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Justin Friedrich Krahé

Legal Services and the European Convention on Human Rights

Securing Private Rights and Public Interests

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Frankfurt/Lausanne, August 2024 Justin Friedrich Krahé

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Table of Abbreviations

(dec)	Decision
CCBE	Council of Bars and Law Societies of Europe
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
GC	Grand Chamber
IBA	International Bar Association
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration on Human Rights
UIA	Union Internationale des Avocats

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Summary

Protection of legal services by means of human rights instruments is a complex matter. Legal representation and advice advance the private interests of clients and lawyers. Simultaneously, they further the general public interest in the rule of law. Since traditional understandings of human rights focus primarily on human rights as protecting the interests of the rights holder, this can lead to tensions: Here, human rights instruments protect not only private, but also public interests, arguably going beyond the ambit of individual rights to regulate questions of State organisation and adding a further dimension of 'constitutional' significance to human rights law.

This study assesses how the European Court of Human Rights has dealt with this interplay of private and public interests. It aims to answer two research questions:

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

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

In a first, doctrinal part (Chapter Two to Chapter Five), the study determines States' obligations by setting out the Court's case law on legal services. While the Court emphasises the public interest in legal services rhetorically, highlighting the 'special status of lawyers'[1] as 'part of the very heart of the Convention system'[2], it does not assign this public interest a clear normative status. Instead, it takes only the private interests of individuals as its point of departure, modifying these in light of their relationship with the public interest in legal services. This leads to inconsistent and incomplete case law, which at times elevates the level of protection applicants will enjoy, but at other times limits their rights without clear justification.

1 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45, discussed in detail in Chapter Five, 227ff.

2 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669, discussed in detail in Chapter Five, 240ff.

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In a second, conceptual part (Chapter Six to Chapter Ten), the study then examines whether this analysis focused exclusively on obligations owed to individuals can convincingly explain the case law. It begins by comparing the case law on legal services to the case law on the media, since in both areas the exercise of private rights also serves public interests (pluralism/democracy for the media). It is then argued that the Court's difficulties flow from the fact that it focuses only on rights and the corresponding directed duties and ignores undirected duties under the Convention. The use of rights to protect public interests is problematic because most of the Court's general doctrines, particularly as regards the scope of the Convention rights and proportionality analysis, have been developed on an individualistic vision of human rights as protecting the rights bearer regardless of whether their activities further any public interest.

The study then proposes an alternative analysis which recognises that the Convention has the capacity not only to impose on States directed duties with corresponding individual rights protecting private interests, but also undirected duties protecting public interests. One of these is the obligation to ensure that legal services exist. Using this second category, the Court's case law can be understood as the result of the relationship between the obligation to protect the applicant's private interests and the public-interest obligation to protect legal services. Where a case touches on both of these obligations, the obligations can be in harmony or conflict, which explains the variations in the level of human rights protection the Court accords. However, clearly separating into two different obligations has the advantage of providing a clearer standard because the impact on the applicant's private interests and on the public interest in legal services can be determined separately.

The study thus establishes that the Court's case law imposes on States certain obligations in the public interest which cannot be reduced to individual rights. While the main focus here is on legal services, similar obligations exist in a number of other areas of the Court's case law, including on judicial organisation, democratic procedures, separation of powers or the rule of law. This finding indicates that beyond protection of individual rights, the Convention also regulates elements of the internal organisation of the State and therefore exhibits 'constitutional' features in a broader sense than previously assumed.

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Chapter One: Introduction, Case Selection and Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 International Bar Association (n 5) 97ff.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Soft law on legal services

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

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

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

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

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

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

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

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

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

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

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

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

29 eg Art. 1 § 3 United Nations Charter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37 García-Sayán (n 21).

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

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

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

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

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

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

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

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

42 Ibid 7.

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

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

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

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

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

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

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

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

48 Ibid, final preambulatory paragraph.

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

(c) *Soft law standards by international NGOs*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

64 Ibid 9.

65 Ibid 9.

66 Ibid 9.

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

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

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

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

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

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

71 cf ibid 14.

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

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

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

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

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

77 Portuguese, Italian, German, Arabic and Mandarin.

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

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

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

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

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

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

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

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

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

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

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

99 Ibid, para IV b).

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

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

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

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

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

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

104 Last amended in 2019.

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

106 See eg General Assembly of the Latvian Sworn Advocates, *Code of Ethics of the Latvian Sworn Advocates* (1993); for Germany see former s 29 BORA as well as the materials prepared in the drafting of s 27 EuRAG; for Russia see Russian Federal Bar Association, *Kodeks professional'noj ètiki advokata* (2003), para I.2.

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

108 Collins (n 16) 15.

109 Boon and Flood (n 69) 47.

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

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

2. Hard international law on legal services

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

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

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

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

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

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

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

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

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

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

117 Ibid 2.

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

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

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

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

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

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

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

4. Legal services and international human rights law

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

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

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

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

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

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

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

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

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

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

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

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

III. The European Convention on Human Rights and legal services

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

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

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1. Research questions

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

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

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

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

2. Structure of inquiry and chapter overview

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Case selection and definitions

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

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1. Case selection

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

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

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

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

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

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

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

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

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

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

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

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2. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

158 Discussed in Chapter Two, 134ff.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

168 Ibid, para 82ff.

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

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

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

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

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

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

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

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

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

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

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

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

i. '*Legal services*'

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

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

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

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

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

ii. *'Lawyer' and 'client'*

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

iii. *'Bar associations'*

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

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

182 Collins (n 16) 4.

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

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

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

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

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

184 See Chapter Eight, 406ff.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

196 Held (n 186) 135.

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

198 See on this Chapter Seven, 375ff.

199 Peter (n 195) 3.

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

201 Isensee (n 189), para 37.

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

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

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

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

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

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

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Chapter Two: Legal Services and the Client's Private Interests: The Internal Dimension

To date, the Court has produced the most case law on the way legal services protect the client's private interests.[206] This case law can be split into two categories, cases concerning the internal dimension of the client-lawyer relationship, which are dealt with in this chapter, and cases concerning the external dimension of the client-lawyer relationship, which are discussed in Chapter Three.

In its case law, the Court consistently elevates protection for the internal relationship between lawyer and client. It conceptualises this relationship as a special relationship based upon a foundation of trust (I.), which generally speaking requires free choice of lawyer and freedom of (confidential) communication. Once these conditions are established, the Court generally leaves all further questions of the internal client-lawyer relationship to the parties' discretion (II.), imposing State responsibility only in cases where there are manifest problems in the provision of legal services.

Unlike some other areas, notably freedom of expression for lawyers acting on behalf of clients,[207] the Court's case law on the internal relationship between lawyers and clients consistently elevates the level of Convention protection this relationship will enjoy. Nonetheless, the techniques employed by the Court vary without a clear rationale. In addition to bringing a whole host of Convention provisions into play,[208] the Court has drawn on the rights of both clients and lawyers, and sometimes both simultaneously, to strengthen their relationship without further explaining when and why it will resort to each of these techniques. In keeping with the approach discussed in Chapter One, cases have thus been grouped according to the factual situation they concern, rather than necessarily the Convention right invoked.

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

207 Where the picture is more mixed, see Chapter Three, 154ff.

208 For example Art. 5 § 4, Art. 6 in various guises, Art. 8 and Art. 34 ECHR, to say nothing of those cases where the Court effectively uses domestic law by arguing that the actions of the authorities violated domestic legal provisions.

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I. Foundation of trust for the relationship between client and lawyer

A core feature of the Court's understanding of the relationship between lawyer and client is that this relationship is different from other relationships in the sense of being particularly important or worthy of protection. Historically, many jurisdictions have treated legal services as going beyond a mere transactional relationship where one party provides highly-qualified services and the other provides remuneration.[209] In the European legal tradition, this kind of 'special' status goes back at least as far as the Roman-law concept of *mandatum*, which was treated distinctly from most other contracts under Roman law.[210] In essence, the argument then as now is that due to the special skills required, as well as the significance of what can be at stake, legal services are not simply a commercial service like any other, but require a particularly close relationship between both parties. In more modern economic terms, this is based at least partly on legal services' status as a credence good, ie one where the buyer cannot ascertain the quality of the good even after purchasing it.[211] Instead of such a 'mere' commercial relationship, to use the Court's own words, 'the relationship between the lawyer and his client should be based on mutual trust and understanding,'[212] and indeed, in another case, the Court has endorsed the position of a number of codes of conduct that 'the essential basis of a relationship between a lawyer and a client is trust'.[213] While at this level of abstraction the standard of 'mutual trust and understanding' is fuzzy at best, it does manifest more operably in two ways: free choice of lawyer (1.) and free communication between lawyer and client (2.).

209 This historical point forms part of the backdrop to the frequent debates about 'commercialisation' of the legal profession, in the course of which it is frequently alleged that the provision of legal services is in the course of becoming a transactional relationship much like other professional services and that this is a negative development.

210 And indeed in many domestic jurisdictions, see only for England & Wales the historical discussions in *Rondel v Worsley* [1969] 1 AC 191 (HL).

211 In this case, due to an information gap. See, in greater detail, Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar Publishing 2013) 13.

212 *Sakhnovskiy v Russia [GC]* App no 21272/03 (ECtHR, 02 November 2010), para 102; *Orlov v Russia* App no 29652/04 (ECtHR, 21 June 2011), para 106; *Jelcovas v Lithuania* App no 16913/04 (ECtHR, 19 July 2011), para 130; *Gennadiy Medvedev v Russia* App no 34184/03 (ECtHR, 24 April 2012), para 35; *Gorbunov and Gorbachev v Russia* App no 43183/06; 27412/07 (ECtHR, 01 March 2016), para 36.

213 *VK v Russia* App no 9139/08 (ECtHR, 04 April 2017), para 37.

