like the *Defensor del Pueblo* in Spain, the *Provedor de Justiça* in Portugal, the Commissioner for Civil Rights Protection in Poland, or the Austrian Ombudsman Board, with three members). In some cases, the specific nature of the role and functions of the entity in question deserves a separate classification. This is the case of the NHRIs that play a predominant consultative and advisory role, particularly regarding the elaboration of draft legislation (like the National Consultative Human Rights Commission in France, the National Commission for Human Rights in Greece or the

¹¹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/410/06/PDF/N1341006.pdf?OpenElement>. See also the paper by the International Service for Human rights on “Promoting participation: Why and how national human rights institutions should be allowed to contribute at the United Nations” (June 2015):

http://www.ishr.ch/sites/default/files/article/files/nhri_research_report_formatted_final.pdf.

Consultative Commission of Human Rights in Luxembourg), or bodies that should be basically seen as research centers or institutes in the area of human rights (being probably the Danish Institute for Human Rights and the German Institute for Human Rights the most outstanding examples).

Another important issue to be considered here is the fact that the mandates, and particularly the powers, of NHRIs in different countries may differ from each other. In a general overview of the areas covered by NHRIs in the CoE area we can notice that freedom of expression and freedom of information fall under the competence of most, if not all, the NHRIs. Their legal and/or constitutional mandates tend to refer to the protection and promotion of human rights in general, and thus it can be understood that these rights are of course covered. It is also worth mentioning here that in the case of hybrid or ombudsman-like institutions, protection of human rights is usually linked and circumscribed to the performance of the public administration (see, for example, the case of the Spanish ombudsman).

All this being said, it is difficult to find specific and direct references to the rights to freedom of expression and freedom of information in the mandates and/or reports of NHRIs. Moreover, a quick oversight of the different websites does not show particularly relevant activities, documents or decisions in this area. In this sense, it can also be noticed that communication rights are not declared as priority areas for NHRIs activities, that tend to focus on the protection of the rights of particularly vulnerable and disadvantaged communities, in some cases in relation with urgent and compelling recent events: protection of immigrants and refugees, prevention of torture and mistreatment of prisoners and detainees, protection of the rights of children and disabled people as well as the rights related to access to basic education and culture, or assessment of the impact of economic crisis in the social and economic rights of the areas of population with low income. There are though some actions undertaken in speech-related areas such as hate speech, xenophobia and anti-Semitism, but of course this represents a very narrow and specific perspective¹².

It would be adventurous to determine the precise reasons why the rights to freedom of expression and freedom of information are not included in the priority areas of most of the NHRIs in Europe, but a few factors need to be taken into account. First of all, while it is still assumed that violations of “political” and “classic” rights can be reasonably tackled by ordinary courts, NHRIs tend to focus their attention to either social or welfare rights, or *de facto* situations where the material conditions of life of certain persons or communities are dramatic and require urgent and comprehensive action, as well as raising social and political awareness. Second, communication rights are commonly understood as the territory of self-regulatory bodies (press commissions, and other ethical and professional supervision mechanisms) and independent broadcasting or audiovisual regulatory commissions. Either both or at least one of such schemes, with a higher or lesser degree of independence vis-à-vis political powers, exists in all the CoE member States.

¹² The French Commission is perhaps the best example of this area of activity:
<http://www.cncdh.fr/fr/dossiers-thematiques/racisme>

Recommendation CM/Rec (2016) 4, however, points at certain elements that will definitely require to take a fresh look at the role and responsibilities of NHRIs with regards to the protection of journalism and safety of journalists and other media actors. The recommendation refers to the need to implement a series of legal mechanisms to provide for such protection, but at the same time it also contains a series of considerations that lead to the conclusion that media actors have become, in a sense, a “vulnerable group” that deserves appropriate protection through a comprehensive set of policies and actions. In other words, freedom of expression and freedom of information cannot only be seen as rights to be claimed before the courts or developed by legislation, but the need for “urgent, resolute and systemic responses” (para. 2) is something to be put very high on the human rights agenda of member States as well. The Recommendation also stresses, along these lines, “the need for a more effective implementation of existing international and regional standards and enhanced compliance with existing monitoring mechanisms and initiatives” (para. 5).

