Chapter Three: Legal Services and the Client's Private Interests: The External Dimension

While the previous chapter has discussed the way the Court protects the client's private interests[650] by granting additional protection to the internal relationship between lawyer and client, on its own this internal relationship will typically cover only a part of clients' needs. Typically – unless all the client wishes is to take advice and then remain passive – the internal dimension will only be a preparatory step, and some sort of external action in the client's interests, such as legal representation, will be necessary. The Court reflects this in specific case law dealing with lawyers acting externally, ie towards third parties, in the client's private interests.

Roughly speaking, the Court's case law here can be divided into two main areas. There is extensive case law concerning the actions of lawyers on behalf of clients in the domestic legal system (I.). Given that lawyers' representative activities frequently involve communication, this case law focuses in particular on Art. 10 and a modified[651] right to freedom of expression, although there is also case law on other elements of legal services' providers activities at the domestic level. Beyond this case law on lawyers' activities at the domestic level, there is also significant case law on lawyers' activities before the Court itself (II.), where Art. 34 (2) ECHR provides explicitly that States should not interfere with the work of lawyers applying to the European Court of Human Rights.

I. Protection for legal services provided at the domestic level

As regards protection of legal services provided at the domestic level, the most developed area of the Court's case law is freedom of expression for lawyers exercising representative functions (1.). Beyond this, there is also case law regarding the protection of legal services in other contexts, such as harassment of lawyers in relation to their activities in specific cases (2.).

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

651 Not necessarily elevated, as will be seen in the case law on statements made outside the courtroom, 170ff below.

1. Freedom of expression for lawyers exercising representative functions

Due to a variety of factors – the essential nature of communication for many legal services (such as representation in litigation or before State authorities), the risk for conflict with third parties this entails and, possibly, lawyers' elevated willingness to take cases all the way through their domestic legal system to the European Court of Human Rights[652] – freedom of expression where lawyers exercise representative functions forms the most developed area of the Court's case law on legal services.[653] Before turning to the details of the Court's jurisprudence in this area, however, it is worth making a few introductory notes.

The first of these relates to how controversial the cases concerning Art. 10 and lawyers often are even within the Court itself. A number of the Court's verdicts, indeed seemingly the majority, have not been reached unanimously.[654] This is presumably due to several factors, which in turn interact heavily with the concept of 'legal culture'. First, from a linguistic point of view, accurately conveying the weight of offensive statements in a different language is particularly difficult.[655] Second, there is also a heavy and frequently unconscious cultural element to the relationship between the various participants to court proceedings. Statements acceptable in one particular legal culture will not necessarily be so in another.

652 The sanctions at issue in the case law differ drastically, ranging from largely symbolic ones (eg *Ottan v France* App no 41841/12 (ECtHR, 19 April 2018), para 73, which concerned a 'warning', the lightest possible penalty in disciplinary proceedings) to those with severe financial repercussions running far into the tens of thousands of Euros (eg *Karpetas v Greece* App no 6086/10 (ECtHR, 30 October 2012), para 24, where the first-instance court sentenced the applicant to pay almost 90,000 EUR in damages).

653 51 of the 345 cases on legal services in the study related to this field. The Court considers its case law 'well-established' in the sense of Art. 28 § 1 (b), meaning judgments can be issued in committee formation, cf below n 840–842 and accompanying text.

654 To name but a few, *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998); *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002); *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004); *Schmidt v Austria* App no 513/05 (ECtHR, 17 July 2008); *Žugić v Croatia* App no 3699/08 (ECtHR, 31 May 2011); *Peruzzi v Italy* App no 39294/09 (ECtHR, 30 June 2015); *Rodriguez Ravelo v Spain* App no 48074/10 (ECtHR, 12 January 2016); *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018).

655 As noted in Judge Galic's dissenting opinion in *Čeferin v Slovenia* (n 654), as well as Judge Kūris' concurring opinion in the same case.

The large variety of different cultures at the level of the Court may therefore go some way towards explaining why these cases so frequently cause disagreements on the bench;[656] what may be seen as a permissible expression of advocatory zeal in one system may be seen as impermissible disrespect in another.[657] Nonetheless, despite how frequently the Court fails to achieve unanimity in deciding these cases, the Court itself has held that there is neither a 'clear lack of common ground among member States regarding the principles at issue' nor 'a need to make allowance for the diversity of moral conceptions'.[658] This is at least questionable; while there may be a common 'moral conception' that lawyers shall not address judges or prosecutors in an impermissible way, what exactly will be 'impermissible' is clearly something on which even the Court frequently disagrees. To make matters more complicated, there is often also a temporal element involved: Due to the Court's limited ability to process cases, so much time may have elapsed in between the initial statements and the Court's decision that values may have been shifted in between.[659]

In addition, as a backdrop to the Court's case law specifically protecting expression by lawyers, it is also worth remembering that even for non-lawyers the Court has generally recognised that, in line with its hierarchisation

656 One sometimes also has the suspicion that whether or not the respective judge has a background as an attorney or generally in litigation also plays something of a role here. For an attempt at statistical analysis of judicial background and decision-making tendencies see Kanstantsin Dzehtsiarou and Alex Schwartz, 'Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why it Matters' (2020) 21 German Law Journal 621.

657 It is worth noting that a unified standard exists at the European level as regards 'insulting or provocative language' in the context of abuse of the right of application within the meaning of Art. 35 § 3, cf eg *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 116ff.

658 *Nikula v Finland* (n 654), para 46; *Schmidt v Austria* (n 654), para 36. A French version of the quote noting that 'dans le cas d'espèce, il n'existe pas de circonstances particulières – telles qu'une absence évidente de concordance de vues au sein des Etats membres quant aux principes en cause ou à la nécessité de tenir compte de la diversité des conceptions morales' appears in eg *Rodriguez Ravelo v Spain* (n 654), para 41.

659 For example, the case of *Čeferin v Slovenia* (n 654), decided in 2018, concerned an application lodged in 2008 regarding statements made in 2004. It is hard to imagine that conceptions of appropriate behaviour should have remained totally unchanged in this time period. As yet, it is not clear what impact the new case-processing strategy announced in European Court of Human Rights, *"A Court that matters/Une Cour qui compte" - A strategy for more targeted and effective case-processing* (2021) will have on these cases.

of different types of speech, criticism of the judiciary will be particularly protected under Art. 10. In this respect, 'it is one of the precepts of the rule of law that citizens should be able to notify competent State officials about conduct of civil servants which to them appears irregular or unlawful' and that therefore 'the important role that the judiciary plays in a democratic society cannot in itself immunise judges from being targets of citizens' complaints'.[660] Moreover, the Court has also held that the accused's defence speech in criminal proceedings is particularly protected,[661] since 'sanctions imposed in relation to statements made by the accused in a criminal case or his counsel can also affect the right to a fair trial, by dissuading them from mounting a vigorous defence'.[662] Although the explicit reference to defence rights might suggest otherwise, this stronger protection does not appear to be limited to the accused in criminal proceedings. Instead, there is some indication that the Court will generally take the view that freedom of expression in the courtroom should be wider than elsewhere.[663]

Nonetheless, the situation of non-lawyers is not entirely identical to that of lawyers: While lawyers will be acting to secure the rights of others and in this sense are fiduciaries,[664] they are also – unlike ordinary citizens – frequently classed as 'officers of the court' or in a similar way partially integrated into the justice apparatus.[665] Consequently, the Court has referred to 'specific principles' applicable to 'freedom of expression in [the] capacity

660 *Bezymyannyy v Russia* App no 10941/03 (ECtHR, 08 April 2010), para 40; *Łopuch v Poland* App no 43587/09 (ECtHR, 24 July 2012), para 63.

661 *Miljević v Croatia* App no 68317/13 (ECtHR, 25 June 2020), para 65ff; *Zdravko Stanev v Bulgaria (No 2)* App no 18312/08 (ECtHR, 12 July 2016), para 38, where the Court set out a number of cases 'relating to disparaging statements against judges or public prosecutors made by unrepresented litigants in the course of or in connection with judicial proceedings'.

662 *Zdravko Stanev v Bulgaria (No 2)* (n 661), para 40; *Spirovska and Spirovski v North Macedonia (dec)* App no 52370/14 (ECtHR, 15 September 2020), para 28. Ironically enough, the cases refer back to *Nikula v Finland* (n 654), *Steur v the Netherlands* App no 39657/98 (ECtHR, 28 October 2003), and *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), all of which concern freedom of expression for defence counsel rather than for the defendant themselves.

663 *Mariapori v Finland* App no 37751/07 (ECtHR, 06 July 2010), para 62. The case concerned a defamation prosecution regarding witness testimony in other proceedings and cites *Nikula* extensively.

664 On the tension this leads to with traditional understandings of human rights see Chapter Eight, 423ff.

665 See Chapter Five, 225ff.

as a lawyer',[666] which, as will be shown, does not necessarily mean that lawyers' freedom of speech will always be protected more strongly than that of their clients.

Turning now to the Convention's protection of representative activities by lawyers, a first point is that the Court will measure speech by lawyers (both in court and out of court) against the lawyer's human rights.[667] While this is not without conceptual difficulties,[668] it does mean that, notwithstanding a representative function, lawyers will enjoy Convention rights of their own in the Court's jurisprudence,[669] which are then modified by reference to their role as lawyers.[670] Building on this, as a general – although not always strictly followed – rule, the closer the connection between a statement and legal representation, the greater the protection it will enjoy.[671] As such, the Court differentiates generally between statements made within court proceedings and those made outside of these in fora

666 *Čeferin v Slovenia* (n 654), para 47. See also *Fuchs v Germany (dec)* App no 29222/11 (ECtHR, 27 January 2015), para 39, and *Peruzzi v Italy* (n 654), para 50.

667 Indeed, in later cases this has not even been disputed by the parties, cf *Kyprianou v Cyprus [GC]* (n 662), para 151; *Rodriguez Ravelo v Spain* (n 654), para 41, and even earlier than this in *Schöpfer v Switzerland* (n 654), para 33 the Court held that 'it goes without saying that freedom of expression is secured to lawyers, too'.

668 Discussed in Chapter Eight.

669 And indeed, as will be shown, in the context of Art. 34 complaints by the client the rights of the representative appear to be so strong as to potentially displace the client's rights, cf *Hilal Mammadov v Azerbaijan* App no 81553/12 (ECtHR, 04 February 2016), para 119; *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), para 187; *Annagi Hajibeyli v Azerbaijan* App no 2204/11 (ECtHR, 22 October 2015), para 70. In this respect, see the discussion below in the section on Art. 34 (194 ff).

670 eg *Rodriguez Ravelo v Spain* (n 654), para 43, where the Court explicitly referred to 'la protection de la liberté d'expression du requérant en sa qualité d'avocat', 'the protection of the applicant's freedom of expression in his capacity as a lawyer' (author's translation).

671 cf eg *Radobuljac v Croatia* App no 51000/11 (ECtHR, 28 June 2016), para 66, where the Court stressed that the applicant's comments 'were aimed at the manner in which the judge was conducting the proceedings … and thus … were strictly limited to the judge's performance in his client's case, and distinct from criticism focusing on his [the judge's] general qualities, professional or otherwise', as well as the similar statement in *Steur v the Netherlands* (n 662), para 41. The opposite is also true, cf *Peruzzi v Italy* (n 654), para 62, where the Court distinguished *Nikula v Finland* (n 654) on the grounds that unlike in *Nikula* 'the applicant's criticisms were not made at the hearing or in the course of the judicial proceedings for the partition of an inheritance'.

such as newspaper interviews and other media.[672] Indeed, in *Morice v France* the Grand Chamber explicitly noted that 'a distinction should, however, be drawn depending on whether the lawyer expresses himself in the courtroom or elsewhere'.[673]

(a) *Freedom of expression in court proceedings*

As regards freedom of expression in court proceedings, the Court has consistently been concerned to secure a particularly high level of Convention protection, although it has also held that 'freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions' on this right.[674] The seminal judgment in this respect is *Nikula v Finland* (2002), which despite its formal status as a Chamber judgment by the Fourth Section went on to lay the groundwork for much of the subsequent case law and is now typically cited in one breath with *Kyprianou v Cyprus*, a judgment by the Grand Chamber.

i. Nikula v Finland *and conflicts between lawyers and prosecutors*

In *Nikula*,

> [t]he applicant alleged that her freedom of expression had been infringed on account of her having been convicted of defamation for having criticised, in her capacity as defence counsel, the public prosecutor's decisions to press charges against a certain person (thereby preventing the applicant's client from examin-

672 A distinction that echoes some domestic approaches, see eg *Munster v Lamb* (1883) 11 QBD 588, discussed in eg *Arthur J S Hall v Simons* [2002] 1 AC 615 (HL) for English law, or the domestic decisions leading up to the ECtHR judgment in *Ottan v France* (n 652).

