Chapter One: Introduction, Case Selection and Definitions

'Lawyers are important. They go to important offices and do important things'.[3] Presumably, most readers will agree with this statement at this level of generality. Its vague language, however, masks the real questions – what do lawyers do? Why is this important? And what is a 'lawyer'? In far more flowery language, the European Court of Human Rights ('the Court') has said much the same thing when it notes 'that persecution and harassment of members of the legal profession strikes at the very heart of the Convention system'.[4] But this, too, leaves the essential questions unanswered. What are legal services, why are they important and to what extent is this reflected in obligations imposed on States by the European Convention on Human Rights ('the Convention')?

The present study aims to shed light on these topics by assessing which obligations the Convention imposes on States regarding how they must regulate legal services, as well as whether the Court's current analysis explains these norms convincingly. By way of introduction, this chapter sets the scene for the study in four sections. It begins by explaining the special character of legal services as a heterogenous activity at the intersection of a range of private and public interests (I.). It then traces the contours of the status quo of international law regulating legal services, taking a wide view that encompasses the global level as well as both soft and hard international law (II.). Against this backdrop, the chapter then narrows the focus to the European Convention on Human Rights and provides an overview of the inquiry to be conducted in the following chapters, explaining both the research questions and the structure of inquiry (III.). Finally, a methods section sets out the research methods that will be used in the course of the inquiry (IV.), which also includes defining a number of key terms such as 'legal services', 'lawyer' and 'client' and 'private' and 'public' interests.

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3 Author unknown, *A Coloring Book for Lawyers* (Year unknown) 2, cited in Joe Patrice, 'The World's Saddest Coloring Book: The Life Of A Lawyer' (2015) <https://abovethelaw.com/2015/01/the-worlds-saddest-coloring-book-the-life-of-a-lawyer/> accessed 08 August 2024.

4 *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 214; *Agora and others v Russia* App no 28539/10 and others (ECtHR, 13 October 2022), para 8.

I. Legal services at the intersection of private and public interests

Phrased most generally, legal services are 'important' because they touch on a range of interests that can be private (concern the well-being of identifiable individuals) or public (concern those individual interests which all members of a community have in common).[5] On the private-interest side, they affect the position of the client, of the lawyer, and potentially of further interested parties, such as eg opposing parties in litigation or third parties who may be affected by the consequences of legal documents. The interests involved can range from the purely financial (such as in commercial law) to the emotional (such as in family law) to the downright existential (such as in criminal law), with every combination in between. This variety is repeated on the public-interest side, where any one of a number of areas may be affected – since legal services can in principle be provided in relation to any area of life affected by law, potentially any societal interest or combination of interests can be engaged.

Legal services are thus a multi-faceted phenomenon. Depending on jurisdiction, the work of lawyers can cover everything from criminal defence of individuals to drafting the documents required for a merger between major multinational corporations, and the structures in which this work is performed can range all the way from the single-lawyer high-street office providing generalised legal advice to consumers to the multinational corporate law firm employing thousands of highly specialised lawyers across the globe.[6] Legal services are hence inherently heterogenous – arguably, the only common denominator is that they involve 'doing something with law'.

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5 For greater detail on private and public interests see below 65ff. For a recent broader study focusing on the impact of 'private practitioners, in-house counsel, judges, prosecutors, academics, and lawyers in the government service' see International Bar Association, *The IBA Report on the Social and Economic Impact of the Legal Profession* (2024) 6ff.

6 In 2021, the largest law firm in the world by headcount was Dentons with over 11,000 lawyers, https://www.insidermonkey.com/blog/5-largest-law-firms-in-the-world-by-headcount-1083910/5/, accessed 08 August 2024. At the domestic level, studies indicate that these structures are each linked to a rather homogenous pool of clients, with one famous US study finding 'that lawyers in Chicago tended to practice in one of two 'hemispheres', with little crossover between the two groups … One group of lawyers primarily represented entity clients whereas the other group of lawyers primarily represented individual clients, such as those involved in criminal, tort or domestic law matters' (Laurel S. Terry, 'Global Networks and the Legal Profession' (2019) 53 Akron Law Review 137, 157).

Yet this common denominator also means that all legal services have a more or less close link to one of the most fundamental public interests, at least under the European Convention on Human Rights: the rule of law, no matter how that contested concept is understood.[7] If legal services involve using the law to do things, then they are closely interrelated with the significance of 'law' as a social construct ordering human life. Legal services are thus a key pillar of a State based on the rule of law; simultaneously, the relevance of law as a means of social ordering is a prerequisite for specifically legal, as opposed to other, services to remain attractive.[8]

This central significance of legal services to the rule of law is perhaps most obvious in those areas which involve the protection of human rights. The easiest examples of the key role of legal services involve the traditional 'negative' sense of State interference with human rights enjoyment: Where a State bans a protest, searches a home or uses force against an individual, the first step for potential victims of a human rights violation will normally be to obtain legal advice, and, if necessary, representation. The services provided by lawyers are thus the place where the legal system meets the individual. Lawyers are typically the first point of contact, as reflected in the common expression that they are 'gatekeepers' to the legal system. As the Venice Commission's Rule of Law Checklist notes, '[i]ndividuals are usually not in a position to bring judicial proceedings on their own. Legal assistance is therefore crucial and should be available to everyone'.[9] Effective protection of human rights is impossible without legal services, which in turn are impossible without lawyers to provide them.

While this is a public interest of a largely ideal nature, legal services, moreover, also affect more easily measurable financial interests, not least

7 For the Court's understanding, see eg Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP 2013) and the references in Chapter Seven at 375ff.

8 As a case in point see eg the rapid decline in the number of lawyers in the German Democratic Republic, which dropped from 3.000 in 1949 to around 600 in 1989, when the GDR had a total population of 16,43 million inhabitants. Christian Booß, 'Gelenkter Rechtsstaat: MfS, SED und ihr Einfluss auf Rechtsanwälte' (2016) <https://www.bpb.de/themen/deutsche-teilung/stasi/218426/gelenkter-rechtsstaat-mfs-sed-und-ihr-einfluss-auf-rechtsanwaelte/#footnote-target-5> accessed 08 August 2024.

9 European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist* (2016), para 99.

supporting the smooth running of the justice system,[10] itself a key requirement for a flourishing economy dependent on a stable investment climate.[11] In addition, they also have considerable economic value as a professional service in their own right.[12] There is, by now, a global market for legal services.[13] In 2021, legal services in the United Kingdom (ranked 'second globally for legal services fee revenue' behind the United States) 'contributed £ 30.7 bn to the UK economy' with a £ 5.4 bn trade surplus.[14] While these numbers are staggering, it is worth noting that at present, the value of this global market is, effectively, concentrated in the hands of relatively few countries.[15] As Collins notes for 2016,

> The United States was the largest legal services market in 2016, accounting for about US $290 billion, or 45 per cent of the global market. The United Kingdom was the second largest, accounting for about $45 billion, or 7 per cent of the global total and approximately 20 per cent of the European market. Germany was in third place, accounting for about $25 billion, or 4 per cent of the global market.[16]

Legal services thus, to put it simply, make money. However, although most States will presumably be happy about points such as this economic contri-

10 As Sabien Lahaye-Battheu, *The case for drafting a European convention on the profession of lawyer, PACE Doc. 14453 Report* (2017), para 6, notes, 'lawyers also contribute to the efficient functioning of the judicial system' since unrepresented litigants often generate unnecessary work in the form of unmeritorious cases and nugatory applications.

11 International Bar Association (n 5) 97ff.

12 And as such pose specific regulatory challenges, for example as regards the risk of abuse of provisions protecting the independence of the legal profession to stifle competition. For an introduction, see eg Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar Publishing 2013).

13 International Bar Association (n 5) 17, 106ff states that 'even though they represent only 0.25 percent of the world's population, [legal professionals] generate approximately USD 1.6 trillion of economic value, or 1.7 percent of the world's GDP (directly and through their supplier ecosystem)'. Note that the report uses a broader definition than the one proposed here and includes 'private practitioners, in-house counsel, judges, prosecutors, academics, and lawyers in the government service' (ibid 6).

14 TheCityUK, *Legal Excellence, Internationally Renowned: UK Legal Services 2022* (2022) 4.

15 Which brings with it certain side-effects. As Yves Dezalay, 'Opportunities and Limits of a Weak Field: Lawyers and the Genesis of a Field of European Economic Power', *Lawyering Europe - European Law as a Transnational Social Field* (Bloomsbury 2013) 270 notes, the 'hegemonic position' of the 'North American legal sector' 'allows the global exportation of the US conception of the rule of law'.

16 David Collins, *The Public International Law of Trade in Legal Services* (CUP 2018) 3. There do not appear to be more recent figures for the other jurisdictions cited.

bution, in their link to human rights defence – which economically often plays a negligible role[17] – legal services are often far less popular. Where lawyers act less as a 'business service'[18] and more as human rights defenders, they are frequent targets for attack by both State and non-State actors as a result of their professional activities.[19] While perhaps the most famous fictitious example is Dick the Butcher's post-coup plan from Shakespeare's Henry VI – '[t]he first thing we do, let's kill all the lawyers' –,[20] reality both past and present provides a litany of examples of lawyers persecuted simply for doing their job.[21]

As a result of the broad range of activities and interests involved, there is thus significant heterogeneity within the umbrella terms of 'legal services' and 'lawyers'. This is true, first and foremost, within a single jurisdiction – clients, fields of law, and significance to private and public interests differ enormously across the spectrum of persons providing legal services and of services provided.[22]

That heterogeny, moreover, grows where there are several different jurisdictions in play. Conceptions of 'law' as a social construct, and consequently what is understood as 'legal services', differ drastically across countries. In a jurisdiction with a comparatively high amount of 'legalisation', with State-created and -enforced norms covering large parts of human activity, legal services will concern a greater range of situations than in

17 For example, to once again take the example of the UK, criminal law makes up such a small part of the UK legal services market in terms of percentage of total market revenue that it is not even mentioned in TheCityUK (n 14), forming part of the 13 % of the market listed as 'other' (ibid 13) and not even listed among the 'Range of international legal services' in ibid 26. Indeed, in contrast to what is perhaps a common perception of lawyers as primarily dealing with dispute resolution, even commercial dispute resolution makes up only 14 % of the UK's legal services market, ibid 13, with the bulk of the market consisting of non-contentious work.

18 cf the categorisation in the GATS, Collins (n 16) 35.

19 As Lahaye-Battheu (n 10) 8 notes, '[h]arassment, threats and attacks against lawyers continue to occur in many Council of Europe member States'.

20 William Shakespeare, *Henry VI, Part 2* Act IV, Scene 2.

21 The Special Rapporteur on the Independence of Judges and Lawyers notes that 'between 2010 and 2020, more than 2,500 lawyers were killed, detained or kidnapped in different regions of the world', Diego García-Sayán, *Protection of lawyers against undue interference in the free and independent exercise of the legal profession, A/HRC/50/36* (2022), para 3.