The guidelines annexed to the Recommendation task the States with the responsibility to “put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear” (para. 1). However, this is not a mere formal requirement, as it is also established that “such framework should be subject to independent, substantive review to ensure that safeguards for the exercise of the right to freedom of expression are robust and effective in practice and that the legislation is backed up by effective enforcement machinery” (para. 3). This review will also necessarily refer to the need to adopt positive actions beyond legislation. A key element here is the fact that “such review may be carried out by one or more appropriate new or existing independent bodies” (para. 4), being NHRIs in many cases the most appropriate bodies to undertake such responsibility.

The guidelines also include a series of provisions that need to be outlined in the context of the present report. Paragraphs 10 and 12 urge member States to “wholeheartedly support and co-operate with the Council of Europe’s platform to promote the protection of journalism and the safety of journalists and thereby help to strengthen the capacity of Council of Europe bodies to warn of and respond effectively to threats and violence against journalists and other media actors” and to “develop protocols and training programmes for all State authorities who are responsible for fulfilling State obligations concerning the protection of journalists and other media actors”, respectively. In cases of crimes against journalists, paragraph 22 says that “member States must ensure that effective and appropriate remedies are available to victims and, as relevant, to their families, including legal remedies, financial compensation, medical and psychological treatment, relocation and shelter”. Paragraph 24 entrusts States with the responsibility of avoiding excessive delays to the administration of justice in these cases and paragraph 25 recognizes the possibility of non-judicial inquiries undertaken by specialized independent bodies. Paragraph 27 refers to cooperation by the States with different international organizations in the effective protection of journalists’ safety and particularly refers to their role and responsibility in the execution of the decisions adopted by the ECtHR in this area. Paragraphs 28-30 refer to the need to disseminate the Recommendation as well as to raise appropriate awareness about its content. They also express the need to promote best practices among media and civil society regarding effective protection of journalists.

It seems thus clear that the adoption of a comprehensive set of legal measures and policies to better protect journalism safety has become, according to CoE standards, a remarkable priority within the overall area of human rights promotion and protection. It is also obvious that, considering the mandate and instruments that NHRIs have, they can play an important role in this area and engage in new venues for cooperation with the CoE, including the execution of the decisions of the Court.

The following sections will analyze possible options for the improvement of the action of NHRIs in the area of journalism safety, as well as a better cooperation with the Council of Europe.

2.2. *Key areas for an improved contribution by NHRIs to the protection of freedom of expression and the implementation of CoE standards.*

a) Mandate: As it was previously stressed, NHRIs that have a general mandate regarding the protection of human rights are entitled to cover freedom of expression and freedom of information issues. In order to perform this task in an appropriate way this wide material scope needs to be complemented with the possibility to monitor and review all sorts of State actions, activities and even lack of activity (the Scottish Commission for Human Rights is usually presented as a good example of a wide and comprehensive mandate). This means that NHRIs should be able to intervene vis-à-vis laws and other formal decisions but also regarding policies, actions and *de facto* activities of any public authority.

b) Powers: NHRIs have a broad range of powers according to their respective constitutional or legal status. These powers vary from one State to another and also depend on the specific model adopted. Considering the role that, according to CoE standards, institutions like the NHRIs can play at the national level in order to reinforce freedom of expression and safety of journalism, a few areas where NHRIs use to operate need to be particularly stressed:

- Definition of standards: despite not usually having legally binding or normative powers, NHRIs can play a “soft law” role at the national level, defining human rights and providing detailed standards for their interpretation and better protection. These standards should of course follow international parameters, but can also provide criteria on how to adapt and apply them in the national context.
- Provision of Information to public authorities: public authorities sometimes neglect the effective protection of human rights due to lack of updated information and proper knowledge about their specific scope and the interpretative standards set by international organizations. NHRIs can become a reliable source of information regarding CoE standards in the field of protection of journalists’ safety, including the execution of ECtHR’s rulings. A good and interesting example is provided by the British Commission, who published the booklet “Human rights, human lives, a guide

to the Human Rights Act for public authorities”¹³. The activities of NHRIs that have a predominant research profile is particularly remarkable in this area.