673 *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 136. See also eg *Karpetas v Greece* (n 652), para 75, and *Furuholmen v Norway* App no 53349/08 (ECtHR, 18 March 2010) 11, where the Court referred to this as 'an essential feature of the present case'.

674 *Kyprianou v Cyprus [GC]* (n 662), para 174; *Radobuljac v Croatia* (n 671), para 58.

> ing him as a witness) and not to charge another person (who had therefore been able to testify against the applicant's client).[675]

The Fourth Section, after making explicit reference to the UN Basic Principles[676] and Recommendation R(2000)21,[677] made some general statements on 'the special status of lawyers'[678] and then noted that 'while lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds', which will depend on 'the right balance between the various interests involved'.[679] The Court, in a nod to the fiduciary nature of lawyers' expression in court, noted that it

> would not exclude the possibility that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. 'Equality of arms' and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties.[680]

Nonetheless, the Court 'reject[ed] the applicant's argument that defence counsel's freedom of expression should be unlimited',[681] effectively amounting to a refusal to import the immunity called for in paragraph 20 of the

675 *Nikula v Finland* (n 654), para 2 – attentive readers will notice the similarity to the 'role manipulation' cases discussed in Chapter Two. For a French-language summary of *Nikula* see eg *Rodriguez Ravelo v Spain* (n 654), para 45.

676 *Nikula v Finland* (n 654), para 27, more specifically to Paragraph 20 of the Basic Principles, which provides that 'lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings in their professional appearances before a court, tribunal or other legal or administrative authority'. The UN Basic Principles are discussed in Chapter One, 34ff.

677 Ibid, para 28, as well as citing a third-party intervention by Interights which contained a limited (Western European and Common Law) comparative law survey. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

678 Ibid, para 45. These are discussed in greater detail in Chapter Five, 227ff, since they relate to the public-interest dimension of legal services.

679 Ibid, para 46. These quotes originally derive from *Schöpfer v Switzerland* (n 654), para 33. *Schöpfer* is discussed in detail below at 171ff.

680 *Nikula v Finland* (n 654), para 49. While the caveat of these 'certain circumstances' has been frequently repeated, it does not appear that such circumstances have yet reached the Court. The conceptual problems regarding the relationship between 'counsel's freedom of expression' and 'the right of an accused client to receive a fair trial' are discussed in Chapter Eight.

681 Ibid, para 49.

UN Basic Principles[682] into the Convention system. The Court also held that the difference between 'the role of the prosecutor as the opponent of the accused,[683] and that of the judge … should provide increased protection for statements whereby an accused criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole'.[684] Since the applicant's criticism had been 'strictly limited to T.'s performance as prosecutor in the case against the applicant's client', 'in that procedural context T. had to tolerate very considerable criticism by the applicant in her capacity as defence counsel'.[685] In a nod to what would later become the *Morice* line of case law, 'the Court note[d], moreover, that the applicant's submissions were confined to the courtroom, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media'.[686]

In particular, the Court in *Nikula* focused on 'chilling effect':[687]

> [T]he threat of an ex post facto review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their client's interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument[.][688]

682 United Nations, *Basic Principles on the Role of Lawyers* (1990), para 20, which itself was presumably partially inspired by similar protective tendencies under some domestic legal systems. The UN Basic Principles are discussed in Chapter One, 34ff.

683 This turn of phrase is at least unfortunate, at least for those systems not based on adversarial justice. Since in those systems the prosecution's role is to pursue the interests of justice and ensure the correct application of the law, casting the prosecutor as the opponent of the accused is a reductionist view. While frequently the prosecution's goals may be opposed to that of the accused, factors such as eg obligations to introduce exonerating evidence mean that the role of the prosecutor is not per se to be the opponent of the accused.

684 *Nikula v Finland* (n 654), para 50. See also *Schmidt v Austria* (n 654), para 39, where this jurisprudence was transferred to the context of administrative criminal proceedings.

685 *Nikula v Finland* (n 654), para 51.

686 Ibid, para 52, contrasting the present case with *Schöpfer v Switzerland* (n 654).

687 A term explicitly used at *Nikula v Finland* (n 654), para 54. 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.

688 Ibid, para 54. Cited in *Rodriguez Ravelo v Spain* (n 654), para 47 as '[i]l appartient en premier lieu aux avocats eux-mêmes, sous réserve du contrôle du juge, d'apprécier la pertinence et l'utilité d'un argument présenté en défense sans se laisser influencer par "l'effet dissuasif" que pourraient revêtir une sanction pénale même relativement légère.'

The Fourth Section then went on to find that 'it is therefore only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society'.[689] In the absence of such exceptional circumstances, there had been a violation of Art. 10.[690] Ultimately, *Nikula* therefore indicated that when acting in court, lawyers will enjoy elevated protection of freedom of expression, which is justified primarily by reference to their function. *Nikula*'s impact can hardly be overstated; the judgment has since been applied in a number of subsequent cases,[691] and forms one of the central pillars of the Court's jurisprudence in this area.[692]

ii. Kyprianou v Cyprus [GC] *and conflicts between lawyers and judges*

While *Nikula* assessed the limits of expression in relation to criticism of a prosecutor, the subsequent Grand Chamber judgment in *Kyprianou v Cyprus* (2005) concerned the limits of expression as regards judges.[693] In that case, during the course of a murder trial, the applicant defence attorney had become involved in a heated argument with the bench, triggered essentially by his accusation that the judges had not been paying sufficient attention to his cross-examination of a witness.[694] The domestic court, after retiring briefly to consider the matter, convicted the applicant of contempt of court and imposed a (non-suspended)[695] sentence of five days' imprisonment.[696] On the one hand, this case raised the issue whether there had been a violation of Art. 6 § 1 (impartial tribunal) as a result of the same judges

689 *Nikula v Finland* (n 654), para 55.
690 Ibid, para 56.
691 eg recently in *Matalas v Greece* App no 1864/18 (ECtHR, 25 March 2021), para 44.
692 See eg the extensive references in *Morice v France [GC]* (n 673), as well as – for the wider impact of *Nikula* regarding the position of lawyers under the Convention – Chapter Five, 227ff.
693 The Court, to date, has simply focused on professional designations such as judge and prosecutor without showing much awareness that the actual role these persons play in the proceedings differs significantly between different procedural systems, as is the case, most obviously, between inquisitorial and adversarial systems.
694 *Kyprianou v Cyprus [GC]* (n 662), para 17.
695 Ibid, para 20, although in slight mitigation the applicant was 'released before completing the full term'.
696 Ibid, para 18.

who had allegedly been insulted adjudicating the case.[697] Indeed, for the Second Section, which decided at first instance, this was the only problem the case raised, since that panel 'consider[ed] that the essential issues raised by the applicant were considered above under Article 6 of the Convention' and that it was therefore 'not … necessary to examine separately whether Article 10 was also violated'.[698] However, and more significantly for present purposes – the point on Art. 6 § 1, while interesting, not being specific to legal services – the Grand Chamber considered that the case also raised the question of whether the applicant's punishment was compatible with Art. 10 of the Convention in that provision's function of securing freedom of expression for defence counsel.

The Grand Chamber, after running through its previous case law and particularly making reference to *Nikula*,[699] reiterated that 'a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right',[700] before reprising the danger of 'chilling effect'.[701] On the facts of the case, the majority then went on to find that 'Article 10 of the Convention ha[d] been breached by reason of the disproportionate sentence imposed on the applicant',[702] focusing particularly on the 'harsh sentence'[703] of five days' imprisonment as opposed to alternatives such as disciplinary action.[704] In particular, the Grand Chamber highlighted that 'albeit discourteous, [the applicant's] comments were aimed at and limited

697 cf ibid, para 61. Arguably, this was the meat of the Grand Chamber judgment, and was also the reason for third-party interventions by the United Kingdom, Ireland and Malta, all of which operated similar systems in their law on contempt of court.

698 *Kyprianou v Cyprus (Chamber)* App no 73797/01 (ECtHR, 27 January 2004), para 72.

699 *Kyprianou v Cyprus [GC]* (n 662), para 173 – note the focus on the authority of the judiciary rather than the 'rights of others', which the Grand Chamber did not even make reference to. Conversely, in *Nikula v Finland* (n 654), para 38, the Court noted that it 'need not decide whether the proceedings instituted by T. as a private prosecutor served the legitimate aim of protecting the judiciary, as the Court can accept that the interference in any case pursued the legitimate aim of protecting the reputation and rights of T' and proceeded to interact only with the latter.

700 *Kyprianou v Cyprus [GC]* (n 662), para 174.

701 Ibid, para 175.

702 Ibid, para 183.

703 Ibid, para 178.

704 Ibid, para 180. This argument is somewhat problematic conceptually since it ignores the difference in the rationales underlying criminal and disciplinary law, cf Chapter Five, 275ff.

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',[705] and that the 'penalty was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel'.[706] There had therefore not been sufficiently 'exceptional circumstances that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression [could] be accepted as necessary in a democratic society'.[707]

iii. *Conflicts between lawyers and experts*

While *Nikula* therefore elevated protection vis-à-vis prosecutors and *Kyprianou* elevated protection vis-à-vis judges,[708] a third category of case concerns protection vis-à-vis experts.[709] These cases are particularly fraught, since typically one time-tested method of challenging an inopportune expert opinion is to question the qualification of the expert giving it. The

705 Ibid, para 179. For a counter-example, where the Court found that the statements had been made in the context of a personal dispute between the applicant and a judge, see *Ţuluş v Romania (dec)* App no 23562/13 (ECtHR, 17 December 2019), para 27.

706 *Kyprianou v Cyprus [GC]* (n 662), para 181 – note in particular the focus on the performance by lawyers of their duties more generally. In a similar vein, in the French-language case of *Rodriguez Ravelo v Spain* (n 654), para 44 the Court highlighted that '[l]e caractère relativement modéré des amendes dont le non-versement peut entraîner une privation de liberté ne saurait suffire à faire disparaître le risque d'un effet dissuasif sur l'exercice de la liberté d'expression. C'est particulièrement vrai s'agissant d'un avocat appelé à assurer la défense effective de son client …'.

707 *Kyprianou v Cyprus [GC]* (n 662), para 174 with reference to *Nikula v Finland* (n 654), paras 54–55.

708 This separation based on the addressee of the statement also appears in *Zdravko Stanev v Bulgaria (No 2)* (n 661), para 38, where the Court references its case law 'concerning disparaging statements against judges, public prosecutors, expert witnesses or police officers made by defence counsel in the course of judicial proceedings', attaching the addressee in brackets after each cited case.

709 As yet, there does not appear to have been case law regarding freedom of expression as regards statements made about other legal representatives, nor about freedom of expression as regards the other party to proceedings, although note *Veraart v the Netherlands* App no 10807/04 (ECtHR, 30 November 2006), which contains statements made in connection with a case but relating to a third party.

two main cases[710] on this area are more recent, the first being the 2015 admissibility decision in *Fuchs v Germany*, in which the Fifth Section found no violation of Article 10 of the Convention where the applicant lawyer had inter alia been subject to criminal and disciplinary sanctions for his strong criticism of a court expert.[711] In its reasoning in *Fuchs*, the Court noted that the domestic courts had 'carefully examined whether the statements could be justified as a legitimate defence of his client's interests, thereby referring to the Court's case law on the role of the defence counsel in criminal proceedings'.[712] Noting that the domestic courts had effectively taken into account all factors highlighted in the European Court of Human Rights' jurisprudence, the latter observed 'that sworn-in experts must be able to perform their duties in conditions free of undue perturbation if they are to be successful in performing their tasks'[713] before considering 'that the fines imposed on the applicant do not appear to be disproportionate to the aim pursued'[714] and therefore finding no violation.