22 As Collins (n 16) 22 notes for regulation, '[t]he policy justification as well as the manner of regulation of a lawyer who represents an individual client in court defending the client's rights against the state can be quite different from the regulation of a lawyer who undertakes transactional work for a commercial purpose'.

jurisdictions where other normative systems play a greater role – and the availability of legal services also affects the extent of such 'legalisation', since where legal services are unavailable 'the law' becomes less relevant as a tool of social ordering. Similarly, there is also great variety in approaches to regulating legal services: Some jurisdictions take as a starting point that only certain persons should provide legal services (thus 'reserving' activities to certain individuals); other jurisdictions are more permissive. Where there is no or very little reservation of activities, the boundaries of what is considered properly 'legal' as opposed to, for example, business advice will be even more difficult to draw. Unsurprisingly, there is thus also an enormous variation concerning the total number of lawyers in a given jurisdiction: Across the Council of Europe, the European Commission for the Efficiency of Justice measures everything from 20 lawyers per 100 000 inhabitants in Azerbaijan to 485 lawyers per 100 000 inhabitants in Luxembourg.[23]

Finally, this variety is also reflected in the extent to which legal services have an 'international' element. While some areas – like human rights defence – will typically be largely domestic, protecting identifiable individuals against the actions of a single State,[24] in others – like large-scale commercial law transactions – involvement of several jurisdictions is more likely to be the rule than the exception.

II. International law on legal services: Setting the scene for the study

Given this heterogenous nature of legal services, it comes as no surprise that international law concerning legal services is significantly fragmented. Binding international obligations at present[25] exist almost entirely in the periphery of regimes that are primarily aimed at regulating other questions. Conversely, those standards which directly address legal services and the role of lawyers are all non-binding. This lack of legal obligations on the

23 The average number is 172, the median 136, cf European Commission for the Efficiency of Justice, *European judicial systems: Part 1: Tables, graphs and analyses 2022 Evaluation cycle (2020 data)* (2022) 84.

24 For example, before the European Court of Human Rights it is extremely rare to see several respondent States, and this is usually the result of either rather specific factual circumstances or a lack of clarity as to who is responsible under international law.

25 See, however, the initiative on a European Convention on the Profession of Lawyer, 47 below.

State concerning legal services mirrors similar tendencies in domestic constitutional law.[26] While many constitutions contain explicit provisions on the judiciary, norms on legal services are far less common.[27] At the international level, this absence of clear provisions may, moreover, be reinforced by the fact that legal services also cover the wide field of relationships between individuals among themselves, traditionally outside the ambit of international law since even the field called 'private' international law consists largely of regulating which system of *domestic* law will apply.

The following section begins with an overview of those documents that focus directly on lawyers and legal services (1.), which are all 'soft' law. It then turns to the various oblique references to legal services that dot the 'hard' international law landscape (2.),[28] before briefly addressing the ongoing work on a 'European Convention on the Profession of Lawyer' (3.) and finally going into greater depth specifically on the way international human rights law addresses legal services (4.).

1. Soft law on legal services

'Soft' international law on legal services consists in essence of the United Nations Basic Principles on the Role of Lawyers ((a).), the Council of Europe Committee of Ministers Recommendation R(2000)21 on the freedom of exercise of the profession of lawyer ((b).), and a plethora of docu-

26 cf eg Andrew Boon, 'Innovation and Change in the Regulation of Legal Services' in Andrew Boon (ed), *International Perspectives on the Regulation of Lawyers and Legal Services* (Hart 2017) 247: 'In none of the jurisdictions covered [the US, Singapore, Ireland, Canada, New Zealand, Israel, Australia, Germany and England & Wales] are independent, self-regulating legal professions guaranteed in a written constitution'.

27 Even eg the Constitution of the Russian Federation, which in Art. 48 § 1 (1) guarantees 'the right to qualified legal assistance', makes no further reference to regulation of the legal profession. However, the Constitutional Court of the Russian Federation, in its order of 28 January 1997, noted that by guaranteeing the right to receive qualified legal assistance, the State had placed itself under a commitment to ensure conditions favourable to the training of qualified lawyers and to ensure minimum qualification requirements were met (ibid, para 3).

28 By contrast, oblique references in soft-law documents (eg the passing reference to the principle of non-identification of lawyer and client in Committee of Ministers of the Council of Europe, *Explanatory Memorandum to Recommendation Rec(2001)10 of the Committee of Minsiters to member states on the European Code of Police Ethics* (2001), para 10, have been omitted entirely as not significant enough to have a major impact on the international law landscape affecting legal services.

ments published by the various non-governmental organisations claiming to represent 'the legal profession' at the international level ((c).).

(a) *Soft law standards from the UN system*

Generally speaking, in the UN system, legal services have primarily been seen from the point of view of the organisation's human rights mandate.[29] Legal services have been addressed in the 1990 UN Basic Principles on the Role of Lawyers as well as via the Human Rights Council's special procedure on the independence of judges and lawyers. Moreover, there is also some overlap with those elements of the UN system designed to protect human rights defenders.

As a result, in addition to the more specific documents cited below, a number of general human rights documents make passing references to the importance of the provision of legal services. For example, paragraph 27 (2) of the World Conference on Human Rights' 1993 Vienna Declaration and Programme of Action reads that

> [t]he administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the process of democracy and sustainable development.[30]

Additionally, there are also a number of resolutions by the Human Rights Council highlighting the importance of lawyers, usually in response to reports by the Special Rapporteur (see ii.).[31]

i. *The 1990 UN Basic Principles on the Role of Lawyers*

The most specific document at the UN level consists of the 1990 UN Basic Principles on the Role of Lawyers. These are non-binding, constituting, in the words of Param Cumaraswamy, the first UN Special Rapporteur on the

29 eg Art. 1 § 3 United Nations Charter.

30 World Conference on Human Rights, *Vienna Declaration and Programme of Action* (1993), para 27.

31 eg Human Rights Council, *Resolution 35/12 on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers* (2017).

Independence of Judges and Lawyers, 'at most … international guidelines'.[32] 'Unlike most other United Nations instruments belonging to the category of "soft law", the Basic Principles were not submitted for approval by the UN General Assembly,'[33] but were instead adopted at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, and then 'welcome[d]' by the General Assembly, which, by resolution 45/166 of December 1990, 'invite[d] Governments to respect them and to take them into account within the framework of their national legislation and practice'.[34] Despite their lack of binding force, the UN Basic Principles are significant because they constitute the only finalised document at the United Nations level dealing specifically with the provision of legal services. Indeed, some authors cite them uncritically as reflecting 'international human rights law'.[35]

In terms of content, the UN Basic Principles consist of 29 points which – in line with the link to human rights identified above – focus rather clearly on legal advice provided to consumers, with a particular focus on criminal defence. In terms of subject-matter, they cover various issues such as access to lawyers and legal services, special safeguards in criminal justice matters, qualifications and training, lawyers' duties and responsibilities, 'guarantees for the functioning of lawyers', freedom of expression and association as well as professional associations of lawyers and disciplinary proceedings. However, due to their age, the UN Basic Principles predate a number of recent developments, such as the advent of digitalisation and, in particular, the international trend towards globalisation of legal services, which has seen the emergence of (primarily Anglo-American) law firms who operate across multiple jurisdictions and sell their services internationally.

32 Param Cumaraswamy, 'The UN Special Rapporteur on the Independence of Judges and Lawyers' (1999) 7 CJIL Yearbook 63 75.

33 Theo van Boven, 'Perspectives for Raising the Legal Status of the Basic Principles of Lawyers' in Lawyers for Lawyers (ed), *Building on Basic Principles* (2011) 48.

34 United Nations General Assembly, *Resolution 45/166, Human rights in the administration of justice* (1990), para 4.

35 eg Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP 2021) 369.

ii. *The UN Special Rapporteur on the Independence of Judges and Lawyers*

Building on the UN Basic Principles on the Role of Lawyers, the UN has, since 1994, maintained a Special Procedure on the Independence of Judges and Lawyers.[36] The Special Rapporteur fulfils a number of functions, including acting on individual complaints by contacting Governments, commenting on national laws, conducting country visits and presenting annual thematic reports to the Human Rights Council and General Assembly. However, in keeping with the broad mandate, much of the Special Rapporteurs' work has focused on judges and prosecutors, with lawyers playing only a subordinate role. For example, out of the 27 total reports to the Human Rights Council and, before this, the Commission on Human Rights, only the 2022 report[37] focused specifically on lawyers.[38] Similarly, engagement with the mandate remains somewhat limited.[39]

iii. *The 'right to defend human rights'*

In addition, legal services may also at times be protected via the 'right to defend human rights'. For example, Art. 9 § 3 (c) of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[40] explicitly provides that 'everyone has the right, individually and in association with others … [t]o offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms'.

Nonetheless, the prevailing view is that not all legal services will always be human rights defence. In line with the heterogenous nature of legal

36 United Nations Commission on Human Rights resolution 1994/41. The Special Procedure was assumed by the United Nations Human Rights Council under General Assembly resolution 60/251 and has since been periodically renewed.

37 García-Sayán (n 21).

38 By contrast, 11 focus specifically on judges, with the rest dealing more generally with transversal issues related to the justice system as a whole, eg corruption or the COVID-19 pandemic.

39 For the 2022 report García-Sayán (n 21), para 7, the Special Rapporteur received a total of 69 responses ('24 responses … from members States, 22 from civil society organizations and 23 from bar associations').

40 United Nations General Assembly, *Resolution 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (1998).

services identified above, the mere fact that all lawyers do things involving law and thus have a special role related to the rule of law does not mean that everything lawyers do will necessarily qualify as human rights defence. To quote a publication by the Office of the UN High Commissioner for Human Rights on 'Who can be a human rights defender?':

> Many professional activities do not involve human rights work all of the time but can have occasional links with human rights. For example, lawyers working on commercial law issues may not often address human rights concerns and cannot automatically be described as human rights defenders. They can nevertheless act as defenders on some occasions by working on cases through which they contribute to the promotion or protection of human rights.[41]

On this understanding, lawyers' general role in the justice system is not enough to perpetually bring them within the ambit of 'human rights defence'; instead, they will only be classed as such 'where these actors in the judicial process make a special effort to ensure access to fair and impartial justice, and thereby to guarantee the related human rights of victims'.[42] As the UN Special Rapporteur on the Independence of Judges and Lawyers has noted, 'not all lawyers can automatically be regarded as human rights defenders simply by virtue of their professional affiliation. Rather, when lawyers provide professional services aimed at promoting the human rights and fundamental freedoms of their clients, they qualify as human rights defenders'.[43]

The background to this distinction may be linked to the development of the role of the UN Special Representative for Human Rights Defenders; this role was only created in 2000,[44] after the first Special Rapporteur on the Independence of Judges and Lawyers had highlighted that there was a need for such a mechanism since he '[c]ontinue[d] to receive complaints of attacks against human rights defenders who are not lawyers or who are lawyers but attack [sic] other than in the course of the discharge of their professional duties in defence of human rights', where, '[o]wing to the need to confine himself within the parameters of his mandate, the Special

41 Office of the United Nations High Commissioner for Human Rights, *Fact Sheet no 29: Human Rights Defenders: Protecting the Right to Defend Human Rights* (2014) 7.

