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"The promotion and protection by national human rights structures of freedom of expression and information"

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WORKSHOP DEBRIEFING PAPER

University of Padua
Interdepartmental Centre on
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Université de Padoue
Centre Interdépartemental pour
les Droits de la Personne et les Droits des Peuples

The present pubblication[1] was prepared by Stefano Valenti of the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua, on the basis of a contribution by Irene Kitsou-Milonas and Olivier Matter, former staff members of the Office of the Commissioner for Human Rights of the Council of Europe.

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[1] *The electronic version of this publication is also available at www.centrodirittiumani.unipd.it*

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Introduction

Co-financed by the Council of Europe (CoE) and the European Union (UE), the *"Peer-to-Peer Project"* consists of a work programme to be implemented, by the Council of Europe's Directorate General of Human Rights and Legal Affairs (DGHL) and the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua[2]. The main tool of the programme is the organisation of workshops for staff members of the National Human Rights Structures (NHRSs), in order to convey information on the legal norms governing priority areas of NHRS action and to proceed to a peer review of relevant practices used or envisaged throughout Europe.

This workshop focused on *"the promotion and protection by national human rights structures of freedom of expression and information"* and was organized on 21-23 October 2008 in Padua (Italy). The event was attended by a total of 34 persons, including participants, speakers and organizers. The participants at the workshop represented the following NHRSs: Albania, Armenia, Azerbaijan, Croatia, Spain, Georgia, Greece, Montenegro, Russian Federation (representatives of regional Ombudsmen), Slovenia, Serbia (including the Provincial Ombudsman of Vojvodina) and Ukraine, as well as Kosovo[3]. The office of the Catalan Ombudsman was also present in its position of representative of the International Institute of Ombudsman.

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[2] *The Interdepartmental Centre on Human Rights and the Rights of Peoples is the structure of the University of Padua established in 1982 with the mandate to carry out teaching, training and research activities in the field of human rights.*

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

Themes of the workshop

The right to freedom of expression and information is a political right guaranteed by various international instruments, among which Article 19 of the Universal Declaration of Human Rights and of the International Covenant of the United Nations on Civil and Political Rights. At European level, Article 10 of the European Convention on Human Rights (the *"Convention"* or *"ECHR"*) protects freedom of expression. Numerous monitoring mechanisms for the respect of these standards were set at international and European level. Among these mechanisms a privileged place should be given to the European Court of Human Rights (ECtHR), which has rapidly developed a case-law ensuring the protection of the freedom of expression. The ECtHR's work has been accompanied by an equally proactive work of various CoE organs, in particular, the Committee of Ministers, the Parliamentary Assembly and the Steering Committee on the Media and New Communication Services (CDMC).
Four aspects of freedom of expression and freedom of information were set as main themes of workshop's working and discussion sessions[4]:

- Reconciling freedom of expression with other individual rights;
- The specific question of hate speech and the protection of religious beliefs;
- Protection of journalists;
- The issue of access to information.

First of all, the workshop dealt with the delicate issue regarding the right balance between freedom of expression and the respect of other fundamental rights. The protection of the reputation and rights of others men-

[4] *These four themes benefit of a particular attention from CoE. The recent works of the Committee of Ministers and Parliamentary Assembly on the protection of the journalists in times of crisis, and the decriminalization of defamation or blasphemy are the proof of the special attention given to the issue. In addition the activities conducted by the NHRSs in the member States of the CoE show that these four topics present a specific interest for them. The exchange of experience among peers during the workshop confirmed the relevance of these four topics.*

tioned in Article 10 paragraph 2 of the ECHR presents a particular interest in this regard. Whereas freedom of expression benefits of an extensive protection in the area of public debate, this protection is reduced when it interferes with the private or intimate sphere of an individual, even when a public figure is concerned. In relation to the restrictions to freedom of expression, the question of defamation deserves a particular attention.
The specific issue of hate speech and the question of reconciling freedom of expression with the protection of religious beliefs were also presented and discussed among peers.
The discussion then focused on the ways journalists can practice their profession without fearing for their safety or without being under pressure. The protection of journalists, particularly in times of crisis, is a *conditio sine qua non* for an effective and concrete exercise of freedom of expression.
Finally, the fourth session dealt with the question of the access to information, mainly in terms of access to official documents of national, regional or local authorities. In this regard, it is worth mentioning the recent Convention of the Council of Europe on access to public documents.
It was also emphasized the role played by the domestic judicial authorities, the NHRSs and ad hoc authorities in the national protection of freedom of expression and information. In addition, a growing role seems to be taken by media self-regulatory mechanisms.

Contents of the workshop debriefing paper

As a follow-up to this event, it was decided to produce this workshop debriefing paper which provides practical information to NHRSs and references to documents concerning the promotion and protection by NHRSs of freedom of expression and information.[5]
In this publication the order of topics of the workshop programme is modified and will follow a *"domino effect"* logic.

[5] *The information contained in this publication is updated till July 2009*

The first step will be the access to information which constitutes the basis for an effective freedom of expression: without access to information, the journalists cannot work and individuals cannot express themselves or be informed.
Secondly, without protection of journalists there cannot be an effective exercise of freedom of expression.
Thirdly, once full access to information is granted and individuals are able to express themselves without being threatened, the range of application of freedom of expression and its limitations can be considered.
The linking of these elements is essential but unfortunately is, as in a domino game, particularly unstable. Each stage has to be firmly respected and implemented, otherwise the whole viability of the democratic system is impaired.

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Chapter 1
The normative framework[6]

The international normative framework related to freedom of expression and information is particularly expanded. In addition, various mechanisms for its protection and promotion were created in order to ensure the effective enjoyment of this fundamental freedom.

We can cite the following international instruments:

- Article19 of the Universal Declaration of Human Rights[7];
- Article 10 of the ECHR:
  "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.";

[6] *That part largely resumes the elements developed in the presentation given by* Stefano Valenti.

[7] *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

- Article 19 of the International Covenant on Civil and Political Rights[8];
- Article 11 of the Charter of Fundamental Rights of the European Union[9];
- Other treaties of Council of Europe[10] and United Nations[11];
- Other regional conventions, as for example the African Charter on Human and Peoples' Rights and the American Convention on Human Rights.

The solemn proclamation of freedom of expression and information in important texts of international law is not sufficient: it is also important to create mechanisms for the promotion and protection of these rights. In that

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[8] *"1. Everyone shall have the right to hold opinions without interference.*
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order, health orb morals."

[9] *"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.*
2. The freedom and pluralism of the media shall be respected."

[10] *Other relevant Conventions of the CoE are: Framework Convention for the Protection of National Minorities (1995), article 11 of the European Charter for Regional or Minority Languages (1992), European Convention on Transfrontier Television (1989) and its modified protocol (1998), the European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite(1994) and European Agreement on the Protection of Television Broadcasts (1960)*

[11] *See for example International Convention on the Elimination of All Forms of Racial Discrimination (1965) (article 5), the Convention on the Elimination of All Forms of Discrimination Against Women (1979) (Article 3), the Convention on the Rights of the Child (1989) (Article 13) or The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).*

sense we can cite the ECtHR, a judicial body tasked to monitor the respect of the ECHR, which plays a pivotal role for the protection of human rights in Europe. It is clear that Article 10 of ECHR cannot be understood today without the Court's extensive case law on it. The ECtHR delivered, at the end of 2008, its 10,000th judgment: approximately 500 of this 10,000 judgements concerned the protection of freedom of expression.
However, it is appropriate to mention other international mechanisms for the promotion and protection of freedom of expression and information, such as the UN Human Rights Committee, the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights, the United Nations Special Rapporteur on Freedom of Opinion and Expression[12] and the OSCE Representative on Freedom of the Media[13].
In addition, there is a proposal, currently under review, to create a specific mechanism within the CoE regarding the implementation of Article 10 of the Convention[14].
Finally, it deserves a special mention the role played at national level by various stakeholders in the implementation of the right to freedom of expression and information, including the judiciary, the NHRSs, ad hoc authorities, the journalists and the civil society.

[12] *www2.ohchr.org/english/issues/opinion/index.htm*

[13] *www.osce.org/fom*

[14] *www.article19.org/pdfs/analysis/council-of-europe-foe-and-foi-mechanism.pdf*

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Chapter 2
The access to information

The question of access to information is distinct from the issue of freedom of expression and of its free exercise. However, the access to information is a determining factor for the exercise of an effective and real freedom of expression. In fact, without access to information journalists cannot work and the people cannot be informed.

I. The normative framework

The protection of the access to information has for long appeared not as important as the protection of freedom of expression.
According to the information provided by the NGO *"Access Info"*[15], only one country adopted before 1950 a law regulating the access to information. Since then, the adoption of these laws has slowly taken place and nowadays 85 countries are equipped with laws regulating the access to information. At national level, it is important to mention that not only the constitutional, legislative and regulatory texts have to play a crucial role to guarantee the access to information, but an equally important role has to be performed by the case-law interpreting those texts and the practice implementing the right to access to information.
At international level, a number of texts referring to the freedom of information have been adopted. Especially the followings:

- The Recommendation No. R (81)19 on the access to information, of the Committee of Ministers of the CoE;
- The Convention on the access to information and public participation and access to justice in environmental matters, the so-called *"Århus Convention"* of 25 June 1998;

[15] *This part of the debriefing paper is based partially on the presentation given by Helen Darbishire.*

- The Recommendation No. R (2002)2 on the access to official documents, of the Committee of Ministers of the CoE.

It is also important to refer to the CoE Convention on access to official documents[16].

Such a convention represents a remarkable progress in the framework of the European protection of the right to access to information, despite the fact that the choice of the terminology to be used in the text of the convention caused heated discussions during the drafting process.

The freedom to receive information and ideas guaranteed by the ECHR implies necessarily the possibility for every person, not only journalists, to collect and research information from all the lawful sources available.

This freedom involves, according to the case-law of the ECtHR, the right of the public to be accurately informed, particularly on issues of general interest. The right to receive information: *"essentially forbids a government to prevent someone from receiving information wanted or consented to be provided by others"*[17].