- Creation of specialized areas: most NHRIs have been using their autonomous capacity to organize their internal structures in order to create specific departments or sub-commissions dealing with particular aspects of their mandate (the French Commission is a good example in this sense). With the assistance of the CoE a specific area or department dealing with freedom of expression issues can be created within the organization of each NHRI.
- Power to interact and intermediate with other State authorities: NHRIs have in general the power to engage in informal relationships with the rest of State authorities as well as the “moral” power to publicly point at cases of wrongdoings which lead to human rights violations. The annual report (generally presented to the respective parliament) constitutes a very interesting and powerful instrument in this sense. However, there are other areas and good practices that need to be particularly stressed within the context of the objectives of the present report. It is deserved to mention the power to challenge the constitutionality of norms approved by State bodies before the respective constitutional court (this would be the case of the Spanish ombudsman), or the power to directly and formally address State authorities (for example, the Human Rights Defender of Armenia can intervene on the occasion of Cabinet meetings or officially meet with other State agencies, and can also make speeches before the National Assembly). It is also interesting to note the power that some NHRIs have to intervene in ordinary legal proceedings, by providing support, advise or testimony (these would be the cases of the British and the Scottish Commissions). These powers will enhance the moral authority and the pressure that NHRIs can exercise in order to properly protect and deal with specific human rights violations. Powers such as the general power to carry on investigations, inspection, entering official facilities without prior invitation, regular monitoring of human rights violations, or compelling evidence from individuals or members of public agencies (this would be the case, for example, of the Northern Ireland Human Rights Commission) would also be particularly relevant¹⁴. In this sense, NHRIs can always play a very important role as “parallel” investigative bodies with regards to possible human rights violations and their findings, even if not necessarily binding in most of the cases, may be achieved in a faster and less onerous manner than ordinary court or law enforcement investigations¹⁵.

¹³ <http://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression> . See also the guide on the legal framework protecting freedom of expression and freedom of information: <http://www.equalityhumanrights.com/en/publication-download/freedom-expression-legal-framework>

¹⁴ In general, these powers are particularly developed in the case of the different human rights commissions in the United Kingdom.

¹⁵ In some cases (like for example the ombudsman in Spain) the existence of a judicial process forces the institution in question to stop its investigations.

- Intervene in gender issues: As it has been outlined earlier, the need to effectively protect the safety of female journalists has become a growing problem that deserves more attention and the application of appropriate instruments. This is an issue that is at the intersection between the rights to freedom of expression and freedom of information and the rights in the area of equality and non discrimination. Some NHRIs explicitly put the promotion of equality at the forefront of their activities (that would be the very clear case of the Equality and Human Rights Commission in the United Kingdom). However, no action in the specific area of protection of female journalists who are attacked, discriminated or harassed on the basis of gender have been found, despite this is an area of particular importance and where the broad mandate of most NHRIs could lead to comprehensive actions.
- Advisory functions: Providing direct or indirect advice is one of the main functions that generally NHRIs have. This function is therefore not only limited to those NHRIs that have a predominant consultative role, but it can also be found in most of their mandates. Moreover, even in those cases where NHRIs are not directly tasked with the responsibility of provide advice to normative powers, this advice can also be informally or indirectly given through the exercise of their reporting powers or on the occasion of their public statements or assessments. It is therefore clear that most NHRIs in the CoE area are particularly fit to perform the task of reviewing the “legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear” that is mentioned by Recommendation CM/Rec (2016) 4 and therefore to suggest possible improvements and new mechanisms to reinforce journalists’ safety at the national level. In this area, NHRIs can play a central role not only in reviewing existing legislation, but also in pushing State authorities to adopt the legislative framework that is required by CoE standards. A key factor for the success and relevance of these reporting activities is the professionalism and expertise by NHRIs, as well as the fact that they are particularly fit to pay attention not only to national standards but also to best comparative practices and international norms¹⁶.
- Interaction with civil society organizations: The relationship between NHRIs and civil society organizations tends to be relevant in many CoE member States, as these organizations are very useful in areas such as compilation of information or general assistance to the monitoring tasks performed by NHRIs. Regarding formats for interaction, several different areas need to be kept in mind: organization area (this means having NGOs representatives being part of the bodies and structures of NHRIs, like for example the case of France), decision-making processes (consultations with NGOs before adopting important and strategic decisions, like in the case of the Northern Ireland Human Rights Commission), or the routine consisting of holding regular meetings and exchanges (this would be the case for example of the Spanish or the Polish ombudsmen). NHRIs can play the role of a

¹⁶ The best example regarding recommendations for a better implementation of human rights international standards at the national level is probably provided by the Danish Institute for Human Rights through a series of research papers and projects: <http://www.humanrights.dk/research> .

platform that facilitates and enables the effective dialogue between NGOs representatives and public officials (this is the case for example of the Ireland Human Rights and Equality Commission). Last but not least, NHRIs can also play a possible role funding the participation of NGOs in relevant international encounters directly linked to the human rights covered by their activities.