42 Ibid 7.

43 United Nations General Assembly, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/71/348** (2016), para 36.

44 United Nations Commission on Human Rights resolution E/CN.4/RES/2000/61 on Human Rights Defenders.

Rapporteur may not intervene'.[45] Due to the significant connection with the Special Procedure on the Independence of Judges and Lawyers, both Special Rapporteurs frequently cooperate.

(b) *Council of Europe Recommendation R(2000)21 on the freedom of exercise of the profession of lawyer*

Moving to the European regional context, within the Council of Europe, the main document is Recommendation R(2000)21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer, which was adopted ten years later than the UN Basic Principles. The non-binding recommendation,[46] which in its preamble explicitly 'ha[s] regard to the United Nations Basic Principles on the Role of Lawyers, endorsed by the General Assembly of the United Nations in December 1990',[47] sets out a number of points on the exercise of the profession of lawyer, the latter term being understood as 'a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.'[48] The Recommendation itself is divided into six principles, each consisting of several more specific sub-points, which concern 'General principles on the freedom of exercise of the profession of lawyer', 'Legal education, training and entry into the legal profession', 'Role and duty of lawyers', 'Access for all persons to lawyers', 'Associations' and 'Disciplinary proceedings'.

45 United Nations Commission on Human Rights, *Report of the Special Rapporteur on the Independence of Judges and Lawyers E/CN.4/2000/61* (2000), para 31, as well as para 338 recommending a monitoring mechanism for the Declaration on Human Rights Defenders.

46 cf Art. 15 b of the Statute of the Council of Europe.

47 Committee of Ministers of the Council of Europe, *Recommendation R(2000)21 on the Freedom of Exercise of the Profession of Lawyer* (2000), second preambulatory paragraph. Note that the Explanatory Memorandum to the Recommendation also refers to various other standards, such as the CCBE Code of Conduct and the main European Union directives regarding the profession of lawyer.

48 Ibid, final preambulatory paragraph.

Similarly to the UN Basic Principles, the Recommendation predates a number of significant developments regarding legal services,[49] most noticeably the increase in internationalisation of trade in legal services and the advent of digital technology.[50] Unlike parallel recommendations on judges[51] and prosecutors,[52] the recommendation on the freedom of exercise of the profession of lawyer has not been updated.

(c) *Soft law standards by international NGOs*

In addition to the UN Basic Principles and Council of Europe Recommendation R(2000)21, which, while non-binding, do have the persuasive force of major international organisations behind them, there are also a wealth of soft law standards on legal services developed by the various non-governmental organisations that make claims to represent 'the legal profession' at the international level.[53] At the global level, this concerns, in particular, the International Bar Association (IBA) and the Union Internationale des Avocats (UIA), while at the European regional level the Council of Bars and Law Societies of Europe (CCBE) plays a significant role.

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49 This need to update standards in light of later developments is also one of the justifications cited for a European Convention on the Profession of Lawyer, cf Lahaye-Battheu (n 10), para 26.

50 Quaintly, the Explanatory Memorandum even makes reference to the now-obsolete medium of the 'floppy disk', Council of Europe, *Explanatory Memorandum to Recommendation R(2000)21 on the freedom of exercise of the profession of lawyer* (2000) 24.

51 Recommendation R(94)12 on the Independence, Efficiency and Role of Judges; Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities.

52 Recommendation Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System; Recommendation CM/Rec(2012)11 on the Role of Public Prosecutors Outside the Criminal Justice System.

53 There are also a host of other lawyer NGOs which focus on specific sub-fields of law or do not engage in standard-setting activities; these have not been included below. Perhaps most significant is the International Commission of Jurists, which, in cases concerning lawyers, has acted as a third-party intervener before the European Court of Human Rights on a number of occasions, eg *Mamatkulov and Askarov v Turkey [GC]* App no 46827/99; 46951/99 (ECtHR, 04 February 2005); *Annagi Hajibeyli v Azerbaijan* App no 2204/11 (ECtHR, 22 October 2015); *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018); *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020).

The IBA, founded in New York in 1947 on the initiative of the American Bar Association,[54] describes itself as 'the foremost organisation for international legal practitioners, bar associations and law societies',[55] claiming to be 'the global voice of the legal profession'.[56] Its membership consists of, on the one hand, national professional bodies, and, on the other, of 'over 80,000 individual members from most of the world's top law firms'[57] as well as a number of law firm members.[58] It has held UN ECOSOC status since 1947,[59] as well as holding participatory status with the Council of Europe,[60] and co-operates with inter alia the United Nations,[61] particularly the UN Special Rapporteur on the Independence of Judges and Lawyers,[62] with the Organisation for Economic Co-Operation and Development,[63] the Financial Action Task Force,[64] the European Parliament,[65] the World Bank,[66] the World Trade Organisation[67] and the international courts of justice.[68] However, it is not clear that the IBA is as representative as it claims to be, since it frequently styles itself as a forum for 'elite'[69] lawyers

54 https://www.ibanet.org/About_the_IBA/Key_milestones.aspx, accessed 24 November 2020 – more recent versions no longer cite the ABA's involvement. For a more detailed history of the formation process see Robert Nelson Anderson, 'The International Bar Association: Its Establishment and Progress' (1950) 36 American Bar Association Journal 463.

55 https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx, accessed 08 August 2024.

56 https://www.ibanet.org/, accessed 08 August 2024.

57 International Bar Association, *IBA President Brochure 2018* (2018) 7. The 2021 version has removed the reference to 'the world's top law firms'.

58 International Bar Association, *IBA President Brochure 2021* (2021) 14.

59 https://esango.un.org/civilsociety/showProfileDetail.do?method=showProfileDetails&profileCode=480, accessed 08 August 2024.

60 https://coe-ngo.org/#/ingo/56a682bd7f63c229362a2fdc, accessed 08 August 2024.

61 International Bar Association, *IBA President Brochure 2021* 9.

62 International Bar Association, *IBA Council Meeting Agenda for 25 May 2019* (2019) 126.

63 International Bar Association, *IBA President Brochure 2021* 9.

64 Ibid 9.

65 Ibid 9.

66 Ibid 9.

67 Ibid 9; see also Laurel S. Terry, 'From GATS to APEC: The Impact of Trade Agreements On Legal Services' (2010) 43 Akron Law Review 869. Indeed, according to Collins (n 16) 221, the IBA 'is among the most important non-state actors governing global trade in legal services'.

68 International Bar Association, *IBA President Brochure 2018* 7.

69 Andrew Boon and John Flood, 'Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct' (1999) 2 Legal Ethics 29, 32.

which 'offers … opportunities through networking with the world's leading business lawyers'.[70] Moreover, there are also significant problems regarding regional representation; regarding its individual members, the IBA consists almost entirely of lawyers from the Global North as well as a select few Global South jurisdictions such as Brazil and Nigeria.[71] This makes it problematic for the IBA to claim to make 'an authoritative statement on behalf of the world-wide legal profession',[72] particularly since eg the fact that the UN Special Rapporteur on the Independence of Judges and Lawyers' site lists only materials produced by the IBA to the exclusion of other soft law indicates that other actors may be uncritically accepting this claim.[73]

The Union Internationale des Avocats (UIA) is, as its French-language name suggests,[74] in many ways considered the Francophone counterpart to the International Bar Association,[75] although with its three working languages[76] and five further official languages[77] it certainly strives for broader international representation. The UIA was formed in 1927 and therefore predates the International Bar Association,[78] whereas the CCBE was initially a sub-unit of the UIA.[79] Similarly to the IBA, the UIA consists of both individual members and national professional and representative bodies.[80]

70 International Bar Association, *IBA President Brochure 2021* 15.

71 cf ibid 14.

72 International Bar Association, *Commentary on the IBA Council 'Rule of Law' Resolution of September 2005* (2009) 2.

73 https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/international-standards, accessed 08 August 2024. The inclusion of the International Bar Association is all the more surprising since the section on 'Europe' does not include the materials produced by the CCBE, which arguably has a much stronger legitimacy claim than the IBA.

74 The Union Internationale des Avocats also translates this as 'International Association of Lawyers', but typically uses the acronym UIA when referring to itself.

75 Hans-Jürgen Hellwig, 'Blick über den Horizont des anwaltlichen Alltags' (2005) Anwaltsblatt 129, 129.

76 English, French and Spanish. The UIA's magazine, 'Juriste International', is consequently also published in a trilingual version, cf https://www.uianet.org/en/juriste-international, accessed 08 August 2024.

77 Portuguese, Italian, German, Arabic and Mandarin.

78 https://www.uianet.org/en/about-us#tab_content_76030, accessed 08 August 2024.

79 Council of Bars and Law Societies of Europe, *The History of the CCBE* (2005) 5ff.

80 Union Internationale des Avocats, *Statutes of the Union Internationale des Avocats* (2023), para 5.1.

Its membership is smaller,[81] but significantly more regionally diverse,[82] and its advertising materials and website do not place particular emphasis on any specific field of legal services. The UIA has held ECOSOC consultative status since 1971[83] and holds participatory status with the Council of Europe.[84] It also interacts with a number of intergovernmental organisations,[85] including the World Trade Organisation,[86] UNCITRAL[87] and the FATF,[88] and has engaged in outreach activities in the Global South together with other actors, such as the International Court of Arbitration of the International Chamber of Commerce.[89]

Both the IBA and the UIA have produced their own soft-law instruments concerning the regulation of legal services. While the IBA has published 'Standards for the Independence of the Legal Profession',[90] 'General Principles for the Legal Profession',[91] the 'Guide for Establishing and Maintaining Complaints and Discipline Procedures',[92] and the 'International Principles on Conduct for the Legal Profession',[93] the UIA has produced the 'Turin Principles of Professional Conduct for the Legal Profession in the 21st Century'[94] and the 'Core Principles of the Legal Profession'.[95]

81 The membership directory lists around 2000 members, https://www.uianet.org/en/directory, accessed 08 August 2024.
82 27 % of the UIA's members are from the African continent, Union Internationale des Avocats, *2019 Annual Report* (2019) 6.
83 https://esango.un.org/civilsociety/showProfileDetail.do?method=showProfileDetails&tab=1&profileCode=621, accessed 08 August 2024.
84 https://coe-ngo.org/#/ingo/56a682bd7f63c229362a2fd7, accessed 08 August 2024.
85 Union Internationale des Avocats, *2019 Annual Report* 14.
86 Terry, 'From GATS to APEC: The Impact of Trade Agreements On Legal Services' (n 67) 955.
87 https://www.uianet.org/en/commissions/bankruptcy-law?backlist, accessed 08 August 2024.
88 Union Internationale des Avocats, *2019 Annual Report* 15.
89 https://www.uianet.org/en/commissions/international-arbitration?backlist, accessed 08 August 2024.
90 International Bar Association, *IBA Standards for the Independence of the Legal Profession* (1990).
91 International Bar Association, *IBA General Principles for the Legal Profession* (2006).
92 International Bar Association, *Guide for Establishing and Maintaining Complaints and Discipline Procedures* (2007).
93 International Bar Association, *IBA International Principles on Conduct for the Legal Profession* (2011).
94 Union Internationale des Avocats, *Turin Principles of Professional Conduct for the Legal Profession in the 21st Century* (2002).
95 Union Internationale des Avocats, *Core Principles of the Legal Profession* (2018).