However, since the ECHR does not guarantee an absolute right to obtain any information, the ECtHR or the former European Commission of Human Rights have therefore concluded in some cases that Article 10 was not violated. Various examples can be provided:

"In the Leander case, the applicant has complained about the fact that Sweden authorities have kept some secret information that was directly affecting him for national security reasons. In its judgment in 1987 the Court held that there had been no violation Article 10.

In July 1989 the Court held that there had been no violation of Article 10 in the Gaskin case[18]. That case concerned an application against the refusal to communicate to the applicant its personal record. The record was related to the period when he had been in public child care.

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[16] *This Convention was opened for signature on 18 June 2009 on the occasion of the 29th CoE Conference of the Ministers of Justice.*

[17] *Decision in the case of Leander v. Sweden, 26 March 1987, §74.*

[18] *Judgement in the case of Gaskin v. United Kingdom, 7 July 1989, series A, no 160.*

In February 1998, the Court concluded in the case of Guerra and others[19], that Article 10 wasn't applicable in this instance. The applicants were complaining that the state had not informed the population about the risks they were exposed to and about the measures to be taken in case of an accident at the chemical factory situated in the neighbourhood.
In the Segerstedt - Wiberg and others v. Sweden[20] case the Court declared admissible a claim concerning the keeping of personal data records and refusal to allow the access to the files concerning the applicants held by the secret services of Sweden"[21].

GENERAL ASPECTS OF THE RIGHT OF ACCESS TO INFORMATION

As it was mentioned above, it is possible to detect some general principles referring to the right of access to information:

- The right of access to information is applicable to everyone and in principle to all information. The Convention of the CoE on the access to official documents specifies in Article 2.1 that each party *"shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities"*;
- That right concerns not only public institutions but also private institutions that exercise a public function or propose services of public nature and private institutions that operate using public funds;
- There is a special approach towards the question of the access to information held by legislative or judicial authorities, as regards their activities other than administrative functions;
- Inspections of official documents have to be free-of-charge, especially for access to the originals and copies of documents in the premises of a public authority;

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[19] *Judgement in the case of Guerra and others v. Italy, 19 February 1998, collection 1998-I.*

[20] *Decision in the case of Segerstedt-Wiberg and others v. Sweden, (application No. 62332/00) 20 September 2005.*

[21] *Human Rights File No.18 of Council of Europe "Freedom of expression in Europe and the case law concerning Article 10 of the ECHR". http://hrls.echr.coe.int/uhtbin/cgisirsi.exe/x/0/0/5?searchdata1=human+rights+files{440}*

- *"A request for access to an official document shall be dealt with promptly. The decision shall be reached, communicated and executed as soon as possible or within a reasonable time limit which has been specified beforehand".* (Article 5.4) ;
- There should be a mechanism that allows to appeal against a refusal to provide a given information.

EXCEPTIONS TO THE RIGHT OF ACCESS TO INFORMATION

As already mentioned, it is impossible to establish an absolute right of access to all information in any circumstances.

There are exceptions to the right of access to information. Reference is made to the list of limitations to the right to access information contained in Article 3[22] of the CoE Convention on access to official documents. Such a relatively extensive list has to be interpreted in a restrictive manner. Most of the disagreements referring to the right of access to information focuses on the interpretation of the field of application of such exceptions. In any case, in a democratic society, these exceptions have to be reasonable and justified.

It was emphasized by certain participants in the workshop that this Convention presents some gaps, not only concerning the list of limitations to the right of access to information, but also concerning the conditions of the im-

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[22] *"1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:*
a. national security, defence and international relations;
b. public safety;
c. the prevention, investigation and prosecution of criminal activities;
d. disciplinary investigations;
e. inspection, control and supervision by public authorities;
f. privacy and other legitimate private interests;
g. commercial and other economic interests;
h. the economic, monetary and exchange rate policies of the state;
i. the equality of parties in court proceedings and the effective administration of Justice;
j. environment; or
k. the deliberations within or between public authorities concerning the examination of a matter."

plementation of this right. These gaps are related to the field of application of the Convention, to the less-protective character of this obligation, to the possibility to appeal against a decision rejecting the access to information and to the limits of this right concerning information contained in communication with heads of State.

II. The implementation of the right of access to information and the role of NHRSs

The civil society plays a considerable role in monitoring the implementation of this right. In that sense various points were reported by NGOs:

- The unsatisfactory character of the public authorities' rate of reply to requests of access to information[23];
- According to the survey set by the NGO *"Article 19"*, some States retain certain information that should be communicated and broadcasted to serve the public interest[24];
- The existence of discrimination based on the identity of the authors of the request for information. According to the NGO *"Access Info"* it is easier to obtain a certain information being a journalist or member of a NGO than being a member of a minority group;
- The need for public authorities to improve information management (especially when the volume of information to deal with is important) and the need to train the staff of the administration dealing with these matters;

[23] *A study of the NGO "Access Info" involving 14 countries reported that in only 23% of cases the information was provided. In 17% of cases the response was a refusal to provide the requested information, in 13% of cases there were difficulties in the submission of the request and 47% of cases the public authorities didn't answer to the request at all.*

[24] *An important example of that practice refers to Ukraine which is still providing limited information on the environmental and sanitary consequences in Chernobyl, twenty years after the catastrophe. It seems that the Ukrainian authorities make use of a sort of "property right" by assigning an intellectual property right to the information they hold, in order to limit the access to it.*

- The establishment of a national agency responsible for matters concerning the access to information is handled in different ways by the different States involved[25].

The involvement of NHRSs in these issues is of primarily importance, both for the NHRSs having a specific mandate oriented towards solving the problems of inefficient management of access to information, as well as for NHRSs having a more general mandate related to the protection of human rights.
The actions of NHRSs depend clearly on their mandate and on the matter of a case, therefore may vary considerably. The NHRSs can for example: bring up a matter in a annual report or in a *ad hoc* report, make use of their moral authority to intervene before the authorities, and adopt recommendations or argue a case before the court.
Certain NHRSs can simply serve as an intermediary for providing information, especially to journalists, as in the case of Albania.
As it was mentioned in the discussion of this workshop, a NHRS has to be particularly vigilant towards abusive restrictions related to the right to information, as for example in the case of laws on data's secrecy.
The creation of a legal framework at national level is a major stage of the implementation of an effective right to information. For example participants mentioned that in Croatia, due to the activism of the civil society, a law on the right to information was adopted in 2003. The representative of the Croatian NHRS reported on its institution's active role for the proper implementation of this law, which is not always promptly applied by governmental authorities. In fact, nowadays in Croatia less than 50% of the relevant agencies respond to the addressed requests for access to information. Some public authorities impose an additional cost to examine a request of information. It seems that a lot of work remains to be done to change mentalities concerning this issue, especially from the part of national authorities.

[25] *Certain States created a specialised commission (in France, Portugal and Former Yugoslav Republic of Macedonia), whereas others established a Commissioner (United Kingdom, Ireland, Germany, Scotland, Slovenia, Hungary and Serbia) or entrusted those functions to an Ombudsman (in Norway, Sweden and Bosnia and Herzegovina).*

In Armenia although the 2003 law foresees specific monitoring mechanisms, none was implemented and it is actually the NHRS that gets involved in this question. Therefore, the Armenian NHRS maintains contacts with NGOs, presents recommendations to the government and other authorities (for example the recommendation to reduce to 5 days the delay to respond to a request for information), or intervenes in cases of non-execution of domestic judgements concerning freedom of information. The Armenian example, regarding the right of access to information, shows us the valuable contribution of NHRSs for an effective implementation of this right.

There is also a certain reluctance to make use of the protection offered by NHRSs. In certain cases when a journalist is not granted the access to information, in order to assert his/her rights he/she doesn't turn towards the courts or NHRSs, but towards more informal means.
Finally, the NHRSs expressed their doubts towards the obligation for them as a public authority to communicate their own information. In fact, it is not always easy to define which information can be communicated by NHRSs to the applicants and which shouldn't be communicated (for example for protecting the privacy of a person who contacted NHRSs).
If it is difficult to bring a sole and valid answer that would be valid in any circumstances, it is equally true that in case of sensitive data different solutions have to be considered, such as the communication of partial or anonym information. Actually, even in particularly sensitive domains as the military one, all information should not be qualified as secret, and some of it can be communicated, like for example the information referring to the budget (the United Kingdom offers an interesting example of a great openness towards communicating information related to defence matters). It is also possible to provide an information without violating its confidentiality (for example giving only the number of complaints against the police, only the information about the nature of infraction or allowing for partial access to a document).

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Chapter 3
The protection of journalists

Journalists could be harmed even before they are capable of exercising their right to freedom of expression. The protection of journalists assumes in this aspect a great importance for the purpose of establishing an effective and real freedom of expression. It is also a manifestation of the *"domino effect"* described above. Three aspects can be distinguished in the framework of this protection:

- The physical protection of journalists against threatens they may be subjected to;
- The protection of journalists who are prevented to have the access to certain persons or places for security reasons;
- The protection of journalistic sources[26].

The standards of the CoE

Regarding the CoE standards, it is well-known that ECHR constitutes the first yardstick for the protection of journalists, being compulsory for all 47 member States of the CoE.

However, other instruments present as well a particular interest in this matter:

- The guidelines of the Committee of Ministers on the protection of freedom of expression and information in times of crisis[27];
- The Recommendation 1706 (2005) of the Parliamentary Assembly on media and terrorism;

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[26] *That part is based on the presentations given by Ivan NIKOLTCHEV, Head of Media Unit, Legal and Human Rights Capacity Building, Directorate General of Human Rights and Legal Affairs of the CoE, and Marc GRÜBER, Director of the European Federation of Journalists.*

[27] *See the guidelines of the Council of Europe on that matter:*

- The Resolution 1438 (2005) and the Recommendation 1702 (2005) of the Parliamentary Assembly on the freedom of media and the work conditions of journalists in conflict areas;
- The Declaration on the freedom of expression and information of media in the context of fight against the terrorism, adopted by the Committee of Ministers on 2 March 2005;
- The Recommendation No. R (96) 4 of the Committee of Ministers concerning the protection of journalists in case of conflict or tension.