- Awareness-raising and training: This is also a very important function, which should be based on two big pillars: the moral authority and legitimacy that such institutions have in the area of human rights, and their professionalism and expertise as basic components of their public reputation. In the specific area of safety of journalists, such function could be performed vis-à-vis several groups: media professionals, law enforcement officials, public officials in general, lawyers and human rights defenders... These activities should not only cover the abstract content of the rights contemplated in article 10 of the Convention, but also very specific and practical areas such as physical safety, guaranteeing the security of communications against surveillance, how to report possible online abuses, specific treatments and advice for victims of violence against journalists, etc.
- Collaboration and participation vis-à-vis international organizations: Resolution 99(50) of the Council of Europe Council of Ministers institutes the office of the CoE Commissioner for Human rights and elaborates its mandate. Article 5.1 of such Resolution establishes that the Commissioner must coordinate his actions with the ombudsmen of the different States. Beyond the national level, the European Network of National Human Rights Institutions (ENNHRI), acting as the platform for NHRIs at the regional level, has the status of permanent observer at the CoE's Steering Committee for Human Rights¹⁷. The Declaration adopted within the context of the High-level Conference meeting in Brussels on 26 and 27 March 2015 on the implementation of the European Convention on Human Rights stresses the importance of involving the NHRIs throughout the different stages of the process: "Reiterates the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities, namely governments, courts and parliaments, and their margin of appreciation in guaranteeing and protecting human rights at national level, while involving National Human Rights Institutions and civil society where appropriate"¹⁸. The so-called Brighton Declaration adopted on 20 April 2012 at the High Level Conference on the Future of the European Court of Human Rights expresses "the determination of the States Parties to ensure effective implementation of the Convention at national level by taking specific measures, such as the establishment, if they have not already done so, of an independent National Human Rights Institution" (...) "The States Parties and the Court also share responsibility for ensuring the viability of the

¹⁷ <http://www.ennhri.org>

¹⁸

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593072>

Convention mechanism. The States Parties are determined to work in partnership with the Court to achieve this, drawing also on the important work of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe as well as the Commissioner for Human Rights and the other institutions and bodies of the Council of Europe, and working in a spirit of co-operation with civil society and National Human Rights Institutions.”¹⁹ It is therefore clear that at the international level NHRIs have an important role to play in order to assist international organizations in the proper implementation of their standards and at the same time to participate in the different discussions and decision-making processes at that level when it comes to human rights issues.

2.3. *NHRIs and the execution of the rulings of the ECtHR*

The appropriate and effective execution of the rulings of the ECtHR constitutes a very important component of the human rights system established by the Convention and implemented within the framework of the CoE. The overall execution system is still at the center of several discussions, seminars and events. Some new relevant legal standards and principles have been introduced in the course of the last years, particularly including the changes introduced by the Protocol no. 14 to the Convention as well as the declarations approved after high level meetings and conferences such as the already mentioned Brighton and Brussels Declarations, plus the Declaration adopted at the High Level Conference of the Future of the European Court of Human Rights in Interlaken on 19 February 2010²⁰, and the Declaration adopted on the occasion of the High Level Conference on the Future of the European Court of Human Rights held in Izmir on 26-27 April 2011²¹.

Regarding the specific area of physical and legal safety of journalists, it has been pointed out that this is an issue that does not only refer to the effective protection of article 10 of the Convention, but also other important articles protecting relevant human rights and fundamental freedoms. On the other hand, it has also been stressed that effective redress and reparatory measures for some of these violations do not only require the adoption of formal decisions or legislative changes, but a series of more complex measures, including a proper acknowledgement of the situation of the victims. For this reason, NHRIs are particularly adequate bodies to facilitate and impulse the execution of ECtHR rulings from a comprehensive vision by exercising a combination of the powers granted in their respective mandates. These execution activities can give particular strength to the possible action

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<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593071>

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<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593073>

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<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593074>

plans elaborated at the national level to guarantee the adequate execution of the Court's ruling on the basis of the subsidiarity principle.