While that would have tended to indicate reduced protection for statements criticising experts, in the subsequent case of *Čeferin v Slovenia* (2018) the Fourth Section arguably took a more assertive stance. In that case, the applicant lawyer had been representing a defendant charged with threefold murder.[715] As part of his defence, he challenged an expert witness' expertise in sharp words,[716] for which he was fined for contempt of court,[717] and was then also fined a second time 'for his statements in the appeal proceedings regarding the expert witnesses, the State Prosecutor and the first-instance court'.[718]

710 Which unfortunately both concern jurisdictions which conceptualise experts as a sort of assistant to the judge, rather than eg the Common Law approach whereby they are seen as closer to the parties, cf *Fuchs v Germany (dec)* (n 666), para 42; *Čeferin v Slovenia* (n 654), para 16 at 13 within the citation.

711 Which included asserting the expert's willingness to falsify results for personal gain, cf *Fuchs v Germany (dec)* (n 666), para 8.

712 Ibid, para 41.

713 Ibid, para 42.

714 Ibid, para 42.

715 *Čeferin v Slovenia* (n 654), para 6.

716 Ibid, para 7ff. Notably, Judge Galic challenged the English translation of the original Slovenian, which, however, had no impact on the proceedings since the respondent Government had not objected to it (cf Judge Kūris' concurring opinion at 4).

717 Ibid, para 12.

718 Ibid, para 19.

The European Court of Human Rights, after summarising its previous case law, highlighted in particular that the applicant's remarks 'ha[d] to be seen in the context of his complaint' regarding several points related to his client's defence, and that 'the applicant consistently protested about expert opinions which carried significant weight in the prosecution and conviction of his client and that his only way of obtaining new ones was to undermine the credibility of the existing ones'.[719] 'His remarks were thus made in a forum where his client's rights were naturally to be vigorously defended'.[720] Based upon this, the Court 'consider[ed] that the domestic courts … failed to put the applicant's remarks in the context and form in which they were expressed',[721] before explicitly criticising that the domestic courts 'did not in any way appear to have afforded increased protection to the impugned statements',[722] a position which 'g[ave] rise to serious disquiet'.[723] The Court then went on to actually apply its prior dictum that 'it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument',[724] and criticised that 'none of the [domestic] courts explored the relation of the impugned statements to the facts of the case'.[725] Based upon this, the Court 'conclude[d] that the domestic courts ha[d] not furnished "relevant and sufficient" reasons to justify the restriction of the applicant's freedom of expression'.[726]

iv. *Elevated protection for statements made in judicial proceedings*

As a result of the above case law, lawyers acting in the course of judicial proceedings will therefore typically not only fall within the scope of Art. 10,[727] but even enjoy an elevated standard of protection. In later cases, this elevated protection for freedom of expression when speaking in domestic courts has been confirmed: For example, in *Steur v the Netherlands* (2003)

719 Ibid, para 54.
720 Ibid, para 54.
721 Ibid, para 55. It is a little unclear what the Court means by 'put … in the … form'.
722 Ibid, para 57.
723 Ibid, para 58.
724 Ibid, para 61.
725 Ibid, para 62.
726 Ibid, para 66.
727 The conceptual problems this leads to are discussed in Chapter Eight.

the Court applied the *Nikula* argument of reduced protection for prosecutors to a situation where defence counsel had criticised an investigating police officer,[728] and indeed in *Bagirov v Azerbaijan* (2020), the Fifth Section highlighted more generally that

> the domestic courts failed to consider a number of elements which should have been taken into account in the assessment of the applicant's remarks. In particular, they did not give any consideration to the fact that the applicant had made the [impugned] statement in a courtroom in the course of the criminal proceedings in his capacity as the lawyer of his client.[729]

In *Bagirov* the Court, drawing on its earlier case law, then also reaffirmed that 'it is an important consideration that in the courtroom the principle of fairness militates in favour of a free and even forceful exchange of arguments between parties',[730] repeating the *Nikula* dictum.[731]

In other cases, the Court has also emphasised the additional protection that statements in the course of litigation will enjoy, noting 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,'[732] and that 'any *ex post facto* review of offending oral or written submissions on the part of a lawyer must be implemented with particular prudence and moderation'.[733] The Court also highlighted this direct link to proceedings in *Igor Kabanov v Russia* (2011),

728 *Steur v the Netherlands* (n 662), para 39.

729 *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 80 – arguably, this shows particularly clearly the situational approach the Court will take to these cases.

730 Ibid, para 80.

731 *Nikula v Finland* (n 654), para 49. This passage also appears in a number of other judgments, eg *Miljević v Croatia* (n 661), para 54, *Mikhaylova v Ukraine* App no 10644/08 (ECtHR, 06 March 2018), para 93, or *Morice v France [GC]* (n 673), para 137.

732 *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 46 – a statement which indicates perhaps particularly clearly that in reality, what is at stake is not freedom of expression, but the exercise of defence rights on behalf of the accused. In the same judgment, at para 55, the Court went on to find 'that by going beyond the firm and dispassionate position of the Court of Appeal and imposing a disciplinary sanction on the applicant, the authorities excessively undermined the lawyer's task of defending his client'. See also *Saday v Turkey* App no 32458/96 (ECtHR, 30 March 2006), para 34.

733 *Bono v France* (n 732), para 55 (emphasis in original). cf also *Steur v the Netherlands* (n 662), para 44, as well as *Čeferin v Slovenia* (n 654), para 64, where 'the Court [stressed] the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all

where the Court, when faced with sanctions against a defence attorney for boorish behaviour, noted that 'the applicant's conduct reflect[ed] a lack of respect for the judges of the Regional Court. Nonetheless, whilst they were discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case',[734] before going on to find a violation of Art. 10. Similarly, in *LP and Carvalho v Portugal* (2019), where the applicant lawyer had filed a criminal complaint against a judge for defamation and racial discrimination of his clients and had then been successfully sued for damages by that judge, the Court noted that the applicant had simply been defending his clients' interests.[735]

In addition to this generally protective position, the Court has also differentiated according to the type of interference with the lawyer's freedom of expression, specifically according to which type of sanction has been imposed. In this regard, specifically criminal sanctions will rarely satisfy the requirements of the Convention, particularly where disciplinary measures exist, but have not been used. The Court, in a number of judgments, has focused on non-use of available disciplinary measures as a central part of its reasoning,[736] and has explicitly held that criminal sanctions limiting defence counsel's freedom of expression will be difficult to justify.[737] Moreover, the Court has also been particularly strict where high amounts

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the fairness of the trial – rather than to examine in subsequent proceedings the appropriateness of a party's statements in the courtroom'.

734 *Igor Kabanov v Russia* App no 8921/05 (ECtHR, 03 February 2011), para 55. See also *Čeferin v Slovenia* (n 654), para 59: 'The Court considers that the impugned remarks could not be construed as gratuitous personal attacks and could not be taken to have had the sole intention of insulting the experts, the public prosecutor or the court'.

735 *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019), para 70. The Court went on to note that the domestic courts' reasoning that accepting the matter had constituted a breach of the lawyer's professional obligations was problematic under Art. 6 § 1 of the Convention, since it risked infringing on the client's right to court under that provision.

736 *Bono v France* (n 732), para 55; *Rodriguez Ravelo v Spain* (n 654), para 49. Regarding the difficulties of treating disciplinary sanctions as a milder version of criminal sanctions see Chapter Five, 278ff. See also *Mikhaylova v Ukraine* (n 731), para 95, where the Court highlighted that 'the applicant was not a lawyer … and so could not have been subjected to disciplinary measures … [but nonetheless] a less severe sanction, a fine, was available to the court'.

737 *Rodriguez Ravelo v Spain* (n 654), para 50: 'Partant, les sanctions pénales, dont notamment celles comportant éventuellement une privation de liberté, limitant la liberté d'expression de l'avocat de la défense, peuvent difficilement trouver de justification'.

of damages were concerned, referring to the chilling effect this might have on the legal profession as a whole.[738] This serves to underline the conclusion drawn above: Freedom of expression is significantly reinforced where lawyers make statements in connection with litigation.

In a reflection of the differentiation between statements in court and out of court alluded to above, the Court has moreover at times highlighted that criticisms which 'remained inside the "courtroom", because they were contained in written pleadings … were not therefore capable of undermining or threatening the functioning of the justice system or the reputation of the judiciary among the general public'.[739] A similar focus on how large the audience for the statements at issue was has also figured in other cases.[740] While that would tend to indicate particularly strong protection of written expression in the course of court proceedings, the case law in this respect is not entirely consistent. While the argument advanced in *Bono* focuses on the fact that written pleadings are less damaging to the authority of the judiciary, and in *Ayhan Erdogan v Turkey* (2009) the Court highlighted that the fact that the statements had been made in a written petition meant that 'the negative impact, if any, of the applicant's words on [the third party's] reputation was therefore quite limited',[741] in other cases the Court has made the opposite argument, arguing that written statements in the course of litigation do not contribute to public debate and therefore enjoy less extensive Art. 10 protection.[742] For example, when assessing the interests to be weighed in *Kincses v Hungary* (2015), where the applicant made written

738 *Pais Pires de Lima v Portugal* App no 70465/12 (ECtHR, 12 February 2019), para 67; *LP and Carvalho v Portugal* (n 735), para 71. For criminal sanctions see *Mikhaylova v Ukraine* (n 731), para 96, where the Court highlighted 'that the penalty imposed on the applicant was disproportionately severe and was thus capable of having a "chilling effect" on individuals (including lawyers) conducting representation in court proceedings'. On the general significance of arguments related to 'chilling effect' see Chapter Six, 335ff.

739 *Bono v France* (n 732), para 54.

740 See eg *Mikhaylova v Ukraine* (n 731), para 93; *LP and Carvalho v Portugal* (n 735), para 68; *Pais Pires de Lima v Portugal* (n 738), para 66.

741 *Ayhan Erdoğan v Turkey* App no 39656/03 (ECtHR, 13 January 2009), para 29. See similarly *Lutgen v Luxembourg* App no 36681/23 (ECtHR, 16 May 2024), para 70.

742 cf eg *Rodriguez Ravelo v Spain* (n 654), para 48. As regards statements by detainees, the Court noted in *Skałka v Poland* App no 43425/98 (ECtHR, 27 May 2003), para 42 that the letter written in that case 'was not an open and overall attack on the authority of the judiciary, but an internal exchange of letters of which nobody of the public took notice'. More generally on the Court's systemic approach to Art. 10 see Chapter Six.

submissions 'as the legal representative of a client in civil proceedings' the Court noted that 'it follows that … the requirement of protection of the interest of the proper administration of justice and the dignity of the legal profession is not to be weighed against the interest in the open discussion of matters of public concern or freedom of the press'.[743] In that case, then, written expression in court proceedings enjoyed *less* extensive protection, and similarly in *Schmidt v Austria* (2008), the First Section noted that the impugned statement had been made in written proceedings before the Vienna Food Inspection Agency and that 'it follow[ed] that in the circumstances of the present case, the requirement of protection of the Vienna Food Inspection Agency's reputation is not to be weighed against freedom of the press or the interest in the open discussion of matters of public concern'.[744] In essence, the fact that statements were made in writing during the course of court proceedings has therefore been used both to argue that the damage done was more limited (thus, in principle, increasing the level of Convention protection) and to argue that there was no contribution to public debate (thus decreasing protection),[745] which, at least for written submissions, calls into question whether the impact of the Court's case law is really to provide additional protection.

If, then, the elevated protection granted in the Court's case law is subject to some variation, it is finally worth noting that not all of the arguments adduced are specific to legal representatives. While the Court rhetorically attaches great importance specifically to the role of lawyers,[746] there may also be reasons for its case law that are not based on the provision of legal services. Most notably, an underlying factor to the Court's case law may be a procedural preference that in principle, all questions relating to the same matter should be dealt with in the same proceedings.[747] This idea of 'unity of proceedings' implies, for example, that questions such as what

743 *Kincses v Hungary* App no 66232/10 (ECtHR, 27 January 2015), para 39. For the general relationship between lawyers and public debate see Chapter Five, 208ff.

744 *Schmidt v Austria* (n 654), para 38. See also *Wingerter v Germany (dec)* App no 43718/98 (ECtHR, 21 March 2002) 7, where 'with regard to the background of the case, the Court notes that no public interest aspect has to be taken into account'. See now also *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), discussed in Chapter Eight, 408ff.

745 Notably, similar debates as to the direction in which this factor should be weighted have also occurred at the domestic level, cf eg *Čeferin v Slovenia* (n 654), para 17.