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1. Free choice of lawyer

Perhaps the clearest emanation of the 'relationship of mutual trust and understanding' is the principle of free choice of lawyer. In the criminal law context, Art. 6 § 3 (c), the provision which guarantees to everyone charged with a criminal offence the right to defend themselves 'through legal assistance of [their] own choosing' is unique within the Convention in that it guarantees not only a right to a certain service – notable enough in a human rights instrument drafted in the immediate post-war period and initially (intentionally)[214] poor in positive rights – but even grants the right to choose who will provide this service. The Court's later interpretation in this field is thus particularly in line with the drafters' original intentions: The Convention does not regard legal services as essentially fungible, but as closely linked to the relationship between the person providing them and the recipient. Indeed, as Judge Pinto de Albuquerque pointed out in one of his famous dissenting opinions, where criminal law is concerned there is a close link between choice of lawyer and the defendant's status as 'a subject of the procedure, rather than its object',[215] and therefore to human dignity.

As a caveat, it is worth noting that Art. 6 § 3 (c) itself applies only in the criminal law context, and, similarly, much of the Court's case law on free choice of lawyer has been developed regarding criminal proceedings. However, concluding from this that outside criminal proceedings there is no general right to choose one's lawyer would seem premature. In fact, the Court has taken pains in its case law to emphasise that the special relationship between client and lawyer is not to be understood restrictively as only relating to client and defence counsel.[216] Instead of being reason to apply the maxim that *expressio unius est exclusio alterius*, the fact that Art. 6 § 3 (c) contains a specific guarantee for the criminal context is instead likely to flow from adverse historical experience[217] and the generally greater

214 cf eg Danny Nicol, 'Original Intent and the European Convention on Human Rights' (2005) Public Law 152.

215 *Correia de Matos v Portugal [GC]* App no 56402/12 (ECtHR, 04 April 2012) 82.

216 cf eg *Campbell v UK* App no 13590/88 (ECtHR, 25 March 1992), para 48 for confidentiality of communication. This is particularly significant in relation to those jurisdictions where the line between restricted and unrestricted legal activities runs between criminal defence and other legal services, since in these jurisdictions different classes of people may be providing criminal and non-criminal services.

217 cf eg Judge Pinto de Albuquerque's dissenting opinion in *Correia de Matos v Portugal [GC]* (n 215), especially at para 65. In essence, the kind of authoritarian

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detail in fair trial rights concerning criminal law (which flows inter alia from the weight of the sanctions involved). Moreover, the comparable lack of contemporary case law on free choice of lawyer outside the criminal law context presumably results at least to some extent from practical factors. Typically, States do not interfere as strongly with choice of lawyer for persons who are not detained, and even where a client at liberty is unable to choose a specific lawyer due to eg limitations such as conflict-of-interest legislation[218] or minimum qualification,[219] exhaustion of domestic remedies under Art. 35 § 1 will usually require that the client eventually does find a (different) lawyer they are satisfied with. Finally, unlike in criminal proceedings, where applicants will not have a choice as to whether or not proceedings are conducted, in other contexts those who cannot find a lawyer they deem suitable may simply give up and decide not to pursue their case, ending the matter far before domestic remedies are exhausted.

Beyond these individual factors, the right to legal assistance of one's own choosing is also significantly affected by regulation in the public interest,[220] two areas of which – conflict-of-interest legislation and minimum qualification – have already been alluded to above. This shows particularly clearly the interlinked nature of the private- and public-interest dimensions of the Court's case law on legal services: Rules limiting the provision of legal services to certain providers can also, where individuals want to choose someone outside this limited group, be interpreted as a restriction on the client's right to choose a lawyer, and indeed this argument has been made before the Court.[221] While the Court's case law is not entirely clear, the

State the Convention is designed to warn of is likely to be more interested in interfering with choice of defence counsel than with legal representation in eg civil proceedings.

218 Which the Court has not, so far, examined in any depth, even though particularly in jurisdictions with few lawyers (Azerbaijan, with just under 1,000 lawyers for a population of nearly 10 million, springs to mind, cf Mike Runey, 'Azerbaijan Moves to Drastically Cut Number of Lawyers' (2017) <https://eurasianet.org/azerbaijan-moves-to-drastically-cut-number-of-lawyers> accessed 08 August 2024) and consequently even fewer human rights defenders this would seem open to abuse.

219 See, in this vein, *Zagorodniy v Ukraine* App no 27004/06 (ECtHR, 24 November 2011), para 53ff.

220 See Chapter Five, 264ff.

221 *Shabelnik v Ukraine* App no 16404/03 (ECtHR, 19 February 2009), para 39; *Zagorodniy v Ukraine* (n 219); *Appas v Greece (dec)* App no 36091/06 (ECtHR, 04 December 2008); *Svintzos v Greece (dec)* App no 2209/08 (ECtHR, 24 September 2009).

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Court has classed minimum educational requirements as such a 'restriction on the free choice of defence counsel',[222] which seems to indicate that Art. 6 § 3 (c)'s scope does extend to free choice of anyone the defendant may want to take the case,[223] with restrictions permissible under the usual conditions. Since these latter restrictions are closely related to the general question of legal services as a regulated market, these issues are dealt with in Chapter Five as part of the public-interest dimension of legal services,[224] while the present section deals (only) with free choice from the pool of persons who, in the abstract, fulfil the requirements of domestic law to act.

(a) *Criminal defence through legal assistance of the accused's choosing, Art. 6 § 3 (c) ECHR*

As regards the aforementioned criminal law guarantee in Art. 6 § 3 (c) ECHR, the Court has both emphasised the importance of that right and the tension inherent in a right to choose one's legal assistance in criminal proceedings. In these cases, the interests of State and defendant frequently do not overlap. The defendant may have an interest in obstructing proceedings,[225] while the State may not be genuinely interested in an effective defence.[226] Both sides have incentives to base choice of counsel on extraneous factors. Unfettered discretion in the hands of either the State or the defendant is therefore unlikely to achieve satisfactory results, leading to the necessity of reading limitations into Art. 6 § 3 (c).

222 *Zagorodniy v Ukraine* (n 219), para 53.

223 Although note that Art. 6 § 3 (c) protects only the right to choose *legal* representation, cf *Shabelnik v Ukraine*, para 39.

224 cf 261ff.

225 eg *Jemeljanovs v Latvia* App no 37364/05 (ECtHR, 06 October 2016), para 29, where the domestic court – after two requests by the applicant to change his State-appointed lawyer had been granted and he lodged a third – 'stated that the applicant was seeking to delay the proceedings'.

226 Particularly the latter point may also explain why in many of the cases concerning choice of lawyer the applicant also raised doubts as to the quality of the legal services they had received, since in many situations (such as *Mayzit v Russia* App no 63378/00 (ECtHR, 20 January 2005) or *Dudchenko v Russia* App no 37717/05 (ECtHR, 07 November 2017)) the reason the applicant wants a different lawyer is because they are dissatisfied with the legal services they have been receiving – although it is worth remembering that this does not necessarily mean that those legal services are actually subpar, given their status as a credence good.

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i. Dvorski [GC] *and the principle of informed choice*

In the 2015 Grand Chamber judgment *Dvorski v Croatia*, the Court clarified its case law on the balance to be struck under Art. 6 § 3 (c) ECHR as follows:

> Notwithstanding the importance of the relationship of confidence between a lawyer and his client, this right [the right to have recourse to legal assistance of one's own choosing, cf preceding paragraph] is not absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them … The Court has consistently held that the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice …[227]

Ultimately, even where a State decision does not conform to these criteria, that will not automatically lead to a Convention violation under the Court's constant jurisprudence that Art. 6 § 3 contains indicative aspects of the fair trial guarantee from Art. 6 § 1, rather than hard-and-fast rules. As the Court went on in *Dvorski*,

> where such grounds are lacking, a restriction on the free choice of defence counsel would entail a violation of Article 6 § 1 together with paragraph 3 (c) if it adversely affected the applicant's defence, regard being had to the proceedings as a whole …[228]

On the facts, *Dvorski* itself was somewhat atypical in the sense that the applicant *had* chosen the lawyer who had represented him. However, he argued that the only reason he chose this lawyer had been because he had not been aware that his preferred lawyer, who had in fact already been instructed by the applicant's family but had for spurious reasons been refused access to the facility where the applicant was detained, would also have been able to take his case.[229] *Dvorski* therefore raised the question not just of the right to choose, but of the basis on which such a choice had to be made. The Grand Chamber, with a 16 to one majority, held that

> while the applicant had formally chosen M.R. to represent him during police questioning, that choice was not an informed one because the applicant had no

227 *Dvorski v Croatia [GC]* App no 25703/11 (ECtHR, 20 October 2015), para 79 (citations omitted).
228 Ibid, para 79 (citations omitted).
229 Ibid, para 15.

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> knowledge that another lawyer, retained by his parents, had come to the police station to see him, presumably with a view to representing him.[230]

This led the Grand Chamber to class *Dvorski* as a case where the national authorities had overridden the defendant's wishes, and the majority then proceeded to apply the case law governing these situations.

This assessment in *Dvorski* is significant because it shows that mere formal freedom to choose is not enough.[231] Instead, Art. 6 § 3 (c) ECHR contains minimum substantive criteria for the client's choice of lawyer. In the Grand Chamber's view, the lack of *free and informed* choice of lawyer amounted to not having been able to choose at all. Indeed, later in the judgment, the Court referred explicitly to a 'right … under Article 6 of the Convention to be represented by a lawyer of his own *informed* choice'.[232] While the Grand Chamber did not make this explicit, it is submitted that the rationale for this additional requirement is that only a choice that conforms to certain minimum standards is likely to form the basis of the relationship of 'mutual trust and understanding' between client and lawyer that the Court has highlighted elsewhere,[233] including to a certain extent in *Dvorski* itself.[234] Moreover, given that the applicant had not complained about the quality of services he had received from the lawyer that he had erroneously chosen,[235] the Grand Chamber's line of reasoning in *Dvorski* also reinforces the suggestion that the Convention does not consider legal advice as an in principle fungible commodity, but as specifically linked to the person of both provider and recipient. From the Convention point of view, it seems, freely chosen legal advice is, all else being equal, per se better than that of a lawyer whom the client has not chosen.

Nonetheless, the Court in *Dvorski* was keen not to take this latter point too far, given the potential for abuse identified above:

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230 Ibid, para 93.

231 Which ties in once again with the Court's general rejection of formalist approaches.

232 *Dvorski v Croatia [GC]* (n 227), para 102 (emphasis added). In, para 13 of their joint concurring opinion Judges Kalaydjieva, Pinto de Albuquerque and Turkovic are even clearer, noting a 'right to a free and informed choice of lawyer'.