The following are possible areas for specific action by NHRIs:

- Dissemination of rulings: It is very important that once a ruling affecting a specific member State is adopted, such decision is widely disseminated and well-known not only by the concerned authorities, but also among all State officials, the different branches of the State as well as civil society organizations and citizens in general²². NHRIs can play a vital role in this task of improving public knowledge and raising awareness about the fundamental trends of the case law of the ECtHR in a certain area. The Danish Institute for Human Rights has been publishing many reports and documents which directly deal with these matters. The guidelines elaborated by the Equality and Human Rights Commission of the United Kingdom (mentioned above) are also a good example. It has to be kept in mind that NHRIs tend to be seen by non-State actors as an independent and reliable source of information and therefore the task that they can perform in the area of public dissemination of case law doctrine is of particular value and importance.
- Individual complaints procedures regarding cases of lack of execution: As it has already been pointed out, several NHRIs (particularly those who are commission-like), have the power to handle individual complaints and to adopt decisions on them (whether binding or not). In cases of lack of a proper execution of an ECtHR's ruling this procedure could eventually be used by affected parties in order to introduce an additional element to raise awareness among State authorities about the need to properly execute international courts' decisions. NHRIs would need to properly publicize the possibility of making this specific use of individuals' complaints' procedures²³.
- Participation in action plans to prevent excessive use of force by law enforcement: Action plans have been chosen as the instrument to deal with some delicate issues derived from ECtHR rulings that deserve actions that go beyond formal administrative or judicial decisions or legislative changes. In cases of abuse of force by law enforcement officers, declared by the Court as a violation of the Convention, the proper execution of the ruling does not only

²² See for example the translation, publication and dissemination among judges and prosecutors of the decision adopted in the case of *Muradova v. Azerbaijan* (ruling of 2 April 2009, First Section) In any case, as mentioned in the text, the respective NHRI can play a useful and central role in this task of public dissemination.

²³ These measures might be considered regarding dramatic cases like the complete lack of execution of the ruling of the *Mikayil Mammadov v. Azerbaijan* case (ruling of 17 December 2009, First Section) (violation of article 10 derived from the conviction and imprisonment of a blogger for denouncing the abuses committed by national authorities' when dealing with a series of riots that took place on 2013 and questioning the official version of the facts). The CoE seems not to have received any information at all about the situation of the victim or any changes in his legal situation so far.

require granting proper compensations to the direct victims of the abuse (or providing other redressing measures), but also to introduce changes in the organization and functioning of this area of State intervention. These changes may include new management directives, new management personnel, trainings for staff, approval of new internal rules, etc. Therefore, action plans in these areas will need to be complex and comprehensive²⁴. Considering the responsibilities of NHRIs in the area of improving human rights respect by public authorities and the specific requirements derived from the need to properly protect journalists' safety (as stressed by Recommendation CM/Rec (2016) 4), these institutions should be necessarily invited to participate in the design, assessment and implementation of such action plans, in order to guarantee that all different necessary aspects are properly covered.

- Advocating for the quality of investigation and efficient functioning of the prosecution system: In some recent cases of attacks against journalists' safety the ruling has declared that the attack in question was not properly investigated by competent authorities and/or the prosecution system did not give an efficient and sufficiently protective response to the victims. In such cases NHRIs should play an important role monitoring and reporting on the way the judicial system must be enabled to effectively respond to certain types of crimes or attacks against journalists²⁵. More specifically, cases of lack of proper investigation, delays in the functioning of the prosecution system or even lack of information or transparency about these procedures should be particularly followed and

²⁴ The effective execution of the *Najafli v. Azerbaijan* ruling (2 October 2012, First Section), for example, clearly shows the need for a real and effective action plan regarding the prevention of abusive use of force by law enforcement authorities. The current very early stage and uncertain outcome of the plan currently discussed bilaterally reflects the need for an national body "assisting" the CoE and national authorities in its drafting. On the other hand, the challenges associated to the need to enact adequate measures in order to properly protect whistleblowers, as a requirement clearly derived from the ruling in the *Bucur and Toma v. Romania* case (*Bucur et Toma c. Roumanie*, 8 January 2013, Third Section) (violation of article 10 and article 8 caused by conviction for public exposure of intelligence services wrongdoings and surveillance of journalists investigating them, as well as violation of article 13 from failure to afford sufficient protection against illegal wiretapping) is another clear example of the need to count on the assistance at the national level of bodies with a relevant power of influence in the area of protection of human rights. In this case, new legal provisions on whistleblowers adopted in execution of the judgment still need to be properly assessed and effectively executed. In the *Nedim Sener v Turkey* case (*Nedim Sener c. Turquie*, 8 July 2014, Second Section), ongoing bilateral consultations on an action plan to avoid further cases of long-term detention or disproportionate punishment of journalists derived from the application of anti-extremist or anti-terrorist laws would probably benefit from the expert and independent contributions of the NHRI, should it be allowed to intervene in such negotiations.

