Chapter Nine: Combining Rights and Undirected Duties to Protect Legal Services under the Convention

As has been shown in the previous chapter, human rights and the corresponding directed duties, with their conceptual focus on the position of the individual, are well-suited to protect private interests, but far less apt to protect public ones.[2166] Instead, public interests are best protected by means of undirected duties, including the obligations the Convention imposes on States that require them to maintain their ability to fulfil the Convention rights.

This chapter demonstrates how the distinction between human rights and the corresponding directed duties on the one hand and undirected duties on the other can be operationalised in practice, taking protection of legal services as an example. It shows that the Court's case law as discussed in Chapter Two to Chapter Five can be reconstructed (in the sense of reaching the same outcome in any given case, but by different argumentative means) as the result of the relationship of the applicant's human rights with the State's undirected duty to ensure legal services. Given that the choice between analysing these cases only in terms of human rights or in terms of both human rights *and* undirected duties is thus outcome-neutral, the chapter establishes that acknowledging undirected duties under the Convention is a suitable replacement for the Court's present systemic conception of human rights.

The chapter begins (I.) by summarising how the Court seems to currently understand the State's undirected duty to ensure legal services. It then sets out the three possible relationships – disconnect (II.), harmony (III.) and conflict (IV.) – between this undirected duty and the directed duties corresponding to human rights protecting the private interests of the individual applicant. Together, this reconstructs the Court's case law as discussed in Chapter Two to Chapter Five as the result of two different types of duties imposed on States under the Convention; the advantages of such an approach are elaborated in the next chapter (Chapter Ten).

2166 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

I. The Court's vision of the public interest in legal services

From the 345 cases included in Chapter Two to Chapter Five, the Court's vision of the undirected duty requiring the State to ensure legal services appears to comport essentially the following elements:

Under the Convention, States are required to maintain a functioning legal services sector.[2167] What this means is that the States are under an obligation to ensure that at the domestic level, there is a sufficient number of sufficiently qualified experts in legal matters, who are independent both from the State and from their clients, to meet the demand for legal advice and representation.[2168] The State also needs to ensure that the relationship between these experts and their clients, the content of which they can largely determine autonomously, can be one of mutual trust and understanding,[2169] which necessitates freedom of communication and the confidentiality of that communication. In addition, the State must ensure that these experts are able to act in their clients' interests, particularly to provide effective representation:[2170] The experts must have elevated protection of freedom of expression where they speak in the course of proceedings, State measures against them will be subject to stricter limitations, and their physical safety as a precondition of their work must equally be ensured, at least as against threats emanating from the State.

However, in the Court's view the elevated protection which these experts enjoy comes at the price that the State will generally be allowed greater scope to regulate their behaviour.[2171] Aside from being allowed to restrict the right to perform certain activities to these experts and create restrictive rules on admission to this group, the State may impose certain additional restrictions on the experts' rights, which may include, for example, limiting their freedom of expression outside the courtroom and creating additional requirements as to their behaviour if they want to maintain their status. Nonetheless, given the obvious potential for abuse, such regulation should be structured in a way that does not question the experts' independence, and ideally should involve the participation of the experts themselves.[2172]

2167 See Chapter Five, 223ff.
2168 See Chapter Two, 121ff.
2169 See Chapter Two, 70ff.
2170 See Chapter Three, 153ff.
2171 See Chapter Five, 260ff.
2172 See Chapter Five, 275ff.

The contents of this complex organisational duty have been derived from the Court's case law by means of the analysis presented in Chapter Two to Chapter Five. In that case law, the Court focuses on a single, directed duty imposed on the State by the Convention towards the individual applicant. The following sections show how these cases can be explained if one instead assumes both such a directed duty *and* an undirected duty on the State protecting the public interest in legal services.

II. Undirected duties and individual rights: Disconnect

The first possible relationship between the State's directed (rights-based) and undirected duties is one of disconnect, where one duty can be realised without any implications on the realisation of the other. In these cases, according to the Court, only the directed duty based on the applicant's private interests (1.) *or* the undirected duty based on the public interest in legal services (2.) are involved. These cases, from the Court's point of view, thus involve either only individualistic grounds or only public interests.

1. Only private interests involved

The first group of cases thus concerns situations where the Court deems that only the private interests of the applicant are involved, but not the public interest in legal services. In essence, this group comprises almost all of the Court's case law, since it includes the plethora of cases before the Court where private interests are at stake which do not affect legal services.

For the most part, such cases were therefore eliminated from the present study at an early stage[2173] since they are mute with regard to the State's obligations as regards legal services and thus do not further the present inquiry. Included cases are largely those where there is at least an argument to be made that the private interests of the applicant *do* affect the public interest in the legal services sector. These cases have served both – descriptively – to define the limits of the Court's case law as regards the public interest in legal services and – normatively – to question whether these limitations are always convincing, or whether in fact the public interest in legal services may be affected by the case at hand.