746 See also Chapter Five, 225ff.

747 Note that this rationale of avoiding the same questions coming up in multiple sets of proceedings (which at its worst can lead to 'relitigation' of the same questions) also

participants to a given set of proceedings may or may not say should be decided within those proceedings, rather than having the original set of proceedings conducted subject to the possible influence of other potential proceedings.[748] In many of the cases on lawyers, this point was adduced as one of several arguments, appearing, for example, as an aside in *Nikula* when the Court

> stress[ed] the duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party's statements in the courtroom.[749]

While the Court in *Nikula* did not clarify the relative weight which this argument carried, it tends to question the Court's focus on the ostensible specificities of lawyers since this procedural point holds true regardless of who makes the statement in issue. In this vein, in *Mariapori v Finland* (2010), which concerned not a lawyer, but a witness,[750] the Court applied much the same approach and criticised the domestic courts' decision to award damages in defamation for a statement that had not attracted any particular criticism during the initial proceedings themselves.[751] At least this argument, then, does not hinge specifically on freedom of expression by lawyers, but instead is a more general preference of a procedural nature which may simply arise more frequently for lawyers than for other participants in court proceedings.

(b) *Freedom of expression outside the courtroom*

If lawyers, then, will generally enjoy freedom of expression in a reinforced form when acting in court, the situation for statements outside of strictly legal fora is entirely different. This may be due to a number of factors: a concern similar to the one identified above to ensure that there are no

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frequently appears in relation to eg (limitations on) professional negligence claims at the domestic level, cf eg Lord Steyn's speech in *Arthur J S Hall v Simons* (n 672).

748 There is a marked parallel here to the case law on freedom of expression where statements are made outside of court, since in those cases the Court also typically argues by reference to the need to protect proceedings from external influence.

749 *Nikula v Finland* (n 654), para 53.

750 *Mariapori v Finland* (n 663), para 7.

751 Ibid, para 64.

external fora debating a specific legal case,[752] a notion of litigation and legal services which largely predates developments such as increased media coverage of legal disputes and the associated rise of the field of so-called 'litigation PR',[753] as well as historically a perceived risk of lawyers side-stepping domestic bans on advertising[754] by simply fulfilling their role more publicly. Where lawyers speak outside of court, it is not clear from the Court's jurisprudence that they will enjoy any elevated protection at all as compared to the general public, and in fact the level of protection lawyers enjoy may actually be reduced due to the 'officers of the court' doctrine.[755] In its case law, the Court has shown a significant concern to limit all matters related to legal disputes to within the courts,[756] as well as to treat lawyers more strictly than their clients.[757]

i. Schöpfer v Switzerland

A particularly clear example, and indeed one of the cases frequently referred to as a foundational judgment, is the 1998 judgment in *Schöpfer v Switzerland*. In that case, the applicant lawyer, who was dissatisfied with the way a specific case had been handled by the local judicial authorities, turned to the press claiming 'it was his last resort',[758] even though he had

752 Which, in the interpretation of the phrase 'authority of the judiciary' in Art. 10 § 2, the Court has referred to as 'the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto', *The Sunday Times (No 1) v UK [Plenary]* App no 6538/74 (ECtHR, 26 April 1979), para 55.

753 Similarly, the phenomenon of eg mass claims at the domestic level does not appear in the Court's case law to date.

754 cf the Lucerne Supervisory Board's reasoning in *Schöpfer v Switzerland* (n 654), para 16. The general international trend towards relaxation of advertising restrictions would seem to have reduced the weight of this argument.

755 cf Chapter Five, 225ff. For an alternative explanation of this limitation of subjective rights see Chapter Nine.

756 Or perhaps to move them there, given that the case law has also been applied to some cases that were arguably already in the public domain.

757 cf eg *Zdravko Stanev v Bulgaria (No 2)* (n 661), para 43, where the Court explicitly 'noted in this context that the applicant was not a lawyer. Lawyers have special 'duties and responsibilities' in the exercise of their right to freedom of expression … Unrepresented litigants cannot be expected to abide by the same standard of conduct and must in principle be able to plead their case without the risk of criminal sanctions, even where their allegations prove on examination to be groundless.'

758 *Schöpfer v Switzerland* (n 654), para 8.

not yet exhausted legal remedies.[759] He was then fined 500 CHF as a result of disciplinary proceedings for violation of a duty of discretion.[760]

The Court, in analysing whether there had been a violation of Art. 10 of the Convention, focused heavily on the fact that 'Mr Schöpfer first publicly criticised the administration of justice in Hochdorf and then exercised a legal remedy which proved effective with regard to the complaint in question'[761] and criticised extensively his choice to go to the media rather than pursue legal remedies.[762] Based upon this, and making reference to the fact that 'because of their direct, continuous contact with their members, the Bar authorities and a country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck',[763] the Court 'consider[ed] that the authorities did not go beyond their margin of appreciation in punishing Mr Schöpfer'.[764]

ii. Morice v France [GC]

While the *Schöpfer* judgment was arguably somewhat specific to its facts in that it concerned a matter which had not previously been subject to public attention and where the domestic authorities had effectively had no chance to remedy the situation before the applicant complained, it nonetheless

759 Ibid, para 30. However, he also 'explained that the reason why he had chosen to make his criticisms through the press was that it was not only his client's case which gave him cause for concern but an intolerable situation that had persisted for years at the Hochdorf district authority', ibid, para 25, and that '[h]is criticisms had been … aimed not at an isolated case but at a long-standing practice contrary to the Convention [and that] a lawyer who noted that such a practice had been followed to the detriment of a number of his clients had the right to begin a public debate on the subject', ibid, para 10. For the relationship with lawyers' role in public debate see Chapter Five, 208ff.

760 Ibid, paras 14, 16.

761 Ibid, para 31. Indeed, the Court in *Foglia v Switzerland* App no 35865/04 (ECtHR, 13 December 2007), para 95 distinguished *Schöpfer* on precisely this point.

762 *Schöpfer v Switzerland* (n 654), para 34. This argument is more problematic than it may initially seem: If the fact that there are still legal remedies to pursue regarding the complaint really does lead to a lowering of Art. 10 protection, that would tend to imply that only once the European Court of Human Rights has had an opportunity to pronounce itself on a case will the full level of Art. 10 protection apply, since until this point there will still be legal remedies to pursue.

763 Ibid, para 33.

764 Ibid, para 34.

went on to influence much of the Court's later case law. The restrictive approach to lawyers' expression outside the courtroom has been a recurring theme in subsequent cases, including the current leading case, the 2015 Grand Chamber judgment in *Morice v France*.[765] That case concerned the infamous 'affaire Borrel', which arose from the death under unclear circumstances of a French magistrate sent to Djibouti as a technical adviser and also led to a judgment by the International Court of Justice.[766] After what he perceived as extensive feet-dragging by the French judiciary, Olivier Morice, a well-known lawyer acting for the deceased's family, complained in an interview with French daily Le Monde of 'connivance between the Djibouti public prosecutor and the French judges'.[767] In response, the investigating judges 'filed a criminal complaint as civil parties' against Morice, 'accusing [him] of public defamation of a civil servant',[768] which ultimately led to a fine of EUR 4,000 in combination with an award of damages in the amount of EUR 7,500 towards each of the judges, as well as costs.[769] Having exhausted domestic remedies, Morice turned to the European Court of Human Rights,[770] arguing inter alia that his right to freedom of expression under Art. 10 had been violated.[771]

After setting out its case law on freedom of expression from first principles including the *Handyside* judgment[772] and discussing its case law on

765 *Morice v France [GC]* (n 673).

766 ICJ, 'Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)' (2008) 2008 ICJ Reports 177. As the European Court of Human Rights itself noted in *Morice v France [GC]* (n 673), para 152, the 'affaire Borrel' has also led to several other cases before the European Court of Human Rights, including *July and SARL Libération v France* App no 20893/03 (ECtHR, 14 February 2008) regarding the limits of press freedom.

767 Court's translation, *Morice v France [GC]* (n 673), para 34.

768 Ibid, para 36.

769 Ibid, para 46.

770 Where, before the Fifth Section, he lost at first instance on the Art. 10 point, see *Morice v France (Chamber)* App no 29369/10 (ECtHR, 11 July 2013), para 109.

771 He also claimed a violation of Art. 6 § 1, arguing that 'his case had not been examined fairly by an impartial tribunal, having regard to the presence on the bench of a judge who had previously and publicly expressed his support for one of the civil parties', *Morice v France [GC]* (n 673), para 65. This complaint will not be discussed here, given that it could have essentially arisen in the same way regardless of any link to legal services. Attentive readers will have noticed that challenges under Art. 6 § 1 which are not specific to lawyers nonetheless come up throughout the case law surveyed here, which may be a reflection of lawyers' increased awareness of potential problems in that respect, as well as of the smaller community of lawyers.

772 Ibid, para 124. On *Handyside* see also Chapter Six, 310ff.

Art. 10 § 2 and 'maintaining the authority of the judiciary',[773] the Grand Chamber turned to 'the status and freedom of expression of lawyers'.[774] Having clarified the 'specific status of lawyers'[775] and the 'special role of lawyers',[776] the Grand Chamber noted that 'freedom of expression is applicable also to lawyers',[777] albeit subject to modifications, before finding that 'a distinction should, however, be drawn depending on whether the lawyer expresses himself in the courtroom or elsewhere'.[778] After a summary of its *Nikula/Kyprianou* case law (which as a result was obiter),[779] the Court held that regarding 'remarks made outside the courtroom', while 'the defence of a client may be pursued by means of an appearance on the televisions news or a statement in the press',[780]

> lawyers cannot … make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis …, nor can they proffer insults … The Court assesses remarks in their general context, in particular to ascertain whether they can be regarded as misleading or as a gratuitous personal attack … and to ensure that the expressions used have a sufficiently close connection with the facts of the case …[781]

After 'tak[ing] the view that, in the circumstances of the case, the impugned statements were more value judgments than pure statements of fact',[782] the Court assessed 'whether the "factual basis" for those value judgments was sufficient',[783] finding that it was.[784] Turning to 'the specific circumstances of the case', the Court then '[took] the view 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'.[785] Despite

773 Ibid, para 128ff.
774 Ibid, para 132.
775 Ibid, para 132.
776 Ibid, para 133. These *topoi* are discussed in further detail in Chapter Five, 227ff.
777 Ibid, para 134. On the conceptual difficulties this raises see Chapter Eight, 423ff.
778 Ibid, para 136. At para 148, the Court also 'refer[red] the parties to the principles set out in its case-law … with emphasis on the need to distinguish between remarks made by lawyers inside and outside the courtroom'.
779 Ibid, para 137. These cases are discussed at 158ff.
780 Ibid, para 138.
781 Ibid, para 139.
782 Ibid, para 156.
783 Ibid, para 157.
784 Ibid, para 158.
785 Ibid, para 171. In essence, these 'very specific circumstances' were a reference to *Mor v France* App no 28198/09 (ECtHR, 15 December 2011), where the Court held at para 59 that in that case 'la défense de ses clients pouvait se poursuivre avec une

this in principle restrictive position on statements in the media, the Court then found that France had violated the Convention,[786] noting in particular 'that neither the Principal Public Prosecutor nor the relevant Bar Council or chairman of the Bar found it necessary to bring disciplinary proceedings against the applicant on account of his statements in the press, although such a possibility was open to them'.[787] Regarding negative repercussions for utilising freedom of expression, the Grand Chamber also 'noted that imposing a sanction on a lawyer may have repercussions that are direct (disciplinary proceedings) or indirect (in terms, for example, of their image or the confidence placed in them by the public and their clients)'.[788]

While *Morice* itself therefore largely consolidated pre-existing standards, and the emphasis that 'the defence of a client may be pursued by means of an appearance on the television news or a statement in the press'[789] was arguably contradicted by the Court's restriction to 'very specific circumstances',[790] the Grand Chamber judgment did show the Court's continued concern to keep legal disputes largely within the courts by allowing more generally for sanctions on lawyers for their statements out of court than for those within court.[791] Ultimately, it is not clear that the Court's protection for lawyers making statements outside of court is any higher than that provided for the general public.[792] Notably, the decisive reasoning in *Morice* is almost entirely devoid of references to the function of lawyer, focusing instead on matters such as contribution to a public debate, but nonetheless noting that the protection enjoyed by a lawyer cannot go as far as that

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intervention dans la presse dans les circonstances de l'espèce, dès lors que l'affaire suscitait l'intérêt des médias et du public', 'the client's defence could be pursued by a statement in the press on the facts of the case, given that the matter already attracted the interest of the media and of the public' (author's translation).