233 *Sakhnovskiy v Russia [GC]* (n 212), para 102; *Orlov v Russia* (n 212), para 106; *Jelcovas v Lithuania* (n 212), para 130; *Gennadiy Medvedev v Russia* (n 212), para 35; *Gorbunov and Gorbachev v Russia* (n 212), para 36.

234 *Dvorski v Croatia [GC]* (n 227), para 79, with reference to the 'relationship of confidence'.

235 As highlighted by Judge Vehabović in his dissenting opinion, ibid 57.

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> In the abstract, if a suspect receives the assistance of a qualified lawyer, who is bound by professional ethics, rather than another lawyer whom he or she might have preferred to appoint, this is not in itself sufficient to show that the whole trial was unfair – subject to the proviso that there is no evidence of manifest incompetence or bias.[236]

Where the right to choose one's lawyer is not respected, that will consequently not suffice to render the entire proceedings 'unfair' contrary to Art. 6 § 1 if there is no other cause for concern. While a violation of the right to choose one's lawyer will therefore not automatically lead to a finding of a Convention violation, it may have that result where there are other problems with the domestic proceedings. Despite the latter caveat, *Dvorski* therefore shows the Court's recognition of the special nature of the relationship between lawyer and client, although in line with the dictum that the right to choose one's lawyer is 'necessarily subject to certain limitations where free legal aid is concerned'[237] 'Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced'[238].

As regards the connection between free choice of lawyer and trust between lawyer and client, the Court's case law clearly reflects the tendency that free choice will lead to increased trust, while appointment can in principle damage this relationship. As Judges Kalaydjieva, Pinto de Albuquerque and Turkovic noted in their joint concurring opinion in *Dvorski*, interference with the right to a lawyer of one's own choosing runs the risk of actively undermining the relationship of trust between that lawyer and the client because there is a risk that the client will perceive this as an attempt 'to impose on him a lawyer who is 'convenient' for the police or the accusatory party'.[239] Where suspicions of such machinations

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236 Ibid, para 111. It is unclear how 'professional ethics' and lack of 'manifest incompetence or bias' relate to each other, given that both manifest incompetence and bias are likely to be professional ethics violations, at least under internationally recognised standards such as the CCBE Code of Conduct; Council of Bars and Law Societies of Europe, *Charter of Core Principles of the European Legal Profession* (2019). For particularly clear examples of the Court assessing whether there had been 'an adverse impact on the overall fairness of the criminal proceedings against the applicant' where her privately-appointed lawyer had been replaced with a publicly-appointed one without her knowledge see *Elif Nazan Şeker v Turkey* App no 41954/10 (ECtHR, 08 March 2022), para 55ff.

237 *Dvorski v Croatia [GC]* (n 227), para 79.

238 *Lagerblom v Sweden* App no 26891/95 (ECtHR, 14 January 2003), para 55.

239 *Dvorski v Croatia [GC]* (n 227), para 14, a type of lawyer frequently referred to in Russian as 'karmannyj advokat' for being 'in the pocket' of the prosecution. On this

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exist,[240] it would be an unwise client who would have the kind of 'full and uninhibited discussion' which the Court has highlighted elsewhere[241] with someone who is potentially an instrument of the other side. Indeed, *Dvorski* itself presents a stark reminder of this if one follows Judge Silvis' concurring opinion that 'an essential characteristic of this case … is that the police apparently sought to orchestrate the defence during the initial stage of the proceedings, contrary to the provisions of domestic law, as well as the Convention',[242] which does not seem entirely far-fetched given that the lawyer in question was a former police chief of the same station.[243]

This tendency to protect trust between client and lawyer by means of a 'thick' (substantive) understanding of free choice of lawyer has also figured prominently in other cases. Perhaps particularly clear is *Martin v Estonia* (2013), where the defendant to a homicide charge complained that

> he had been pressurised to agree to be represented by R., counsel chosen by the investigative authorities under the legal-aid scheme,[244] who had acted in the interests of the authorities rather than those of the applicant. Under pressure exerted by both the authorities and the legal-aid lawyer, the applicant had confessed to the offence.[245]

The Court 'note[d] that in the present case legal-aid counsel was not chosen by the Bar Association but rather by the police investigator', and considered that the official justification given (potential conflict of interest due to the applicant's preferred lawyer also representing further suspects in the same proceedings) was unconvincing because there was a formal

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basis, the concurring opinion goes on to argue that denial of choice and denial of access to a lawyer should be treated the same.

240 See eg *Martin v Estonia* App no 35985/05 (ECtHR, 30 May 2013), para 69, discussed below.

241 *Campbell v UK* (n 216), para 46.

242 *Dvorski v Croatia [GC]* (n 227), para 48.

243 Ibid, para 21, although Judge Vehabović at n 1 of his dissenting opinion criticised that it had been 'completely irrelevant' to mention the lawyer's past as a former chief of that police station 'in circumstances in which there is no evidence that MR acted in any way contrary to the applicant's interests' in a case which took place seven years after the lawyer had left the police.

244 This ability for the investigating authorities to appoint their procedural opponent is itself a remarkable example of the fox guarding the henhouse.

245 *Martin v Estonia* (n 240), para 69.

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procedure available for removing counsel due to conflict of interest which had not been used.[246] Ultimately, the Court held that

> [b]ased on the above elements, in particular the authorities' failure to make use of the formal procedure for the removal of counsel in case there were doubts about a conflict of interests on his part and their reliance, instead, on informal talks with the applicant, the applicant's young age as well as his apparent instability, which prompted his subsequent psychiatric and psychological expert examination on two occasions, and also the seriousness of the charges, the Court is not satisfied that the applicant's wish to replace counsel of his own (his parents') choosing could be considered genuine in the circumstances of the present case.[247]

In the following evaluation of 'the overall fairness of the criminal proceedings',[248] the Court focused on the fact that the domestic courts had ultimately relied on the applicant's pre-trial statements made without the lawyer of his choosing, and 'conclude[d] that the applicant's defence rights were irretrievably prejudiced owing to his inability to defend himself through legal assistance of his own choosing', leading to a violation of Article 6 §§ 1 and 3 (c) of the Convention.[249]

Similarly to *Dvorski*, which referred extensively to *Martin*,[250] the Court showed a significant willingness to read minimum standards into the quality of the defendant's choice. Essentially, such a choice will only conform to the requirements of Art. 6 § 3 (c) ECHR where the defendant is in a position to make a free and informed choice as to their legal counsel. This position fits well with that taken more generally for waiver of Convention rights.[251] Indeed, the Court has shown that it considers these questions as two sides of the same coin by reinterpreting the argument that legal counsel

246 Ibid, para 90. This rationale is the reason why some jurisdictions maintain a blanket ban on representing more than one suspect in the same set of proceedings.
247 Ibid, para 93.
248 Ibid, para 94.
249 Ibid, para 97.
250 eg *Dvorski v Croatia [GC]* (n 227), para 78ff.
251 *Sakhnovskiy v Russia [GC]* (n 212), para 90 with further references. For a case where the Court actually applied this 'waiver' jurisprudence in the present context see *Jemeljanovs v Latvia* (n 225), para 85, where the applicant, after having already dismissed his legal aid lawyer once, was warned by the authorities that 'in the event of an unjustified refusal of the services of a legal aid lawyer, [he] had a right to hire a lawyer of his own choosing and at his own expense, or defend himself without a lawyer', but nonetheless pressed ahead with a further application to dismiss his (second) legal aid lawyer.

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had been freely chosen into the argument that the right to free choice had been waived in the 2019 case of *Utvenko and Borisov v Russia*.[252]

Utvenko, decided by the Third Section, raised the question of the minimum foundation for choice of lawyer in a particularly drastic way. In that case, the first applicant had been arrested on a homicide charge and had selected two defence attorneys, who were present at an initial interview.[253] At a later stage of the investigation, he made a confession which he subsequently retracted as having been the result of duress. Significantly, during the interview in which the confession had been made, the applicant had not been assisted by his defence counsel, who he had been (incorrectly) told were unavailable[254] and who had also been denied access to their client on spurious grounds.[255] Instead, the interview was attended by a State-appointed lawyer contacted directly by one of the investigators.[256] This lawyer made no attempt to pursue the client's interests, and was in fact later disbarred for her role in the damage to the client's fair-trial rights,[257] with the Bar association finding that she had violated Russian professional rules through her direct contact with the investigator[258] and by not providing any legal assistance to the applicant during the course of the interview,[259] her role essentially having been to 'formalise' the applicant's self-incriminatory declarations.[260] During the trial itself, none of the domestic courts interacted significantly with these procedural irregularities, focusing instead on the fact that the applicant had signed a power of attorney in favour of the State-appointed lawyer, an argument which the Government repeated at Strasbourg.[261]

The Court, rejecting that line of reasoning, once again made its position on a general right to choose one's lawyer clear, noting that '[l]a Cour doit donc rechercher s'il y a eu en l'espèce des restrictions au droit du premier requérant à bénéficier de l'accès à l'avocat de son choix et si, le

252 *Utvenko and Borisov v Russia* App no 45767/09; 40452/10 (ECtHR, 05 February 2019), para 180.
253 Ibid, para 9.
254 Ibid, para 71, 84, 181. In reality, the investigators had not attempted to reach them.
255 Ibid, para 19, 181.
256 Ibid, para 178, in violation of Russian professional rules, cf ibid, para 32.
257 Ibid, para 31.
258 Ibid, para 32.
259 Ibid, para 33.
260 Ibid, para 183.
261 Ibid, para 178.