2173 See Chapter One, 54ff.

(a) *No link to legal activities whatsoever*

A case from the former category, defining the limits of the Court's case law on the legal services sector, is the admissibility decision in *Ursulet v France* (2016).[2174] This was used in Chapter One to show that the Court focuses on whether legal functions are being exercised rather than on the applicant's status. In that case, the only link to legal services was that the applicant, who had been stopped by the police while riding his motor scooter, had coincidentally also been a member of the French Bar and argued that the police had intended to humiliate him in his quality as a lawyer.[2175] The Court, after highlighting that the Convention does indeed afford particular importance and protection to lawyers when intervening in the exercise of their functions,[2176] explicitly noted that this latter condition was not fulfilled in the instant case because the applicant had not been intervening as a lawyer.[2177] Similarly, even where the applicant *is* intervening as a lawyer, the case will be one of disconnect if the point in issue reflects only the lawyer's private interests, as in the recent case of *Paun Jovanović v Serbia* (2023), in which a lawyer complained of having been discriminated against on linguistic grounds.[2178] In these cases, from the Court's point of view, there is thus no relationship between the applicant's private interests and the public interest in legal services. Only the State's directed duty to the individual is involved, not the undirected duty to ensure legal services.

(b) *General right of lawyers to exercise their profession*

Whereas it is convincing that cases involving lawyers, but without any connection to their professional activities, have no effect on the public interest

2174 *Ursulet v France (dec)* App no 56825/13 (ECtHR, 08 March 2016), discussed in Chapter One at 62, where further examples are also discussed.
2175 Ibid, para 34.
2176 Ibid, para 43.
2177 Ibid, para 48. See in a similar vein *Martins Pereira Penedos v Portugal (dec)* App no 74017/17 (ECtHR, 22 November 2022), para 55, where the domestic authorities had held that in reality, the applicant had been 'hired as a lawyer' to provide a cover for a corruption scheme, which led to the Court not further interacting with his status as a lawyer.
2178 *Paun Jovanović v Serbia* App no 41394/15 (ECtHR, 07 February 2023).

in legal services,[2179] there are other cases which the Court has classed as 'disconnect' where it is less clear that the public interest in legal services really remains unaffected. For example, the Court largely[2180] also sees the general (ie not related to any individual case) rights of lawyers to exercise their profession as concerning only the private interests of those lawyers, rather than public interests. The cases discussed above that relate to the general rights of lawyers outside of individual cases[2181] are largely devoid of reasoning based on the public interest in having lawyers, focusing instead on the Court's general case law without awareness of the fact that this profession, unlike others, also serves the additional function of supporting human rights and the rule of law. As such, for example, the general right to access the profession of lawyer,[2182] the general exercise of legal practice[2183] or the professional reputation of lawyers[2184] are no more protected than other professions that have no such link to overarching Convention goals, despite the fact that the State is required to ensure the existence of legal services at the domestic level. This stance is open to debate; one could also conceivably argue that these cases should reflect greater concern for the public interest in legal services and, depending on which party applies to the Court, be classed as 'harmony' or 'conflict' cases, a line of argument which would have tended to elevate legal services' protection.[2185]

(c) *Attacks on lawyers by private individuals*

Moreover, the Court also appears to have classed as 'disconnect' cases involving attacks on lawyers by non-State actors. While, as has been shown, cases involving attacks on lawyers by State actors engage additional protec-

2179 Leaving aside the fact that in *Ursulet v France (dec)* (n 2174) there was good reason to doubt the applicant's version of events, ibid, para 48.
2180 With the exception, perhaps, of the disbarment cases, see Chapter Four, 207, as well as below 467.
2181 cf Chapter Four, 201ff.
2182 See Chapter Four, 202.
2183 See Chapter Four, 202.
2184 See Chapter Four, 203.
2185 For a potential line of reasoning to this effect see below 473ff.

tion,[2186] this is not the case as regards attacks by private individuals.[2187] That the Court treats these cases as ones not engaging a public interest in the protection of legal services is particularly apparent from *Bljakaj v Croatia* (2014), where the majority did not interact with this point despite a dissenting opinion focusing on 'protection [of] lawyers from work-related violence'.[2188] The State's undirected duty to ensure legal services thus does not currently extend to additional protection against attacks by private individuals. Given the risk of 'chilling effect'[2189] regardless of who commits the physical attack, whether these cases should really be treated as ones of 'disconnect' is open to question.

(d) *'Exceptional circumstances' cases*

Furthermore, the Court also treats as 'disconnect' certain cases in which, in States it sees as obviously satisfying their undirected duty to maintain their ability to fulfil the Convention rights, there are situations which the Court sees as so particular to their facts as to have no conceivable impact on the State's undirected duty to ensure legal services. The two cases that show this most clearly relate to France and Germany: *Mattei v France (dec)*,[2190] which arose in the context of civil unrest in Corsica in the 1990s, and *Döring v Germany (dec)*,[2191] which arose in the context of German reunification. In both cases, the Court highlighted the atypical factual nature of the circumstances surrounding the cases. It thus did not see a connection to the State's undirected duty to ensure legal services, and instead assessed these cases in terms of the applicant's private interests.

2186 See Chapter Three, 183ff, as well as below 466.
2187 See Chapter Three, 188ff, which discusses *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014) and *Karpetas v Greece* App no 6086/10 (ECtHR, 30 October 2012).
2188 *Bljakaj and others v Croatia* (n 2187) 35.
2189 The Court's use of the term 'chilling effect' to denote that a certain minimum activity level is desirable is discussed in Chapter Six, 335ff.
2190 *Mattei v France (dec)* App no 40307/98 (ECtHR, 15 May 2001) 14.
2191 *Döring v Germany (dec)* App no 37595/97 (ECtHR, 09 November 1999) 8.