²⁵ The statements made by the Court, for example, in the case of *Dink v. Turkey* (*Dink c. Turquie*, 10 September 2010, Second Section) declaring the failure of Turkish authorities to properly protect an individual who was threatened because of his writings (which is considered a violation of article 10 and article 2 of the Convention), show the delicate and complex implications of the execution of this kind of rulings and the need to count on all kinds of assistance, both at the international and national levels. Awareness training activities for judges and prosecutors are indeed ongoing, as well as new instructions on how to deal with such cases have been issued by the Ministry of the Interior. Once again, the implication of the NHRI in these actions could be of special interest and effectiveness.

proper awareness be raised among the State authorities, citizens and eventually vis-à-vis international organizations as well²⁶.

- Training judges and prosecutors to avoid the arbitrary application of restrictive legislation: Some of the violations of freedom of expression and freedom of information rights declared by the Court are caused by a disproportionate, inadequate and even arbitrary application of the legislation by national authorities, particularly the courts. Despite the fact that this may eventually require the introduction of changes in the legislation itself in order to avoid the existence of overbroad provisions with serious potential impact on freedom of expression, it might also be needed to enhance the skills and capacities of judges and prosecutors vis-à-vis the interpretation and application of certain legal provisions according to CoE standards and the case law of the Court. This is particularly relevant regarding defamation laws, as they always have a certain degree of generality and their adequate application requires a proper identification and definition of the different values and rights at stake, specially the protection of the dissemination of information of public interest. NHRIs can once again become very important tools in this area, in particular by organizing trainings and other activities to better familiarize national judges and prosecutors with the requirements and standards deriving from the CoE human rights system²⁷.
- Monitoring the effective execution of the Court's rulings by domestic courts: The possibility of using the individual complaints' mechanism in cases of lack of execution of ECtHR's rulings has been mentioned above. In addition to this specific mechanism, NHRIs can play a general monitoring role in this area, even in the absence of an individual complaint. As it has also been mentioned, NHRIs can become one of the main aggregators and disseminators of ECtHR's rulings at

²⁶ All these issues still are pending for execution from the ruling *Gongadze v. Ukraine* (ruling of 8 November 2005, Second Section), where the Court declared a violation of article 2 of the Convention derived from the failure to protect the life of a journalist that had been threatened by unknown persons, resulting in his abduction and death. The CoE seems to be lacking information on comprehensive measures to be adopted in order to guarantee the effective functioning of the investigation and prosecution national system.

²⁷ For example, the *Pakdemirli v. Turkey* case (*Pakdemirli c. Turquie*, 22 February 2005, Second Section) (violation of freedom of expression caused by disproportionate compensations to be paid in a civil defamation case) shows that the proper appreciation of the public interest by national courts requires a long-term action as well as a comprehensive set of measures. Turkish authorities still need to provide the CoE with information on interpretation of defamation provisions, including the distinction between value judgments and statement of facts in cases involving public figures or politicians or in cases related to academic freedom. Information is also still expected regarding possible measures to introduce the exceptions of truthfulness and public interest in Turkish law through legislation and/or case law. The decision in the *Ozgur Radyo v. Turkey* case (*Özgür Radyo-Ses Radyo-Televizyon Yayın Yapım ve Tanıtım A.Ş. c. Turquie*, 10 May 2009, no. 3, Second Section) (suspension of broadcasting license on the grounds of incitement to violence and separatism, as well as defamation), also stresses the importance of the adoption and proper understanding, at the national level, of a notion of "hate speech" compatible with the protection of human rights.

the national level and therefore they can also engage ex officio in a general monitoring function when it comes to their execution.