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cas échéant, ces restrictions ont eu un impact sur l'équité de la procédure pénale prise dans son ensemble'.[262] It then held that a potential waiver had not been 'knowing and intelligent'[263] because the incorrect information given to the applicant by the authorities as to the availability of his chosen legal representatives had vitiated his agreement to be represented by the State-appointed lawyer.[264] The Court also highlighted that the question of whether or not the applicant could foresee the consequences of his behaviour was intrinsically linked to the effectiveness of the State-appointed lawyer's assistance,[265] which the Court went on to criticise heavily by reference to the devastating findings of the later disbarment decision.[266] On this basis, the Court found that the applicant had not validly waived his right to be represented by a lawyer of his choice, and that therefore there had been an interference with this right. Focusing on the lack of engagement with this point by the domestic courts, the Court went on to find that the deficiencies at the investigatory stage of the proceedings, notably the restriction on the applicant's right of access to the lawyers of his choice during the key interview, had not been remedied by the procedure taken as a whole, and that therefore there had been a violation of Art. 6 §§ 1, 3 (c) ECHR.[267]

262 Ibid, para 179, 'the Court must therefore consider whether there were any restrictions on the first applicant's right of access to a lawyer of his choice in this case and whether, if so, these restrictions had an impact on the fairness of the criminal proceedings as a whole' (author's translation).

263 The term typically used in English, cf *Dvorski v Croatia [GC]* (n 227), para 101. In the *Utvenko* judgment itself, the passage reads '[la Cour] estime que cette renonciation n'a pas été "consciente et éclairée"', *Utvenko and Borisov v Russia* (n 252), para 181.

264 'Aux yeux de la Cour, l'information erronée, communiquée au premier requérant par l'enquêteur B., quant à la disponibilité des avocates choisies par l'intéressé, n'a pas permis à ce dernier de donner son accord pour être représenté par l'avocate Ku. en toute connaissance de cause', 'In the Court's view, the erroneous information given to the first applicant by investigator B. as to the availability of the lawyers chosen by the applicant did not enable him to give his consent to be represented by lawyer Ku. in full knowledge of the facts' (author's translation), *Utvenko and Borisov v Russia* (n 252), para 181.

265 Ibid, para 182.

266 Ibid, para 183.

267 Ibid, para 203, 204.

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ii. *The importance of free choice of lawyer as conducive to trust*

The aforementioned case law highlights several things. First of all, it shows that the Court, generally speaking, sees free choice of lawyer as particularly important, in keeping with the explicit guarantee of the corresponding right in Art. 6 § 3 (c)[268] and the finding that this guarantee is 'generally recognised in international human rights standards as a mechanism for securing an effective defence to the accused'.[269] While interference with the right of access to the lawyer of one's choice will not automatically render the proceedings as a whole unfair, restrictions on this central right can have that effect if not offset at later stages,[270] and 'domestic [court] decisions to override or obstruct a defendant's wish as to his or her choice of legal representation must be accompanied by procedural safeguards calculated to ensure that the right to legal assistance of one's own choosing remains practical and effective, and not theoretical and illusory'.[271] Most importantly, however, the Court requires a robust basis for this choice in terms of information and actual freedom to choose. Beyond a general tendency to interpret Convention rights substantively rather than formalistically, the most convincing justification for this would appear to be a general assumption that it is easier to build a relationship of mutual respect and understanding on a voluntary choice than on a forced assignment, which would also explain why the Court moved so seamlessly from the right 'to have recourse to legal assistance of [one's] own choosing' to 'the relationship of confidence between a lawyer and his client' in *Dvorski*.[272] Furthermore, this would explain the Grand Chamber's passing criticism in *Sakhnovskiy v Russia [GC]* (2010), where the Court noted with disapproval that 'the applicant was expected either to accept a lawyer he had just been introduced to, or to continue without a lawyer'.[273] On this analysis,

268 And indeed, in *Schönenberger and Durmaz v Switzerland* App no 11368/85 (ECtHR, 20 June 1988) the Court elevated the level of protection of communication between a prisoner and an attorney engaged by the former's wife to the extent that this communication was intended to enable the former to choose his own lawyer, cf, para 29.

269 *Elif Nazan Şeker v Turkey* (n 236), para 42.

270 For a further example in this regard see eg *Pavlenko v Russia* App no 42371/02 (ECtHR, 01 April 2010).

271 *Elif Nazan Şeker v Turkey* (n 236), para 51.

272 *Dvorski v Croatia [GC]* (n 227), para 78–79.

273 *Sakhnovskiy v Russia [GC]* (n 212), para 105. At para 63, the Grand Chamber summarised the applicant's complaint as being that 'he had not had any objection

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the reason why the Convention protects choice of lawyer is because it is conducive to trust between client and lawyer, which the Court has explicitly highlighted as particularly important.

iii. *Abusive bans on legal representation*

While in legal aid cases such as *Martin v Estonia* (2013), where the State itself appoints counsel, there is a particularly high risk of abuse, this does not rule out problems regarding choice of lawyer where defendants are not reliant on legal aid. Although in cases where the authorities have powers of appointment the risk of bad-faith actors appointing stooges as defence counsel looms particularly large, the converse problem – depriving clients of a lawyer they have freely chosen – is not to be underestimated. In this vein, even in the area of privately chosen counsel there is some indication that bad-faith actors may have found new ways of removing counsel who take their role seriously. One particularly noticeable method is the abusive application of otherwise unproblematic bans on representation.[274] Perhaps the clearest of these is conflict-of-interest legislation, which exists in some shape or form in essentially every jurisdiction and is itself designed to secure the special relationship of trust and understanding between lawyer and client by ensuring that the lawyer is not 'conflicted' in their pursuit of the client's interest.[275] While the basic idea is the same – lawyers should not act for clients where the lawyer has other interests that may interfere with their professional activities –, the conditions and scope of the prohibition vary significantly from jurisdiction to jurisdiction.[276]

In a practice sometimes referred to as 'role manipulation', domestic authorities may be tempted to prevent a specific lawyer from taking a case by artificially creating a situation where conflict of interest legislation bars

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to [his lawyer] personally, even though he had not known her previously, but had pointed to the fact that they had been deprived of any opportunity to form even a semblance of a meaningful lawyer-client working relationship'.

274 As noted above, general questions on who may provide legal services are dealt with in Chapter Five, 261ff.

275 On the conceptual difficulties this causes for the application of human rights to lawyers see Chapter Eight, 423ff.

276 For example, while some jurisdictions attach an abstract standard, prohibiting legal services where there is even a relatively remote risk of a later conflict of interest, other jurisdictions require a more concrete conflict to actually arise.

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them by operation of law from taking that case. For example, in some States legislation prohibits lawyers from acting in proceedings where they are also charged with an offence. If defence counsel do their job well, bad-faith actors may thus seek to disqualify them from the case by simply charging them in the same matter, frequently as accessories or supporters of prohibited organisations.[277] Since such a charge will trigger the legislative ban on continued representation, the lawyer will then be prohibited from acting in the case, depriving defendants of their choice of defence counsel.

To date, the Court has not yet had much opportunity to deal directly with this type of abuse of procedural norms, which may in part be because it will frequently be difficult to show that the decision to bring charges against defence counsel was improperly motivated.[278] The problem is an exceptionally tricky one, since conflict of interest legislation serves a pre-eminently legitimate aim, the very relationship of trust that the Court goes to great lengths to protect. Only when perverted to interfere with choice of lawyer does this type of legislation – or rather, its application – become problematic. In keeping with its general strategy of increasing procedural-isation,[279] the Court has sometimes been able to circumvent these issues and resolve allegations of role manipulation by focusing on procedural issues, as in *Martin* itself, where the formal conflict of interest procedure available under domestic law had not been used.[280] In other cases, the domestic authorities were so inept as to violate the provisions of domestic law in their attempts at role manipulation, something which the Court has been happy to base its reasoning on.[281]

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277 cf eg *Sarli v Turkey* App no 24490/94 (ECtHR, 22 May 2001), para 85. To achieve the desired effect, it will often not even be necessary for proceedings to end in a conviction.

278 Note the proximity to Art. 18 ECHR in this area.

279 For an introduction see eg Oddný Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 International Journal of Constitutional Law 9.

280 *Martin v Estonia* (n 240), para 90. Note that the Court also avoided clarifying exactly what weight this aspect carried in its reasoning.

281 eg *Dudchenko v Russia* (n 226), para 155 where the Court relied on the fact that 'the domestic law does not provide for the removal of counsel in order to question him or her as a witness'. Ultimately, however, the Court found no violation because the proceedings as a whole had been fair. In Russian criminal procedural law, Art. 56 § 3 (2), (3) of the Criminal Procedural Code bans questioning of *advokaty* regarding information obtained from their clients without the latters' consent, although practice seems to indicate this provision is not always closely followed, cf eg Rostislav Xmyrov, 'V zaščite prav advokatov každaja udovletvorennaja žaloba –

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(b) Correia de Matos [GC] *and defending oneself in person, Art. 6 § 3 (c) ECHR*

While the Court has thus far been able to detect alleged attempts at role manipulation, sooner or later cases are likely to arise that are more difficult to identify. For these cases, the Court's current jurisprudence would appear to exacerbate rather than defuse the risk of role manipulation, partly due to the 2018 Grand Chamber judgment in *Correia de Matos v Portugal*. The inclusion of this case in a section entitled 'free choice of lawyer' is not without irony, the applicant's main complaint being that he had not been free *not* to choose a lawyer.[282] Mr Correia de Matos, who had completed legal training in Portugal and had practised for a certain time as a lawyer,[283] had wanted to represent *himself* in criminal proceedings against him for criminal insult of a judge.[284] Portuguese law as in force at the time, however, prevented him from representing himself, and instead required that he be represented by another lawyer.[285]

The Grand Chamber, in a 9–8 split vote, ultimately held that there had been no violation of the Convention,[286] since the Portuguese rules totally prohibiting self-representation fell within the State's margin of appreciation. While on the facts of the case the majority's reasoning focusing on margin of appreciation may be defensible, this finding significantly weakens the protection the Convention might otherwise have provided against role manipulation. Defendants who are able to conduct their own defence can

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pobeda' (2021) <https://www.advgazeta.ru/mneniya/v-zashchite-prav-advokatov-kazhdaya-udovletvorennaya-zhaloba-pobeda-/> accessed 08 August 2024, who refers to this as one of the most frequent violations of advocates' rights.

282 *Correia de Matos v Portugal [GC]* (n 215), para 3. The case also contains a fascinating problem regarding the relationship between the ECtHR and the United Nations Human Rights Committee, which, however, is not specific to legal services and therefore not of interest to the present enquiry.