2. Only public interests involved

If those cases concerned situations which the Court saw as involving only private interests, the second sub-group of 'disconnect' cases concerns situations which engage only the State's undirected duties. These are those cases in which only the public interest in legal services is in play without directly touching on private interests. These cases are comparatively rare, which can be explained by the Court's focus on rights and directed duties as discussed in Chapter Eight. However, this group contains, for example, those areas where the Court makes normative statements not (yet) directly connected to any individual's subjective rights. While at present the normative status of such statements is unclear, it is submitted that they are best seen as the Court clarifying the State's undirected duties.

This is the case as regards the Court's statements concerning 'the legal profession',[2192] given that this amorphous group of persons is not obviously able to hold Convention rights. Here, the Court has made a number of statements regarding how States should reflect the public interest in legal services, without, however, drawing on a duty directed *to* anyone or securing anyone's private interests. For example, the Court has emphasised both the 'essential role of an independent legal profession in a democratic society'[2193] and that the 'independence of the legal profession … is crucial for the effective functioning of the fair administration of justice'.[2194] Moreover, the legal profession must be able to 'provide effective representation'.[2195] Finally, the Court has drawn attention to the importance of 'the dignity of the legal profession'.[2196] These statements engage only the public interest in how legal services should be organised, rather than anyone's private interests, and are thus cases of disconnect. They appear to address *only* the State's undirected duties.

Similarly, the group of 'only public interests' comprises the Court's statements on administrative arrangements regarding how lawyers should be

2192 See Chapter Five, 257ff.

2193 *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007), para 112, discussed in Chapter Two at 124ff.

2194 Ibid, para 135, discussed in Chapter Five, 257.

2195 *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), para 175; *Kincses v Hungary* App no 66232/10 (ECtHR, 27 January 2015), para 34; as well as the further cases cited in Chapter Five at 257.

2196 *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998), para 33; *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 46.

regulated.[2197] Here, there are no subjective rights immediately in play; when the Court makes statements such as that 'professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently, and that respect towards professional colleagues and self-regulation of the legal profession are paramount',[2198] it is addressing *only* the States' undirected duty to maintain a functioning legal services sector and not (yet) directly interacting with any subjectively assigned position.

III. Undirected duties and individual rights: Harmony

A second group of cases is that in which both directed and undirected duties on the State are involved and both argue, from the Court's point of view, for the same result. In these cases, the applicant's rights and the State's undirected duties are in harmony.[2199] As a result, they reinforce each other, resulting in particularly strong Convention protection: what the applicant claims is also what the Court sees the State as being obliged to provide beyond the instant case. Consequently, this group covers that part of the case law discussed above in which the Court provides for enhanced protection that flows both from the duties directed to the applicant and the State's undirected duty to ensure legal services.

1. Elevated protection for the internal lawyer-client relationship, particularly confidential communication

A first example of this harmony between directed and undirected duties is the case law regarding the elevated protection for the internal relationship between lawyer and client.[2200] Here, above and beyond the private interests

2197 cf Chapter Five, 286ff.

2198 *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 78, discussed in Chapter Five, 299ff.

2199 Note that while a similar term of 'harmony' appears in Joseph Raz, 'Rights and Individual Well-Being' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 51 (see Chapter Eight, text to n 2041ff) he uses this in a systemic sense as a justification of *rights*, rather than interacting with the possibility of undirected duties.

2200 Chapter Two.

of the client (and, according to the Court, of the lawyer), the Court sees the States as being under an undirected duty to create the necessary conditions for the client-lawyer relationship to be based on 'mutual trust and understanding'[2201] as part of the general obligation on the State to ensure 'the proper administration of justice',[2202] which requires that the State put in place 'an adequate institutional framework … so as to ensure effective legal representation for entitled persons and a sufficient level of protection of their interests',[2203] a 'system capable of ensuring the respect of rights guaranteed under the Convention'.[2204] Both the State's directed duties and the undirected public-interest obligation require the State to ensure the preconditions for such a relationship, which explains why the Court's case law provides such strong protection.

(a) *Freedom to communicate confidentially*

Perhaps paradigmatic of harmony between private and public interests are the cases on confidential communication.[2205]

Confidential communication engages a directed duty in the classic logic of a human right requiring the State to respect and protect the private interests of the applicant in each case. This directed duty derives, as the case may be, from any one of a number of Convention rights, particularly Arts 5 § 4, 6 under both civil and criminal limbs, 8 and 34.[2206] These place the State under a directed duty towards the individual and assign the individual a subjective position protecting the confidentiality of their communication.

In addition, however, these cases also engage an *undirected* duty on the State that requires it to ensure confidentiality of lawyer-client communication. This undirected duty derives not from any one individual's rights, but from the wider public interest in the rule of law. In fact, in some national jurisdictions, this even leads to confidentiality not being waivable by the

2201 cf *Sakhnovskiy v Russia [GC]* App no 21272/03 (ECtHR, 02 November 2010), para 102, and more generally Chapter Two, 70ff.

2202 cf on that point *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 37, discussed in Chapter Two at 111.

2203 *Bąkowska v Poland* App no 33539/02 (ECtHR, 12 January 2010), para 47. See also *Feilazoo v Malta* App no 6865/19 (ECtHR, 11 March 2021), para 125.

2204 *Andreyev v Estonia* App no 48132/07 (ECtHR, 22 November 2011), para 71.