While there are thus two potential contender organisations at the global level, at the European regional level, the picture is more unified, with the CCBE standing largely uncontested in its claim to represent lawyers in Europe. Initially formed with the goal of being 'a representative body that would act in the interests of lawyers before the European Economic Community (EEC)',[96] the CCBE, which became independent from the UIA in 1966,[97] is composed of the professional bodies of lawyers from the Member States of the European Union[98] as well as associate members (without voting rights) who must be from member States of the Council of Europe which are 'in official negotiations in view of [their] accession to the European Union'.[99] Unlike the UIA and IBA, the CCBE does not provide for the possibility of individual membership for lawyers or law firms, arguably greatly reducing the potential for conflicts of interest. It cooperates closely with EU bodies[100] and maintains permanent delegations to the European Court of Justice, the General Court and the EFTA Court,[101] and to the European Court of Human Rights.[102]

Similarly to the IBA and UIA, the CCBE has also drafted soft law documents, most significantly the 1988 Code of Conduct for European Lawyers[103] and the 2006 Charter of Core Principles of the European Legal

96 https://www.ccbe.eu/about/history/, accessed 08 August 2024. See also Louise Lark Hill, 'Alternative Business Structures for Lawyers and Law Firms: A View from the Global Legal Services Market' (2017) 18 Oregon Review of International Law 135, 138.

97 https://www.ccbe.eu/about/history/, accessed 08 August 2024.

98 'Designated by the authorities of each Member State of the European Union or the European Economic Area or the authorities of the Swiss Confederation', Council of Bars and Law Societies of Europe, *Statutes of the Council of Bars and Law Societies of Europe* (2020), para IV a) 1.

99 Ibid, para IV b).

100 https://www.ccbe.eu/about/who-we-are/, accessed 08 August 2024.

101 https://www.ccbe.eu/actions/committees-working-groups/?idC=535&Committee=Permanent%20Delegation%20to%20the%20Court%20of%20Justice%20and%20the%20General%20Court%20and%20the%20EFTA%20Court, accessed 08 August 2024.

102 https://www.ccbe.eu/actions/committees-working-groups/?idC=537&Committee=Permanent%20Delegation%20to%20the%20European%20Court%20of%20Human%20Rights, accessed 08 August 2024.

103 Last amended in 2007. Note that this Code of Conduct itself drew on standards by the IBA, UIA and ABA (cf Council of Bars and Law Societies of Europe, *The History of the CCBE* (n 79) 20) and was accompanied by fierce discussion between continental lawyers and their Anglo-Saxon counterparts.

Profession.[104] In addition, it has acted as an intervener both in cases before the European Court of Justice and the European Court of Human Rights, and has even been actively consulted by the latter under Rule 116 of the ECtHR Rules of Court.[105] In general, the CCBE's suggestions have had a greater impact than the other soft law standards identified above, with in particular the Code of Conduct for European Lawyers experiencing significant 'hardening'.[106]

Like the soft-law standards formulated by the UN and the Council of Europe, the documents drafted by international non-governmental organisations also exhibit a comparatively heavy focus on criminal law. While this is in keeping with the particularly close link between criminal defence and human rights identified above, it does mean that there is a certain disconnect between these standards and the organisations expounding them, since those areas most closely related to human rights defence are also typically least likely to involve an international dimension. Instead, the type of legal services that are provided internationally are usually closer to commercial law, and the IBA explicitly states that it 'brings together the worldwide legal fraternity to develop the harmonisation of law across borders and provide an environment conducive to international business'.[107] As one author has noted, 'the kinds of law firms that enter a foreign market tend not to provide the kinds of legal services in which local firms specialize, such as private client, criminal, or family law work',[108] while others have argued that 'international commercial lawyers have little in common with the bulk of their domestic professions, save for a common past and a common title'.[109] The combination, for example, of the IBA's explicit focus on (international) commercial law with soft-law standards highlighting more general concerns is thus somewhat surprising,[110] since the IBA's members

104 Last amended in 2019.

105 Council of Bars and Law Societies of Europe, *CCBE position on the amendment of Rules 36 and 44 of the Rules of Court of the European Court of Human Rights* (2020).

106 See eg General Assembly of the Latvian Sworn Advocates, *Code of Ethics of the Latvian Sworn Advocates* (1993); for Germany see former s 29 BORA as well as the materials prepared in the drafting of s 27 EuRAG; for Russia see Russian Federal Bar Association, *Kodeks professional'noj ètiki advokata* (2003), para 1.2.

107 International Bar Association, *IBA President Brochure 2021* 9.

108 Collins (n 16) 15.

109 Boon and Flood (n 69) 47.

110 Perhaps particularly critical ibid 44: 'the development of international codes of ethics by international lawyers may therefore be seen as an ideological claim reflecting the strategies of dominance used by the commercial clients that they serve'; 'like

largely do not engage in activities traditionally considered human rights defence. This discrepancy raises questions as to whether these organisations are really best-placed to provide input to the international law on legal services, where they are effectively 'promoting a particular vision of the role of lawyers in civil society',[111] particularly since commentators have noted that '[c]ommercial and political interests play a role in international [lawyer] organizations' efforts to influence lawyer regulation'.[112] At the domestic level, in fact, in some systems the heterogenous nature of legal services noted above has led to separation into several different organisations committed more specifically to certain sub-fields of law.[113]

2. Hard international law on legal services

While those documents that focus directly on legal services are thus non-binding, in terms of hard law, legal services typically come up in the periphery of international legal regimes designed to deal with other questions.

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international business, international lawyers are suspicious of, even fearful of, an effective system of regulation of their activities. They produce codes to create the impression that professionalism is an adequate mechanism of control'.

111 Leslie Levin, Lynn Mather and Leny de Groot-van Leeuwen, 'The Impact of International Lawyer Organizations on Lawyer Regulation' (2018) 42 Fordham International Law Journal 407, 411.

112 Ibid 409. Collins (n 16) 225 criticises the IBA and other lawyers' associations 'because such organisations have foremost in mind the interest of their members (the lawyers and law firms) rather than the general public interest, including the desire to open markets to competition for the benefit of consumers even when this may lower fees'.

113 As Collins (n 16) 246 notes '[s]ome believe that there is a need for differential regulation within the legal services profession, with different rules applying to legal services suppliers on the basis of the nature of their organization or the type of law that they practise. Larger law firms have urged a decoupling of the regulations covering the profession for their type of transnational, sophisticated, and commercially focused practice from the type of regulations that are imposed on ordinary consumers, for whom knowledge asymmetry is at its worst'. For an example from Germany see eg the recently created 'Forum for Commercial Law Firms', which consists of a number of major commercial law firms who were unhappy with the level of representation provided by the general Bar association and thus created their own, Marcus Jung, 'Eine Stimme für Wirtschaftskanzleien' *Frankfurter Allgemeine Zeitung,* 01 April 2022 (<https://www.faz.net/aktuell/wirtschaft/wirtschaftskanzleien-schliessen-sich-zu-bundesverband-bwd-zusammen-17926889.html>).

In keeping with the aforementioned role as both a facilitator and a beneficiary of globalisation,[114] perhaps the greatest detail specifically on legal services is in international economic law, particularly the law of the World Trade Organisation. Here, legal services are included in the General Agreement on Trade in Services under 'business services'[115] and thus treated 'like any other industry [, which] ignores the crucial role of the lawyer as an agent of the justice system and as a servant of society'.[116] That, in turn, may be based on the fact that the international law of trade in legal services focuses almost entirely on 'a new model of legal services oriented towards providing legal advice to businesses rather than the traditional one in which lawyers, often sole practitioners, represent clients at local courts'.[117] Human rights defence is thus simply far less likely to come up in the course of the type of legal services regulated by the GATS regime.

Moreover, beyond international economic law, legal services are also mentioned in passing in a variety of other contexts. Most commonly, and in close proximity to the general law of human rights, this is in relation to other regimes which for certain situations provide fair trial guarantees.[118] Perhaps the most visible example is international criminal law.[119] However, similar references also appear in less obvious areas, such as eg in international humanitarian law[120] or in the law of aliens.[121]

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114 As Collins (n 16) 204 notes, 'adequate access to high-quality legal advice and representation is a cornerstone of the functioning global economy; it is not an end in itself but an instrument by which, arguably, all other kinds of commerce are actualized'.

115 Ibid 35. Note that 'the US had originally requested that the GATS contain an Annex on Legal Services that would be binding on all members and would contain some minimum level of access for their legal markets', ibid 37.

116 Ibid 23. Elsewhere, however, Collins is more critical and mentions 'questionable claims of distinctiveness on the part of legal services' (ibid 7).

117 Ibid 2.

118 For an introduction see eg Louise Doswald-Beck, 'Fair Trial, Right to, International Protection' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (2013).

119 See eg Clooney and Webb (n 35), Chapter Five.

120 eg Art. 99 § 3 Geneva Convention III: 'No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel'; Art. 105 § 1: 'The prisoner of war shall be entitled … to defence by a qualified advocate or counsel of his own choice'. The provision also sets out further protection of legal services, such as minimum preparation time. See also Art. 72 § 1 Geneva Convention IV. Under Art. 8 § 2 (a) (vi) of the ICC Statute, 'wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial' is a 'grave breach' of the Geneva Conventions and thus a war crime.

3. A 'European Convention on the Profession of Lawyer'?

In addition, in an attempt to clarify and enhance the protection international law provides for legal services, work is currently ongoing within the ambit of the Council of Europe on a 'European Convention on the Profession of Lawyer'. This may well ultimately take the form of a binding instrument[122] and will potentially also be open to accession by non-member States of the Council of Europe.[123] At the time of writing, this project is still at a relatively early stage. Following a general feasibility study,[124] the Council of Europe has convened a Committee of Experts on the Protection of Lawyers, which, according to its terms of reference, shall

> [d]raft [a] legal instrument aiming at strengthening the protection of the profession of lawyer and the right to practice the profession without prejudice or restraint, which sets out a comprehensive set of minimum standards applicable to a lawyer's right to freely exercise their professional activities and ensure protection and independence of the profession, and may include establishing a mechanism entrusted with the implementation of the standards by member States or giving guidance on their application.[125]

This draft is projected to be submitted to the Council of Europe European Committee on Legal Co-operation in November 2024.[126]

4. Legal services and international human rights law

While not directly addressed, legal services are also implied in a number of places in international human rights law. Human rights which presuppose

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121 Hollin Dickerson, 'Minimum Standards' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (2010), para 11.