283 Not always while also authorised to do so, cf ibid, para 9.

284 This is a constellation that underlies a large number of the cases discussed in Chapter Three in the context of lawyers' Art. 10 rights.

285 *Correia de Matos v Portugal [GC]* (n 215), paras 13, 22, 37.

286 Thus departing from United Nations Human Rights Committee, *Communication no 1123/2002 Carlos Correia de Matos* (2006), para 7.3, where the Human Rights Committee noted that 'if an accused person had to accept an unwanted counsel whom he does not trust he may no longer be able to defend himself effectively as such counsel would not be his assistant. Thus, the right to conduct one's own defence, which is a cornerstone of justice, may be undermined when a lawyer is imposed against the wishes of the accused' and therefore a blanket ban was inadmissible.'

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be forced to accept defence counsel against their will, even if there is no specific reason establishing that they are unable to defend themselves.[287] While in many cases there may be something to be said in favour of an independent third party taking up defence duties,[288] the majority's decision in *Correia de Matos* deprives defendants of a means of defence where they have good reason *not* to trust their defence counsel. In effect, *Correia de Matos* allows States to require defence even where the requisite trust does not exist, which lays the groundwork for abusive appointment of counsel by bad-faith actors.

(c) *Protection of choice of legal services rather than choice of lawyer*

Finally, the Court's aforementioned jurisprudence on free choice of lawyer appears, in reality, to be a guarantee of free choice of legal services provider in the sense that it is limited to services that are truly legal, mirroring the focus on function over status identified above. Aside from arguably flowing from the rationale of many of the cases discussed above, this would seem to be the gist of the Second Section's 2018 admissibility decision in *Tuğluk and others v Turkey*.[289] In that case, Abdullah Öcalan's lawyers had been subjected to a temporary ban on representing their client because they had communicated reports of their conversations with their client in which he issued instructions and comments regarding the policy to be pursued by the Workers' Party of Kurdistan (PKK) to the press.[290] The Court, in dismissing the applicant's complaint under Art. 10 ECHR as manifestly ill-founded, explicitly

287 The Human Rights Committee, conversely, noted at ibid, para 7.4 that 'notwithstanding the importance of the relationship of trust between accused and lawyer, the interests of justice may require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in his own interests, or where it is necessary to protect vulnerable witnesses from further distress' but that 'any restriction of the accused's wish to defend himself must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.'

288 cf in this regard on quality requirements for legal services 133ff, which includes a discussion of independence as a quality factor.

289 *Tuğluk and others v Turkey (dec)* App no 30687/05 (ECtHR, 04 September 2018).

290 Ibid, para 5, 13.

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> observe[d] 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 …[291]

The Court then went on to dismiss this part of the application, noting also that the 'moderate sanction, which moreover had no repercussions on the applicants' professional activities concerning clients other than Mr Öcalan, did not constitute a disproportionate response to their actions, given that their conduct contravened the rules governing their office'.[292] This suggests that the provision of other services will not enjoy the same level of protection as the provision of legal services, and that therefore what the Court is trying to protect here is free choice of lawyer in a narrow sense, rather than any activities by those holding a special status under domestic law.[293]

2. Communication between client and lawyer

The Court's case law, then, places significant emphasis on a right – in principle – to free and informed choice of one's own counsel, which is designed to secure a relationship of 'mutual trust and understanding'.[294] However, mere choice on its own is unlikely to do much to advance trust and understanding. Instead, this requires the parties to be able to interact with each other. As a central precondition to the relationship of mutual trust and understanding, the Convention therefore also protects communication between lawyer and client. This communicative dimension manifests in two main ways: client and lawyer must be free to communicate ((a).), and they must be free to do so in principle confidentially ((b).).

291 Ibid, para 37.
292 Ibid, para 38.
293 Note the similarities here to the more general case law regarding Art. 10 and the activities of lawyers, discussed in Chapter Three, 154ff.
294 See the references at n 212.

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(a) *Freedom to communicate between client and lawyer*

In most situations, freedom to communicate between client and lawyer is not subject to State interference. States have not typically imposed blanket restrictions on contact between clients and lawyers in the course of ordinary life. Consequently, cases regarding freedom to communicate between client and lawyer have primarily reached the Court where the client is detained.[295] However, given the reasoning frequently adduced by the Court, it seems unlikely that the Convention guarantees freedom to communicate *only* where the client is detained, and indeed the many general references to the importance of legal services in other fields of law[296] would seem largely otiose if there were no right to communicate with these lawyers. The lack of case law regarding communication between lawyers and clients at liberty is therefore more likely to be based on the usual absence of State interference with communication in this sphere and the procedural requirement for exhaustion of remedies discussed in the context of free choice of lawyer.[297] Moreover, there is significantly less case law on communication itself than on *confidential* communication, which may be due to the fact that States in practice often permit lawyer-client contacts under the condition that they may listen in to the conversation.[298] As regards this area, the Court has been clear that the level of Convention protection does not depend on which area of law lawyer-client communications concern,[299] which would also tend to support the conclusion that communication between lawyer and

295 The obverse does not appear to have reached the Court yet, since in *Ramazan Demir v Turkey* App no 68550/17 (ECtHR, 09 February 2021), para 19, the applicant – a detained lawyer – complained of not having access to legal resources required for the defence of his clients, but not of inability to meet them.

296 cf eg *MSS v Belgium and Greece [GC]* App no 30696/09 (ECtHR, 21 January 2011), paras 319, 191.

297 See above 71.

298 Although note the exception that has arisen in the last decades in the context of combatting terrorism, where States may seek to limit lawyer-client contact to avoid prejudicing their sources or the working methods of their intelligence services, as in *A and others v UK [GC]* App no 3455/05 (ECtHR, 19 February 2009); *M v the Netherlands* App no 2156/10 (ECtHR, 25 July 2017), both discussed below.

299 *Vlasov v Russia* App no 78146/01 (ECtHR, 12 June 2008), para 142; *Petrov v Bulgaria* App no 15197/02 (ECtHR, 22 May 2008), para 43. Indeed, in the seminal case of *Campbell v UK* (n 216) the Court explicitly rejected an invitation to differentiate between different levels of Convention protection for different areas of law, cf ibid, para 48.

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client is in principle guaranteed by the Convention regardless of whether the client is detained or at liberty.

i. *Freedom of communication as the rule*

Ironically enough, perhaps the clearest statement of this principle of freedom to communicate between client and lawyer came in a case that was not interpreted by the majority as dealing primarily with this problem: *Golder v UK [Plenary]* (1975), one of the early leading judgments of the European Court of Human Rights. In *Golder*, the applicant, a detainee, had wanted 'to consult a solicitor with a view to taking civil action' against a prison guard.[300] Notwithstanding this rather clear request,[301] both the Commission and the Court assessed the case as a question of access to court, rather than of communication with a lawyer,[302] thus assuming an unknown, that the outcome of the applicant seeking legal advice would have been a decision to bring an action. While such a clear departure from the applicant's initial request is no doubt questionable – and seems to treat the involvement of a lawyer as little more than a formality –, the resulting decision does show that the Court assumes that freedom to communicate with a lawyer is protected by the right to access to a court as a precondition of such access.[303] That, in turn, would lead to the conclusion that at least within the sphere of application of Art. 6 § 1, the basic position under the Convention is that anyone is entitled to communicate with a lawyer, and that any restriction on this right must be justified.

That analysis appears to be confirmed by later case law, including the 2018 Grand Chamber judgment of *Beuze v Belgium*, where the Court pointed out that 'suspects must be able to enter into contact with a lawyer from

300 *Golder v UK [Plenary]* App no 4451/70 (ECtHR, 21 February 1975), para 16.

301 The only real reference to this request being by Judge Fitzmaurice in his dissenting opinion, particularly at ibid 36.

302 Particularly clear are later cases in which the Court repeated this approach, all the while heavily drawing on *Golder*, eg *Silver and others v UK* App no 5947/72 and others (ECtHR, 25 March 1983), para 80, and *Campbell and Fell v UK* App no 7819/77; 7878/77 (ECtHR, 28 June 1984), para 105: 'The applicants submitted that the delay in granting them permission to seek legal advice … constituted a denial of access to the courts'. There is a step missing in this chain of reasoning.

303 See, in a similar vein, *Airey v Ireland* App no 6289/73 (ECtHR, 09 October 1979).

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the time when they are taken into custody'.[304] Once again, the focus on 'suspects' is unlikely to result from an exclusion of other persons; instead, the choice of wording is more likely due to the fact that prior to being taken into custody, there will typically be no problems in terms of contacting lawyers. The general position under the Court's case law, therefore, seems to be that everyone will be able to contact lawyers, and that exceptions to this rule must be justified.

ii. *Restrictions in the context of counter-terrorism law*

Similarly to *Beuze*, in the judgment of *A and others v UK [GC]* (2009),[305] the Grand Chamber had an opportunity to rule on freedom to communicate between client and lawyer regarding the UK's Special Immigration Appeals Commission. In the context of terrorism-related cases impinging on national security and concerning sensitive matters such as secret informants and intelligence-gathering methods, the relevant legislation provided that classified (so-called 'closed') evidence could not be seen by detainees or their legal advisers, but only by 'special advocates' appointed by the State. However, 'from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of [the Special Immigration Appeals Commission]'.[306] As part of a third-party intervention by NGO Justice,

> nine of the thirteen serving special advocates … highlighted the serious difficulties they faced in representing appellants in closed proceedings due to the prohibition on communication concerning the closed material. In particular, the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented.[307]

304 *Beuze v Belgium [GC]* App no 71409/10 (ECtHR, 09 November 2018), para 133, applied recently in *Brus v Belgium* App no 18779/15 (ECtHR, 14 September 2021). See also *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009), para 32. While Beuze has been extensively criticised for walking back the so-called 'Salduz' (*Salduz v Turkey [GC]* App no 36391/02 (ECtHR, 27 November 2008)) rule on access to a lawyer, for present purposes the key point is that the Court continues to emphasise the importance of contact between lawyers and clients.

305 *A and others v UK [GC]* (n 298).