2205 See Chapter Two, 96ff.

2206 cf Chapter Two, n 353 and accompanying text.

lawyer or by the client, since it is classed as part of the public order.[2207] Reflecting this undirected duty, the Court, in language totally devoid of any subjective position, has described 'legal professional privilege' as 'without a doubt one of the fundamental principles on which the administration of justice in a democratic society is based'.[2208] This is because 'it is clearly in the *general* interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion'[2209] since the Court sees this as intimately related to 'effective representation'.[2210] There is thus a public interest in the confidentiality of lawyer-client communication, above and beyond the interests of any individual. This is particularly clear in those cases in which the Court begins the 'legitimate aim' section of its analysis – the classic place for the identification of public, rather than private,[2211] interests – not by identifying which public interest justifies the interference with the applicant's rights, but by instead highlighting the public interest in the protection of legal services.[2212] Moreover, it also explains the Court's emphasis on the State's (undirected) duty to ensure 'a practical framework for the protection of legal professional privilege'.[2213] Recent case law supports this conclusion: In *Canavcı and others v Turkey* (2023), the Court highlighted that

> the privilege that attaches to correspondence between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason, the Court has held in the context of Article 8 of the Convention, that the fundamental rule of respect for lawyer-client con-

2207 Such as France, cf Union Internationale des Avocats, *International Report on Professional Secrecy and Legal Privilege* (2019) 19.

2208 *Michaud v France* App no 12323/11 (ECtHR, 06 December 2012), para 123.

2209 *Campbell v UK* App no 13590/88 (ECtHR, 25 March 1992), para 46 (emphasis added).

2210 On the Court's systemic justification of confidentiality as a general requirement for high-quality legal services, where it has given key significance to 'the general interest' (ibid, para 46) in 'effective representation' (*Oferta Plus SRL v Moldova* App no 14385/04 (ECtHR, 19 December 2006), para 145; *Castravet v Moldova* App no 23393/05 (ECtHR, 13 March 2007), para 49; *Apostu v Romania* App no 22765/12 (ECtHR, 03 February 2015), para 96; *Modarca v Moldova* App no 14437/05 (ECtHR, 10 May 2007), para 87), see Chapter Two, 98ff.

2211 Outside of the constellation of the protection of the rights of others.

2212 cf, for example, *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), para 181.

2213 *Särgava v Estonia* App no 698/19 (ECtHR, 16 November 2021), para 98.

> fidentiality may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place.[2214]

This quote can easily be read as reflecting a fundamental right of the individual (client) and a fundamental, undirected 'rule' of respect for lawyer-client confidentiality. These two duties on the State – a directed duty based on the applicant's private interests, an undirected one based on considerations of public interest – are in harmony as regards the activity of confidential communication. The result is that this is particularly strongly protected, and the Court will apply 'especially strict scrutiny'.[2215]

(b) *An autonomously determined relationship*

Similarly, such harmony underlies the Court's case law that lawyers and clients should, generally speaking, determine the contents of their relationship themselves.

The private interests of clients (and of lawyers) here impose the usual directed duty on the State which prima facie protects them against interference, in line with the position that any State interference with an activity within the scope of a Convention right must be justified.

Moreover, however, the State's undirected duty to ensure legal services *also* requires reticence by the State. This is because – even outside the rights of any individual – the public interest in the rule of law requires the State not to interfere with the provision of legal services. 'Given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the defendant and his or her counsel'.[2216] It is thus

> not the role of the State to oblige a lawyer … to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy. It is in the nature of things that such powers of the State would be detrimental to the essential role of an independent legal

2214 *Canavcı and others v Turkey* App no 24074/19 and others (ECtHR, 14 November 2023), para 96.

2215 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669; *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020), para 125, as well as the cases cited in Chapter Two at 111.

2216 *Siałkowska v Poland* (n 2193), para 99, as well as the cases cited in Chapter Two at 126.

> profession in a democratic society which is founded on trust between lawyers and their clients.[2217]

In addition to the private interests of clients and lawyers in the State not interfering in their internal relationship, there is thus a *public* interest that the State generally leave this relationship to the parties concerned. Once again, harmony between the directed and undirected duties involved leads to elevated protection.

2. Elevated protection for lawyers' external activities

Beyond this elevated protection for the internal lawyer-client relationship, the same tendency towards harmony and mutual reinforcement also underlies a part of the cases regarding lawyers' external activities. Lawyers' position, here, is protected by two different kinds of duties on the State. On the one hand, it is protected by the directed duties which require the State to secure their private interests in, for example, freedom of expression and bodily integrity.[2218] On the other hand, the fact that lawyers need to be able to engage in certain activities in order for the rule of law to function imposes an undirected duty – based on public interests – on the State to protect lawyers when engaging in activities that the Court sees as furthering the public interest in the rule of law. Together, these lead to elevated protection.

(a) *Freedom of expression for lawyers in court proceedings*

A particularly clear example is the case law on freedom of expression for lawyers in judicial proceedings.[2219]

Lawyers, on the Court's understanding, retain their Convention right to freedom of expression under Art. 10 even when acting in judicial proceedings and thus as 'officers of the court'.[2220] From the Court's point of view, their private interest in being able to express themselves freely can thus generate directed duties on the State.

2217 Ibid, para 112.
2218 On the difficulties related to protecting lawyers' private interests see Chapter Eight, 423ff.
2219 See Chapter Three, 158ff.
2220 On this term see Chapter Five, 228.