The following text can also serve as a source of inspiration for the work of NHRSs:

- The results of the Conference on the legislations concerning anti-terrorism and their consequences on the freedom to expression and information;
- The Collection of answers to the survey on media and terrorism and Written Contributions on the issues concerning freedom of expression and information and the fight against terrorism (14 may 2002) by the NGOs "Article 19", the European Newspaper Publishers' Association (ENPA) and the European Federation of Journalists.

Of course, certain instruments are of a binding nature, while others are just soft law. However, this distinction is not of great importance because certain non-binding instruments are based, for example, on standards used by the ECtHR in its case-law. This is the case of the standards referring to the freedom of expression as defined in the Recommendation (2000) 7 of the Committee of Ministers concerning the right of journalists not to disclose their sources of information.

The position of the Commissioner for Human Rights was clearly spelt out in his viewpoint named: *"Investigative journalists and whistle blowers must be protected"*[28].

[28] www.coe.int/t/commissioner/Viewpoints/070917_en.asp

I. The physical protection of journalists

The protection of journalists has recently known a visible deterioration. This worsening has been registered especially in the context of the fight against terrorism. The threats affecting the stability of a State or, in another contexts, the aftermath of devastating natural catastrophes can lead to the reinforcement of security and surveillance.

The need for security and surveillance's measures can affect the work of journalists. There can be some situations of abuse from the part of national authorities in the context of the *"Post 9/11"*. It could be the case of certain European countries directly affected by terrorism such as Spain or the United Kingdom. However, the protection of journalists can be as well in danger besides crisis periods.

Examples of concrete situations that raise concern in the member States of the CoE were widely mentioned:

- In Bulgaria, on 25 September 2008 the Bulgarian journalist Ognian Stefanov, known for his articles denouncing corruption, has been aggressed with a hammer by four people on the streets of Sofia. The European Federation of Journalists (EFJ) denounced the aggression of the photojournalist Emil Ivanov led by police officers on May 2008. The cause of the aggression was the refusal of the journalist to erase certain photos from his camera.
- In Romania, the EFJ denounced the existence of various violent and insulting comments regarding journalists made by respected political figures.
- In Serbia, the journalist Dejan Anastasijevic, of the weekly newspaper *"Vreme",* known for his articles about war crimes, was the victim on 16 April 2007 of a attack with a grenade in front of his house. Similarly, some journalists of the famous radio and TV station B92 were subjected to repeated threats to life, particularly against Veran Matic. The request to get police protection could not be fulfilled because of the lack of available means for it, implying an additional risk for a journalist, who in order to ensure his protection, was forced to turn to-

wards private security companies. In Turkey, similar cases of refusal or impossibility by the police to protect the threatened journalists were reported.

- In Spain, numerous journalists, especially in the Basque region, are victims of threats. Approximately 100 journalists are under permanent police's protection. Recently, in June 2008 there was a bomb attack at the offices of the newspaper Basque *El Correo.*
- In the Russian Federation, there are the particularly serious cases of murders of journalists. The threats to the security of journalists have led certain journalists to a kind of self-censorship. The newspapers that preserve their independence become the main target of threats.
- In Azerbaijan, the NHRS asserts that there exist arrests of journalists for deceitful reasons, unrelated to their profession.
- In Croatia, at the time the workshop was taking place, a car bomb attack ceased the life of Ivo Pukanic and Niko Franjic, the owner and the sales manager of the weekly newspaper *"Nacional"*, in Zagreb on 23 October 2008. The death of the journalist has generated numerous reactions. We can cite Andrew McIntosh, Rapporteur on the freedom of media and President of the sub-committee of media of the Parliamentary Assembly of the Council of Europe, according to whom: *"The brutal silencing of Mr Pukanic will not silence his newspaper, or the many other investigative journalists who seek to expose corruption, wrongdoing and abuses of human rights. Death threats against journalists in Croatia are not uncommon. It is a challenge for democracy and the rule of law, if such cases are not fully investigated"*[29]. Furthermore, in September 2008, 300 journalists have demonstrated against increasing threats affecting the journalists and the citizens of Croatia.

[29] *CoE press release "PACE media freedom rapporteur reacts to Zagreb car bombing" at http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2091 .*

ENSURING PHYSICAL PROTECTION OF JOURNALISTS AND THE ROLE OF NHRSs

The examples presented above reveal that the threats posed on journalists, actively practicing their profession, are real: these threats sometimes materialize, leading to situations such as intimidations, physical aggression, harassment or even murders.

Thus, when the security of a journalist is at risk, the public authorities have to take all the necessary measures to ensure the security of the threatened journalist. However, during the workshop it was emphasized that gathering together the necessary financial and human resources for effectively ensuring the protection of threatened persons, it's not an easy task to accomplish by the State authorities.

In any case, when a threat against a journalist is carried out, it is important for the national authorities to stop the culture of impunity. In application of ECHR standards, it exists a procedural obligation on the State to hold an effective investigation on the facts in question. Moreover, for an effective enquiry, the investigations have to be held promptly.

However, it must be acknowledged that from a legal point of view the protection of the physical integrity of a journalist can be hardly distinguished from the one of another person. There is no difference, according to Articles 2 and 3 of the ECHR, if the victim of the violation is a journalist or not. Journalists have the same rights as other persons (such as right to life or right to physical integrity). However, they have specific rights related to their professional activity (the right to conceal information, the right to have access to certain public areas to complete their work, etc.). It is appropriate to re-emphasize that the ECtHR case-law recognises the concept of positive obligation upon the State, for example in the matter of protection of the right to life. This concept was particularly relevant in the case of the death of the journalist Guéorgui Gongadzé[30].

In this type of particularly serious situations, it is important for NHRSs to be vigilant and consequently act in compliance with their mandate. As an

[30] *See the judgment in the case of Gongadzé v. Ukraine, 8 November 2005.*

example, in Ukraine a journalist was physically assaulted by the director of a sports stadium. The Human Rights Commissioner of the Parliament, once informed about the issue, reported the fact to the General Prosecutor so that the police could afterwards take action. The Ukrainian Human Rights Commissioner has the mandate to intervene before the Parliament on these issues.

The way NHRSs act in that type of situations can vary: the NHRS can actually openly deal by means of press-releases, can organise missions on the spot with the help of journalists or lawyers, has the opportunity to adopt recommendations and of participating in various investigations. Even if a NHRS cannot act before a court, it can use its moral authority to find solutions to manifest violations of the ECHR. It is a pity that lack of financial and human resources can prevent NHRSs from efficiently acting in these situations. However, in times of crisis and against all odds, as for example in Armenia or Georgia, the respective NHRSs have taken up successfully that role on their own initiative.

II. Other forms of obstacles to the journalists' work

The question of protection of journalists is not solely about avoiding or sanctioning the most spectacular forms of attack to freedom of expression, such as the physical aggression of journalists. The protection of journalists implies also the protection of their work material. During the workshop a short documentary was projected on the work of journalists at the time of demonstrations in United Kingdom, showing that quite frequently the journalists are refused access to certain places. This fact can be considered as a form of restriction of the freedom of expression and information of the public. The journalists' material can also be confiscated or destroyed.

The relations between media and police turn to be in these circumstances a little delicate, if not even tense. During a demonstration on a public highway, the documentary showed the tendency of the police officers to identify not only demonstrators, but also the journalists on the spot. Policemen

acted with a certain harshness towards journalists, probably fearing of being filmed or photographed by the media and later on identified.
As it has been mentioned before, there are other forms of pressure exerted on journalists, for example the restriction to have access to certain places. Restriction to the access to places can be considered in some situation as legal, but it can also be disproportionate, thus violating the right of journalists to inform the public.
Other forms of restrictions can also be incompatible with the ECHR. In matter of access to information, different restrictions can prevent the journalists from the free exercise of their right to free information.
According to EFJ, the Dutch journalists' trade union complained about the obligation to get an authorization from a director of prison for obtaining an interview with a detained person, authorization which in practice was rarely given. Without wanting to discuss the compatibility of such measure with the ECHR, it is important to remind that NHRSs must remain vigilant and ready to act for the protection of journalists against any restrictions that would prove to be contrary to the ECHR.
In different member States of the CoE law-suits for defamation were made against journalists in an abusive manner, simply in order to deter journalists from conducting their work.
The application of criminal sanctions for defamation can also have a very important discouraging effect on the freedom of expression of a journalist.
The abusive use of the *"state secrets"* notion, when confidential or classified documents are declared secret with the purpose of protecting public security, can equally represent an undue restriction of the freedom of expression of journalists, as it will be examined in the next paragraph.

III. The protection of journalistic sources

The protection of the sources of journalists is at the core of the protection of journalists' work. The ECtHR has set a conspicuous jurisprudence protecting journalists and the confidentiality of their sources, which establishes an almost absolute inviolability of such a right.

Often sources of journalists are anonymous and journalists do not have to reveal the identity of their sources. That confidentiality permits people to provide journalists with information without fearing to be inquired afterwards.

The case-law of the ECHR on the issue of protection of sources is extremely detailed. The leading judgement in the case of *Goodwin v. United Kingdom* is of particular importance:

"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest".

According to the Court's case-law, only overriding requirements in the name of public interest can justify a breach of the confidentiality of journalistic sources. The Recommendation No. R (2000) 7 on *"the right of jour-*

nalists not to disclose their sources of information", adopted by the Committee of Ministers of the CoE, refers to the same case-law.
Thus *"the disclosure of sources should be allowed only in the presence of an absolute necessity and if the circumstances are sufficiently vital and serious. Also it is important that the imperative or the circumstances present a superior interest to the protection of journalistic sources"*[31]. The above-mentioned recommendation states moreover that *"journalists should be informed by the competent authorities of their right not to disclose information identifying a source, and the limitations of this right before the disclosure is requested"*[32]. In addition, *"the judicial search, surveillance or interception of communications of journalists or their employers, should not be allowed if they are aimed at circumvent the right of journalists not to disclose information identifying their sources"*[33].
In spite of this enhanced protection of sources, there have been detected numerous violations of the right of a journalist not to reveal his/her sources. The EFJ provided various examples of these violations:

- In the Netherlands, in November 2006, Bart Mos and Joost de Haas, two journalists working for *De Telegraaf*, were detained for two days by the national intelligence agency (AIVD) following their refusal to reveal their sources. Also in September 2008, the secret services have tapped two journalists also working for *De Telegraaf* for the reason that they had published confidential information. In September 2008 De Telegraaf lodged a complaint with the European Court of Human Rights.
- In Denmark, from 2004 to 2006 journalists from the daily *Berlingske Tidende* were arrested and prosecuted because they broadcasted extracts from military service reports on the lack of weapons of mass de-

[31] *See Monica Macovei, Handbook on human rights, No.2, Freedom of expression: a guide on the implementation of Article 10 of the European Convention on Human Rights, pp.65.*

[32] *See Recommendation No. R (2000) 7, Principle No. 5 b).*

[33] *See Monica Macovei, Handbook on human rights, No.2, Freedom of expression: a guide to the implementation of Article 10 of the European Convention on Human Rights, pp. 65.*

struction in Iraq. However, the prosecuted journalists were proved to be innocent later by the national courts. Similar cases of unjust prosecutions exist also in Germany.