306 Ibid, para 215.

307 Ibid, para 199.

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In a unanimous decision, the Grand Chamber focused on an analysis of whether the applicants had been able to ascertain the charges against them and therefore instruct the special advocate effectively in each individual case:

> The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.[308]

In those cases where the allegations against the applicants were 'of a general nature' and the Commission had relied largely on secret material which the applicants had not been able to discuss with their special advocates, the Court went on to find a violation of Art. 5 § 4 because 'these applicants were [not] in a position effectively to challenge the allegations against them'.[309]

A and others v UK [GC] is a particularly clear example of the importance which the Court attaches to free communication between client and lawyer. Ultimately, only those cases were deemed to comply with Art. 5 § 4 in which the applicants had been able to discern the charges against them based upon the open material.[310] In those cases, the applicants and their special advocates had been able to discuss the case prior to becoming subject to restrictions on their communications, since those restrictions only came into play once the latter had seen the secret material.[311] The judgment would therefore tend to indicate that the Court endorses a robust view of the importance of free communications between clients and lawyers – effectively, the only cases where the Court found no violation of Art. 5 § 4 were the ones where the restrictions on communication had had little to no impact on the parties' communication because there had been no significant need for additional discussion once the restrictions had entered into force. Conversely, in those cases where the restrictions did make a difference to the parties' ability to communicate regarding the case, the Court found violations of Art. 5 § 4.[312] It would seem, therefore, that States

308 Ibid, para 220.
309 Ibid, para 223.
310 Ibid, para 222.
311 Ibid, para 93.
312 Ibid, para 224.

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will only be able to restrict free communication between client and lawyer in truly exceptional circumstances.

The 2017 Third Section case of *M v the Netherlands*,[313] which adds further detail to this principle of free communication between client and lawyer, tends to reinforce this conclusion that the Court takes an assertive approach regarding the importance of free communication between lawyer and client. In *M v the Netherlands,* the applicant, who had worked for the Dutch intelligence services, had not been prohibited entirely from discussing his case with his defence counsel.[314] Instead, the Dutch authorities held that the applicant's duty to maintain the secrecy of information to which he had been privy in the course of his work continued even in the context of a trial against him for violations of this secrecy obligation, and that consequently – on pain of further prosecution for breach of secrecy obligations – he was limited in his ability to discuss his case with defence counsel.[315] The applicant turned to the Court, complaining inter alia that this had 'prevent[ed] him from instructing his defence counsel effectively' in violation of Art. 6 §§ 1 and 3 (c).[316]

The Third Section, after reiterating the Court's case law on confidentiality of communications between clients and legal representatives,[317] began its reasoning with an important clarification. While the Government had argued that the applicant's duty of secrecy continued to constitute the rule, with the right to discuss with counsel matters subject to the secrecy obligation as an exception, the Court explicitly took 'the opposite view, namely that [there had been] a restriction on the right of an accused to communicate with his or her legal counsel without hindrance'[318] and that consequently 'communication between the applicant and his counsel was

313 *M v the Netherlands* (n 298).

314 Given the looming threat of prosecution and the consequent 'chilling effect', this position may arguably have been worse for the applicant than a total ban on lawyer-client communication.

315 The Dutch authorities, who were aware of the problem, attempted to resolve this situation by means of an undertaking by the prosecution that 'the applicant would not be prosecuted if a breach of his duty of secrecy was justified by invoking Article 6 of the Convention', *M v the Netherlands* (n 298), para 76, which would not seem to have done much to combat the uncertain situation in which the applicant found himself.

316 Ibid, para 51.

317 Ibid, para 85. As noted, this case law is considerably more developed than the case law dealing directly with communication.

318 Ibid, para 91.

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not free and unrestricted as to its content, as the requirements of a fair trial normally require'.[319] In particular, the Court highlighted that, at the preceding stage of deciding whether or not to disclose secret information to his defence counsel, the applicant had not been able to access legal services.[320] The Court therefore unanimously found that 'the fairness of the proceedings was irretrievably compromised by the interference with communication between the applicant and his counsel' and that there had consequently been a violation of Art. 6 §§ 1 and 3 (c).[321] Significantly, *M v the Netherlands* also shows that, as the Court has held in other cases, even partial restrictions on communication between lawyer and client can violate the latter's fair trial rights. In this vein, perhaps the clearest cases are those regarding the so-called 'aquaria', glass cages present in some of the Russian Federation's criminal courts, which the Court found in violation of the Convention inter alia due to the difficulties they posed for communication between lawyer and client.[322]

iii. *Art. 34 ECHR and freedom to communicate with representatives before the Court*

In addition to these cases concerned primarily with national proceedings themselves, the Court has also had occasion to discuss freedom to communicate with legal representatives in the context of Art. 34 ECHR regarding interference with communication in relation to applications already before the European Court of Human Rights. In principle, the right of individual application also protects communication between representative and client, and the Court has found violations of Art. 34 'in circumstances where an applicant in detention had been prevented from communicating freely with his representative before the Court',[323] such as in *Shtukaturov v Russia* (2008), where the applicant had been banned from contacting his lawyer

319 Ibid, para 93.
320 Ibid, para 96.
321 Ibid, para 97.
322 eg *Mariya Alekhina and others v Russia* App no 38004/12 (ECtHR, 17 July 2018), para 166ff.
323 *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), para 182; see also *Hilal Mammadov v Azerbaijan* App no 81553/12 (ECtHR, 04 February 2016), para 122.

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while in hospital.[324] It is particularly noteworthy that in its case law on Art. 34 ECHR[325] the Court has granted visiting rights even to those representatives before the Court that are not 'lawyers' under domestic law. Since the Rules of Court[326] do not necessarily require representatives before the Court to be members of their domestic bar,[327] non-Bar-member representatives in proceedings before the European Court will enjoy visiting rights regardless of whether domestic law restricts these to Bar members.[328] In addition to demonstrating once again the link between communication and effective representation, this jurisprudence is also further evidence of the Court's focus on function rather than on domestic status discussed in Chapter One.[329]

iv. *Communication with detained clients*

Despite this strong protection of communication between lawyer and client in principle, the Court has held that 'the State may regulate the conditions in which a lawyer meets his detained client',[330] corresponding to the practical exigencies of legal advice for detainees, for example as regards time, place and restrictions related to security risks.[331] Nonetheless, the Court has also emphasised that such restrictions on contact between lawyer and client have the potential to damage their relationship and therefore impair the effective provision of legal services. In the Grand Chamber judgment in *Sakhnovskiy v Russia* (2010), the Court

324 *Shtukaturov v Russia* App no 44009/05 (ECtHR, 27 March 2008), para 139; see similarly *Zakharkin v Russia* App no 1555/04 (ECtHR, 10 June 2010), para 157.
325 And its predecessor, Art. 25.
326 Rule 36 § 4 (a).
327 And generally if one follows the dictum in *Shtukaturov v Russia* (n 324), para 143 it would appear that no national rule whatsoever can apply to the individual application mechanism, ie not even national rules regarding capacity to act, a position which sits well with Art. 34's purpose of ensuring protection against a potentially abusive State.
328 cf eg *Hilal Mammadov v Azerbaijan* (n 323), para 123; *Rasul Jafarov v Azerbaijan* (n 323), para 183; *Zakharkin v Russia* (n 324), para 157.
329 59ff.
330 *Khodorkovskiy and Lebedev v Russia* App no 11082/06; 13772/05 (ECtHR, 25 July 2013), para 628.
331 Ibid, para 628.

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> emphasise[d] that the relationship between the lawyer and his client should be based on mutual trust and understanding. Of course, it is not always possible for the State to facilitate such a relationship: there are inherent time and place constraints for the meetings between the detained person and his lawyer. … Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled.[332]

The link drawn between communication, trust and effective legal services and the significance the Court attaches to freedom to communicate between lawyer and client in *Sakhnovskiy* is particularly clear because – unlike in many other cases regarding legal-aid counsel[333] – the applicant explicitly had no objection to the lawyer's qualification. Instead, he complained only 'that they had been deprived of any opportunity to form even a semblance of a meaningful lawyer-client working relationship'.[334] Effectively, this isolated the issue as one of communication, where the Court in principle took a robust stance, highlighting inter alia 'that nothing prevented the authorities from organising at least a telephone conversation between the applicant and [the lawyer] more in advance of the hearing', and that 'nothing prevented them from appointing a lawyer from Novosibirsk who could have visited the applicant in the detention centre and have been with him during the hearing'.[335] Criticising the lack of freedom to communicate between lawyer and client, the Grand Chamber in *Sakhnovskiy* went on to unanimously 'conclud[e] that the arrangements made by the Supreme Court were insufficient and did not secure effective legal assistance to the applicant'.[336] Similarly, in *Orlov v Russia* (2011), where the applicant *had* complained about the quality of the legal aid provided to him, the Court noted that 'in the absence of any appropriate evidence to the contrary, the Court may give weight to the applicant's argument based on his lack of contact with [his lawyer] before the appeal hearing',[337] before going on to criticise the lack of effective defence by the applicant's lawyer.

332 *Sakhnovskiy v Russia [GC]* (n 212), para 102.
333 See eg *Jelcovas v Lithuania* (n 212), para 22.
334 *Sakhnovskiy v Russia [GC]* (n 212), para 63.
335 Ibid, para 106.
336 Ibid, para 106.
337 *Orlov v Russia* (n 212), para 109.

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v. *A right for the client or the lawyer?*

As regards who may invoke this right to communication, to date the Court has focused primarily on the rights of the client. However, it has also consistently emphasised that it takes two to communicate. When the Government in *Martin v Estonia* argued that the application was 'inadmissible *ratione materiae* or … manifestly ill-founded' because, according to the Government, 'the applicant's counsel … was seeking to defend his own civil rights rather than the rights of the applicant',[338] the Court was quick to note that 'it is only a difference of perspective whether the situation is described as counsel not having access to the suspect or the suspect not having access to counsel',[339] dismissing the Government's objection. Similarly, in *Schönenberger and Durnaz v Switzerland* (1988), the Court found a violation of the Art. 8 rights of both client *and* lawyer where the prison authorities had stopped a letter from the latter offering his services.[340] Aside from also allowing the lawyer to invoke the communicative right, the judgment also made a further valuable clarification: The Convention's elevated protection does not necessarily require the lawyer to already be officially acting for the client,[341] but will also apply to preparatory measures aimed at constituting a new lawyer-client relationship.[342] Similarly to the general tendency in its case law, the Court will therefore typically focus less on formalities and more on whether the substance of the right in question has been 'practical and effective'.[343] Where, therefore, client and lawyer are allowed to communicate, but are 'offered only a ten-minute break to

338 *Martin v Estonia* (n 240), para 58.