122 Parliamentary Assembly of the Council of Europe, *Recommendation 2121 (2018) - The case for drafting a European convention on the profession of lawyer* (2018), para 4; cf Committee of Experts on the Protection of Lawyers (CJ-AV), *2nd meeting 11-13 July 2022 - Meeting Report CJ-AV(2022)10* (2022), para 4.

123 Parliamentary Assembly of the Council of Europe (n 122), para 4; Committee of Experts on the Protection of Lawyers (CJ-AV), *1st meeting 6-8 April 2022 - Meeting Report CJ-AV(2022)04* (2022), para 11.

124 Jeremy McBride, *Profession of Lawyer: Study on the Feasibility of a New European Legal Instrument* (2021).

125 Extract from CM(2021)131-addfinal - Committee of Experts on the Protection of Lawyers (CJ-AV) 1.

126 Committee of Experts on the Protection of Lawyers (CJ-AV), *7th meeting 30 January-1 February 2024 - Meeting Report CJ-AV(2024)05* (2024), para 20.

the existence of high-quality legal services appear as early as the 1948 United Nations Universal Declaration on Human Rights (UDHR). These include, for example, the right to an effective remedy,[127] the right to a fair trial[128] and specific defence guarantees in criminal trials.[129] From the non-binding UDHR, these rights were progressively translated into the other major international and regional human rights law documents, notably the International Covenant on Civil and Political Rights,[130] the European Convention on Human Rights,[131] the Charter of Fundamental Rights of the European Union,[132] the American Convention on Human Rights[133] and the African Charter on Human and Peoples' Rights.[134] They also come up in the context of more specific human rights documents, such as the Convention on the Rights of the Child[135] or the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.[136]

In addition to rights to *receive* legal services, international and regional human rights instruments also contain a number of rights which – in their current interpretation – cover the *provision* of legal services. The most basic example is the right to freely choose one's profession, which inter alia protects the right to choose the provision of legal services as a professional endeavour, but a number of other rights have also been interpreted to cover aspects of the provision of legal services, such as freedom of expression for

127 Art. 8 UDHR.
128 Art. 10 UDHR.
129 Art. 11 § 1 UDHR.
130 See eg Arts 2 § 3 (a), 14 ICCCPR, as well as United Nations Human Rights Committee, *General Comment no 32 - Article 14: Right to equality before courts and tribunals and to a fair trial* (2007), which notes inter alia that '[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way', ibid, para 10.
131 Particularly Arts 6 and 13 ECHR. See also the in-depth analysis in the following chapters.
132 Art. 47 CFR, particularly Art. 47 § 2 (2), '[e]veryone shall have the possibility of being advised, defended and represented'.
133 Arts 8, 25 ACHR.
134 Art. 7 ACHPR.
135 cf eg Art. 37 (d), '[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance'.
136 cf eg Art. 18 § 3 (b), which provides for the right '[t]o have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing'.

statements made in the course of legal practice or privacy rights interpreted to extend to the protection of professional secrecy.

Moreover, there are also international human rights norms which refer to aspects relevant to legal services in the course of attempts to *prevent* violations of other human rights. The main example of this is the Convention against Torture and Other Cruel, Inhuman or Degrading Forms of Treatment or Punishment, which requires in Art. 2 § 1 that 'each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. In a 2003 recommendation, the Committee against Torture interpreted this to recommend that Azerbaijan 'ensure the prompt creation of the new bar association and take measures to guarantee an adequate number of qualified and independent lawyers able to act in criminal cases'.[137] Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has highlighted access to a lawyer as a 'formal safeguar[d] against ill-treatment'.[138]

III. The European Convention on Human Rights and legal services

As the foregoing has shown, while legal services are mentioned in a variety of different areas of international law, the exact extent of States' obligations concerning legal services remains unclear. This is so even in relation to the European Convention on Human Rights, and this despite the crucial importance legal services have for the 'practical and effective'[139] realisation of the Convention rights. Indeed, the European Court of Human Rights itself has emphasised that '[t]he freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention'.[140] Nonetheless, States' obligations under the European Convention as regards legal services remain significantly unclear.

137 United Nations Committee Against Torture, *CAT/C/CR/30/1* (2003), para 7 (f).
138 CPT/Inf(2001)25, cited in *Salduz v Turkey [GC]* App no 36391/02 (ECtHR, 27 November 2008), para 39.
139 *Airey v Ireland* App no 6289/73 (ECtHR, 09 October 1979), para 24.
140 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669.

1. Research questions

The present study aims to address this lack of clarity by answering two main research questions:

What obligations securing the private and public interests in legal services does the Court's case law impose on States?

Does the Court's approach to cases involving legal services comprehensively reflect the private and public interests involved while maintaining consistency with the rest of its case law, or are there other ways of reflecting these interests which are both more comprehensive and consistent?

The first of these questions is answered in Chapter Two to Chapter Five; the second will be dealt with in Chapter Six to Chapter Ten.

2. Structure of inquiry and chapter overview

The study begins, in Chapter Two, by exploring the first half of the Court's case law protecting the client's private interest in legal services: case law specifically protecting the internal relationship between client and lawyer. The Court sees this as a special relationship that should be based on a foundation of trust, which in turn is based on (in principle) free choice of lawyer and freedom to communicate confidentially. If these conditions are established, the Court will generally leave client and lawyer to resolve all further questions concerning their relationship autonomously, except where there are manifest failings in the quality of the legal services provided, where the State will have to step in if it is or should be aware of such problems.

Chapter Three turns to the way the Court protects the client's private interests by protecting the outward-facing activities which the lawyer performs on their behalf. Here, the Court applies the Convention rights to the lawyer, but interprets them largely in terms of what they do for the client, as well as applying certain preconceived notions (particularly a focus on litigation) about what it considers lawyers' proper role to be. The Court's case law reveals that lawyers' activities will, in many areas, enjoy additional protection; this is true, for example, as regards lawyers' freedom to act as representatives in court proceedings, and as regards elevated protection against physical attack or unlawful detention by the State. However, there are also some areas where lawyers will actually enjoy a *lower* level of human

rights protection than non-lawyers; this concerns particularly freedom of expression outside the courtroom, where lawyers' rights are curtailed by the Court's vision of legal services as essentially litigation-based. The chapter closes with an overview of the protection provided where individuals have lodged applications to the Court under Art. 34 ECHR, where the Court has provided an additional protective regime for legal services related to individual applications under the Convention mechanism.

While Chapters Two and Three thus deal primarily with legal services in their role as realising the private interests of the *client*, Chapter Four turns to protection of legal services in *lawyers'* private interests. This case law is generally far less developed than that on the client's private interest in legal services: While there is some case law protecting access to and exercise of the profession of lawyer, as well as on questions of professional reputation, by and large this protects lawyers far less strongly than the case law on their activities in the client's private interests. A group of cases that lies at the intersection between the lawyer's private interests and the public interest and is hence dealt with separately concerns the question of whether lawyers should be 'watchdogs' for the rule of law, ie the extent to which they are allowed to comment on cases which they are not involved in personally. Here, the Court has sometimes provided additional protection, but has also highlighted that lawyers' protection cannot go as far as that afforded to journalists, which in line with the restrictive case law on lawyers speaking outside of court means that lawyers will have to be cautious in their statements.

With the private interests of clients and lawyers in legal services addressed, Chapter Five moves away from private interests entirely and focuses on the Court's case law concerning the public interest in legal services. This deals, first, with the Court's two main statements highlighting the role of legal services in furthering the public interest, which the Court has referred to as the 'special status of lawyers'[141] as part of the 'very heart of the Convention system'.[142] After a discussion of the Court's case law in this area, the chapter turns to those areas where the Court has set out standards intended to secure the public interest in legal services. This concerns, for example, the Court's largely oblique statements regarding how the market for legal services should be regulated, as well as its more

141 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45.

142 *Elçi and others v Turkey* (n 140), para 669. Both quotes are discussed extensively in Chapter Five, 225ff.

explicit statements concerning a separate administrative regime for legal services. Though the Court leaves a significant margin of appreciation to the States, it seems to generally take the view that legal services should be based on particular qualification and personal standing, combined with a separate set of disciplinary rules enforced by professional bodies such as Bar associations. However, it has been keen to highlight the need for 'independence' as a criterion of legal services' quality, emphasising that too much direct involvement by the State is undesirable.

Chapters Two to Five thus set out how, under the Convention, States must regulate legal services, separated into the private interests of clients, the private interests of lawyers and the broader public interest in legal services. Given the possibility of similar factual situations arising under a variety of norms, the cases discussed are grouped not by the norm the Court applied, but primarily according to their factual similarity. Generally speaking, the Court is happy to analyse similar situations under different Convention articles, and often transfers its jurisprudence from one legal context to another either silently or explicitly, as long as the facts of the cases are sufficiently close.[143] However, it must be noted that the study does not attempt to set out exhaustively every nuance of the Court's case law in each of the areas surveyed. Instead, it focuses primarily on setting out the main lines of the Court's relevant case law, with references to further case law and secondary literature included in the footnotes where appropriate.[144]

Building on this overview of the Court's black-letter law, Chapter Six to Chapter Ten then turn to the underlying conceptual problem, that of human rights exercised not in the interests of the rights holder themselves, but in the interests of others.

Chapter Six begins this inquiry by performing a comparison to a different area where private activities also serve public interests, that of the media. Like legal services, the media reporting on matters of public interest act not only in their own interests, but also in the interests of the recipients

143 Perhaps the clearest example being questions related to professional secrecy, which have been dealt with under (at least) Art. 5 § 4, Art. 6 § 1, Art. 6 § 3 (c), Art. 8 and Art. 34 ECHR.

144 Although it is worth noting that many of the areas considered here are surprisingly under-researched given their practical significance. A contributing factor may be that in the judgments surveyed, the risk of separate development of French- and English-language case law looms large, since most of the judgments surveyed exist only in one of the official languages and eg the seminal dictum in *Elçi and others v Turkey* (n 140), para 669, lacks a French version since the Court decided all cases citing it in English.

of information, as well as the public interest in pluralism and democracy. The Court's case law on the media exhibits a number of similarities to legal services, but is generally more developed, inter alia because the Court highlights more clearly that the State is under an obligation as the 'ultimate guarantor' of pluralism, which requires that it ensure a certain level of media activity. While a number of areas of this case law could be usefully transferred to legal services, ultimately the conceptual problem identified above persists for both, in line with the Court's general unwillingness to engage with conceptual issues.