- Assessment of legislation: As it has already been stressed, the execution of ECtHR's rulings should require in some cases the introduction of changes in the national legislation. NHRIs may be a relevant institution to impulse and promote such changes as well as to provide the legislator and other State authorities with the expertise and the criteria that may be needed in order to adopt the most adequate provisions. Last but not least NHRIs can also follow and publicly report about cases of delays or lack of political will in starting the required legislative process²⁸.

3. Possible ways to improve the cooperation between the CoE and NHRI in the area of freedom of expression

In previous sections of this report it has been shown that there are different areas where powers and responsibilities of NHRIs may intersect with and complement the system for the protection of human rights and fundamental freedoms managed by several institutions within the CoE. This being said, it is also true that in the area of freedom of expression and freedom of information and particularly regarding the protection of safety of journalists there is still room for improvement, particularly when it comes to comprehensive cooperation between NHRIs and the CoE. Some references have already been made to the role that NHRIs can play in the specific area of execution of ECtHR's decisions. The following are other possible ways for a more consistent and strengthened involvement and assistance by NHRIs to the activities and competences of the CoE in the area that is the object of the present report:

- Permanent participation of NHRIs in relevant CoE's committees: It has already been mentioned that the ENNHRI has the status of permanent observer to the Committee for Human Rights. It is now time to consider the participation of this representative platform, either as an observer or as a participant without the right to vote, in the meetings of the Steering Committee on Media and Information Society (CDMSI), as the specialized body in charge of the preparation and discussion of the CoE standards directly related to freedom of expression and protection of safety of journalists²⁹. The participation in NHRIs in the sessions of this body would incorporate a first-hand report on the problems

²⁸ There are particularly sensitive cases, in which the participation of an independent body at the national level may be particularly useful in this area. For example, the decision of *Bozhkov v. Bulgaria* (ruling of 19 April 2011, Fourth Section) still to be fully executed, requires national authorities to abolish aggravated punishments in cases of defamation when the victim is a public official. These needed changes in the law are still to be drafted by the Ministry of Justice. The execution of the ruling of the case *Eerkainen and others v. Finland* (decision of 10 February 2009, Fourth Section) (criminal and civil convictions for invading privacy and defamation deemed not to respond to a pressing social need), apart for the redress of individual harms, will be accompanied by the public dissemination of the action plan. Such a measure is a good practice that could be particularly implemented by the NHRI.

²⁹ <http://www.coe.int/en/web/freedom-expression/cdmsi-meetings>

regarding the effective protection of such rights and values, improve the quality and realism of future standards in this area, as well as improve the knowledge and the quality of NHRIs in this area.

- Creation of a network of contact points at NHRIs regarding freedom of expression issues: In order to facilitate a permanent contact and exchange between CoE bodies and NHRIs, the CoE might consider the possibility of agreeing with each national body on the designation of a permanent interlocutor which will become the contact point between both institutions. The workshop planned to take place soon in order to discuss the issues tackled in this report should be a good opportunity not only to raise awareness among NHRIs about the importance of the freedom of expression component of their mandates, but also to invite these institutions to create a specialized area or department, entrusted with the task to interact and communicate with the CoE, among others.
- Trainings and specialized seminars with NHRIs officers: Some NHRIs may not have at this point staff that is particularly specialized or trained on freedom of expression and safety of journalists issues. In order to facilitate the adoption of the measures suggested in the previous points, it may also be necessary to organize seminars or trainings aimed at strengthening the knowledge of NHRIs staff members in the mentioned areas. These activities should take place in parallel with other common actions at a higher level (like for example the participation of within the framework of the CDMSI) and would need to particularly focus on the detailed presentation of relevant CoE standards and decisions of the Court.
- Establishment of direct and bi-directional communication channels to guarantee the effective execution of ECtHR's decisions: It has already been shown that NHRIs can make valuable contributions to the adequate and effective execution of the decisions of the Court. In this context, it can be interesting to consider the possibility of creation some sort of platform or communication mechanism that immediately informs the respective NHRI about the existence of a ruling by the Court pending to be executed and that requires the adoption of a series of measures and actions to be monitored by such authority. This mechanism may also be useful for NHRIs in order to report to CoE's competent bodies about the state of execution of Court's decisions, specially regarding the issues that are most problematic in a specific case.
- Possible adoption of a recommendation or a similar standards' setting instrument on the role of NHRIs institutions vis-à-vis the protection of freedom of expression, freedom of information and safety of journalists: This text would be discussed within the framework of the CDMSI and contain, at least, the following elements:

- Member States should properly empower NHRIs to cover and effectively deal with freedom of expression and safety of journalists' issues within the framework of their mandate.
 - Member States should provide NHRIs with sufficient resources and capabilities in order to be able to operate at the international level and to engage with different platforms and organizations.
 - Member States should guarantee that NHRIs are established as a fundamental instrument for the proper incorporation of international human rights standards into national legislation and the overall action of public authorities.
 - Member States may also entrust NHRIs with some relevant responsibilities regarding the protection and improvement of the right to access to information.
 - NHRIs should be allowed, particularly at the national level, to engage with all sorts of media professionals and organizations to promote a better performance of their mandate.
 - NHRIs should be considered as relevant and necessary actors in the process of implementation of CoE standards and execution of ECtHR's decisions at the national level.
- Specific new tasks for NHRIs derived from Recommendation CM/Rec (2016) 4: As it has already been stressed, this Recommendation contains several elements that may transform and strengthen the role of NHRIs in the area of freedom of expression and safety of journalists. The first area would be to assist member State's authorities, in the exercise of their mandate and powers, in the proper and effective implementation of the different and exhaustive guidelines included as an annex to the Recommendation. The second one would be to undertake the task to comprehensively and independently review the legislative framework in place regarding the abovementioned areas as well as its implementation mechanisms, in the specific terms described by the Recommendation as well.

4. Summary and conclusions

The Declaration on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers (CM) on 30 April 2014. The Declaration observes the growing tendency of journalists "being harassed, intimidated, deprived of their liberty, physically attacked and even killed" because of their work, and the even more worrying fact that States quite often fail to properly investigate such attacks, which is leading to what is described as a "culture of impunity". This Declaration includes a series of directives regarding actions to be urgently undertaken by States, in line with the efforts also put in place by several international organizations and other actors.

Recommendation CM/Rec (2016) 4, adopted by the CM on 13 April 2016, stresses the responsibilities of States in creating a favorable environment for freedom of expression through a range of positive obligations.

The adoption of a comprehensive set of legal measures and policies to better protect journalism safety has thus become, according to CoE standards, a remarkable priority within the overall area of human rights promotion and protection. It is also obvious that, considering the mandate and instruments that NHRIs have, they can play an important role in this area and engage in new venues for cooperation with the CoE, including the execution of the decisions of the Court

Freedom of expression and freedom of information fall under the competence of most, if not all, the NHRIs. Their legal and/or constitutional mandates tend to refer to the protection and promotion of human rights in general, and it can be thus understood that these rights are of course covered. However, it is difficult to find specific and direct references to the rights to freedom of expression and freedom of information in the mandates and/or reports of NHRIs. Communication rights are not generally declared as priority areas for NHRIs activities either.

This report has analyzed how NHRIs can use their current mandate and powers in order to improve the protection of freedom of expression and freedom of information at the national level. This would require the adaptation of such capacities to the specific needs derived from the requirement to create a positive environment for the most effective exercise of such rights.

The report has also analyzed possible actions through which NHRIs can make a valuable contribution to the better and more effective execution of ECtHR's rulings. Physical and legal safety of journalists does not only refer to the effective protection of article 10 of the Convention, but also to other important articles in the Convention protecting relevant human rights and fundamental freedoms. On the other hand, effective redress and reparatory measures for some of these violations require the adoption of a series of more complex measures, including a proper acknowledgement of the situation of the victims. For this reason, NHRIs are particularly indicated bodies in order to facilitate and impulse the execution of ECtHR rulings by exercising a combination of the powers granted in their respective mandates. These execution activities can give particular strength to the possible action plans elaborated at the national level to guarantee the adequate execution of the Court's ruling on the basis of the subsidiarity principle.

Last but not least, the report has also explored possible ways for a more consistent and strengthened involvement and assistance by NHRIs to the actions and competences of the CoE in the area of freedom of expression. This may include the permanent participation of NHRIs in CoE's committees, the creation of a network of contact points at NHRIs, the organization of trainings and seminars addressed to NHRIs personnel, the establishment of two-sided communication channels, as well as the adoption of a recommendation or a similar standards' setting instrument on the role of NHRIs institutions vis-à-vis the protection of freedom of expression, freedom of information and safety of journalists.