786 *Morice v France [GC]* (n 673), para 178 (unanimous).

787 Ibid, para 173. On the Court's willingness to use disciplinary proceedings as indicative of the severity of the lawyer's conduct see Chapter Five, 299ff.

788 Ibid, para 176.

789 Ibid, para 138.

790 Ibid, para 171.

791 As *Morice* itself shows, this is unconvincing at least for those trials which are subject to substantial debate and therefore cannot be confined to their legal fora anyway. For another example, concerning the 'Chalabi' case, see *Coutant v France (dec)* App no 17155/03 (ECtHR, 24 January 2008).

792 And may well be lower, given the 'officers of the court' doctrine (discussed in greater detail in Chapter Five, 225ff) which tends to impose additional obligations on lawyers.

enjoyed by journalists.[793] Indeed, even though 'the applicant argued that his statements … served precisely to fulfil his task of defending his client' and advanced a more comprehensive view of his role, the Court 'fail[ed] to see how his statements could have directly contributed to his task of defending his client, since the judicial investigation had by that time been entrusted to another judge who was not the subject of the criticism'.[794] In fact, most of the statements made by the Grand Chamber in *Morice* which related specifically to the applicant's status of lawyer focused on additional restriction, not expansion, of rights.[795]

iii. Morice *in practice*

This differentiation between speech in court and a more restrictive position on expression outside judicial proceedings may well have been inspired by tendencies at the domestic level,[796] including in France itself. For example, in *Ottan v France* (2018), where a lawyer representing the civil party in a homicide trial against police officers was sanctioned for stating immediately after the delivery of the verdict that 'with a white – all-white – jury on which not all communities are represented … the door was wide open for an acquittal',[797] the domestic court of appeal held that 'outside the courtroom, lawyers are not protected by immunity [of judicial speech] and the appropriate degree of their freedom of speech is no longer assessed in relation to the requirements of the exercise of the rights of the defence, but only in relation to freedom of expression'.[798] In *Ottan* itself, the European

793 This was a suggestion made by the CCBE (*Morice v France [GC]* (n 673), para 116), who intervened in the case, but was explicitly rejected by the Court at para 148. For a more general comparison of the Court's case law on these two groups of human rights defenders see Chapter Six.

794 Ibid, para 149. This, notably, entirely ignores the use of statements *colorandi causa*, a typical and time-tested litigation technique.

795 Ibid, para 133ff, 147ff. On this, see Chapter Five, 227ff.

796 For eg English domestic law see *Munster v Lamb* (n 672).

797 *Ottan v France* (n 652), para 20 (Court's translation).

798 Ibid, para 25, a view which the Court 'observed' without criticism at para 55. Note that apparently the lawyers for the other side were rather more sympathetic, cf para 17, where one of them is quoted as pointing out that 'all the lawyers had been very emotional and the applicant had no doubt used an unfortunate turn of phrase, intending only to point to the lack of representation of certain communities in the criminal-justice system'.

Court of Human Rights went on to note that 'although the applicant was inside the court building when he made the impugned remarks', his statements nonetheless 'did not form part of "conduct in the courtroom" because the acquittal verdict at this instance had been given moments before.[799] The Fifth Section also offered a summary of *Morice* as holding that

> With regard to remarks made outside the courtroom, the Court has previously held that a client's defence may, in certain circumstances, be pursued through the media if the remarks do not constitute gravely damaging attacks on the action of the courts, if the lawyers are speaking in the context of a debate of public interest concerning the functioning of the justice system and in connection with a case that has aroused media and public interest, if they do not overstep the permissible expression of comments without a sound factual basis, and if they have made use of the available remedies on their client's behalf.[800]

The Court also referred to

> the criteria it adopted in *Morice*, namely the applicant's status and the role played by his statement in the task of defending his client; the contribution to a debate of public interest; the nature of the impugned remarks; the specific circumstances of the case; and the nature of the sanction imposed.[801]

On the facts of the case, the Court highlighted that the applicant's statements in *Ottan* had been aimed at continuing 'his client's defence',[802] and that 'the applicant's remarks, which concerned the functioning of the judiciary, and in particular proceedings before an assize court sitting with a lay jury and the conduct of a criminal trial relating to the use of firearms by law-enforcement agents, were part of a debate on a matter of public interest'.[803] 'Accordingly, it was first and foremost for the national authorities to ensure a high level of protection of freedom of expression, with a partic-

799 Ibid, para 55. Presumably, most readers would have interpreted 'in the courtroom' as a metaphor even without this clarification, given the total irrelevance of physical location to all of the Court's reasoning.

800 Ibid, para 56.

801 Ibid, para 57 (emphasis in original). Unlike most of the Court's judgments in this area, *Ottan* does not contain the typical paragraph on 'lawyers' special status', discussed in Chapter Five, 227ff.

802 Ibid, para 58. This choice of wording is a little odd, given that the civil party to criminal proceedings is in no sense being 'defended', but the Court does not typically appear to modify its language based upon the procedural situation in these cases.

803 Ibid, para 61.

ularly narrow margin of appreciation being afforded to them'.[804] On this basis, the Fifth Section unanimously found that the applicant's statement 'amounted to a value judgment with a sufficient factual basis made in the context of [the applicant's] client's representation in criminal proceedings', and that therefore the disciplinary sanction – a mere warning, the lightest possible penalty under domestic disciplinary law[805] – was disproportionate.

Ottan in this sense is a good example that despite the restrictive approach to freedom of expression outside the courtroom in principle endorsed in *Morice*, the Court has not always maintained this position stringently. Indeed, the Court also held that as regards criminal trials 'the public has a legitimate interest in the provision and availability of information about criminal proceedings, and that remarks concerning the functioning of the judiciary relate to a matter of public interest',[806] which would seem to call into question the focus on confining disputes to the courts that the European Court of Human Rights has shown elsewhere. To the extent this latter point relates to the 'watchdog' function raised in a number of international standards[807] and unsuccessfully argued by the CCBE in *Morice*,[808] it would tend to question whether it is really appropriate to allow States to sanction more readily statements made outside the courtroom and therefore potentially more closely linked to public debate.[809] Moreover, the Court's narrow view of counsel's function in *Morice* is also not universal in the Court's case law: As the Court's prior statement in *Veraart v the Netherlands* (2006) shows, where the applicant explicitly argued that '[h]is duty, as legal adviser of the K. family, had included advising them on how to deal with media interest and representing their case in public'[810] and the Court noted that 'it cannot be doubted that the applicant was entitled to make public statements in his client's interest, even outside the courtroom, subject to the proviso that he was acting in good faith and

804 Ibid, para 61.
805 Ibid, para 73.
806 Ibid, para 61. See, in a similar vein in the French language, *Foglia v Switzerland* (n 761), para 86.
807 UN Basic Principles on the Role of Lawyers, para 23; Committee of Ministers of the Council of Europe, *Recommendation R(2000)21 on the Freedom of Exercise of the Profession of Lawyer* (2000), para I.3. Both are discussed in Chapter One, 34ff.
808 *Morice v France [GC]* (n 673), paras 116, 148. This is not the first time this argument has been made before the Court, see eg *Karpetas v Greece* (n 652), para 65, where the applicant also argued on the basis of a parallel between journalists and lawyers.
809 See also Chapter Four, 208ff.
810 *Veraart v the Netherlands* (n 709), para 47.

in accordance with the ethics of the legal profession',[811] the assumption that lawyers' activities outside the courtroom are somehow necessarily less central to the client's interests is questionable.[812] To the extent that one possible reaction to this case law would simply be for the lawyer to advise clients to hire an independent public relations service, who would then not be subject to the restrictive 'officers of the court' doctrine, this result is hardly convincing. This is true at least for those cases which have already or are likely to attract significant media interest,[813] as enunciated particularly clearly in *Foglia v Switzerland* (2007) when the Court noted that '[a]ux yeux de la Cour, le contexte litigieux était indéniablement médiatique, déjà bien avant les interviews accordées par le requérant'.[814]

Nonetheless, despite these inconsistencies, the separation between strongly protected expression in the courtroom and expression outside the courtroom, for which the Convention provides only a lower level of protection, forms a constant pillar of the Court's case law, at least rhetorically. For example, in *Bagirov v Azerbaijan* (2020) the Court highlighted that '[the] remarks were confined to the courtroom, as opposed to criticism of the judiciary voiced outside the courtroom by other means, for instance in the media'.[815] The Court then highlighted the 'important consideration that in the courtroom the principle of fairness militates in favour of a free and even forceful exchange of arguments between parties', which it approvingly underlined by reference to the fact that 'the impugned remarks were not repeated outside the courtroom'.[816] Similar statements highlighting additional protection where 'the impugned remarks had not been repeated outside the courtroom'[817] also appear in a number of other cases.[818]

811 Ibid, para 53.
812 See also *Coutant v France (dec)* (n 791).
813 Which is true for many of the cases cited here, eg *Mor v France* (n 785) concerning the widely-publicised 1990s controversy in France regarding allegedly dangerous hepatitis B vaccines.
814 *Foglia v Switzerland* (n 761), para 94. 'In the eyes of the Court, the context of the disputes was undeniably already subject to media attention well before the interviews given by the applicant' (author's translation), although of course this judgment predates *Morice*.
815 *Bagirov v Azerbaijan* (n 729), para 80.
816 Ibid, para 80.
817 *Mikhaylova v Ukraine* (n 731), para 93.
818 *Ayhan Erdoğan v Turkey* (n 741), para 29; *Pais Pires de Lima v Portugal* (n 738), para 61.

(c) *Freedom of expression on 'non-legal' topics*

While the Court therefore protects freedom of expression in the courtroom more strongly than freedom of expression outside the courtroom, where freedom of expression effectively does not relate to traditional legal functions at all it appears not to enjoy any additional protection, but instead to be subject solely to the additional restrictions imposed on lawyers by virtue of the 'officers of the court' doctrine. In *Tuğluk and others v Turkey (dec)*, the Court noted in this regard that 'the role played by the applicants as lawyers and intermediaries between their client Abdullah Öcalan and the criminal courts imposed a number of duties on them as regards their conduct'.[819] It then highlighted that

> the press conferences given by the applicants after their visits to their client did not concern his defence, and nor did they form part of the exercise of the right to inform the public about the functioning of the justice system; rather, they could be seen as conveying Mr Öcalan's views on such matters as the strategy to be adopted by his former armed organisation, the PKK (... contrast *Morice* ...).[820]

On this basis, in the absence of any special protection attached to an exercise of legal functions by the applicants, their additional duties as lawyers outweighed their rights, and the Court went on to find that 'the application discloses no appearance of a violation of Article 10 of the Convention and must be rejected as being manifestly ill-founded'.[821] In a similar vein, in *LP and Carvalho v Portugal* (2019), the Court dedicated an entire paragraph with the heading 'la qualité d'avocat des requérants'[822] to establishing that both applicants had made their statements in the pursuit of their clients' interests,[823] and in the admissibility decision in *Ţuluş v Romania (dec)* the Court highlighted that the applicant had not been a lawyer, contrasting this with several of the cases discussed above.[824] As with many areas of the Court's case law, however, there are some inconsistencies: For example, in *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* (2011) the Court

819 *Tuğluk and others v Turkey (dec)* App no 30687/05 (ECtHR, 04 September 2018), para 37.
820 Ibid, para 37.
821 Ibid, para 39.
822 'The applicants' status as lawyers' (author's translation).
823 *LP and Carvalho v Portugal* (n 735), para 65.
824 *Ţuluş v Romania (dec)* (n 705), para 26.

highlighted its typical text on the specific status of lawyers[825] despite the fact that the Court also noted that the applicants' role in the domestic proceedings had been that of witnesses.[826]

(d) *Relationship between lawyers' and clients' rights*

As regards *Tuğluk*, a further significant factor in this decision may have been the relationship between the lawyers' and the client's rights.[827] More specifically, the judgment showed a distinct unwillingness to have the lawyer's rights as regards the same statements go further than the client's, since the Court attached significance to its own finding in prior judgments that

> the rules on contact with the outside world for life prisoners in a high-security prison were aimed at restricting the links between such prisoners and their criminal background, in order to minimise the risk that they might maintain personal contact with criminal organisations. The Court also considered well-founded the Government's concerns that Mr Öcalan might take advantage of communication with the outside world to renew contact with members of the armed separatist movement of which he was leader …[828]