Chapter Seven highlights that a central problem underlying the Court's case law may be that it focuses exclusively on the directed duties that correspond to rights and displays too little awareness that the Convention can also impose 'undirected' duties on States that do not correspond to individual rights. The chapter begins by discussing various types of duty, particularly rights-based, non-rights-based, directed and undirected duties, before highlighting that duties not owed to individuals are a common feature of both domestic constitutional law and public international law. The chapter then shows that the Convention can also be understood as imposing a range of such undirected duties on States, such as, for example, the duty to maintain a Convention-compliant judiciary, to maintain a democratic form of government and to maintain separation of powers. Given the startling lack of debate on undirected duties under the Convention, the chapter closes by offering a number of possible explanations for why these have not been discussed. In particular, this includes the fact that the debate on the Convention's 'constitutional' role has so far been centred largely on individual rights, rather than on how the Convention regulates the organisation of public power. In light of the current rule-of-law crisis in several Convention States and new developments in the Court's jurisprudence particularly as regards judicial independence, this second 'constitutional' function may well play an increasing role in the years to come.

Chapter Eight underlines the limits of approaches that use only rights and corresponding directed duties. In both moral human rights theory and Convention law, human rights are typically justified individualistically, ie as reflecting or furthering private interests of the rights holder regardless of whether these coincide with public interests. In some areas, particularly as regards freedom of expression, there are also more systemic conceptions of human rights, which focus on the extent to which rights further public interests or those of persons other than the rights holder. While these latter conceptions are shown to be less wide-spread, they do highlight a point that

has led to a burgeoning debate in moral philosophy: whether the activities of so-called role-bearers (such as journalists or, it is argued, lawyers) are properly a question of those persons' rights, as opposed to eg duties on the State to protect them. The chapter closes by highlighting that, in any case, simply mixing systemic understandings with doctrines developed on an individualistic conception is unconvincing because it leads to a number of inconsistencies in the way cases are decided, raising the question of why the Court nonetheless draws on systemic conceptions. On that latter point, it is submitted that the Court chooses systemic conceptions as a means of reflecting public interests because its doctrine of undirected duties is underdeveloped.

Chapter Nine presents an alternative approach that uses both directed and undirected duties, once again taking legal services as an example. Here, the public interest in legal services grounds an undirected duty on the State to ensure that legal services are available. This undirected duty can then interact with directed duties reflecting the private interests of individuals in one of three ways: disconnect, where only the undirected *or* the directed duty is engaged; harmony, where both duties militate for the same result and reinforce each other; and conflict, where the undirected duty and the applicant's private interests pull in different directions. This approach based on two different State obligations can explain the variations in the Court's case law without changing the outcome of any individual case, and is thus a suitable substitute for the Court's current approach.

After having thus established that it is also possible to understand the Court's case law as a reflection of both directed and undirected duties, Chapter Ten explains why this is preferable. Recognising that the State is under an undirected duty to ensure legal services can explain a number of features of the Court's case law which, on an analysis using exclusively directed duties corresponding to rights, are difficult to explain. In addition to this explanatory value, such an approach can also resolve a number of problems in the current case law regarding the scope, content and legal bindingness of the State's duty to ensure legal services.

IV. Case selection and definitions

This section sets out the methods used to answer the research questions. It begins by explaining how cases were selected before clarifying a number of definitions that are central to the following chapters.

I. Case selection

The cases analysed in Chapter Two to Chapter Five were obtained from the Court's HUDOC ('Human Rights Documentation') database using a number of strategies. All searches were made for both English and the corresponding French terms and were last repeated in July 2024. In the text below, English versions have been used wherever official English versions were available, with French originals cited only where no English translation by the Court exists.

In a first step, the Court's case law was searched for all cases making direct reference to any of the soft-law documents or lawyer organisations discussed in II. of this chapter.[145] In keeping with the Court's justificatory style, this yielded primarily those cases where the Court either established a new point of law and argued inter alia by reference to this point's acceptance in these documents or in which one of the parties to the case or (more frequently) a third-party intervener made reference to one of these documents, as well as cases where one of the lawyer organisations intervened,[146] which were usually cases of significance beyond the individual applicant. The number of cases obtained in this way was comparatively limited; however, subsequent cases citing these initial judgments could then be identified as potentially relevant to the study.[147]

The second step was a more open search of the HUDOC database. Here, the 'plain text' field was searched for a number of search terms including 'specific status of lawyers', 'special status of lawyers', 'statut spécifique des

145 Searching the category 'Text' for the names in both languages.

146 Particularly the CCBE, cf *Senator Lines GmbH v Austria and others (dec) [GC]* App no 56672/00 10 March 2004); *Staroszczyk v Poland* App no 59519/00 (ECtHR, 22 March 2007); *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007); *Mor v France* App no 28198/09 (ECtHR, 15 December 2011); *Michaud v France* App no 12323/11 (ECtHR, 06 December 2012); *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* App no 34118/11 (ECtHR, 21 May 2013); *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015).

147 eg all cases were included which cited the following particularly important cases (arranged alphabetically): *Bigaeva v Greece* App no 26713/05 (ECtHR, 28 May 2009); *Elçi and others v Turkey* (n 140); *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017); *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020); *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005); *Morice v France [GC]* (n 146); *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020); *Nikula v Finland* (n 141); *Tuheiava v France (dec)* App no 25038/13 (ECtHR, 28 August 2018).

avocats'; 'legal profession', 'profession d'avocat'; 'heart of the Convention system'; 'officers of the court', 'auxiliaires de la justice'.

In a third step, all cases that were not specific to legal services, ie that could have arisen in the same way for a different activity than the provision or receipt of legal services, were excluded from the study. For example, this eliminated a number of cases where the applicant happened to be a lawyer and alleged violations of Art. 6 § 1's 'independent and impartial tribunal established by law' requirement regarding a court of general jurisdiction;[148] this issue could have arisen in exactly the same way for a non-lawyer before the same tribunal, meaning that the cases do not further an inquiry into the State's obligations specifically as regards legal services. Filtering in this way also eliminated a number of cases relating to the Special Rapporteur on the Independence of Judges and Lawyers which dealt with prosecutors or with military tribunals.

Together with other case law relevant to the issues examined in this study (for example on the media), this yielded a total of 580 cases in the Court's working languages French and English which were included in the present analysis. 463 of these are included in the final text below, 345 of which concern specifically legal services. The difference between the figures can be explained largely by cases which, on closer inspection, fell into the 'not specific to legal services' category or which are essentially identical repeat cases of the same problem.[149] Temporally, the cases included go from February 1975 to June 2024; geographically, they span the entire Convention space, including individual applications brought against every one of the 46 current Convention States, as well as against the Russian Federation.

148 For an example of a case that was eliminated see eg *Puolitaival and Pirttiaho v Finland* App no 54857/00 (ECtHR, 24 November 2004), where the applicants, who happened to be lawyers, complained 'that they had not had a fair hearing by an independent and impartial tribunal as one of the Court of Appeal judges, P.L., had represented the respondent in earlier proceedings brought by the applicants' (ibid 25). This case could have risen in a legally identical way without the applicants being lawyers. For an analysis arguing that this part of Art. 6 § 1 is best understood as creating an *un*directed duty see Chapter Seven, 366ff.

149 This is particularly the case in relation to the older cases on access to the appellate courts in Poland, discussed in Chapter Two, 124 ff.

2. Definitions

As a result of the heterogenous nature of legal services identified above, a study of legal services from the perspective of European human rights law runs the risk of what, in linguistics, is known as a 'false friend': terms that seem to mean the same thing, but do not. This begins as early as conceptions of 'law'/'droit'/'Recht'/'pravo' – while a dictionary might give these as translations of the same term, the highly context-dependent nature of law as a social construct means that there are actually significant differences between these terms.[150] The same is true of other terms that are of central importance to the present study, such as 'legal services' or 'lawyer', which differ significantly from jurisdiction to jurisdiction, even though they sound outwardly similar. For example, Russian 'advokaty', German 'Rechtsanwälte' and English 'solicitors' are all 'lawyers' for the purposes of their respective jurisdiction, but a Russian 'advokat' will frequently focus on criminal law,[151] the German 'Rechtsanwalt' is, under s 3 Federal Code for Lawyers, an 'independent adviser and representative in all legal matters', and an English 'solicitor' may, in addition, also take care of conveyancing, which in the other two jurisdictions is largely a matter for notaries.

This means that, for a study from the Convention perspective, it is necessary to define these terms 'autonomously' in the sense of independently from national law, as the Court has done in a number of other areas.[152] However, for the present project's key terms, the Court's case law contains at best partial definitions. Following an overview of what little case law exists ((a).), particularly regarding significantly incomplete definitions of the terms 'legal service' and 'lawyer', this section defines the key terms to be used in the following chapters ((b).).

150 Which, in comparative law, is one of the reasons for the use of the functional method. See eg Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann, Reinhard Zimmermann and Ralf Michaels (eds), *The Oxford Handbook of Comparative Law* (OUP 2019).

151 Peter B. Maggs, Olga Schwartz and William Burnham, *Law and Legal System of the Russian Federation* (7th edn, Juris 2020) 225. See also Susan Carle and others, 'The Reform of the Russian Legal Profession: Three Varying Perspectives' (2018) 42 Fordham International Law Journal 271, 282, 286, who also note that 'most high-end commercial legal services were rendered by unregulated firms and the vast majority of law school graduates chose to remain outside the advokatura'.

152 For the classic case on the 'autonomous' nature of the term 'any criminal charge' in Art. 6 § 1 see *Engel and others v the Netherlands* App no 5100/71 and others (ECtHR, 08 June 1976), para 80ff.

(a) *The Court's understanding of the terms 'legal services' and 'lawyer'*

The Court has not, to date, comprehensively defined the terms 'legal service' or 'lawyer'. This is presumably because it has not needed to do so. In domestic law, a precise definition of these terms will be necessary particularly where there is either reservation of activity (only certain persons are permitted to provide 'legal services') or of title (only certain persons are allowed to call themselves 'lawyer'/'barrister'/'solicitor'), which necessitates a clear definition. The Convention contains no such reservation, and thus the Court has not defined these terms. Nonetheless, there are some less concrete indications in its case law, which will be dealt with below.

i. *The Court's references to 'legal services'*

In fact, the Court has provided some further information on what it considers as 'legal services'. In addition to the rather hesitant statement that 'representation of a person before courts and authorities and managing a person's property are not services outside the ambit of the normal activities of a practising lawyer',[153] the Court has, at least, had occasion to set out what it considers as 'the whole range of services specifically associated with legal assistance'[154] for the purposes of Art. 6 § 3 (c), which uses the latter term in a criminal-law context. 'In this regard,' the Court has held,

> counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.[155]

While this list is heavily linked to the criminal defence context of Art. 6 § 3, it does perhaps give an indication as to what the Court considers as a legal service: In addition to a certain social support function, the Court understands legal services as dealing with the way legal norms are applied to a given factual situation as well as the process that determines that factu-

153 *Graziani-Weiss v Austria* App no 31950/06 (ECtHR, 18 October 2011), para 41.