In addition, however, there is also an undirected duty on the State requiring it to protect lawyers' ability to make statements in judicial proceedings. This undirected duty derives not from the lawyer's own interests, but from the public interest in securing the effective representation of clients as part of the rule of law. This departure from the private interests of the lawyer is perhaps particularly clear from a statement in *Bono v France* (2015) that 'as regards "conduct in the courtroom", … only those remarks which exceed what is permitted by the exercise of defence rights would legitimise restrictions on the freedom of expression of lawyers'.[2221] The Art. 10 rights of the applicant lawyer themselves are therefore not the only or main standard; instead, the 'permission' in question flows from the interest in the exercise of defence rights.[2222]

This public-interest obligation on States to protect lawyers' speech in judicial proceedings explains the Court's strong focus on the relationship between the lawyer's expression and their function in the proceedings at instance,[2223] as well as the Court's emphasis on the impact that a certain decision may have more generally on lawyers other than the applicant,[2224] neither of which are related to the lawyer's private interests. Furthermore, it explains why the Court, in these cases, makes the otherwise terminologically odd choice of departing from the traditional logic of human rights analysis and speaks of the applicant's 'duties'[2225] as opposed to the client's rights.[2226] That there is more than just a private interest involved is, moreover clear from the way the Court has struggled to find a subjective private right to attach this public-interest obligation to. For example, in eg

2221 *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 46.

2222 And, in some specific situations, in access to justice, cf eg *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019), para 70 as regards a limitation on a lawyer's freedom of expression that would have effectively made it impossible to bring the case in question to court at all and thus would have led to a problem regarding Art. 6 under that aspect.

2223 cf eg *Kyprianou v Cyprus [GC]* (n 2195), para 179, where the Grand Chamber emphasised that 'albeit discourteous, [the applicant's] comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder'.

2224 See the discussion in ibid, para 175, of the '"chilling effect" not only on the particular lawyer concerned but on the profession of lawyers as a whole'.

2225 cf eg ibid, para 181.

2226 cf eg *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018), para 54, 'remarks were thus made in a forum where his client's rights were naturally to be vigorously defended'.

Nikula v Finland it argued both by reference to the lawyer's own Art. 10 rights and the client's Art. 6 rights[2227] and ultimately resigning itself to 'considerations of fairness'.[2228] This is because the more significant duty on the State is an undirected duty on the State to ensure effective representation.

The cases on lawyers' freedom of expression in judicial proceedings therefore engage not only the rights of the lawyer (and the corresponding directed duties),[2229] but also an undirected duty on the State requiring it to protect legal services. Here, these two duties are in harmony, both militating for strong protection of lawyers' speech in court. As a result of this mutual reinforcement, the latter will benefit from 'increased protection'.[2230]

(b) *Protection of lawyers against the State in fields other than freedom of expression*

Moreover, a similar example of harmony concerns the cases on protection of legal services against State officials in fields other than freedom of expression.[2231]

Once again, lawyers' private interests in eg freedom and bodily integrity impose directed duties on the State, much like any non-lawyer's interests would.

In addition, however, there is also an undirected duty on the State to protect the work of lawyers, which derives from the public interest in the rule of law. That this obligation does not derive from the private interests of the applicant is clear from a number of features of the case law: The Court refers to the applicant lawyer's acting in their professional functions,[2232] explicitly focuses on the duties of the State rather than the applicant's

2227 *Nikula v Finland* (n 2196), para 49, discussed in Chapter Three, 159ff.
2228 Ibid, para 49.
2229 Indeed, perhaps they are best seen as not engaging private interests on the part of the lawyer at all, as has been argued in Chapter Eight, 423ff.
2230 *Čeferin v Slovenia* (n 2226), para 57.
2231 See Chapter Three, 183ff.
2232 cf eg *François v France* App no 26690/11 (ECtHR, 23 April 2015), para 51ff, as well as *Cazan v Romania* App no 30050/12 (ECtHR, 05 April 2016), para 41, discussed in Chapter Three at 183ff.

rights,[2233] and draws on soft-law instruments to concretise the State's undirected duties.[2234]

Together, this combination of directed and undirected duties leads to particularly strong protection because the private interests of the applicant and the public interest in effective legal services pull in the same direction.

3. Protection against disbarment

A further example of harmony relates to cases which concern abusive dismissal from the profession of lawyer (disbarment).[2235]

Here, the Convention provides a certain level of protection for the private interests of the lawyer. Art. 8, in the interpretation the Court has by now developed, protects

> the right to form and develop relationships with other human beings and the outside world, including relationships of a professional or business nature [because] [i]t is, after all, in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world.[2236]

This is, in essence, a private interest, general to any professional activity.[2237] However, it is not generally classed as an interest that is protected particularly strongly under the Convention, in line with the fact that the Convention does not contain an explicit right to choose one's profession or engage in professional activities.

In addition to these potential directed duties, there is also an undirected duty on the State requiring it to particularly protect lawyers against disbarment. This flows not from the interests of the individual lawyer, but from the general public interest in legal services, and, in the Court's case law, specifically in human rights defence. This undirected duty requires the

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2233 eg *Cazan v Romania* (n 2232), paras 42, 68, where the Court focused on the obligations of the police to respect the role of lawyers and not to interfere unduly with their work, rather than on subjective rights.

2234 cf eg ibid, para 41.

2235 See eg Chapter Four, 207. Cases concerning the exclusion of certain persons from the provision of legal services in the interest of complying with the State's obligation to ensure legal services are dealt with below in the 'conflict' section at 471.

2236 *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 87.