While the Court is therefore clearly aware that there is an inter-relationship between freedom of expression for clients and for lawyers, their positions nonetheless remain separate. This means, inter alia, that lawyers will not be able to draw on their clients' rights directly. This is clear from the admissibility decision in *Mattei v France* (2001),[829] where the applicant argued that a measure preventing her from providing legal services violated both her own rights and those of her clients, who could no longer rely on the legal assistance of their chosen lawyer.[830] Rejecting this argument, the Court noted that the applicant – unlike her clients – was not 'accused' in the sense of Art. 6 § 3 ECHR and in any case did not have 'victim status' for the purposes of Art. 34.[831] Similarly, where a lawyer argued 'that his right

825 *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* App no 1529/08 (ECtHR, 29 March 2011), para 46.
826 Ibid, para 49.
827 For a discussion that goes into greater conceptual detail on this problem see Chapter Eight, 423ff.
828 *Tuğluk and others v Turkey (dec)* (n 819), para 36.
829 *Mattei v France (dec)* App no 40307/98 (ECtHR, 15 May 2001), particularly 15.
830 Ibid 15.
831 Ibid 15.

to freedom of expression ha[d] been violated in that he was punished for putting forward arguments with a view to defending his clients' interests'[832] and alleged a breach of Art. 6 § 1[833] the Court noted

> that an interference with counsel's freedom of expression in the course of a trial may raise an issue under Article 6 with regard to the right of a client to receive a fair trial. Equality of arms militates in favour of a free and forceful exchange of argument between the parties. Turning to the present application, the Court observes, however, that the applicant's clients in the domestic proceedings are not applicants before this Court.[834]

It then found the complaint 'incompatible *ratione personae* with the provisions of the Convention' and declared it inadmissible,[835] and reached the same result where 'the applicant alleged a breach of Article 13 of the Convention in respect of his clients'.[836]

(e) *Conclusion: Freedom of expression for lawyers exercising representative functions*

In summary, then, as regards Art. 10 and freedom of expression, the Court has created a modified regime for lawyers acting in their representative functions. While their expression in court will in principle be privileged and enjoy an elevated level of protection, expression out of court is more restricted than it would be for others, with the Court drawing heavily on the 'officers of the court' doctrine and using the 'special status'[837] of lawyers to restrict their Convention rights, although there is a certain amount of inconsistency in this case law. This restrictive position on freedom of expression outside the courts is noticeable since to the extent that it rests on 'the notion that the courts are, and are accepted by the public at large as being, the proper forum for the resolution of legal disputes'[838] it assumes a fairly well-functioning legal system in which legal remedies are generally

832 *Ignatius v Finland (dec)* App no 41410/02 (ECtHR, 17 January 2006) 1.
833 Ibid 6.
834 Ibid 6.
835 Ibid 6 (emphasis in original).
836 Ibid 7.
837 cf Chapter Five, 227ff.
838 *Morice v France [GC]* (n 673), para 129.

effective. While this may or may not be a necessary fiction for Convention purposes, at least in some situations it may be just that: a fiction.[839]

2. Protection of legal services in fields other than freedom of expression

While the case law on freedom of expression does seem well-developed – and indeed, in the recent cases of *LP and Carvalho v Portugal* (2019)[840] and *Simić v Bosnia and Herzegovina* (2022)[841] the Court clearly considered it so well-established as to be able to decide a case in Committee formation under Art. 28 § 1 (b) of the Convention[842] – this is not the only area where the Court has modified the way the Convention applies to protect the external dimension of legal services. In fact, even outside this area the Court has underlined the importance and the particular protection which the Convention accords to lawyers acting in the exercise of their functions.[843]

(a) *Protection against physical attacks by State actors*

In the 2016 case of *Cazan v Romania*,[844] which shows the precarious positions lawyers may find themselves in, the Fourth Section had to deal with

839 In slightly different phrasing of a similar point, the International Commission of Jurists, in its third-party intervention in *Bagirov v Azerbaijan* (n 729), noted at para 50 that 'in some States legal proceedings for protection of human rights may be unavailable or ineffective and, in such circumstances, for lawyers to be effective in protecting the rights of their clients they may need to engage in activity, which may include statements or other forms of expression, that takes place outside of the strict confines of judicial proceedings.'

840 *LP and Carvalho v Portugal* (n 735).

841 *Simić v Bosnia and Herzegovina* App no 39764/20 (ECtHR, 17 May 2022).

842 Under Art. 28 § 1 (b) ECHR '[i]n respect of an application submitted under Article 34, a committee may, by a unanimous vote … declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court'.

843 *François v France* App no 26690/11 (ECtHR, 23 April 2015), para 51: 'La Cour souligne enfin l'importance et la protection particulière que la Convention accorde à l'avocat intervenant dans l'exercice de ses fonctions'.

844 *Cazan v Romania* App no 30050/12 (ECtHR, 05 April 2016). *Cazan* has not yet been applied in other cases, although in the Questions to the Parties communicated with *Koutra and Katzaki v Greece* (App no 459/16, communicated on 26 January 2017) the Court referred to it.

the way Art. 3 of the Convention, the prohibition of torture and inhuman or degrading treatment or punishment, applies where legal services are provided. The facts of that case were disputed between the Government and the applicant; what is clear is that the applicant visited a police station with his client, who was subject to a criminal investigation,[845] and that later a doctor established that the applicant had a sprained finger which required a cast for several days.[846] According to the applicant, at the police station, he had raised certain procedural irregularities regarding his client's case. When the applicant refused to sign a declaration that had been falsified as to its date and attempted to leave with his client, the police officer in charge of the investigation allegedly locked them in the office and snatched the lawyer's phone, causing the applicant's injury in the process. When the client then tried to call emergency services, the police officer let them out of the room, but continued to insult and threaten the applicant.[847] The Government, in essence, denied this version and any impropriety,[848] and argued that the medical opinion regarding the applicant's sprained finger did not establish how this had been sustained.[849] After exhausting domestic remedies, the applicant complained to the Court under a number of articles.[850] The Fourth Section re-classified most of the complaint as a question of Art. 3,[851] highlighting just how seriously the Court took the matter.[852]

Regarding Art. 3's substantive limb, the Court began[853] by setting out the evidentiary principle under the *Bouyid* line of cases that

> where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities [as in the case of an identity check in a police station or a mere interview on such premises, cf subsequent paragraph] strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim … In the absence of such

845 Ibid, para 6.
846 Ibid, para 15.
847 Ibid, paras 7–8.
848 Ibid, paras 9, 34.
849 Ibid, para 34.
850 Ibid, para 31, viz. Arts 3, 5, 6, 10, 14 and 17 of the Convention.
851 Ibid, para 31.
852 This is particularly noticeable since the applicant appears not to have presented detailed observations on Art. 3, cf ibid, paras 33, 50.
853 Ibid, para 40.

> explanation, the Court can draw inferences which may be unfavourable for the Government.[854]

Noting that unlike in *Bouyid* the present applicant had come to the police station of his own volition, the Court noted that the confrontation had taken place in the applicant's capacity as the lawyer of a client requesting information regarding pending criminal proceedings.[855]

The Court then made the following statement:

> À cet égard, la Cour attache une importance particulière au fait que le requérant intervenait en sa qualité d'avocat. Elle rappelle avoir déjà reconnu le statut spécifique des avocats qui, en leur qualité d'intermédiaires entre les justiciables et les tribunaux, occupent une position centrale dans l'administration de la justice [reference to *Morice* omitted]. Elle a également rappelé que les avocats bénéficient de droits et de privilèges exclusifs, qui peuvent varier d'une juridiction à l'autre; la Cour a ainsi reconnu aux avocats une certaine latitude concernant les propos qu'ils tiennent devant les tribunaux [reference to *Casado Coca* and *Steur* omitted]. Ces principes doivent s'appliquer à plus forte raison lorsqu'il s'agit de reconnaître aux avocats le droit d'exercer leur profession à l'abri de tout mauvais traitement.[856]

Making reference to the European Code of Police Ethics,[857] particularly para 10 and the accompanying explanatory memorandum,[858] the Court then went on:

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854 *Bouyid v Belgium [GC]* App no 23380/09 (ECtHR, 28 September 2015), para 83 (citations omitted).

855 *Cazan v Romania* (n 844), para 40.

856 Ibid, para 41. 'In this respect, the Court attaches particular importance to the fact that the applicant was acting in his capacity as a lawyer. It recalls that it has already recognised the specific status of lawyers who, as intermediaries between litigants and the courts, occupy a central position in the administration of justice. It has also recalled that lawyers enjoy exclusive rights and privileges, which may vary from one jurisdiction to another; the Court has thus recognised that lawyers have a certain latitude in what they say in court. These principles must apply all the more when it comes to recognising the right of lawyers to exercise their profession free from ill-treatment.' (author's translation)

857 Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001.

858 *Cazan v Romania* (n 844), para 42. Para 10 of the European Code reads '[t]he police shall respect the role of defence lawyers in the criminal justice process and, whenever appropriate, assist in ensuring the right of access to legal assistance is effective, in particular with regard to persons deprived of their liberty'. The Commentary notes that 'this implies inter alia that the police shall not interfere unduly into their work or in any sense intimidate or harass them. Moreover, the police shall not associate defence lawyers with their clients'.

> La Cour estime qu'il revient ainsi à la police de respecter le rôle des avocats, de ne pas s'immiscer indûment dans leur travail, ni de les soumettre à aucune forme d'intimidation ou de tracasserie … et par conséquent, à aucun mauvais traitement. Cette obligation doit d'autant plus s'appliquer pour assurer la protection des avocats, agissant en leur qualité officielle, contre les mauvais traitements.[859]

The Court therefore found that the *Bouyid* principle applied and that the burden of proof rested with the respondent government.[860] Since the Government had not produced any indication that the applicant's injuries had not been caused by the police officer, the Court found against the Government on this point.[861] It also dismissed the Government's argument that a sprained finger fell below the threshold of severity required for Art. 3 to come into play, with the Court focusing on the fact that five to seven days of medical treatment had been recommended.[862] On this foundation, it found that there had been degrading treatment,[863] and that therefore there had been a violation of Art. 3 in its substantive limb.[864]

Turning to Art. 5 § 1, the Court reaffirmed the police's duty to respect the role of lawyers, not to interfere unduly with their work, nor to subject them to any form of intimidation or harassment.[865] The Court, however, also noted that the parties were in agreement that the deprivation of liberty had been very short, lasting less than ten minutes. Given the circumstances of the case, the Court then found that the applicant had not been 'deprived of his liberty' in the sense of Art. 5 § 1, particularly given the fact that the applicant had gone to the police station of his own free will and had been able to leave it very shortly after the incident complained of.[866]

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859 Ibid, para 42. 'The Court considers that it is thus incumbent on the police to respect the role of lawyers, not to interfere unduly with their work, nor to subject them to any form of intimidation or harassment and consequently to no ill-treatment. This obligation must apply all the more to ensure the protection of lawyers, acting in their official capacity, from ill-treatment.' (author's translation)

860 Ibid, para 43.

861 Ibid, paras 44–45.

862 Ibid, para 46.

863 Ibid, para 48.

864 Ibid, para 49. The Court also went on to find a violation of Art. 3 in its procedural limb, but in the absence of explicit reference to the applicant's provision of legal services this is less helpful for present purposes.

865 Ibid, para 68.

866 Ibid, para 68. The passage reads, in the original, '[e]n particulier, la Cour attache de l'importance au fait que le requérant s'est rendu de son propre gré au poste de police et a pu le quitter en très peu de temps après l'incident qu'il dénonce'.

In this regard, *Cazan* arguably seems a little inconsistent. If the role of the applicant as a lawyer was so important as to elevate even a sprained finger, an injury clearly on the lighter end of those that have merited classification as 'degrading' treatment in the past,[867] to the status of a substantive Art. 3 violation, the fact that this role did not lead to even the finding of an interference with his right under Art. 5 is surprising. The focus on the fact that the applicant had gone to the police station 'of his own free will',[868] in particular, is somewhat problematic, given that the Court itself highlighted at the beginning of the same paragraph that the lawyer was acting within the ambit of his professional obligations by assisting his client. In this sense, he was not at the police station 'voluntarily', at least to the extent that not attending might have brought him into conflict with his professional rules, but instead in his client's interests. In fact, what the Court may have meant – as the reference to *Creangă v Romania [GC]*[869] suggests – was that the applicant in *Cazan* was not generally 'under the control of the authorities'[870] at the police station in the sense of having been ordered to go there. Moreover, it is likely that this part of the judgment was coloured both by the fact that the client, when heard during the domestic enquiry, had not mentioned that the police officer had locked the door, and that in any case the parties were agreed that any deprivation of liberty had been very short indeed.