154 *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009), para 32, see recently eg *Elif Nazan Şeker v Turkey* App no 41954/10 (ECtHR, 08 March 2022), para 42.

155 *Dayanan v Turkey* (n 154), para 32; cited with approval by the Grand Chamber in *Dvorski v Croatia [GC]* App no 25703/11 (ECtHR, 20 October 2015), para 107.

al situation.[156] Elsewhere, in a judgment that concerned civil proceedings, the Court noted that 'the right of the applicants – members of the Bar Association – to practise as lawyers … entails advising and representing or defending clients both within and outside court proceedings'.[157] This tends to indicate that the difference between civil and criminal proceedings is not decisive.

The Court, therefore, seems to understand the concept of 'legal services' comparatively broadly. This is confirmed by the indications the Court gives in its case law concerning minimum quality standards for legal services;[158] here, the Court takes a wide view of what high-quality legal services will require, beginning with basics such as active defence of the client's interests and setting out more comprehensively the requirements regarding preparation of the case on the basis of the lawyer's expertise and independence and communication with the client.

ii. *The Court's references to 'lawyers'*

Similarly, while the Court has not explicitly defined who it will consider as a 'lawyer' for Convention purposes, there is some indication that it will understand this as anyone engaging in the activity of providing legal services, rather than eg requiring a certain status under domestic law. In the 2020 Third Section case of *Kruglov and others v Russia*, which dealt inter alia with search and seizure against non-Bar lawyers in the Russian Federation,[159] the Court held that 'it would be incompatible with the rule of law to leave without any particular safeguards at all the entirety of relations between clients and legal advisers who, with few limitations, practise, professionally and often independently, in most areas of law, including repres-

156 As opposed to, for example, legal treatises without a link to a specific case, such as the present piece of legal research.

157 *Angerjärv and Greinoman v Estonia* App no 16358/18; 34964/18 (ECtHR, 04 October 2022), para 97.

158 Discussed in Chapter Two, 134ff.

159 The Russian Federation's legal services market at the time was largely deregulated, with only a very few activities – such as criminal defence – reserved to Bar lawyers, known as *advokat* (адвокат). For an introduction see eg Maksim Penizev, 'Osnovnye podxody k ponimaniju instituta advokatskoj monopolii v rossijskoj i meždunarodnoj praktike' (2020) Rossijskoe Pravo: Obrazovanie, Praktika, Nauka 82.

entation of litigants before the courts'[160] and that therefore there had been a violation of Art. 8 of the Convention regarding the search of 'practising lawyers … not members of the Bar'.[161] The Court, unlike domestic Russian legislation as in force at the time, did not attach this protection to a specific status, such as Bar membership,[162] but instead appeared to focus on the fact that legal services were in fact provided.

While *Kruglov* appears to be the only judgment in which the Court has had to explicitly clarify whether it attaches its special protection to status or to function, it seems likely that this will be the position generally for the case law on legal services.[163] This is consistent with one of the rationales for the autonomous concepts doctrine, the risk of abuse. If Convention terms were interpreted by reference to national law, the States could control the ambit of their own obligations. For 'lawyers' this would mean that, were the Court to use a definition based on a certain status under domestic law, a State could limit its obligations by changing its laws or by abusively disbarring or preventing admission to the Bar.[164] Given that in the era of Art. 18 ECHR the presumption that all States are always acting in good faith is untenable, that result would hardly be convincing.

Kruglov therefore seems to be representative of the Court's current approach, even if in other judgments the Court has been less explicit or has used language that sounds as though it might require a special status under

160 *Kruglov and others v Russia* (n 147), para 137. Perhaps somewhat surprisingly, given the fuzziness of the latter concept, the Court did not give any reasoning why this would be 'incompatible with the rule of law'.

161 Ibid, para 137. The point had been left open in *Rozhkov v Russia (No 2)* App no 38898/04 (ECtHR, 31 January 2017), para 119, to which *Kruglov* does not refer.

162 cf s 8(3) of the Federal Law 'On the practice of law and the legal profession in the Russian Federation', translation available at https://fparf.ru/en/documents/federal-legislation/on-the-practice-of-law-and-the-bar--in-the-russian-federation/, accessed 08 August 2024.

163 See, in this sense, *Bersheda and Rybolovlev v Monaco* App no 36559/19; 36570/19 (ECtHR, 06 June 2024), para 76. Note that actual provision of services also appears in the search & seizure cases, cf *Leotsakos v Greece* App no 30958/13 (ECtHR, 04 October 2018), para 42, 'A cet égard, la Cour rappelle que dès lors que les perquisitions ou les visites domiciliaires visent le domicile ou le cabinet d'un avocat *exerçant régulièrement sa profession* …' (emphasis added), 'in this respect, the Court recalls that when searches or home visits are aimed at the home or office of a lawyer regularly exercising his profession…' (author's translation).

164 As the applicants alleged had happened in *Hajibeyli and Aliyev v Azerbaijan* (n 53), discussed in greater detail in Chapter Five at 303.

domestic law.[165] Focusing on the activities typically associated with legal services is also consistent with older case law. For example, in *Nikula v Finland* (2002), where the Court's reasoning focused heavily on the applicant's role as defence counsel, it considered the point that the applicant was not a Bar member so irrelevant that it only mentioned it as an aside.[166] Similarly, in *Mikhaylova v Ukraine* (2018), which concerned an applicant who, while not a lawyer, had appeared as a representative before the courts in a number of cases,[167] the Court made extensive reference to the case law it had developed regarding members of the Bar.[168] Moreover, such a focus on the activity actually performed also fits in well with a general tendency in the Court's case law on legal services to reject arguments based on formal criteria. In this vein, when States have tried to raise the argument that a lawyer was not entitled to certain domestic protective provisions due to not yet being formally appointed to the case, that has typically not been successful.[169]

Finally, this focus on function is underlined by the Court's tendency, in cases concerning lawyers, to highlight whether they were acting in this capacity. A number of the cases discussed below highlight that the applicant was acting 'in [their] capacity as a lawyer'[170] or 'en sa qualité d'avocat',[171] suggesting that it is exercising this function, not merely holding a title, that will lead to a modification of the way the Convention applies. A particularly clear case is the admissibility decision in *Ursulet v France* (2016): Here, the Court explicitly highlighted that the applicant, while holding the formal status of lawyer, had *not* been intervening in the course of his professional

165 cf eg the reference to the 'legal profession', which arguably sounds more like a status-based approach, in *Elçi and others v Turkey* (n 140), para 669, discussed in detail in Chapter Five, 240ff.

166 *Nikula v Finland* (n 141), para 53: 'The Court further reiterates that even though the applicant was not a member of the Bar and therefore not subject to its disciplinary proceedings, she was nonetheless subject to supervision and direction by the trial court'.

167 *Mikhaylova v Ukraine* App no 10644/08 (ECtHR, 06 March 2018), paras 6, 95. As noted above, this is common practice in many post-Soviet states.

168 Ibid, para 82ff.

169 *Sarli v Turkey* App no 24490/94 (ECtHR, 22 May 2001), para 85; *Dudchenko v Russia* App no 37717/05 (ECtHR, 07 November 2017), para 103; *Schönenberger and Durmaz v Switzerland* App no 11368/85 (ECtHR, 20 June 1988), para 29.

170 See eg *Morice v France [GC]* (n 146), para 146.

171 See eg *Laurent v France* App no 28798/13 (ECtHR, 24 May 2018), para 48.

activities when he came into conflict with the police,[172] noting the particular protection which the Convention provides (only) to lawyers intervening in the exercise of their functions.[173] Moreover, in *Xavier da Silveira v France* (2010) the Court explicitly rejected any separation between lawyers acting full-time or only occasionally, holding instead that elevated protection applied to any lawyer regularly exercising their profession.[174] Finally, there are also some cases where the Court noted as an aside that the applicant, while not acting as such, held the status of lawyer, but 'was not targeted … in relation to her professional activities or her membership of the Russian bar',[175] the Court according no additional protection. For example, in the 2022 admissibility decision in *Martins Pereira Penedos v Portugal*, where the domestic courts had held that the applicant's recruitment as a lawyer had been used as a cover for a corruption scheme,[176] the Court made no further references in its reasoning to the applicant's status as a lawyer.

Taken together, all of these cases tend to indicate that the Court attaches the term 'lawyer' to the activity of providing legal services, rather than to a specific status, even if the Court has not been as explicit as it has in some other areas where it accords elevated protection.[177]

iii. *The Court's rationale for legal services*

Finally, the Court has also provided some clarification on its rationale in protecting legal services. Here, there is evidence of both the private-interest and the public-interest aspects of legal services. While the Court's case law on the public interest in legal services is discussed in Chapter Five, its statements on the private interest in legal services are typically limited

172 *Ursulet v France (dec)* App no 56825/13 (ECtHR, 08 March 2016), para 48.
173 Ibid, para 43.
174 *Xavier da Silveira v France* App no 43757/05 (ECtHR, 21 January 2010), para 41.
175 cf eg *Samoylova v Russia* App no 49108/11 (ECtHR, 14 December 2021), para 84.
176 *Martins Pereira Penedos v Portugal (dec)* App no 74017/17 (ECtHR, 22 November 2022), para 55.
177 cf, for example, regarding media the Grand Chamber judgment in *Magyar Helsinki Bizottság v Hungary [GC]* App no 18030/11 (ECtHR, 08 November 2016), para 166 (discussed in greater detail in Chapter Six at 327), where the Court explicitly highlighted that the additional protection that enabling public debate triggers applies not only to the press in a traditional sense, but may apply to anyone who exercises the relevant activities.

to the specific situation under adjudication and are thus discussed in the course of Chapter Two to Chapter Four.

However, the Court has recently also made one more general statement on the reason why legal services are important for private interests. Similarly to most other foundational questions, this has not fallen to be decided outright, but the Court has provided some clarification in the course of its reasoning on Art. 8 and correspondence between lawyers and clients. In *Altay v Turkey (No 2)* (2019), the Second Section 'consider[ed] that a person's communication with a lawyer in the context of legal assistance falls within the scope of private life *since the purpose of such interaction is to allow an individual to make informed decisions about his or her life*',[178] and went on to clarify that this applied 'whether in the context of assistance for civil or criminal litigation or in the context of seeking general legal advice'.[179] That would tend to indicate that the Court sees the private interest in legal services essentially as securing autonomy: Since without access to legal services most individuals would be unable to navigate large parts of the legal system, lack of legal services would prevent individuals from acting purposively through law, reducing them from actors to mere objects of the legal system.

(b) *Definitions used in the course of the study*

The Court, then, has provided only incomplete definitions. As a result, the study has had to define its own terms, which are set out below.

i. '*Legal services*'

The difficulties in defining the term 'legal services' are well-known.[180] As a result, in line with the project's research aims, the term will, here, be understood as broadly as possible. This means that, to draw inspiration from

178 *Altay v Turkey (No 2)* App no 11236/09 (ECtHR, 09 April 2019), para 49 (emphasis added); *Canavcı and others v Turkey* App no 24074/19 and others (ECtHR, 14 November 2023), para 91.