- In France, there is no specific law on protection of sources, which is protected only by the Code of Criminal Procedure, prohibiting unreasonable searching and seizures involving journalists, if these measures have the sole aim of obtaining the identity of an informant. Thus, a journalist from the newspaper *Le Monde* was prosecuted for disseminating confidential reports referring to the awareness of the French authorities concerning the plans of terrorist attacks from Al-Qaeda. In addition, following the publication of a blurred picture showing a demonstration in Corsica, the police wanted to obtain a clear copy of it and sent a request to the editor of the newspaper. The latter actually consented to the request, but was subsequently dismissed for that.
- In Italy, Prime Minister Berlusconi announced in July 2008 that he wished to submit a decree to the parliament providing for the imprisonment of journalists who were publishing *verbatim* (original, word for word) or reproduction of wiretaps used in criminal proceedings without prior authorization of the competent judge[34].
- In Germany, the European Federation of Journalists have estimated, since 1987, 187 cases of pressure or attacks against journalists. In 2007, it was decided that the confiscation of documents is unconstitutional, if it aims to obtain the identity of an informant.
- In Belgium, mention was made of a case referring to OLAF, the European anti-fraud office, on the question of whether a journalist had paid civil servants.

There is now a tendency, according to EFJ, to intrude into journalists' new means of communication (e.g. intrusion into the mailbox).

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[34] *The decree approved afterwards contains only a provision for the expulsion of the journalists publishing the verbatim from the journalists' association and not for their imprisonment. In its 2008 annual report the Italian Authority for the right to privacy (Garante per la privacy) strongly objected to penal sanctions against journalists publishing information related to judicial proceedings.* www.garanteprivacy.it

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Chapter 4
Limits to the freedom of expression: balancing freedom of expression with other individual rights

Freedom of expression and information is certainly one of the foundations of a democratic society, as well as one of the main conditions of its progress and of the development of each individual[35]. Freedom of expression and information is a *sine qua non* condition for the enjoyment of other fundamental human rights.

Freedom of expression covers very broadly the right to hold opinions, but also the right to express them. Freedom of information includes the right to seek and receive unbiased information.

The case law of the ECtHR is particularly extended and developed on the application of Article 10 of the Convention. The Court considers that freedom of expression *"applies not only to information or ideas that are favourably received or regarded as inoffensive or indifferent, but also to those that offend, shock or disturb the State or any sector of population. Thus it demands that pluralism, tolerance and open-mindedness without which there is no "democratic society". Therefore, any "formality", "conditions", "restriction" or "sanction" imposed in this regard must be proportionate to the legitimate aim pursued"*[36].

Media require special protection as they play a *"watchdog"* role in any democratic society[37]. However, even if the field of application of freedom of expression is quite wide, it is not absolute.

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[35] *See the judgment in the case of Handyside v. United Kingdom case, 7 December 1976, §49.*

[36] *Idem.*

[37] *See the cases of Castells v. Spain, 23 April 1992 ,§43 and Sunday Times v. United Kingdom, 26 April 1979, §65.*

Thus, paragraph 2 of Article 10 clearly states that: *"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 for national security, territorial integrity or public safety, for the prevention of disorder or crime, protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of confidential information or for maintaining the authority and impartiality of the judiciary."*

The protection of freedom of expression naturally relates to the responsibilities of the person who expresses his/her opinion. This is a functional approach to freedom of expression. It is appropriate in this case to establish a *"balance",* searching for an equilibrium between the opportunity to use one's freedom of expression and the need to respect other individual rights. This balance is particularly difficult to be established and it might be therefore useful to refer to the extensive case-law of the Court on these issues[38].

I. The Court's approach

Interferences with freedom of expression can take many forms, such as censorship or seizure of information before it is communicated. These types of restrictions are particularly dangerous and therefore can be allowed only in very specific situations. The interference can also take the form of an indirect pressure on the person exercising his/her freedom of expression. The use of deterrents to the full enjoyment of freedom of expression might have a *"chilling effect"*, materializing in a kind of *"sword of Damocles"* pending on the person who wishes to express him/herself. It could take the form of an unsubstantiated summon to justice, the threat of closure of a radio or the imposition of exorbitant penalties.

[38] *This section is based in part on the presentations given by Mario OETHEIMER, Legal Officer, Division of Research, Registry of the European Court of Human Rights and Sejal PARMAR, Senior Legal Affairs, Article 19, London, United Kingdom.*

The method of the Court to review whether a restriction to the right to freedom of expression is legitimate under the ECHR is very similar to the one applied to any other guaranteed right susceptible of restrictions.
The ECtHR reasoning follows three stages:

- Is the restriction to freedom of expression foreseen by a law[39]?
- Does the restriction of freedom of expression pursue a legitimate aim, namely one of the purposes specified in Article 10 paragraph 2?
- Is the restriction of freedom of expression proportionate and necessary in a democratic society?

The later standard is difficult to assess and, in this context, the Court conducts a real *"test of proportionality"* trying to establish a balance between the need to protect the right to freedom of expression and the need to protect other conflicting rights guaranteed by the ECHR.
The Court takes into consideration all the facts of the case, puts them into context, analyzes the decisions already taken by the national courts, the reasoning and conclusions adopted at the domestic level, so as to see if the sanction imposed could be considered proportionate to the aim pursued. The more severe is the penalty, the more convincing has to be the need for this penalty.
It is, of course, not possible in the context of this paper to deliver a comprehensive overview of the Court's jurisprudence on the limits to freedom of expression. Only some examples of cases relevant to the balancing between freedom of expression and other individual rights will be provided.

II. Freedom of expression and defamation

One of the key aspects of the limitation to freedom of expression lies in the protection of the reputation of others against defamation.

[39] *The term "law" used by the Court must be understood in a broader sense including not only acts as defined by the legislation, but also regulatory acts or case-law applied in a constant manner.*

It should be noted that the dividing lines between the subject of defamation and the one relating to hate speech may be difficult to establish. The issue will be more widely addressed in the part relating to hate speech here below.

The case-law of the ECtHR in this regard has been partly established in the judgment in the case of *Lingens v. Austria*, which relates to the criticism to a German Chancellor for his strive to protect former members of the SS forces.

This judgement shows that a criticism is more widely acceptable towards a public figure. Thus, the Court considers 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 political leaders. [...] The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance*"[40].

"In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof"[41].

According to the ECtHR *"journalistic freedom also includes the possible use of a certain amount of exaggeration or even provocation. [...]It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth*"[42].

In the eyes of some commentators, the recent case-law of the Court on Article 10 seems now less protective towards freedom of expression than other rights guaranteed by the Convention[43].

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[40] *See the case of Lingens v. Austria, July 1986, A series, No. 103, p. 26, § 42 ; also the case of Mamère v. France, 7 November 2006.*

[41] *Case of Lingens v. Austria, § 46.*

[42] *See the case of Dalban v. Romania, September 28, 1999, § 49.*

[43] *See the judgment of the Grand Chamber in the cases of Lindon, Otchakovsky-Laurens and July v. France, October 22, 2007.*

The NGO *"Article 19"* mentioned some examples of misuse of defamation and the issue of criminalisation of it[44].
Finally, there is a tendency within the CoE institutions to move towards the absolute decriminalization of defamation. The Parliamentary Assembly of the Council of Europe has worked on this issue, especially through its Recommendation 1814 (2007) and Resolution 1577 (2007) *"Towards decriminalization of defamation"*[45].

III. Freedom of expression and the right to respect for private life

The respect for privacy is a legitimate objective that can justify restrictions of freedom of expression. Also in this context, a balance should be struck between the right to freedom of expression and other competing rights. The ECtHR seems to grant in this regard a considerable importance to the concept of *"debate of general interest"*. It is estimated that: *"In the cases in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest"*[46]. The Court however found, in one case, that the use of certain terms in relation to an individual's private life was not *"justified by considerations of public concern"* and that those terms

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[44] *See the report of the NGO "Article 19" on Russia "The cost of reputation: Defamation Law and Practice in Russia" appeared in November 2007, noting in particular the sentences till 4 years of imprisonment and the question of the excessive fines. This report is available online at: www.article19.org*

[45] *See also the report "Towards a decriminalization of defamation" by Jaume BARTUMEU CASSANY on 25 June 2007 (Doc. 11305) available at: http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc07/FDOC11305.htm*
See also the overview of national legislation on defamation and insult (DH-MM(2003)006rev).

[46] *Case of Von Hannover v. Germany (Application no. 59320/00), 24 June 2004, § 60.*

did not *"[bear] on a matter of general importance"*[47] and went on to hold that there had not been a violation of Article 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of *"major public concern"* and that the published photographs "*did not disclose any details of [the] private life of the person in question"*[48] and held that there had been a violation of Article 10. Similarly, in a more recent case concerning the publication by President Mitterrand's former private doctor of a book containing revelations about the President's state of health, the Court held that *"the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality"*[49] and held that there had been a breach of Article 10.

In the past the ECtHR was asked to check whether the cases regarding the limitations to freedom of expression imposed by the national authorities were justified on the ground of Article 10 paragraph 2. However, more recently it has been found that private individuals introduce complaints before the ECtHR in order to have their right to private life protected based on Article 8 of the Convention.[50]

The English Courts have been confronted with the question of the balance between freedom of expression and privacy in the case of articles or photographs published in newspapers called *"tabloid"*.