867 cf eg ECtHR, *Guide on Article 3 of the European Convention on Human Rights* (2022), para 19ff.

868 *Cazan v Romania*, para 68, 'de son propre gré' (author's translation).

869 *Creangă v Romania [GC]* App no 29226/03 (ECtHR, 23 February 2012). *Cazan v Romania* (n 844), para 68, refers a contrario to paras 94–100 of *Creangă*, which contain inter alia (at para 97) the point that '[t]he Court notes … that the applicant was not only summoned but also received a verbal order from his hierarchical superior to report to the NAP. … At the material time, police officers were bound by military discipline and it would have been extremely difficult for them not to carry out the orders of their superiors. While it cannot be concluded that the applicant was deprived of his liberty on that basis alone, it should be noted that in addition, there were other significant factors pointing to the existence of a deprivation of liberty in his case, …'.

870 *Creangă v Romania [GC]* (n 869), para 94.

(b) *No additional protection against physical attacks by non-State actors*

While *Cazan* indicated that for Art. 3, protection may be stronger where legal services are provided, *Bljakaj v Croatia* (2014) shows that this will not necessarily be so as regards Art. 2, at least where threats from private individuals are concerned. In that case, a lawyer who had acted in divorce proceedings was murdered by her client's estranged husband.[871] Her family complained to the Court under Art. 2, the right to life, alleging that the State had taken insufficient steps to protect the lawyer's life despite the threat of violence having been clear as a result of repeated threats to this effect and 'a history of alcohol abuse, violent behaviour and unlawful possession of firearms' by the husband.[872] While the majority did not focus specifically on the victim's position as a lawyer, Judges Lazarova Trajkovska and Pinto de Albuquerque, in a joint partly concurring and partly dissenting opinion, saw one of the main questions of the case as being 'what kind of protection … the State [should] afford to lawyers from work-related violence'.[873] They drew on (North American) empirical research to argue that 'many law professionals face a higher-than-average risk of work-related violence and threats',[874] and argued, based upon this, that 'any physical or verbal attack [on legal professionals] as a result of their work must be seen as an attack on the entire public system of justice'.[875] Referring explicitly to paragraph 17 of the UN Basic Principles,[876] they argued for an obligation on the State to protect members of the legal profession specifically. Nonetheless, the majority did not take this point into account in its reasoning, and it therefore appears that Art. 2 will apply to lawyers in the same way that it does to any other group without any elevated protection, regardless of lawyers' central importance to the rule of law.[877] In keeping with this position, in *Karpetas v Greece* (2012), a defamation case that

871 *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014), para 6ff, 23.
872 Ibid, paras 7ff, 89.
873 Ibid 35.
874 Ibid 38.
875 Ibid 39. The UN Basic Principles are discussed in Chapter One, 34ff.
876 Ibid 39.
877 Compare and contrast in this regard the position the Court has taken regarding journalists, cf eg *Dink v Turkey* App no 2668/07 and others (ECtHR, 14 September 2010), para 137, where the Court explicitly found a positive obligation on States to create effective systems protecting authors and journalists. The issue is discussed in greater detail in Chapter Six at 314ff.

arose out of a serious physical attack on a lawyer,[878] the Court made no reference whatsoever to the elevated risks lawyers may face as a result of their professional activities.[879]

(c) *Additional protection against unlawful detention by the State*

Finally, the Court has also had to rule on protection of lawyers acting in individual cases against unlawful detention under Art. 5 § 1 ECHR. In the Fifth Section case of *François v France* (2015), the applicant lawyer complained that he had been detained for 13 hours, as well as searched and subjected to an alcohol test, for intervening to support an underage client in a police station, who claimed to have been the victim of police aggression and had suffered visible injuries.[880] After setting out its general case law on Art. 5 § 1, the Court made explicit reference to the importance and particular protection which the Convention affords to lawyers intervening in the exercise of their functions,[881] referring to case law from a number of areas.[882] It then specifically highlighted the link between the applicant's detention and his professional activities, noting that the applicant's presence at the police station had only been due to his intervention, in his professional role, to assist a minor client.[883] The Court further emphasised that, notwithstanding differences as to the details of the altercation, the parties were in agreement that the origin of the dispute between the applicant and the police officers had been the police officers' refusal to include in the case file the applicant's written observation that his request for a medical

878 *Karpetas v Greece* (n 652), para 8.

879 Which is particularly noticeable since the Court did make reference to the need to protect the judiciary against attacks on its reputation, ibid, para 68 (the applicant had been sentenced to pay damages after a scathing open letter following a judicial decision to let his attackers off with a slap on the wrist).

880 In a parallel to many of the contempt of court cases discussed above regarding freedom of expression for lawyers, there was also the problem that the police officer who ordered the detention was the same officer whom the applicant had allegedly offended, which even the Government saw as problematic, cf *François v France* (n 843), para 45.

881 Ibid, para 51.

882 Viz, *Schöpfer v Switzerland* (n 654), *Nikula v Finland* (n 654), *Amihalachioaie v Moldova* (n 654), *Kyprianou v Cyprus [GC]* (n 662), *André and another v France* App no 18603/03 (ECtHR, 24 July 2008) and *Michaud v France* App no 12323/11 (ECtHR, 06 December 2012).

883 Contrast *Cazan v Romania* (n 844) above.

examination of the client had been refused.[884] The dispute had therefore been directly connected to the applicant's intervention at the police station in his professional capacity.[885] This point was, moreover, so important to the Court's argument that it repeated it in each of the next paragraphs,[886] where it also criticised the fact that the applicant had been subjected to a full-body search and an alcohol test without any objective reason,[887] leading the Court to find that the measures taken had improperly pursued other purposes than those for which these powers had been provided.[888]

In a similar vein to the additional protection of freedom of expression for lawyers to protect the client's private interests, this case law shows that the Court is willing to modify the level of Convention protection to specifically protect legal services. Where the Court perceives a risk of harassment of lawyers by State authorities, it appears to take a particularly strict view, which it typically bases on the importance of lawyers' activities in protecting the client's interests, which justifies increased protection of lawyers' activities.

II. Protection for legal services regarding individual applications under Art. 34 ECHR

In addition to modifying the application of the substantive Convention rights where lawyers act in individual cases at the domestic level, the Court has also created a separate set of rules regarding the provision of legal services with respect to individual applications to the European Court of Human Rights itself. It has done this by interpreting State obligations under Art. 34, the right to individual application, expansively.

This section gives an overview of the way the Court protects legal services surrounding the individual application mechanism, beginning with a general summary (1.) before discussing the relationship between the applicant's and the representative's rights (2.), emphasising certain minimum

884 *François v France* (n 843), para 53.
885 Ibid, para 53.
886 Ibid, paras 54–55.
887 Ibid, para 54.
888 Ibid, para 56. As the Court highlighted at para 57, the domestic authorities had also raised doubts as to the way the applicant had been treated, as well as recommending that the law be changed to render a medical examination of a detainee obligatory where requested by a lawyer.

quality requirements (3.) and that the Court acts even against abstract risks (4.).

1. A protective regime for legal services related to individual applications

In many ways, the Court's jurisprudence in this area mirrors the tendencies identified as regards legal services provided at the domestic level, which have been discussed extensively above. This extends both to more specific lines of case law, such as the transfer of jurisprudence developed under other Convention articles to Art. 34,[889] and as regards more general, overarching tendencies. Regarding the latter, an example is the continued focus on function rather than formal status, since under Rule 36 § 4 of the Rules of Court the applicant's representative before the European Court of Human Rights does not necessarily have to be 'an advocate authorised to practise in any of the Contract Parties', but can also be 'any other person approved by the President of the Chamber'. In a similar way to the *Nikula/Kruglov* application of protective norms to non-Bar members,[890] this means that States cannot rid themselves of their procedural opponents in cases before the Court by simply disbarring them.[891] This focus on function rather than form is also particularly clear from *Sarli v Turkey* (2001), where the Court, faced with the allegation that a lawyer involved in the drafting of an application under Art. 34 had been harassed, noted that

> it is also not material that Mahmut Sakar [the lawyer] was not named as the applicant's representative in the proceedings before the Commission and Court.

889 Particularly clear in this regard *Yefimenko v Russia* App no 152/04 (ECtHR, 12 February 2013), para 152: 'The Court has previously examined complaints specifically concerning the monitoring of correspondence between applicants and the Court under Article 8 of the Convention …, under its Article 34 … or under both provisions …'. (citations omitted)

890 cf Chapter One, 60ff.

891 Which, the applicant argued, at para 30, was the main motivation in *Bagirov v Azerbaijan* (n 729). Indeed, in *Hilal Mammadov v Azerbaijan* (n 669), para 123, the Court explicitly held that 'the suspension of Mr Bagirov's licence, which prevented him under domestic law from representing applicants in domestic criminal proceedings, could not be interpreted as a measure limiting his rights in the representation of applicants before the Court'. Substantially the same quote can also be found at *Rasul Jafarov v Azerbaijan* (n 669), para 183.

> His role in submitting the petition of the applicant's husband was instrumental in assisting her lawyers in the United Kingdom in introducing the application.[892]

Once again, this tends to indicate that the Court focuses on whether interference takes place with any lawyer contributing to the individual application, rather than merely limiting the obligation under Art. 34 to protection of the representative formally named before the Court.

Unlike the system of Art. 10 protection at the domestic level,[893] this special protective regime for representatives before the Court has a more explicit textual basis. Under the second sentence of Art. 34 ECHR, 'the High Contracting Parties undertake not to hinder in any way the effective exercise of [the right to individual application]'.[894] The Court has taken a robust approach to this undertaking, noting that

> it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 25 [now Article 34] that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.[895]

Consequently, the Court has taken a very wide view of the term 'any form of pressure', which will cover any 'improper indirect acts or contacts designed to dissuade or discourage [applicants] from pursuing a Convention remedy'.[896] In *Kurt v Turkey* (1998), where criminal proceedings had been commenced against the applicant's lawyer concerning 'allegations … made against the State in the application' which the lawyer had lodged on the applicant's behalf,[897] the Court found that

> the moves made by the authorities to institute criminal proceedings against the applicant's lawyer, even though they were not followed up, must be considered an interference with the exercise of the applicant's right of individual petition

892 *Sarli v Turkey* App no 24490/94 (ECtHR, 22 May 2001), para 85.
893 154ff.
894 Note the explicit reference to 'effective exercise', which, for the substantive Convention rights, the Court first had to establish by means of interpretation, cf *Airey v Ireland* App no 6289/73 (ECtHR, 09 October 1979), para 24.
895 *Akdivar and others v Turkey [GC]* App no 21893/93 (ECtHR, 16 September 1996), para 105, recently applied in *Feilazoo v Malta* App no 6865/19 (ECtHR, 11 March 2021), para 117.
896 *Kurt v Turkey* App no 15/1997/799/1002 (ECtHR, 25 May 1998), para 160, recently applied in *Mehmet Ali Ayhan and others v Turkey* App no 4536/06; 53282/07 (ECtHR, 04 June 2019), para 39.
897 *Kurt v Turkey* (n 896), para 164.

> and incompatible with the respondent State's obligation under Article 25 [now Article 34].[898]

This case law providing additional protection to representatives before the Court continues to this day, and the Court has generally held that 'the threat of criminal or disciplinary proceedings invoked against an applicant's lawyer concerning the contents of a statement submitted to the Court [will] interfere with the applicant's right of petition'.[899] In *Khodorkovskiy and Lebedev v Russia* (2013), where 'the prosecution made several attempts to disbar [the first applicant's] lawyers', the Court noted that it was 'concerned by the negative position of the law-enforcement agencies vis-à-vis the first applicant's legal team' (and found a violation of Art. 34).[900] Similarly, in *Annagi Hajibeyli v Azerbaijan* (2015), where the domestic authorities seized the entire case file relating to the application before the Court, the Court found a violation of Art. 34.[901] Moreover, the Court will generally react extremely sensitively in this area: Even attempts by States to enter into direct contact with applicants are typically regarded critically,[902] given the obvious potential for abuse this entails.[903]

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898 Ibid, para 165. See similarly *Colibaba v Moldova* App no 29089/06 (ECtHR, 23 October 2007), para 67.