339 Ibid, para 64. See also *Altay v Turkey (No 2)* App no 11236/09 (ECtHR, 09 April 2019), para 68, where the Court also noted – in the context of determining whether the dispute was one of private law – that 'a restriction on either party's ability to confer in full confidentiality with each other would frustrate much of the usefulness of this right'.

340 *Schönenberger and Durmaz v Switzerland* (n 268), para 23ff.

341 cf explicitly ibid, para 29: 'Dans les circonstances de la cause, que Me Schönenberger n'eût pas été formellement désigné ne tire donc pas à conséquence', 'In the circumstances of the case, the fact that Mr Schönenberger was not formally appointed is therefore of no consequence.' (author's translation)

342 In *Schönenberger and Durmaz v Switzerland* (n 268) itself, the lawyer had been instructed by the client's wife, and the letter which the prison authorities had stopped contained a request for the client to sign a power of attorney to this effect.

343 On this basis, it has also held that it is sufficient if client and lawyer can communicate via an interpreter, and that the Convention does not require that a lawyer be appointed who speaks the client's language, cf *Lagerblom v Sweden* (n 238), para 62.

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communicate with the newly-appointed lawyer',[344] that will not suffice for anything but very simple cases.

vi. *Conclusion: Freedom to communicate between client and lawyer*

In essence, then, the case law indicates that in addition to the right – in principle – of freedom for clients to choose their own lawyer, the Convention also requires in principle that clients and lawyers be able to communicate freely. While both rights can be subject to restriction where the typical grounds for justification of interference are fulfilled, the Court maintains a comparatively high standard of protection as regards the right to communication between client and lawyer. It typically links this to the need for a relationship of mutual trust and understanding between lawyer and client, which in turn is conceptualised as a precondition for effective legal assistance.

(b) *Freedom to communicate confidentially between client and lawyer*

Of course, even the combination of free choice of lawyer and freedom to communicate with the latter is an insufficient precondition for mutual trust and understanding. Communication is unlikely to fulfil its enabling function unless such communication is perceived by the interlocutors as safe, which necessitates, at least in principle, confidentiality. Effective exercise of legal services requires trust; trust requires confidentiality.[345] Similarly to many domestic legal systems, the Court therefore grants an elevated level of protection of confidentiality to communication between clients and lawyers,[346] which will be termed 'professional secrecy' here for short to avoid the inconsistencies of the Court's own case law, which

344 *Jelcovas v Lithuania* (n 212), para 130.

345 It is no coincidence that 'confidentiality' contains the Latin word *fides* (trust).

346 Which, in the Art. 8 context, it referred to explicitly in *RE v UK* App no 62498/11 (ECtHR, 27 October 2015), para 131 as '"strengthened protection" [for] exchanges between lawyers and their clients [because] the surveillance of a legal consultation constitutes an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence' and in *Versini-Campinchi and Crasnianski v France* App no 49176/11 (ECtHR, 16 June 2016), para 76, as 'une protection renforcée [pour les] échanges entre les avocats et leurs clients'.

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meanders (at least)[347] between 'professional secrecy',[348] 'legal professional privilege',[349] 'attorney-client privilege',[350] and 'lawyer confidentiality'[351] without any clear rationale or noticeable awareness of the different conceptual backgrounds to each of these terms.[352]

Professional secrecy is arguably one of the areas where the Court has generated the most case law relevant to legal services, due presumably to a combination of States' willingness to interfere with communications between lawyer and client and the cross-cutting nature of legal services. This plentiful case law exhibits considerable heterogeneity, and the Court has dealt with similar problems under different articles, with a particular focus on Art. 5 § 4, Art. 6 under both criminal and civil limbs, Art. 8 and Art. 34, often transferring lines of reasoning from one to the other or re-characterising an applicant's claim under a different article than the one invoked.[353] In addition, the Court has dealt with the norm that communications between client and lawyer must in principle be confidential from a number of different vantage points, and has used both the subjective rights of clients and of lawyers, sometimes even simultaneously.[354] However, practically all cases have concerned professional secrecy as regards protection against the State obtaining information, which is only one of the functions of professional secrecy at the domestic level, where it typically also prevents disclosure to other private individuals.[355]

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347 The following list is non-exhaustive, there may also be other terms in isolated judgments.

348 eg *Saber v Norway* App no 459/18 (ECtHR, 17 December 2020), para 51.

349 eg *Big Brother Watch and others v UK [GC]* App no 58170/13 and others (ECtHR, 25 May 2021), para 99, or even the consistent use of the abbreviation 'LPP' in *Saber v Norway* (n 348).

350 eg *Yuditskaya and others v Russia* App no 5678/08 (ECtHR, 12 February 2015), para 29.

351 eg *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 45.

352 For a practitioner's view see eg Union Internationale des Avocats, *International Report on Professional Secrecy and Legal Privilege* (2019).

353 cf eg *Castravet v Moldova* App no 23393/05 (ECtHR, 13 March 2007), para 45, where the applicant invoked Art. 8 and the Court used Art. 5 § 4 to assess a question of confidentiality. See also *Khodorkovskiy v Russia (No 1)* App no 5829/04 (ECtHR, 31 May 2011), para 198, which formed the backdrop to *Reznik v Russia* App no 4977/05 (ECtHR, 04 April 2013), discussed in Chapter Five, 211ff.

354 eg *Versini-Campinchi and Crasnianski v France* (n 346), para 49.

355 This shortage of case law regarding the horizontal dimension of professional secrecy is unlikely to be due only to the vertical State-individual structure of Convention litigation, given that it is easy to think of eg claims against the State based upon failure to adequately secure professional secrecy vis-à-vis private actors.

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i. *Confidential communication as a prerequisite of effective legal services*

While the justification for confidentiality of client-lawyer communications has varied a little, the main justification which the Court has proposed has been confidentiality of communications as a prerequisite of effective legal services, drawing a link similar to those discussed in the previous sections.[356] To quote the seminal 1992 *Campbell v UK* judgment: 'It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged'.[357] '[Confidentiality] encourages open and honest communication between clients and lawyers,'[358] and, as the Court 'emphasised' in *Saber v Norway* (2020), 'professional secrecy is the basis of the relationship of trust existing between a lawyer and his client'.[359] Indeed, the Court has held that 'one of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information exchanged between them must be protected'.[360] This systemic conception of professional secrecy as a prerequisite for effective legal services to the client is also reflected in the Court's case law that professional secrecy will not protect *the lawyer* where they commit criminal offences while advising their clients.[361]

356 For example, in *Sakhnovskiy v Russia [GC]* (n 212), para 104 the Court went on to note that 'the applicant might legitimately have felt ill at ease when he discussed his case with Ms A [his lawyer]' where this was done via a 'video-conferencing system installed and operated by the State'. See similarly *Gorbunov and Gorbachev v Russia* (n 212), para 37.

357 *Campbell v UK* (n 216), para 46.

358 *Modarca v Moldova* App no 14437/05 (ECtHR, 10 May 2007), para 87; *Apostu v Romania* App no 22765/12 (ECtHR, 03 February 2015), para 96.

359 *Saber v Norway* (n 348), para 51; *Michaud v France* App no 12323/11 (ECtHR, 06 December 2012), para 117; *André and another v France* App no 18603/03 (ECtHR, 24 July 2008), para 41. From the French-language case law see eg *Xavier da Silveira v France* App no 43757/05 (ECtHR, 21 January 2010), para 36; *Moulin v France* App no 37104/06 (ECtHR, 23 November 2010), para 71; *Pruteanu v Romania* App no 30181/05 (ECtHR, 03 February 2015), para 49; *Sérvulo & Associados - Sociedade de Advogados, RL and others v Portugal* App no 27013/10 (ECtHR, 03 September 2015), para 77; *Kırdök and others v Turkey* App no 14704/12 (ECtHR, 03 December 2019), para 50.

360 *Oferta Plus SRL v Moldova* App no 14385/04 (ECtHR, 19 December 2006), para 145; *Castravet v Moldova* (n 353), para 49; *Apostu v Romania* (n 358), para 96; *Modarca v Moldova* (n 358), para 87.

361 *Versini-Campinchi and Crasnianski v France* (n 346), para 81ff.

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Underlining the general importance of professional secrecy, the Court, in later cases, has even referred to a 'fundamental rule of respect for lawyer-client confidentiality [which] may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place,'[362] and noted that 'effective legal assistance is inconceivable without respect for lawyer-client confidentiality'.[363] Consequently, States will have only a narrow margin of appreciation in this area,[364] since 'legal professional privilege … is without a doubt one of the fundamental principles on which the administration of justice in a democratic society is based'.[365] Despite some recent tendencies to link professional secrecy to freedom from self-incrimination,[366] which would suggest it is limited to the context of criminal litigation,[367] it is moreover worth noting that there is a long line of cases stretching back to *Campbell v UK*[368] holding that 'whether in the context of assistance for civil or criminal litigation or in the context of seeking general legal advice, individuals who consult a lawyer can reasonably expect that their communication is private and confidential'.[369] In principle, therefore, confidentiality applies to all fields of law, although interference may be justified more easily in a criminal law context, particularly where serious criminal offences are concerned.

The aforementioned significance of professional secrecy notwithstanding, the Court is sceptical about the idea of *absolute* professional secrecy in

362 *M v the Netherlands* (n 298), para 88; *Wolland v Norway* App no 39731/12 (ECtHR, 17 May 2018), para 66.

363 *Khodorkovskiy v Russia (No 1)* (n 353), para 232.

364 *Altay v Turkey (No 2)* (n 339), para 52.

365 *Michaud v France* (n 359), para 123.