So in the case *Naomi Campbell v MGN Ltd*[51], the House of Lords held that the applicant could invoke her right to privacy related to the publication of photographs showing her entry to *"Narcotics Anonymous"*, which exceeded the freedom allowed to a free press and constituted a disproportionate in-

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[47] *Case of Tammer v. Estonia, (Application no. 41205/98), 6 Febbruary 2001, § 68.*

[48] *Case of Krone Verlag GmbH & Co. KG v. Austria, (App. no. 34315/96) 26 February 2002, § 37.*

[49] *Judgement in the Case of Editions Plon v. France, (App. No. 58148/00), 18 May 2004 § 53.*

[50] *Judgment in the case of Petrina v. Romania, (App. No. 78060/0114) 14 October 2008.*

[51] *(2004) 2 All ER 995.*

terference with the right to privacy of the applicant. More recently, in July 2008, in the case of *Max Mosley v. News Group Ltd*, the High Court decided that Mr Mosley could expect not to see unveiled its unconventional sex and sadomasochistic orientation. The fact of revealing such information could be justified only on the basis of public interest, which was not the case here where the claimant was portrayed to have engaged in a *"Nazi orgy"* in order to make fun of Holocaust's victims[52].

IV. Freedom of expression and national security

The issue of national security and the need to respect the right to life is becoming more and more a reason (or an excuse) to limit freedom of expression in the current context of the fight against terrorism.
The restrictions of freedom of expression in order to protect national security can of course be perfectly compatible with the ECHR. A good example is the judgment of the Grand Chamber of the ECtHR in the case of *Stoll v. Switzerland*[53], where the Court decided compatible with Article 10 of the ECHR the applicant's conviction for publishing a classified document, namely a diplomatic note on the dormant accounts of Holocaust victims in Swiss banks and the attitude of the Swiss authorities during negotiations on this issue. However, the limitation of freedom of expression for reasons of national security can also be clearly abusive. The picture painted by the NGO *"Article 19"* is alarming in this regard:

- The application of new anti-terrorism laws has resulted in some circumstances to be a limitation of freedom of expression through actions such as: the criminalization of apology of terrorism or the criminalization of the publication of state secrets. Following the examples of France and Spain, the United Kingdom and Denmark have criminal-

[52] *Concerning this case, an application introduced by the company MGN Limited, communicated to the UK government on 22 October 2008, is currently pending before the ECtHR (Application No. 39401/04).*

[53] *See the case of Stoll v. Switzerland (No. 69698/01), 10 December 2007.*

ized the *"glorification"* or the *"justification"* of terrorism. In the United Kingdom, the Attorney General has warned newspapers they could be prosecuted if they publish internal memos between President Bush and Prime Minister Blair on the conduct of the war in Iraq;

- The anti-terrorist legislation passed in Turkey in September 2006, resulted in significant restrictions of freedom of expression because propaganda or advocacy of terrorism was set as a crime[54].

V. Freedom of expression and other concurrent rights

During the workshop, it was mentioned that there were other considerations likely to limit freedom of expression. For example, the protection of morality may restrict the freedom of expression. This is especially true in the context of child's protection. These limitations to freedom of expression are acceptable to the extent that they are necessary in a democratic society.

In Spain, for example, the *Defensor del Pueblo* has run for ten years a campaign in favour of the protection of children and youth in connection with the contents of messages broadcasted by media. The *Defensor del Pueblo* has first decided to alert the Parliament on the issues of child's protection. Spain has also been able to develop a code of self-regulation of the press and audiovisual control councils were established in various regions. The fact remains that these efforts are insufficient and there is a plan to establish in Spain a specific body tasked with child's protection in the area of media. It has been observed that recommendations of the *Defensor del Pueblo* on this issue are not always followed.

Similarly, several NHRSs expressed their concern about the disclosure of the identity of minors in the media, in the framework of pending criminal proceedings. The disclosure of the identity of these children may be done by police officers, but sometimes also by the parents of those children. This disclosure may pose serious questions concerning the protection of chil-

[54] http://www.ifex.org/turkey/2006/08/15/article_19_urges_president_to_reject

dren, particularly in sensitive cases such as sexual assault. The Slovenian and Azerbaijani NHRSs have, among others, expressed their concern on this issue. NHRSs may indeed have again a crucial role to play as they are able to alert the police forces, judiciary, journalists and private individuals who are parties themselves, on the need in some circumstances to maintain a certain level of anonymity.

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Chapter 5
Limits to freedom of expression, the specific cases of hate speech and insults to religious beliefs

Apart from general considerations related to limitations on freedom of expression and the necessary balance between freedom of expression and other rights, the workshop dealt with two specific cases relating to the limits of freedom of expression: hate speech and insults to religious beliefs.[55]
These are certainly two of the most delicate issues brought before the ECtHR[56]. As highlighted before, the international instruments themselves may appear ambiguous and uncertain about these issues.
The use of hate speech, through the *"hate media",* becomes a vector spreading conflicts. These *"hate media"* existed in the former Nazi Germany, former Yugoslavia and in Burundi, and participants mentioned that they still exist, for example in Russia, Romania, Israel, and Palestine. But the most illustrating example is certainly the one of the Radio Television of Thousands of Hills (RTTH) which played a major role in the genocide of the Tutsi minority in Rwanda in 1994, perfectly embodying the destructive force of hate speech. The main culprits in the RTTH case were condemned to heavy prison sentences by the International Criminal Tribunal for Rwanda[57].

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[55] *This part of the debriefing paper is based in particular on the presentations given by Irene KITSOU-MILONAS, legal adviser of the Commissioner for Human Rights, and Aline USANASE, staff member of the Secretariat of ECRI.*

[56] *It seems useful to refer to two recently published documents Fact sheet on wearing religious symbols in public and Fact sheet on hate speech by the CoE.*
http://www.coe.int/t/dc/files/events/2008_cultural_diversity/default_EN.asp

[57] *See in particular the decision of the International Criminal Tribunal for Rwanda on 3 December 2003, Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze Case No. ICTR-99-52-T. at http://69.94.11.53/index.htm*

I. The normative framework

The concept of hate speech is not defined in the ECHR, unlike for example in the United Nations Covenant on Civil and Political Rights.
However, the Recommendation (97) 20 on hate speech adopted by the Committee of Ministers of the CoE on 30 October 1997 explains that:
"The term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."
Faced with the question of hate speech, the ECtHR considered it from the following two different angles.

A) HATE SPEECH FORBIDDEN BY ARTICLE 17 OF THE ECHR
Article 17, related to the prohibition of abuse of rights, provides that *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."*
Thus, when the Court is faced with a text of a clearly hateful content, it applies Article 17 of the ECHR. The application of this Article puts aside the substantial issue of the complaint and does not allow for the review of the case in terms of Article 10. Thus, the Court renders a decision of inadmissibility. The Court will have to further specify the type of expression falling within the scope of Article 17. Reading *a contrario* the judgment in the case of *Soulas v. France*[58], in order to qualify as a hate speech the offending passages have to be sufficiently serious. Similarly, another interpretation *a*

[58] *"Finally, the Court considers that the offending passages of the book in question are not sufficiently serious to warrant the application of Article 17 of the Convention in this case. Therefore, the Court rejects the exception of the Government from this article and concludes that there was no violation of Article 10" Judgment of 10.July .2008, (§ 48).*

contrario of the case of *Leroy v. France*[59], leads to conclude that, in order to bring into place Article 17 of the ECHR, the media article in question must seek to deny fundamental rights and go against the underlying values of the Convention, such as racism, anti-Semitism or Islamophobia.
For esample:

- Arguing denial thesis to question the reality of clearly established historical facts such as the Holocaust[60];
- Issuing a series of publications referring to the Jews as the source of all problems in Russia[61];
- Displaying a poster by a member of the British National Party in front of his apartment containing a photograph of the Twin Towers in flames with the words *"Islam out - let's protect the British people"* with the symbol of the crescent and the star reproduced in a billboard ban[62].

B) HATE SPEECH EXAMINED IN ACCORDANCE WITH ARTICLE 10 PARAGRAPH 2

In other *"abusive"* cases that directly violate the principles promoted by the Convention, while their content is not clearly anti-democratic, ECtHR applies the provisions of Article 10 paragraph 2 on freedom of expression. The Court then proceeds to the *"test of proportionality"* mentioned above. However in no event, shall such test of proportionality be linked to an assessment of the *"good taste"* of the contexted publication. Even those expressions that shock or offend should be considered worthy of protection.
The leading judgement on this subject was in the case of *Jersild v. Denmark*[63], in which a journalist was condemned by the national courts for having relayed the racist remarks made by a group of young extremists. The

[59] *Case of Leroy v. france (application No. 36109/03), 2 October 2008.*

[60] *Decision of inadmissibility in the case of Garaudy v. France, 24 June 2003.*

[61] *Decision of inadmissibility in the case of Pavel Ivanov v. Russia, 20 February 2007.*

[62] *Case of Norwood v. Great Britain, 16 November 2004.*

[63] *Case of Jersild v. Denmark, (Application no. 15890/89) 23 September 1994.*

Court in this case considered that the condemnation of this journalist was contrary to Article 10 of the ECHR. The ECtHR usually puts an emphasis on the medium of communication used, and on the fact that broadcasting media have a more immediate and powerful impact than the written press. However, a criterion used by the Court to assess such case, relayed in the attitude of the journalist, and whether he stood out of any racist or extremist expression. It is therefore appropriate to distinguish between journalists' comments and comments relayed by journalits[64].

In the judgment of *Jersild*, the fact that the journalist dissociated himself from the extremists expressions and took care to contextualize these extremist remarks, enabled the Court to conclude that *"the story doesn't appear to have as purpose the propagation of racist ideas and opinions. On the contrary, it seeks to clearly - through an interview - expose, analyze and explain this particular group of youths, limited and frustrated by their social situation, with a criminal record and attitudes of violence, and dealing with specific aspects of an issue that really concerns the public"*(§ 33).

As we have observed, the judgment in the *Jersild* case is particularly protective of freedom of expression. However, in the eyes of some commentators the most recent judgments seem to be *"in retreat"* and somehow more keen to take into account other concerns such as the reputation of others.