899 *Khodorkovskiy and Lebedev v Russia* App no 11082/06; 13772/05 (ECtHR, 25 July 2013), para 928.

900 Ibid, para 927.

901 *Annagi Hajibeyli v Azerbaijan* (n 669), para 79; applied again in *Fatullayev v Azerbaijan (No 2)* App no 32734/11 (ECtHR, 07 April 2022), para 107.

902 *Tanrıkulu v Turkey* App no 23763/94 (ECtHR, 08 July 1999), para 131. cf also eg *Ryabov v Russia* App no 3896/04 (ECtHR, 31 January 2008), para 59, where the Court 'emphasise[d] at the outset that it is not appropriate for the authorities of a respondent State to enter into direct contact with an applicant on the pretext that "forged documents have been submitted in other cases" … If the Government had reason to believe that in a particular case the right of individual petition had been abused, the appropriate course of action was for that Government to alert the Court and to inform it of its misgivings'.

903 Although note the newer differentiation in eg *Novruk and others v Russia* App no 31039/11 and others (ECtHR, 15 March 2016), para 116 (with further references) that 'not every contact between the authorities and an applicant in connection with the application pending before the Court can be regarded as "intimidation". Article 34 does not prevent the State from taking measures for improving the applicant's situation or investigating the problem which was at the heart of the complaints to the Court …'.

2. The relationship between the applicant's and the representative's rights

Similarly to the difficulties in the relationship between the client's and the lawyer's rights alluded to as regards the domestic context,[904] the Court has also had to deal with the relationship between the applicant's Art. 34 rights and the lawyer's substantive rights. At present, it is not clear that applicants will be able to invoke Art. 34 to protect the legal services they receive if the lawyer also complains to the Court in their own right. This raises the problem of the relationship between the client's and the lawyer's rights.[905] In *Hilal Mammadov v Azerbaijan* (2016), the Court effectively refused to address the applicant's complaint under Art. 34 where this was also the substance of a complaint by the applicant's representative themselves. Instead, the Court

> note[d] that [the applicant's representative] Mr Bagirov[906] has already lodged a separate application with the Court … concerning the suspension of his licence to practise law … The Court considers that, when deciding the present case, it should avoid prejudging any issues which might be raised in that application, and should therefore leave unaddressed the applicant's argument in the present case that the suspension of Mr Bagirov's licence was part of a general crackdown campaign against human-rights lawyers and activists.[907]

The same approach was then followed in *Rasul Jafarov v Azerbaijan* (2016),[908] and – regarding another Azerbaijan human rights lawyer – in *Annagi Hajibeyli v Azerbaijan* (2015), where the Court similarly held that to 'avoid prejudging any issues raised' in the application by the representative 'it should … leave unaddressed the applicant's argument in the present case that the institution of criminal proceedings against [his representative] was an act of intentional interference with his legal representation of a number of applicants before the Court'.[909] This trend not to interact with the applicant's Art. 34 challenge that his lawyer has been disbarred or harassed for taking his case if the lawyer themselves brings an application is problematic because it confuses two issues, the rights of the client and the rights of the lawyer. Interference with representative functions affects the rights of both representative and client. The mere fact that the representative has

904 See eg 181ff, as well as Chapter Two, 95ff.
905 Discussed from a conceptual point of view in Chapter Eight, 423ff.
906 The applicant in *Bagirov v Azerbaijan* (n 729).
907 *Hilal Mammadov v Azerbaijan* (n 669), para 119.
908 *Rasul Jafarov v Azerbaijan* (n 669), para 187.
909 *Annagi Hajibeyli v Azerbaijan* (n 669), para 70.

also lodged an application under Art. 34 in their own right therefore does not remedy the damage done to the client's procedural rights.

3. Minimum quality requirements under Art. 34 ECHR

Beyond these cases where the applicant already has a representative before the Court, the Court – in line with the general tendency identified above to interpret Art. 34 in the same way as similar substantive Convention guarantees – has recently had occasion to set out requirements regarding Art. 34 and minimum quality of legal services where legal aid is required in the course of an individual application. In *Feilazoo v Malta* (2021), the Court effectively transferred its case law on the requirements for legal aid under Art. 6 ECHR to the context of the right to individual application under Art. 34,[910] noting that 'an adequate institutional framework should be in place to ensure effective legal representation for entitled persons and a sufficient level of protection of their interests'.[911] Running through much of the case law discussed in Chapter Two,[912] the Court noted that

> after notice of a number of complaints had been given to the Respondent Government, a lawyer was required for the purposes of the proceedings before the Court and at that stage legal aid was granted to the applicant and a local legal aid lawyer was appointed by the domestic courts. However, the Court is of the view that in the present case that grant was not enough to safeguard the applicant's right to individual petition in a 'concrete and effective manner' …[913]

The Court then explicitly '[left] open the issue of the quality of the advice given to the applicant or whether pressure was exerted on him to drop his case', finding that '[i]t suffices to note that the applicant's local legal aid representative failed to keep regular confidential client-lawyer contact' and 'proceeded to abandon her mandate without informing the applicant

910 *Feilazoo v Malta* (n 895), para 125ff, another good example of the Court's willingness to shift its case law between articles.

911 Ibid, para 125.

912 *Staroszczyk v Poland* App no 59519/00 (ECtHR, 22 March 2007); *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007); *Bąkowska v Poland* App no 33539/02 (ECtHR, 12 January 2010); *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989); *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980) etc., cf Chapter Two, 122ff.

913 *Feilazoo v Malta* (n 895) (reference *mutatis mutandis* to *Anghel v Italy* App no 5968/09 (ECtHR, 25 June 2013) and *Korgul v Poland* App no 35916/08 (ECtHR, 17 April 2012) omitted).

(and/or the Court) and without her having obtained the revocation of her appointment by the domestic courts'.[914] The Court noted that despite the fact that the Government had been informed of this, 'no steps were taken by any State authority to improve the situation',[915] and that therefore 'these failings amounted to ineffective representation in special circumstances which incur the State's liability under the Convention'.[916] Art. 34's effect on the provision of legal services in Convention proceedings is therefore clearly not limited to a simple protective dimension prohibiting the State from interfering with a pre-existing lawyer/client relationship. Instead, Art. 34, in a similar way to Art. 6 and the right of access to a court, may trigger a positive obligation on the part of the State to ensure that access to the European Court of Human Rights is practical and effective.[917]

4. Abstract risk suffices

Finally, it is worth noting that Art. 34 – at least as regards its negative dimension[918] – provides such strict protection as to apply regardless of whether or not the right to individual application has actually been affected. As highlighted in *Annagi Hajibeyli v Azerbaijan*, 'a failure by the respondent Government to comply with their procedural obligation under Article 34 of the Convention does not necessarily require that the alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition'.[919] The Court therefore embraces an abstract standard, whereby the question of the impact of any interference is irrelevant[920] – as confirmed particularly clearly by the ra-

914 *Feilazoo v Malta* (n 895), para 127.
915 Ibid, para 128.
916 Ibid, para 130 with reference to *Anghel v Italy* (n 913).
917 For the case law on domestic legal aid see Chapter Two, 122ff.
918 For the positive dimension actual hindrance of exercise of the right of individual petition is already a requirement for the State to even fall under the obligation to ensure access to legal services as a prerequisite of access to the Court, cf *Feilazoo v Malta* (n 895), para 127.
919 *Annagi Hajibeyli v Azerbaijan* (n 669), para 77.
920 Although, if this is the standard, one wonders why the Court in *Khodorkovskiy and Lebedev v Russia* (n 899), para 925 highlighted 'that the first applicant submitted a very detailed and well-supported application' – while of course the applicant's lawyers will have been glad for this praise, in combination with the finding at para 933 that 'although it is difficult to measure the effect of those measures on the first

tionale given in *Janowiec and others v Russia [GC]* (2013), where the Grand Chamber 'reaffirm[ed] that the Contracting Party's procedural obligations under Articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives'.[921] Particularly regarding lawyers, the Court has held that lodging a spurious formal complaint against a solicitor connected to an application may constitute a violation of Art. 34 regardless of whether the complaint is ultimately dismissed as unfounded.[922]

III. Conclusion: Protecting the client's private interest in legal services

In sum, the European Court of Human Rights has created a number of lines of case law intended to protect the private interests of clients by particularly protecting legal services. This protection extends to two main areas, protection of the internal client-lawyer relationship (which was discussed in Chapter Two) and protection of the lawyer's ability to perform outward-facing activities such as representation (discussed in the present chapter).

As regards the former, internal facet, the Court has tried to protect a relationship between client and lawyer that is based upon trust and mutual understanding, which in turn will require – in principle – that the client can freely choose their lawyer, freely communicate with them, and rest safe in the knowledge that communication between the two will be confidential. The Court has otherwise been hesitant to set out requirements regarding this internal relationship, preferring instead to leave the details largely to the parties and impose an obligation on the State only to remedy particularly egregious shortcomings.

As regards the external dimension of legal services, the Court has created complex and differentiated case law which sometimes elevates, sometimes reduces the level of Convention protection which legal services will enjoy.

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applicant's ability to prepare and argue his case, it was not negligible' it does raise questions as to the standard applied.

921 *Janowiec and others v Russia [GC]* App no 55508/07; 29520/09 (ECtHR, 21 October 2013), para 209, applied recently in *Feilazoo v Malta* (n 895), para 122. 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.

922 *McShane v UK* App no 43290/98 (ECtHR, 28 May 2002), para 151.

In this regard, it has been guided by a classical view of legal services that focuses largely on litigation, with a focus on criminal defence. In particular, it has elevated the protection of lawyers' freedom of expression where they represent clients in court proceedings, as well as providing additional protection against physical harassment of lawyers by State authorities. Beyond this, it is less clear whether the Convention provides additional protection or additional restrictions where legal services are provided, particularly with respect to freedom of expression outside the courtroom, since the Court has also frequently referred to the obligations lawyers have as part of the 'administration of justice'.

This case law on the protection of the client's private interest in legal services appears to be based on certain assumptions about the domestic context, particularly the assumption of a comparatively well-functioning justice system. However, the Court has at times shown awareness of potential difficulties and taken that context into account in its jurisprudence. For example, in *Bagirov v Azerbaijan*, where the Court 'observe[d] that in a series of cases it ha[d] noted a pattern of arbitrary arrest, detention or other measures taken in respect of government critics, civil society activists and human rights defenders', the Court appeared to elevate the level of protection the Convention provides by noting that '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'.[923] Conversely, where the context of the case is such as to make it wholly exceptional in a situation that does not otherwise pose systemic rule-of-law problems, that may in principle lead to a greater margin of appreciation for States. For example, in the admissibility decision in *Mattei v France* (2001) the Court emphasised the specific context of civil unrest in Corsica in the 1990s,[924] which led to a wide margin of appreciation.[925] Similarly, in the admissibility decision in *Döring v Germany* (1999), which concerned the disbarment of a lawyer who had previously participated in political repression as a judge in the GDR,[926] the Court noted in particular the 'exceptional circumstances of German reunification'[927] in finding

923 *Bagirov v Azerbaijan* (n 729), para 103.

924 *Mattei v France (dec)* (n 829) 14. *Mattei* is discussed in Chapter Five at 236.

925 Ibid 15.

926 *Döring v Germany (dec)* App no 37595/97 (ECtHR, 09 November 1999) 3.

927 Ibid 8 (author's translation). The original reads '[c]ompte tenu de tous ces éléments, et notamment des circonstances exceptionnelles liées à la réunification allemande, la Cour estime que l'Etat défendeur n'a pas excédé sa marge d'appréciation et qu'il

a wider margin of appreciation.[928] These cases show an indication of the Court looking beyond the facts of the individual case, and contextualising them against the backdrop in which they take place – essentially including a public-interest dimension in its cases, which will be discussed later in Chapter Five.

n'a pas manqué, eu égard aux objectifs légitimes poursuivis, de ménager un "juste équilibre" entre les intérêts économiques du requérant et l'intérêt général de la société allemande.'

928 Ibid 8. For another example of the Court granting leeway to Germany due to the exceptional circumstances surrounding its reunification see eg *Olbertz v Germany (dec)* App no 37592/97 (ECtHR, 25 May 1999) 10.