2237 cf eg Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, CH Beck 2021), § 25, para 37ff.

State to ensure that lawyers are not disbarred for extraneous reasons that have nothing to do with the legal services sector, for example for political reasons. That this is not primarily based on the private interests of the applicant lawyer, but instead on the public interest in the rule of law, is clear from cases such as *Bagirov v Azerbaijan* (2020), where the Court noted that 'against th[e] background' of 'a pattern of arbitrary arrest, detention or other measures taken in respect of government critics, civil society activists and human rights defenders' 'the alleged need in a democratic society for a sanction of disbarment of a lawyer in circumstances such as this would need to be supported by particularly weighty reasons'.[2238] These considerations have little to do with the applicant's private interests and the directed duties they generate; instead, they are central to the State's undirected duty to ensure legal services and thus derive from a public interest.

4. Watchdog cases

Moreover, the 'watchdog' cases discussed above are also ones of harmony.[2239]

Once again, Art. 10 § 1 protects the private interest in expressing oneself and creates corresponding directed duties on the State.

In addition, however, the State is under an undirected duty to ensure that lawyers can comment on matters of public debate. The Court has 'reiterate[d] that the freedom of expression of lawyers is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice'.[2240] That language focuses not on the applicant's interests, but on the public interest in having lawyers contribute to political debate. The shift away from the applicant's private interests and towards an undirected duty is moreover clear from the Court's statement explicitly 'draw[ing] the Government's attention to Recommendation R(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, which clearly stated that lawyers should enjoy freedom of expression'.[2241] Again, this

2238 *Bagirov v Azerbaijan* (n 2236), para 103.
2239 See Chapter Four, 208ff.
2240 *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), para 60, as well as the cases discussed in Chapter Four, 208ff.
2241 Ibid, para 60. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

relates not to the applicant's private interests, but to a wider public interest concerning legal services.

5. The *Elçi* doctrine as recognition of the State's undirected duties?

The foregoing has shown that those cases in which the Court grants elevated protection under the Convention can be understood as the result of harmony between the State's directed duties towards individual applicants and its undirected duties requiring it to ensure legal services. However, it is noticeable that the Court has not highlighted that the latter obligation is equally legally binding under the Convention. Nonetheless, some allusion to this undirected duty derived not from the interests of the applicants, but from a broader public interest in legal services, can be derived from the cases using the *Elçi and others v Turkey* (2003) doctrine,[2242] which arose in a case concerning alleged harassment of lawyers for their human rights work.

In that doctrine, the Court makes no reference to any individual rights, nor indeed to any one identifiable Convention norm. Instead, the Court simply 'emphasised the central role of the legal profession in the administration of justice and the maintenance of the rule of law',[2243] two public-interest goals. In fact, even the subjective position of 'the freedom of lawyers to practise their profession without undue hindrance' was protected as 'an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention'.[2244] This is a justification that differs significantly from the private interests that human rights traditionally protect and highlights that the protection of legal services does not derive from individual interests.

Moreover, the undirected nature of this duty is emphasised by the way the Court classes the additional protection lawyers will enjoy in the harmony cases as *derivative* of their membership of a group, since 'persecution or harassment of members of the legal profession … strikes at the very heart of the Convention system'.[2245] The public-interest nature of this undirected obligation is, moreover, also evident in the Court's focus on 'chilling

2242 See Chapter Five, 240ff.
2243 *Elçi and others v Turkey* (n 2215), para 669.
2244 Ibid, para 669.
2245 Ibid, para 669.

effect',[2246] on its own 'constitutional' role[2247] and in its heavy use of soft-law documents in these cases.[2248]

While the Court has not said as much, on the analysis proposed here the *Elçi* doctrine can be seen as recognition of the State's undirected, public-interest obligations: The State is under an obligation to ensure legal services, which can then interact with the duties generated by individual rights to reinforce these.

IV. Undirected duties and individual rights: Conflict

While for the 'harmony' cases, both the directed duties resulting from the applicant's private interests and the State's undirected duties to ensure legal services militate for the same result, it is also possible for these two obligations to conflict. In these cases, there are two conflicting obligations on the State: The applicant's rights and the State's obligation to ensure legal services pull in different directions, with the Court consistently giving greater weight to the latter. The fact that the State is acting to fulfil its latter undirected duty allows it to provide a lower level of protection to the individual, allowing it to limit the individual's rights to a greater extent than it otherwise could.

1. Lawyers' freedom of expression outside the courtroom

A first example of such conflict is the case law on lawyers' freedom of expression outside the courtroom.[2249]

Here, Art. 10 protects the lawyer's right to freedom of expression and imposes a corresponding directed duty on the State to protect the lawyer's private interests.

However, the Court assumes that the State's undirected duty to ensure legal services includes imposing limitations on lawyers' freedom of expression outside of court. There is thus, in these cases, a countervailing obliga-

2246 Ibid, para 714, as well as Chapter Six, 335ff.
2247 See *Annagi Hajibeyli v Azerbaijan* App no 2204/11 (ECtHR, 22 October 2015), para 36, and *Aliyev v Azerbaijan* (n 1977), para 225, discussed in Chapter Five at 247ff.
2248 Chapter Five, 256.
2249 See Chapter Three, 170ff.

tion under the Convention. This permits States to restrict lawyers' freedom of expression to a greater extent than that of other human-rights holders.