This is particularly true in the Grand Chamber judgment in *Lindon, Otchakovsky-Laurens and July v. France*[65]. The ECtHR in the most solemn form of a Grand Chamber judgment clearly asserted the right to protect the reputation of a French political party, the National Front, and its president, Mr. Le Pen, who in a work of fiction particularly critical, was compared to a *"chief of a gang of killers"*, or a *"vampire"* who thrives on *"the bitterness of his constituents"* and the *"blood of his enemies"*.

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[64] *The Court could also give importance to the period of time dedicated to calmly discuss certain issues, as for example in the case of Lehideux and Isorni v. France (No. 24662/94), 23 September 1998.*

[65] *Lindon, Otchakovsky-Laurens and July v. France, (Applications nos. 21279/02 and 36448/02) 22 October 2007.*

II. The issue of insult to religious beliefs

The reconciliation between freedom of expression and insult to the religious beliefs must be examined as another separate case, in view of the complexity of the issue and of recent events, namely the case known as the *"Danish caricatures"* [66].

Firstly, it should be noted that the principles established by the judgment in the case of *Otto-Preminger-Institute v. Austria*[67], may appear as giving considerable space to the possibilities of restricting freedom of expression in order to respect the religious beliefs. Indeed, the Court concluded that it is difficult to find a uniform definition of what constitutes an affront to religious feelings and therefore granted a wide margin of appreciation to the States in this regard.

It should be mentioned that if the remarks are not *"expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs"* [68], they enjoy the protection provided by Article 10.

Thus, in the judgment in the case of *Klein v. Slovakia* of 31 January 2006, the Court found, referring to an article critical of the Archbishop Sokol, senior representative of the Catholic Church in Slovakia, that the complainant, by criticizing the Archbishop, has not violated the right of believers to express and practice their religion and neither has their faith denigrated[69].

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[66] *The unprecedented worldwide protests and street demonstrations against the publication of a series of satirical cartoons by a Danish newspaper, which printed a set of 12 caricatures depicting Prophet Mohammad, which Muslims believe is blasphemous.*

[67] *The applicant institute tried to show a film that allegedly offended the Catholic religion and the religious feelings of the people of Tyrol, a region that consists of a large majority of Catholics in whose lives religion plays a very important role. The authorities had banned the showing of the film in an art cinema and confiscated the film.*

[68] *Judgment in the case of Otto-Preminger-Institut v. Austria case, 20 September.1994, §49.*

[69] *Other cases present a certain interest in relation to the balancing between freedom of expression and the respect for religious beliefs. See the judgments in the cases of Wingrove v. United Kingdom, 21 November 1996, Giniewski v. France, 30 January 20006, Aydin Tatlav v. Turkey, 2 May 2006.*

The case of the *"Danish caricatures"*, that had brought the issue of respect for religious beliefs under the spot of public debate, was also brought before the ECtHR which however rendered a decision of inadmissibility *ratione personae*[70].

III. A tendency towards the criminalization of hate speeches, including the insults to religious beliefs

While there is a trend towards the decriminalization of defamation, there is, on the contrary, a willingness to favour criminalization of hate speech and insults to religious beliefs.

Reference is made to the recent work of the CoE, especially the "Venice Commission"[71], the ECRI and the Parliamentary Assembly. The latter in its Recommendation 1805 (2007), *Blasphemy, religious insults and hate speech against persons on grounds of their religion*, recommends:

"17.1. take note of Resolution 1510 (2006) on freedom of expression and respect for religious beliefs together with this recommendation and forward both texts to the relevant national ministries and authorities;

17.2. ensure that national law and practice:

17.2.1. permit open debate on matters relating to religion and beliefs and do not privilege a particular religion in this respect, which would be incompatible with Articles 10 and 14 of the Convention;

17.2.2. penalize statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds;

17.2.3. prohibit acts which intentionally and severely disturb the public order and call for public violence by references to religious matters, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention;

17.2.4. are reviewed in order to decriminalize blasphemy as an insult to a religion;".

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[70] *Decision in the case of Mohammed Ben El Mahi and others v. Denmark, 11 December 2006.*

[71] *Report on the relationship between freedom of speech and freedom of religion: the question of regulation and prosecution of blasphemy and of insults with religious connotation and incitement to religious hatred.* http://venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf

While the CoE seeks to advocate the criminalization of hate speech or religious insults, the same stand does not apply in the case of blasphemy. In this case CoE favours instead decriminalization, as we have seen for defamation.

The most difficult issue is the finding of a dividing line between what represents incitement to racial discrimination or hatred and what can be considered, on the contrary, an acceptable conduct under the freedom of expression standards of the Council of Europe.

In that respect, we can mention the work of the ECRI, including its Recommendation of General Policy No. 7 on national legislation against racism and racial discrimination. This recommendation recalls in paragraph 2 that:

"The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination".

This recommendation further specifies in paragraph 18 what behaviours should be adopted in case of criminal offences[72].

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[72] *"The law should penalize the following acts when committed intentionally:*
a) public incitement to violence, hatred or discrimination,
b) public insults and defamation or
c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
e) the public denial, trivialization, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);
g) the creation or the leadership of a group which promotes racism; support for such a group; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);
h) racial discrimination in the exercise of one's public office or occupation".

IV. Examples of concrete situations and the role of NHRSs

First of all, it is interesting to refer to *"Examples of good practices to fight against racism and intolerance in the media in Europe",* published by the ECRI.[73]

Schematically, it appears according to ECRI that three types of situations related to hate speech may arise in the member States of the CoE:

- The lack of legislation on these issues;
- The necessity to improve the existing legislation;
- The necessity to implement and enforce existing legislation in the fight against hate speech.

There may be a risk to abuse the concept of *"hate speech"* in order to muzzle NGOs or minorities. Several examples were further mentioned:

- the need to improve and strengthen legislation against racist expressions in Norway. ECRI has particularly emphasized in its third report on Norway the need to revise Article 135 of the Penal Code of Norway[74]. It was noted, in particular in a judgment of the Supreme Court on 17 December 2002 that the Norwegian clauses seemed inadequate;
- it was also discussed the example of Poland where some messages of intolerance and anti-Semitism were broadcast by *Radio Maryja*. ECRI considers that while the Polish legislation is good enough (especially with regard to Articles 256 and 257 of Polish penal code), the implementation of this legislation needs to be improved, particularly regarding the insufficient actions of the police or prosecutors in this matters[75];

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[73] *These documents can be consulted on the website of ECRI at the following address: www.coe.int/t/dghl/monitoring/ecri/default_EN.asp*

[74] *See the CRI report (2004) 3.*

[75] *See the Third Report on Poland, adopted on 17 December 2004 and made public on 14 June 2005, CRI (2005) 25.*

- the Greek NHRS also shared its experience as concerns Greece, where there is a legislation against discrimination from 1979 that punishes the incitement to hate. There is also a penalty for racist ideas applicable when these ideas are offensive. However, the first sentence applying this law was made not until 30 December 2007 (sentence to 14 months of imprisonment). The Greek NHRS also reported its action in matters affecting the religious beliefs as well as in the fight against proselytizing. Despite the fact that the Greek NHRS initiated a concrete action in the education of religion and promotion of tolerance, it could be regretted that its circular or recommendations on these subjects have not been followed-up;
- There is sometimes a problem of *"journalistic maturity"* of a country. For example, it is regretful that in Bulgaria a prize was awarded to a journalist who relayed articles openly discriminating people of Roma origin;
- In Georgia, it appears that the regulatory framework is inadequate because there are only two general standards: the one contained in the criminal code, which is never used with regard to hate speech, and the one in the law on broadcasting. Furthermore, the Georgian NHRS expressed its concerns regarding certain bias broadcastings related to minorities (while only 2% of the population believes that there is a problem for broadcasting concerning minorities). There is therefore a problem of awareness of these issues. The Public Defender of Georgia is also engaging with journalists on issues related to hate speech, because of the seriousness and extent of this problem in Georgia. During the recent conflict between Georgia and Russia, hate speeches about Russian citizens were broadcast. The Georgian public defender then sent a recommendation to the television broadcasting such contents;
- ECRI also expressed concern about the rise in anti-Semitic or racist statements in the Russian Federation, made sometimes by public figures and the lack of prosecutions against the authors of such remarks[76].

[76] *See the Third Report on the Russian Federation adopted on 16 December 2005 and made public on 16 May 2006, CRI(2006)21.*

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Chapter 6
Other questions

Other issues of particular importance were raised with regard to freedom of expression.

Freedom of expression during elections

As the UN Human Rights Committee has emphasised:
"The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion ... This implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members" [77].

In Albania for example, during the elections it arose the question about the extent of freedom of expression for political purposes. During the election campaign the television broadcaste only messages of the political party at the government. The role of the Albanian NHRS was then to adopt recommendations for enabling the respect of the principle of non-discrimination, in order to grant to other political parties the same means of communication. These recommendations, however, were followed only partially. In such situations it may be possible to find solutions to these issues by turning towards the judiciary, at national or international level, or to report to other international fora promoting human rights, such as the Commissioner for Human Rights.

[77] *Gauthier v. Canada, 7 April 1999, Communication No. 633/1995.*

Independence and diversity of media[78]

The issue of independence and diversity of media is crucial for the implementation of an effective freedom of expression. Independence and diversity, however, are often breached in Europe. So even if this topic was not fully dealt in this workshop due to lack of time, several points of view were raised during discussions.

For example, the question of the composition and ownership of the media in Italy and its lack of diversity and independence was raised. Some participants lamented the existence of a bad legislation and the practice of a duopoly (the media being controlled by the State or by private companies in which Prime Minister Berlusconi has personal interests). It was regretted the fact that the competent NHRS *(autorità per la garanzia delle comunicazioni)* did not adequately respond to these issues. However, the jurisprudence of the Constitutional Court of Italy has dealt adequately on this aspect of freedom of information[79].

The protection of journalists may also concern the control of the movement of shares of the companies involved in the press.

The question of the competences of NHRSs was as well raised. The Slovenian Ombudsman for example has no jurisdiction to act with respect to the private media but only in the area of public service broadcasting media. However, the Slovenian Ombudsman was able to make a recommendation to expand the accessibility of election spots for the deaf persons, but this recommendation was not followed. Despite some hesitation it was not necessary to go to court, since alternative means of action were found.