179 *Altay v Turkey (No 2)* (n 178), para 49 reprising, in this vein, *Campbell v UK* App no 13590/88 (ECtHR, 25 March 1992), para 48.

180 Boon, 'The Regulation of Lawyers and Legal Services' (n 26) 11; Collins (n 16) 4.

the broad definition embraced in eg German law,[181] legal services will be understood as any activity on behalf of others which requires determining the content of the law. Such a definition embraces a wide range of activities, including 'classic' legal services such as legal advice and representation, but also other activities such as transactional work related to eg property or company law. For comparison, the UN Central Product Classification Group 181 lists four classes of legal services: legal advisory and representation services in the different fields of law; legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.; legal documentation and certification services; and 'other' legal advisory and information services.[182] Use of a broad and thus somewhat 'fuzzy' definition therefore reflects particularities of the subject matter, rather than being a sign of problems with the definition itself.

ii. *'Lawyer' and 'client'*

In line with this tendency towards broad definitions, the term 'lawyer' will be used to describe any natural person who provides legal services. In particular, this means that the term is used on the basis of a certain activity, rather than a particular status. Formal aspects such as membership of a national Bar are therefore not a prerequisite for this definition; where such points are significant, the project will instead use the terms 'Bar' and 'non-Bar' lawyers. To reflect this wide scope, where the collective of all lawyers, ie all persons who provide legal services, is meant, the project will use the term 'legal services sector'. In a similarly broad way, the study uses the term 'client' to denote anyone who receives legal services, regardless of whether this is against remuneration or not.

iii. *'Bar associations'*

The term 'Bar association' will be used to mean any organisation representing or regulating all lawyers in a jurisdiction or region, regardless of whether it is established on a private-law or statutory basis. This is in

181 s 2 (1) Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz), English translation available at http://www.gesetze-im-internet.de/englisch_rdg/, accessed 08 August 2024.

182 Collins (n 16) 4.

keeping with the approach taken by the UN Special Rapporteur on the Independence of Judges and Lawyers, who in his 2018 report on Bar associations noted the various definitional difficulties before explaining that

> [i]n the present report, the term 'bar association' is used to refer to a general professional organization of lawyers established in a given jurisdiction to protect the independence of the legal profession and its members. The Special Rapporteur is aware that the use of such terminology goes beyond the meaning that the term has in some jurisdictions. In those cases, considerations related to bar associations apply — mutatis mutandis — to law societies as well.[183]

iv. '*Private interest' and 'public interest'*

Finally, in keeping with the position that an interest theory of rights can in principle be a useful framework to better understand the Court's case law,[184] the study will at various times use the terms 'private interest' and 'public interest'. While the Court uses them without clear definition[185] and the details of these terms, and how to determine whether something is 'in the public interest'[186] or its cousins such as the *intérêt général*,[187] *obščes-*

183 Diego García-Sayán, *Report of the Special Rapporteur on the independence of judges and lawyers, A/73/365* (2018), para 18.

184 See Chapter Eight, 406ff.

185 For an introduction to the many uses of 'public interest' in the Court's case law see, for example, Christoph Bezemek and Tomáš Dumbrovský, 'The Concept of Public Interest' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021). Note that the Court sometimes also uses the term 'general interest', which appears to be inspired by the French *intérêt général*, particularly since in French legal discourse the terms 'intérêt général' and 'intérêt public' are used synonymously, Maryse Deguergue, 'Intérêt général et intérêt public : tentative de distinction' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015) 132.

186 See particularly Virginia Held, *The Public Interest and Individual Interests* (Basic Books 1970); for a recent overview see Mike Feintuck, *'The Public Interest' in Regulation* (OUP 2004). As Leanne Cochrane and John Morison, 'Public Interest' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2017), para 30, note '[i]t is clear that public interest is a term without a fixed meaning and that it exists in a variety of contexts'. In fact, as Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202, notes at 228, even '[t]he meaning of "interest", like butter, is semisolid'.

187 For a discussion of the Court's use of this term see eg Emmanuel Decaux, 'L'intérêt général, « peau de chagrin » du droit international des droits de l'homme ?' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015). As eg Guillaume Merland, *L'intérêt général dans la*

tvennyj interes[188] or *öffentliches Interesse*,[189] are heavily debated, there is a certain amount of consensus around the idea that they relate to different types of justification.

In this sense, 'private interest' will be used here where something is justified as furthering the well-being[190] of an identifiable individual rights holder or group of rights holders, for example (Chapter Two and Chapter Three) the well-being of clients[191] or (Chapter Four) that of lawyers.[192] By contrast, 'public interest' will be understood here in the common-interest sense of a justification referring to 'those individual interests which all members of a community have in common'.[193] This definition must be dis-

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jurisprudence du Conseil Constitutionnel (LGDJ 2004) 1 notes, the concept is just as unclear and disputed in French law as it is in other contexts, and eg Deguergue (n 185) highlights at 134 that the definition has been debated for decades which, as Martin Collet, 'L'intérêt général dans la jurisprudence constitutionelle : Remarques sur la notion, son usage et son eviction' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015) 95 notes, frequently leads writers not even to attempt a definition.

188 See eg for a classic depiction of this separation Fëdor Fëdorovič Kokoškin, *Russkoe gosudarstvennoe pravo v svjazi s osnovnymi načalami obščego gosudarstvennogo prava* (1909) 22ff; for more recent discussions see eg Andrej Jurov, 'Vvedenie v koncepciju prav čeloveka' in Vadim Karastelev (ed), *Kurs «Prava čeloveka»: učebnoe posobie* (Moskovskaya Xel'sinkskaya Gruppa 2012) 28ff and Artur Aleksandrovič Ibraimov, 'Teoretičeskie voprosy artikuljacii obščestvennyx interesov' (2014) 10 Vestnik universiteta 250ff with further references.

189 See eg Klaus Stern, 'Band III/2: Allgemeine Lehren der Grundrechte', *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1994) 342ff; Robert Uerpmann, *Das öffentliche Interesse* (Mohr Siebeck 1999), particularly at 23ff. See also Josef Isensee, 'Gemeinwohl im Verfassungsstaat' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland: Band IV: Aufgaben des Staates* (3rd edn, CF Müller 2015), para 35 ff, who highlights the equivalence with the sum of public interests at para 36.

190 On the definition of interest as an aspect of well-being see eg Joseph Raz, *The Morality of Freedom* (Clarendon 1988) 166.

191 For example, their interest in not being imprisoned, in not having their communication intercepted, or in having a fair trial.

192 For example, their interest in being able to exercise their profession.

193 Held (n 186) 99. Taking a similar approach Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) Modern Law Review 671, 678; Pavel Ondřejek, 'The Theoretical Basis of the Relationship between Fundamental Rights and Public Interests' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021) 67. This approach is, moreover, not limited to the English-speaking literature, see eg Jacques Chevallier, 'Déclin ou permanence du mythe de l'intérêt général ?' in Anémone Cartier-Bresson and others (eds),

tinguished from so-called 'unitary conceptions',[194] 'which claim that there is a public interest which is more than an aggregate of private benefits'.[195] Because under such conceptions 'there is a unitary scheme of moral judgments which should guide every individual at a given time and place, although these individuals may be unaware of it',[196] such conceptions are not only significantly open to abuse,[197] but moreover difficult to reconcile with the type of pluralist society which the European Convention, as interpreted by the Court, envisions.[198]

Such individual interests which all members of a community have in common include, for example, the rule of law and a functioning justice system or democracy, since these further the interests of all members of the community (for this case law see, in particular, Chapter Seven). However, the fact that these, as an abstract ideal, are in the interests of all members of the community does not mean that conflict with individuals' private interests is not possible; in fact, part of the essence of 'public interest' is that it 'is a regulative idea which allows a political community to pursue policies even to the detriment of individual interests'.[199] People have a multitude of different interests, including ones not shared with others, and therefore conflicts between interests,[200] between different understandings of what interests require,[201] and between how they are to be weighted in specific

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L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet (Dalloz 2015) 84, particularly at 85ff, where he compares the English- and French-language debates, as well as the discussion in Merland (n 187) 11ff. For German law, see eg Isensee (n 189), para 36.

194 Held (n 186) 135ff. See also the discussion in Merland (n 187) 11ff.

195 Simone Peter, *Public Interest and Common Good in International Law* (Helbing Lichtenhahn 2012) 11.

196 Held (n 186) 135.

197 Ultimately, such conceptions make it possible to completely detach the idea of 'public interest' from the interests of individuals, see eg the criticism in Stern (n 189) 343ff. Because of this lack of focus on the interests of individuals, such unifying conceptions have in the past experienced 'extensive and abusive use' in the hands of authoritarian leaders because they can require 'unconditional subordination of personal interests to [alleged] community interests', Peter (n 195) 2. As Klaus Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' in Klaus Stern (ed), *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1988) 530 notes, such conceptions also struggle to accommodate individual human rights.

198 See on this Chapter Seven, 375ff.

199 Peter (n 195) 3.

200 Including between different aspects of the public interest, cf eg Uerpmann (n 189) 27.

201 Isensee (n 189), para 37.

cases are commonplace and a constant feature of pluralistic societies.[202] Moreover, while acting in the public interest will often also further certain private interests, it is important to keep the two distinct.[203] As Harel notes, things that are in the public interest cannot be meaningfully justified on the grounds that they promote any individual's well-being since promoting them for the sake of someone entails necessarily promoting them for everybody.[204]

3. A note on interactions with domestic legal systems: Translations and references

Finally, given the intertwined nature of Convention and domestic law, in a number of places it has been necessary to make reference to the various domestic legal systems that make up the Convention space.

Where translations of terms from domestic law have been made, the study has used the translations by the European Court of Human Rights itself where possible and otherwise those of the European Union Interactive Terminology for Europe database.[205]

Where references to parallel situations in domestic legal systems have been necessary, examples have typically been taken from the most populous suitable jurisdiction in order to increase accessibility to readers. As a result, many of the examples relate to legal systems such as Germany, England and Wales or France, but also to the Russian Federation, which was a party of the European Convention on Human Rights until 16 September 2022, although it is, at the time of writing, currently not a party to the Convention. This approach has the added advantage of not only including legal systems from a range of legal traditions, but also with a number of very different approaches to the regulation of legal services.

202 See eg Decaux (n 187) 126.
203 Discussing this see also ibid 124.
204 Alon Harel, 'Revisionist Theories of Rights: An Unwelcome Defense' (1998) 11 Canadian Journal of Law and Jurisprudence 227, 239 with reference to Jeremy Waldron, 'Can Communal Goods be Human Rights?' (1987) 28 European Journal of Sociology 296.
205 https://iate.europa.eu/home, accessed 08 August 2024.