While the Court has not explicitly said as much, its language can perhaps better be explained by means of this idea of an undirected duty on the State. This is evident, in particular, from wording that is largely devoid of any direct reference to subjective Convention rights. Instead, the Court highlights that 'the defence of a client by his lawyer must be conducted not in the media, save in very specific circumstances …, but in the courts of competent jurisdiction',[2250] in keeping with the 'dignity of the legal profession'.[2251] The Court also heavily emphasises lawyers' 'tasks',[2252] in a notable shift away from the traditional idea of human rights as creating rights for individuals.

The result is that in these cases, the level of protection that Art. 10 ECHR would otherwise provide is reduced due to the States' undirected duty to ensure the Court's vision of a functioning legal services sector.

2. State regulation of legal services

Moreover, the Court's case law on State regulation of legal services[2253] can also be understood as an example of conflict between directed duties based on individuals' rights and the State's undirected duty to ensure legal services.

As has been shown above, the Convention rights generally protect at least to a certain degree the private interest in professional activities, including exercising the profession of lawyer. Art. 8 protects the right of access to the legal profession[2254] as well as the exercise of the profession, which can also be protected by Art. 1 Protocol 1.[2255] Art. 8 also generally protects against disbarment.[2256]

2250 *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 171, discussed in greater detail in Chapter Three, 173ff.

2251 *Schöpfer v Switzerland* (n 2196), para 33; *Kincses v Hungary* (n 2195), para 38; as well as the cases cited in Chapter Five at 259.

2252 *Morice v France [GC]* (n 2250), para 149.

2253 See Chapter Five, 260ff.

2254 *Bigaeva v Greece* App no 26713/05 (ECtHR, 28 May 2009), para 31, as well as the cases cited in Chapter Four at 202.

2255 *Döring v Germany (dec)* (n 2191) and the cases cited in Chapter Four at 202.

2256 *Bagirov v Azerbaijan* (n 2236), para 101 as well as Chapter Four at 207.

On the other hand, the Court assumes an undirected duty on the States requiring them to regulate the provision of legal services to ensure, for example, certain quality standards. This can lead to limitation of individual rights.[2257] The Court assumes that the State should ensure eg minimum levels of competence, 'protect[ing] the public by ensuring the competence of those carrying on the legal profession'.[2258] The Court also accepts that the State may introduce requirements based on individuals' personal standing,[2259] for example where they are insufficiently independent[2260] or are not of 'good character',[2261] or as a result of violations of disciplinary rules.[2262] Moreover, the Court sees the State's obligation to ensure legal services as comprising the possibility to limit commercial expression by lawyers.[2263] These considerations are typically linked to the State's undirected duties as regards legal services: For example, the Court has held that 'it is certainly the task of the judicial and disciplinary authorities, *in the interest of the smooth operation of the justice system*, to take note of, and even occasionally to penalise, certain conduct of lawyers',[2264] and that disbarment in a certain case 'pursued the legitimate aim of protecting the public by ensuring the integrity of those carrying out the legal profession and also the proper administration of justice'.[2265] This link between ensuring legal services and the public interest is particularly clear in eg *Helmut Blum v Austria* (2016), where the Court 'accept[ed] the Government's argument that the [disciplinary] measure aimed to protect public interests and the reputation of the legal profession and therefore the administration of justice itself'.[2266]

2257 See Chapter Five, particularly at 261ff.

2258 *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005), para 93.

2259 Chapter Five, 267ff.

2260 cf *Lederer v Germany (dec)* App no 6213/03 (ECtHR, 22 May 2006), discussed in Chapter Five at 268.

2261 cf *Biagioli and Biagioli v San Marino (dec)* App no 8162/13 (ECtHR, 08 July 2014), discussed in Chapter Five at 269.

2262 See Chapter Five, 275ff.

2263 cf *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994), discussed in Chapter Five at 231ff.

2264 *Bono v France* (n 2221), para 55 (emphasis added).

2265 *Biagioli and Biagioli v San Marino (dec)* (n 2261), para 102.

2266 *Helmut Blum v Austria* App no 33060/10 (ECtHR, 05 April 2016), para 64. Similarly, in *Bagirov v Azerbaijan* (n 2236), para 97, the Court accepted that the applicant's disbarment for statements made in court 'had pursued the legitimate aim of "the prevention of disorder" within the meaning of Article 8 § 2 of the Convention, since it concerns the regulation of the legal profession which participates in the good administration of justice'.

Finally, the Court has also highlighted that Bar associations and disciplinary law serve 'the public interest'.[2267]

In these cases, then, there is a conflict between the directed duties owed to individuals and based on their private interests and the State's undirected duties to ensure legal services in the public interest. The result is that the level of protection accorded by the Convention rights will be reduced as a consequence of the State's obligation to ensure legal services.

3. Protecting legal services against third parties

Moreover, the 'conflict' group can go beyond conflict between the lawyer's or client's rights and the State's undirected duty to ensure the functioning of the legal services sector. Those rare cases where the State intervenes against third parties to protect the public interest in legal services also fall into this category.[2268] A clear example is *Mesić*,[2269] where the applicant had made threatening remarks towards a lawyer acting in his professional functions and had then been sentenced for defamation: These remarks fell within the scope of Art. 10 ECHR.[2270] However, on the other hand, the State's obligation under Art. 10 ECHR was in conflict with the State's undirected duties to protect legal services. As a result, the State could rely on both the rights of the lawyer[2271] and its own undirected duty to protect legal services when it interfered with the applicant's freedom of expression, giving it a particularly strong justification.