According to the NHRSs some media draw away from the rules applicable to them, by broadcasting abroad. This poses an incontestable problem on the ability to control the media.

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[78] *See Commissioner for Human Rights of the Council of Europe, viewpoint on "Media diversity: a core element of true democracy", 1 October 2007.*

[79] *See the Opinion of the Venice Commission on freedom of expression and pluralism of the media in Italy. www.venice.coe.int/docs/2005/CDL-AD(2005)017-e.asp*

It was mentioned that in St. Petersbourg, the issue of media independence may also arise particularly regarding censorship. There are cases in which strict instructions are given in advance about the content of information to be published. In this regard, the low wage of journalists creates an *"economic vulnerability"* undermining the independence of the media. The economic burden on some journalists, poorly paid, is likely to drag them into the role of *"copyrighters"* providing *"propaganda"* more than an objective and reliable information.

Any space for self-regulation of journalists?

A final issue concerned the mentoring of journalists by their peers. This is a code of ethic issue that may take the form of self-regulation, or, even better, the form of co-regulation in order to prevent major abuses in the exercise of freedom of expression.
The increasing role of ethics and quality of publications is emphasized for example by the judgment in the case of *Stoll v. Switzerland* mentioned above. In this decision, the Court confirmed the conviction of the applicants by the national court for publishing a diplomatic note classified as confidential. The Grand Chamber of the Court seemed to pay considerable attention to the content of the publication. The Court based its decision on the opinion, adverse to the applicant, of the Swiss Press Council, a self-regulatory agency. The Court also noted several shortcomings in the article in question: the content of the article was reductive and truncated; the language used was manifestly excessive, the layout was designed to create sensations, and the article, imprecise, tended to mislead the reader. This decision seems to indicate that the Court is prone to pay attention to the opinions of the self-regulatory agencies. According to the International Federation of Journalist, this could lead towards the dangerous path of an assessment of publications' quality and style by the courts.[80]

[80] *The same criticisms were made for example as regards the case of Flux (No. 6) v. Moldova, (No. 22824/04), 29 July 2004.*

In the context of promoting freedom of expression and information, it was stressed that there is a role and a place for self-regulatory bodies. These bodies may be quite efficient in controlling the excesses and abuses committed by some journalists.

At a time when more and more States, like Ukraine, adopt self-regulatory codes, or codes of ethics for journalists, participants discussed on the possible active role NHRSs could play in self-regulation matters.
Some NHRSs are cooperating with national supervisory bodies, for example the Ombudsman of Catalonia. The NHRS may also submit cases to the self-regulatory authorities for their opinion. In fact, an agreement at this stage of the procedure could avoid legal disputes.
However, the discussion seems to have shown that the role of self-regulatory bodies may in no case be overestimated and cannot under any circumstances replace the role played by courts or NHRSs[81].

[81] *See Resolution 1636 adopted by the Parliamentary Assembly of the Council of Europe on 3 October 2008, on "Indicators for media in a democracy", points 8.25, 8.26, 8.27.*

Conclusions

NHRS's action tools

Throughout all this debriefing paper, for each of the topics mentioned above, the NHRS's action tools were examined. In conclusion, it appears relevant to deliver a general synthesis on the means of action of NHRSs in the promotion and protection of freedom of expression and information. Indeed, NHRSs can contribute to the emergence of truly independent, especially audiovisual, media.

NHRS's action tools: a variable geometry

The protection of freedom of expression and information depends largely on the extent of the mandate of a NHRS.
The capacity, and hence the level of involvement of NHRSs, will not be the same all over Europe. It will depend on whether the institution's mandate is oriented towards the issues of resolutions of problems of maladministration and of disputes between governments and citizens, or towards a broader protection of human rights.
As it has already been mentioned above, for example the Slovenian Ombudsman has in principle no jurisdiction to act with respect to the private media, but with respect of public broadcasting media. Similarly, some Russian Regional Ombudsmen are not competent to act in the field of freedom of expression and information.

Means and opportunities to act in the field of freedom of expression and information

In addition, it should be clarified that a NHRS is not always able or willing to act in the field of freedom of expression and information.

For example, some participants noted that in specific circumstances it is difficult for an institution to give priority to these issues, since its priorities are towards particularly urgent issues, such as the question of public housing's allocation.
Moreover access to NHRSs may pose some difficulty: although normative texts adequately guarantee the protection of freedom of expression and information, it was noted that too often victims of violations of freedom of expression do not address their complaints, for various reasons, to courts or NHRSs in order to see their rights redressed.

Possibilities to act for NHRSs

As we have seen, the types of actions of NHRSs depend largely on their mandate. The examples that were discussed at this workshop show a particular ample field of action. A NHRS can:

- Make use of annual or *ad hoc* reports: this is a *"common denominator"* in the NHRSs' action. Since all NHRSs in principle prepare an annual report about their activities, a report alerting authorities or the population on a particular topic sometimes constitutes the only means available. The NHRS in this context can play its role as a *"sentinel"* and *"lookout"* ready to sound the alarm on issues deserving special attention;
- Alert the authorities or public opinion on an issue by organizing targeted press conferences;
- Use its moral authority to contribute to the solving of a case;
- Contribute to or participate in the training of journalists, police officers, judges and lawyers on national, European and international standards;
- Publish training materials on these issues, including a better dissemination of the ECHR case-law;
- Disseminate information on actions to be undertaken by NHRSs in support of the *"victims"* of violations of the right to freedom of expression and information;

- Be a contact and information point for people claiming to be victims of violations of their right to freedom of expression and information (e.g. setting up a free telephone line to respond promptly to issues disserving urgent action);
- Check the compatibility of draft laws, existing laws and administrative practices with the norms and standards set by the CoE;
- Detect a situation of systemic violations of human rights and act to remedy it;
- Make recommendations to national authorities;
- Deal with individual complaints;
- Conduct enquiries;
- Appear before the courts as *amicus curiae*;
- Initiate a case *ex-officio*: this possibility, when it exists, is a crucial added value in comparison to judicial mechanisms for the protection of freedom of expression and information, especially when the judicial authority does not have the mandate to initiate a procedure on its own;
- Contribute to a better implementation of decisions of governments and courts' judgments;
- Contribute to the full execution of the ECtHR judgments: NHRSs not only can play an important role during the execution of judgments pending before the CoE Committee of Ministers, but also can play a role at national level in order to improve the understanding of the ECtHR case-law.

Appendixes

List of background documents

SELECTIVE READINGS

For an overview of the case-law of the European Court of Human Rights, see the documents[82] established under the auspices of the Programme HELP (Human Rights Education for Legal Professionals). See in particular the course outline on Freedom of Expression at www.coehelp.org/course/view.php?id=14

The selective readings below follow the order of the programme of the workshop:

- European Convention on Human Rights (1950): article 10
- Freedom of expression in Europe – Case-law concerning Article 10 of the European Convention on Human Rights (Human rights files No.18) (2007)
- Committee of Ministers, 1st annual report 2007, Supervision of the execution of judgments of the European Court of Human Rights, see Appendix 1, thematic overview of issues examined in 2007, Freedom of expression and information
- Council of Europe Standards with respect to freedom of Expression and Information: a survey of Council of Europe standards, 28 February 2003, Monitor/Inf (2003)3
- Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly towards decriminalisation of defamation
- Recommendation 1805 (2007) of the Parliamentary Assembly on blasphemy, religious insults and hate speech against persons on grounds of their religion
- Resolution 1510 (2006) of the Parliamentary Assembly on freedom of expression and respect for religious beliefs
- Recommendation No. R (97) 20 of the Committee of Ministers to member States on "hate speech" and its Explanatory Memorandum
- Recommendation No. R (2000) 7 of the Committee of Ministers to member States on the right of journalists not to disclose their sources of information and its Explanatory Memorandum

[82] *Documents are available in English, French, German, Russian, Serbian, Turkish.*

- Commissioner for Human Rights of the Council of Europe: Viewpoint "Investigative journalists and whistle blowers must be protected"
- Resolution 1535 (2007) and Recommendation 1783 (2007) of the Parliamentary Assembly on threats to the lives and freedom of expression of journalists
- Guidelines on protecting freedom of expression and information in times of crisis, adopted by the Committee of Ministers on 26 September 2007
- Draft Council of Europe Convention on Access to Official Documents (2008)
- Recommendation No. R (2002) 2 of the Committee of Ministers on access to official documents and its Explanatory Memorandum
- Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content
- Commissioner for Human Rights of the Council of Europe: Viewpoint "Media diversity: a core element of true democracy"
- Recommendation No. R (99) 1 of the Committee of Ministers to member states on measures to promote media pluralism and its Explanatory Memorandum

EXTENSIVE READINGS

I. COUNCIL OF EUROPE

Media and Information Society Division of the Council of Europe
www.coe.int/t/dghl/standardsetting/media/Doc/default_en.asp

General Conventions

- Framework Convention for the Protection of National Minorities (1995)
- European Charter for Regional or Minority Languages (1992), Article 11

Convention and Treaties in the Media field

- European Convention on Transfrontier Television (1989) with the amending protocol (1998)
- European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (1994)
- European Agreement on the Protection of Television Broadcasts (1960)

Various Documents of the Council of Europe classified by themes

a. Freedom of expression (in general)

- Report of the Committee on Culture, Science and Education of the Parliamentary Assembly on possible indicators for media in a democracy Doc. 11683 7 July 2008 http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11683.htm
- Recommendation CM/Rec(2007)11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment
- Declaration on political debate in the media, adopted by the Committee of Ministers on 12 February 2004
- Declaration on freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003
- Recommendation 1589 (2003) of the Parliamentary Assembly on freedom of expression in the media in Europe
- Luxembourg conference on freedom of expression, Luxembourg, 30 September - 1 October 2002
- Recommendation 1506 (2001) of the Parliamentary Assembly on freedom of expression and information in the media in Europe
- Conference on Freedom of Expression and the Right to Privacy Strasbourg, 23 September 1999 Conference Reports (DH-MM(2000)007)
- Declaration on freedom of expression and information, adopted by the Committee of Ministers on 29 April 1982

b. Defamation and hate speech

- Expert Seminar: Combating racism while respecting freedom of expression, by the European Commission against Racism and Intolerance, November 2006; see in particular "The case-law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance" - Paper prepared by Ms Anne WEBER, Dr. iur., Institut de recherche Carré de Malberg, Université Robert Schuman, Strasbourg
- Legal Provisions concerning Defamation, Libel and Insult (DH-MM(2003)006rev)
- Regional conference on defamation and freedom of expression, Strasbourg, 17-18 October 2002
- General policy recommendation n° 6: Combating the dissemination of racist,

xenophobic and antisemitic materiel via the internet, adopted by the European Commission against Racism and Intolerance (ECRI) on 15 December 2000

c. Journalists

- Recommendation CM/Rec(2007)11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment, adopted on 26 September 2007
- Recommendation 1789 (2007) of the Parliamentary Assembly on professional education and training of journalists
- Resolution 1372 (2004) and Recommendation 1658 (2004) of the Parliamentary Assembly on persecution of the press in the Republic of Belarus
- Recommendation 1215 (1993) and Resolution 1003 (1993) of the Parliamentary Assembly on the ethics of journalism

d. Freedom of the press in times of crisis

- Recommendation 1706 (2005) of the Parliamentary Assembly on media and terrorism
- Conference "Safeguarding free speech and the right to information: media in times of crisis", Strasbourg, 13-14 October 2005
- Resolution 1438 (2005) and Recommendation 1702 (2005) of the Parliamentary Assembly on freedom of the press and the working conditions of journalists in conflict zones
- Declaration on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers on 2 March 2005
- Compendium of the replies to the questionnaire on media and terrorism (CDMM(2002)007)
- Written contributions on questions concerning Freedom of Expression and Information and the Fight against Terrorism (14 May 2002) by Article 19, ENPA and the European Federation of Journalists
- Recommendation No. R (96) 4 of the Committee of Ministers to member states on the protection of journalists in situations of conflict and tension

e. Freedom of information

- Recommendation No. R (2003) 13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings
- Declaration on the provision of information through the media in relation to criminal proceedings, adopted by the Committee of Ministers on 10 July 2003
- Recommendation 1037 (1986) of the Parliamentary Assembly on data protection and freedom of information

f. Diversity and Concentration

- Declaration on protecting the role of the media in democracy in the context of media concentration, adopted by the Committee of Ministers on 31 January 2007
- Final report "the assessment of content diversity in newspapers and television in the context of increasing trends towards concentration of media markets" by Mr D. WARD (MC-S-MD(2006)001, PDF version)
- Regional Conference on media ownership, Bled (Slovenia), 11-12 June 2004
- Report on Media Diversity in Europe (H-APMD(2003)001, PDF version)
- Declaration on cultural diversity, adopted by the Committee of Ministers on 7 December 2000
- Report on Media Pluralism in the Digital Environment (CDMM(2000)pde) (available in French only)
- Pluralism in the multi-channel market: suggestions for regulatory scrutiny, by Mr Chris Marsden (MM-S-PL(1999)012)
- Recommendation No. R (94) 13 of the Committee of Ministers to member states on measures to promote media transparency and its Explanatory Memorandum

g. Media and elections

- Recommendation CM/Rec(2007)15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns
- Media and elections - Handbook, June 1999 (PDF version)
- Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns and its Explanatory Memorandum

The Commissioner for Human Rights of the Council of Europe

- Annual activity report 2007 by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe (see in particular point 1.2)
- You may also find some other documents concerning Freedom of Expression or Information (and in particular the various country reports) at the following webpage: www.coe.int/t/commissioner/WCD/Search_en.asp

Selected judgments of the European Court of Human Rights
www.echr.coe.int/ECHR

- Freedom of expression in Europe – Case-law concerning Article 10 of the European Convention on Human Rights (Human rights files No.18) (2007).

Judgments and Decisions:

- Engel and others v. the Netherlands, 8 June 1976
- Handyside v. the United Kingdom, 7 December 1976
- Sunday Times v. UK, 26 April 1979
- Lingens v. Austria, 8 July 1986
- Müller v. Switzerland, 24 May 1988
- Castells v. Spain, 23 April 1992
- Thorgeir Thorgeirson v. Iceland, 25 June 1992
- Hadjianastassiou v. Greece, 16 December 1992
- Jersild v. Denmark, 23 September 1994
- Prager and Oberschlick v. Austria, 26 April 1995
- Vogt v. Germany, 2 September 1995
- Goodwin v. UK, 22 February 1996
- Oberschlick v. Austria No. 2, 25 June 1997
- Guerra and others v. Italy, 19 February 1998
- Lehideux and Isorni v. France, 23 September 1998
- Steel and others v. UK, 23 September 1998
- Sürek v. Turkey (No. 1), 8 July 1999
- Nikula v. Finland, 21 March 2002
- Garaudy v. France, 24 June 2003
- Gündüz v. Turkey, 4 December 2003
- von Hannover v. Germany, 24 June 2004

- Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France, 7 June 2007
- Hachette Filipacchi Associes v. France, 14 June 2007
- Lindon, Otchakovsky-Laurens and July v. France, 22 October 2007
- Flux v. Moldova, 20 November 2007
- Stoll v. Switzerland, 10 December 2007

II. UNITED NATIONS

- Universal Declaration of Human Rights (1948) (Article 19)
- International Covenant on Civil and Political Rights (1966) (Article 19)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965) (article 5)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965) (article 5)
- Convention on the Elimination of Discrimination Against Women (1979) (Article 3)
- Convention on the Rights of the Child (1989) (Article 13)
- General Comment 10 [19] (Article 19) of the Human Rights Committee (CCPR/C/21/Rev.1 of 19 May 1989)
- General Comment 11 [19] (Article 20) of the Human Rights Committee (CCPR/C/21/Rev.1 of 19 May 1989)
- Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996)
- Convention on the protection and promotion of the diversity of cultural expressions (2005)
- UN Special Rapporteur on Freedom of Opinion and Expression

III. OSCE

- Amsterdam Recommendations. Freedom of the Media and the Internet. Organization for Security and Co-operation in Europe (OSCE)
- Bishkek Declaration. Organization for Security and Co-operation in Europe (OSCE)
- OSCE Representative on Freedom of the Media http://www.osce.org/fom/documents.html)

IV. OTHER USEFUL LINKS AND DOCUMENTS

- The website of the NGO "Article 19" www.article19.org/publications/regions/europe/index.html
- A note discussing the need for a new mechanism to ensure respect for the right to freedom of expression *"Council of Europe: Mechanism on the implementation of Article 10 ECHR"*
- The Private and the Public in the Media: the experience of Slovenia, by Jernej Rovsek: http://mediawatch.mirovni-institut.si/eng/mw16.htm

Workshop programme

TUESDAY, 21 OCTOBER 2008

Arrival of participants in Padua

18.30 –19.00 Welcome reception

19.00 – 20.15 **Opening session**

Opening address by Prof. Marco Mascia, Director of the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

Issues addressed by the workshop

by Markus Jaeger, Deputy to the Director, Head of the National Human Rights Structures Unit, Office of the Council of Europe Commissioner for Human Rights

Freedom of expression and information: rights at stake and international instruments of protection and promotion

by Stefano Valenti, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua, P2P Project Officer

20.30 Dinner

WEDNESDAY, 22 OCTOBER 2008

9.00 – 11.00 **Working session 1: Limits to the freedom of expression, the confrontation between freedom of expression and other individual rights: norms and practices**

Presentation of the Standards of the Council of Europe with specific focus to the ECtHR case-law

by Mario Oetheimer, Lawyer, Research Division, Registry of the European Court of Human Rights

Examples of concrete situations that raise concern in the Council of Europe Member States

by Sejal Parmar, Senior Legal Officer, Article 19 (London, United Kingdom)

Discussion and exchange of experiences, with contributions from NHRSs, namely from Slovenia and Spain

11.00 – 11.30 Coffee break

11.30 – 12.15 Exchange of experiences continued

12.15 – 13.00 **Working session 2 - Limits to the freedom of expression, the specific cases of hate speech and insults to religious beliefs: norms and practices**

Presentation of the Standards of the Council of Europe
by Irène Kitsou-Milonas, Legal Advisor of the Commissioner for Human Rights of the Council of Europe

Examples of concrete situations that raise concern in the Council of Europe Member States
by Aline Usanase, Lawyer, Secretariat of the European Commission against Racism and Intolerance of the Council of Europe

Discussion and exchange of experiences, with contributions from NHRSs, namely from Georgia and Greece

13.00 – 15.00 Lunch break

15.00 – 16.15 Exchange of experiences continued

16.15 – 16.45 Coffee break

16.45 – 18.00 **Working session 3 – The protection of journalists: norms and practices**

Presentation of the Standards of the Council of Europe (including divulgation of sources)
by Ivan Nikoltchev, Head of Media Unit, Legal and Human Rights Capacity Building Division, Directorate General of Human Rights and Legal Affairs of the Council of Europe

Examples of concrete situations that raise concern in the Member States of the Council of Europe
by Marc Grüber, Director of the European Federation of Journalists

Discussion and exchange of experiences, with contributions from NHRSs, namely from Azerbaijan and Ukraine

20.30 Dinner

THURSDAY, 23 OCTOBER 2008

8.45 – 10.00 **Working session 3 – The protection of journalists (continued)**

Exchange of experiences continued

10.00 – 10.30 Coffee break

10.30 – 13.00 **Working session 4 – Access to information: norms and practices**

The access to information and official documents
by Helen Darbishire, Executive Director, Access Info Europe

Discussion and exchange of experiences, with contributions from NHRSs, namely from Armenia and Croatia

13.00 – 13.45 Winding-up of the workshop by Markus Jaeger

13.45 Close of the workshop by Stefano Valenti

14.00 – 15.00 Lunch

15.00 – 19.00 Guided tour of the city of Padua or transfer to Venice

20.30 Dinner

FRIDAY 24 OCTOBER 2008
Departure

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[83] *All reference to Kosovo, whether to the territory, institutions or population, in this document shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo*

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This project aims at setting up an active network of independent non-judicial human rights structures in Council of Europe member States.