2267 *Casado Coca v Spain* (n 2263), para 39; *Tuheiava v France (dec)* App no 25038/13 (ECtHR, 28 August 2018), paras 25, 26.

2268 Note that the Court classes many of these situations as 'disconnect', cf 457, since it does not see the State's undirected duty as generally comprising an obligation to protect lawyers against attack by non-State actors.

2269 *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022), discussed in detail in Chapter Six, 344ff.

2270 Ibid, paras 33ff, 76.

2271 To this extent, the case would have been one of 'harmony' had the reverse case been brought by the lawyer.

4. Recognition of the conflict cases in the Convention?

Moreover, the 'conflict' cases are particularly simple to bring within the Convention text. In line with the combination of rights-enhancing and rights-reducing effects identified above for a number of the State's undirected duties,[2272] the Convention can relatively easily be interpreted to recognise the State's ability to limit private interests where the public interest in legal services so requires. As discussed above, Art. 10 § 2 explicitly sets out that 'maintaining the authority and impartiality of the judiciary' is an aim that is in principle 'necessary in a democratic society'. On the Court's constant case law, the phrase 'authority of the judiciary' 'includes, in particular, the notion … that the public at large have respect for and confidence in the courts' capacity to fulfil [their] function'.[2273] Simultaneously, the Court has also held that 'for the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation',[2274] and has classed 'the dignity of the legal profession' as part of the 'protection of the interest of the proper administration of justice'.[2275] Arguably, maintaining the authority and impartiality of the judiciary thus also requires protection of legal services, which, if one interprets Art. 10 § 2 in this way, can also justify the limitation of subjective rights where the State's undirected duty to ensure legal services so requires.

5. The *Nikula* doctrine as recognition of the State's undirected duties?

The cases in which the Court lowers the protection provided by the Convention can thus be explained as the result of a conflict between the Convention rights' protection of private interests (which impose corresponding directed duties on the State) and the State's undirected duty to ensure legal services. While it has been shown above that for the 'harmony' cases the closest the Court has come to naming this undirected public-interest duty has been in the *Elçi* dictum, for the conflict cases it is the *Nikula v Finland*

2272 See Chapter Seven, 368ff.
2273 *The Sunday Times (No 1) v UK [Plenary]* App no 6538/74 (ECtHR, 26 April 1979), para 55.
2274 *Kyprianou v Cyprus [GC]* (n 2195), para 175; *Kincses v Hungary* (n 2195), para 34.
2275 *Kincses v Hungary* (n 2195), para 38.

(2002) dictum,[2276] which arose in the context of a prosecutor's defamation claim in reaction to in-court criticism by a defence attorney.

At its core, the *Nikula* dictum justifies that the State can limit individual rights where the Court sees it as fulfilling its undirected obligation to ensure legal services,[2277] although once again – in a crucial difference to the analysis proposed here – the Court has not explicitly held that this is a legal obligation flowing from the Convention. However, as with the *Elçi* doctrine in the 'harmony' cases, the Court makes a number of references to the idea that the State, in the 'conflict' cases, is acting in line with an (undirected) duty to ensure legal services.

Most clearly, this is the case when the Court justifies restrictions on individuals' rights by reference to the general situation of lawyers. As such, the 'special role of lawyers, as independent professionals, in the administration of justice entails a number of duties'.[2278] Therefore, lawyers' 'position explains the usual restrictions on the conduct of members of the Bar'.[2279] It is consequently 'legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence'.[2280] This marks a significant departure away from the classic language of individual Convention rights that can best be explained as the result of an undirected duty on the State to ensure legal services. That this is, moreover, an obligation in the public interest, rather than one directed towards any private individual, is clear when the Court refers, in the cases concerning restrictions on lawyers' freedom of expression, to a bundle of public concerns. Here, it has highlighted 'the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices'.[2281] Notably, none of these are *private* interests assigned to any one individual; instead, they are all *public* interests.

2276 See Chapter Five, 227ff.
2277 See Chapter Five, 235ff.
2278 *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 46.
2279 *Nikula v Finland* (n 2196), para 45.
2280 *Schöpfer v Switzerland* (n 2196), para 29.
2281 *Casado Coca v Spain* (n 2263), para 55. Similar phrases appear in eg *Schöpfer v Switzerland* (n 2196), para 32; *Nikula v Finland* (n 2196), para 46; *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004), para 28; *Kincses v Hungary* (n 2195), para 38.

The *Nikula* doctrine, then, can be seen as recognition of the potential conflict between the directed duties the State owes to the applicant and its undirected, public-interest duty to ensure legal services, thus forming the conceptual underpinning for the 'conflict' cases discussed above.

V. Conclusion: Combining rights and undirected duties

As has been shown, then, it is entirely possible to understand the Court's case law on legal services as reflecting the relationship of two different duties on the State, the directed duties grounded in the rights of the applicant in each case and the State's undirected duty, grounded in the public interest, to ensure legal services. There are three possible relationships between these two duties: disconnect, where realising one of the duties has no implications on the other; harmony, where both duties reinforce each other; and conflict, where the State's duties conflict, with greater weight given to the undirected duty. In this chapter, it has been established that the relationship between these two duties can explain the Court's case law without changing the outcomes of any individual case, and is thus a possible substitute for the Court's current analysis focusing only on directed duties towards the individual rights holder. The following chapter explains why recognising undirected duties under the Convention is preferable.