366 *Brito Ferrinho Bexiga Villa-Nova v Portugal* App no 69436/10 (ECtHR, 01 December 2015), para 55; *Vinci Construction and GTM Génie Civil et Services v France* App no 63629/10; 60567/10 (ECtHR, 02 April 2015), para 68; *Saber v Norway* (n 348), para 51; *Kırdök and others v Turkey* (n 359), para 50.

367 As noted in John L. Powell and Roger Stewart, *Jackson & Powell on Professional Liability* (8th edn, Sweet & Maxwell 2017), para 7–048, in EU law a similar approach is the reason for 'significantly less protection [of] lawyer/client confidentiality'.

368 *Campbell v UK* (n 216), para 48: 'The Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character'; applied recently in *Altay v Turkey (No 2)* (n 339), para 51. For a recent French-language application of Campbell, see eg *Laurent v France* App no 28798/13 (ECtHR, 24 May 2018), paras 44, 47.

369 *Altay v Turkey (No 2)* (n 339), para 49; *Canavcı and others v Turkey* App no 24074/19 and others (ECtHR, 14 November 2023), para 91. See also *Laurent v France* (n 368), para 47.

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the sense of a model of professional secrecy entirely free from exceptions. Despite invitations to find this result,[370] the Court has consistently rejected absolute professional secrecy,[371] arguing instead that countervailing interests may justify exceptions. While stopping here would simply mean that the Convention does not *require* that States implement an absolute model of professional secrecy in their domestic law, the judgment in *Golovan v Ukraine* (2012)[372] goes even further. In this judgment, the Fifth Section criticised the Ukrainian Bar Act, which 'declare[d] a general prohibition on examining, divulging and seizing documents entrusted to a lawyer or related to his professional activity',[373] inter alia because a need for (unwritten) exceptions – which the Court simply assumed without further justification – to this provision rendered it insufficiently foreseeable.[374] 'Accordingly, the absolute statutory ban, aimed at protecting the inviolability of the legal profession, could not be consistently applied without the introduction of further binding rules governing justified interference with privileged material'.[375]

This holding in *Golovan* is problematic because it appears to state that the Convention not only does not require States to provide for absolute professional secrecy, but indeed even *prohibits* them from making such pro-

370 *Versini-Campinchi and Crasnianski v France* (n 346), para 75.

371 *Altay v Turkey (No 2)* (n 339), para 52; *Versini-Campinchi and Crasnianski v France* (n 346), para 77.

372 *Golovan v Ukraine* App no 41716/06 (ECtHR, 05 July 2012).

373 Ibid, para 60. The impact this provision had on actual practice may have been limited, given eg the Court's finding in *Kadura and Smaliy v Ukraine* App no 42753/14; 43860/14 (ECtHR, 21 January 2021), para 144 that in that case 'no reason was cited at any point for the decision to conduct the seizure and there was no indication that there were any safeguards in place to ensure proper handling of the information potentially subject to the lawyer's professional privilege'.

374 *Golovan v Ukraine* (n 372), para 65. German readers will notice a certain similarity to the 'Wesentlichkeitslehre' applied under the Basic Law, which inter alia states that important balancing exercises must be performed by the democratically legitimate legislator to the extent possible.

375 Ibid, para 60. For a somewhat similar case concerning a discrepancy between a clear statutory prohibition and actual domestic practice see *Kopp v Switzerland* App no 13/1997/797/1000 (ECtHR, 25 March 1998), para 73, where the Court noted inter alia that '[e]ven though the case-law has established the principle … that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel.'

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vision,[376] a proposition that must be disconcerting for those jurisdictions which take this as their point of departure.[377] A system in which absolute professional secrecy does exactly what it says, rather than being subject to 'unwritten exceptions', may be undesirable for policy reasons, since it might eg hamper law enforcement if professional secrecy is abused. However, it is not clear why such a rule should violate the Convention, particularly since it is not clear it would necessarily have an adverse impact on identifiable individual Convention-rights holders (as opposed to public policy goals such as combatting crime).[378] While the Court has thus rejected absolute professional secrecy, it has at least generally held that 'only exceptional circumstances, such as to prevent the commission of serious crime or major breaches of prison safety and security, might justify the necessity of limitation' of the privacy of consultation and communication with a lawyer.[379]

Factually, there have been four main groups of cases relating to professional secrecy:

- overt surveillance in the context of communications between lawyers and detained clients (ii.),[380]
- covert surveillance of lawyer-client communications, particularly wiretaps (iii.),[381]
- search and seizure operations at lawyers' offices (iv.)[382] and

376 Arguably, there is some tension to Art. 53 ECHR here, since due to the fact that individual (as opposed to collective) interests will typically only be engaged on the part of those who wish to keep the secret this amounts to prohibiting States from providing for a higher level of protection than the Convention requires.

377 For example English law, see eg Lord Taylor's speech in *R v Derby Magistrates' Court, ex p B* [1995] AC 487 (HL), 508, although ultimately in certain circumstances there can be exceptions to this protection. See also Powell and Stewart (n 367), para 7–045.

378 Indeed, *Golovan v Ukraine* (n 372) may also simply be an example of the judges involved projecting their own domestic preconceptions as to the desirable scope of professional secrecy, given that the case does not contain any interaction with systems which in principle treat professional secrecy as absolute and inviolable. For a very brief comparison of ECHR and English law, see Powell and Stewart (n 367), para 7–045.

379 *Altay v Turkey (No 2)* (n 339), para 52.

380 Which can be seen as affecting particularly the trust within a specific lawyer-client relationship due to the problem of 'chilling effect'.

381 Which can be seen as eroding both trust more generally and the lawyer's ability to fulfil their rule of law functions where used abusively.

382 Which show similar problems to covert surveillance, but have generated different case law in the Court's jurisprudence.

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– requirements on lawyers to report on their clients, particularly in the context of anti-money-laundering rules (v.).[383]

These will be dealt with in turn below.

ii. *Confidential communication with detainees*

In addition to being one of the areas where the Court has generated the most case law, communication between lawyers and detained clients is also one of the oldest fields of the Court's jurisprudence surveyed, in keeping with the particular relevance of human rights guarantees for a group which is at the State's mercy.[384]

In this regard, for the criminal defence context, the Court's justification for professional secrecy has been explicitly based upon its role in securing effective exercise of legal services: 'If a lawyer were unable to confer with his client and receive confidential instructions from him without [...] surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective'.[385] Consequently, 'an accused's right to communicate with his advocate

383 Which can be seen to deal effectively with a more 'structural' erosion of trust in lawyers due to the conflict of interest it creates on the part of the lawyer where confidentiality and disclosure obligations pull in different directions.

384 This is also reflected in a number of soft-law documents making specific reference to legal services in this context, eg Committee of Ministers of the Council of Europe, *Resolution (73) 5 - Standard Minimum Rules for the Treatment of Prisoners* (1973), para 93, or Committee of Ministers of the Council of Europe, *Recommendation Rec(2006)2-rev on the European Prison Rules* (2020), which at para 23 features a separate section entitled 'Legal advice'. The Court has made explicit reference to these documents, notably in *S v Switzerland* App no 12629/87; 13965/88 (ECtHR, 28 November 1991), para 48, *Modarca v Moldova* (n 358), para 39ff, *Atristain Gorosabel v Spain* App no 15508/15 (ECtHR, 18 January 2022), para 24, and *Demirtaş and Yüksekdağ Şenoğlu v Turkey* App no 10207/21; 10209/21 (ECtHR, 06 June 2023), para 62.

385 *S v Switzerland* (n 384), para 48; *Brennan v UK* App no 39846/98 (ECtHR, 16 October 2001), para 58; *Oferta Plus SRL v Moldova* (n 360), para 146; *Castravet v Moldova* (n 353), para 50 (concerning Art. 5 § 4); *Istratii and others v Moldova* App no 8721/05 and others (ECtHR, 27 March 2007), para 90; *Modarca v Moldova* (n 358), para 88; *Cebotari v Moldova* App no 35615/06 (ECtHR, 13 November 2007), para 59; *Sakhnovskiy v Russia [GC]* (n 212), para 97; *Insanov v Azerbaijan* App no 16133/08 (ECtHR, 14 March 2013), para 165; *Khodorkovskiy and Lebedev v Russia* (n 330), para 627; *Apostu v Romania* (n 358), para 97 (concerning Art. 5 § 4); *Urazov v Russia* App no 42147/05 (ECtHR, 14 June 2016), para 85. The Court did not

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out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6, para 3 (c) of the Convention'.[386] Similarly, as regards letters, the Court has established that

> the reading of a prisoner's mail to and from a lawyer … should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature.[387]

In this vein, the Court has highlighted the strengthened protection which correspondence with lawyers will enjoy, differentiating in *Jankauskas v Lithuania* (2005) between correspondence of legal and non-legal nature.[388] Here, it held that 'fear of the applicant's absconding or influencing trial'[389] 'could not be sufficient to grant the remand prison administration an open licence for indiscriminate, routine checking of all of the applicant's correspondence'[390] and that 'this [was] particularly so in connection with the censorship of the applicant's letters addressed to and coming from his

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elaborate in greater detail *why* this assistance would lose much of its usefulness, although the reason is likely to be the one given in *Campbell v UK* (n 216) at para 46 related to 'the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion'.

386 *S v Switzerland* (n 384), para 48. Essentially identical statements appear in *Brennan v UK* (n 385), para 58; *Lanz v Austria* App no 24430/94 (ECtHR, 31 January 2002), para 50; *Marcello Viola v Italy* App no 45106/04 (ECtHR, 05 October 2006), para 61; *Moiseyev v Russia* App no 62936/00 (ECtHR, 09 October 2008), para 209; *Sakhnovskiy v Russia [GC]* (n 212), para 97; *Insanov v Azerbaijan* (n 385), para 165; *Khodorkovskiy and Lebedev v Russia* (n 330), para 627; *Urazov v Russia* (n 385), para 85; *Yaroslav Belousov v Russia* App no 2653/13; 60980/14 (ECtHR, 04 October 2016), para 149; *M v the Netherlands* (n 298), para 85; *Mariya Alekhina and others v Russia*, para 168; *Khodorkovskiy and Lebedev v Russia (No 2)* App no 51111/07; 42757/07 (ECtHR, 14 January 2020), para 464.

387 *Campbell v UK* (n 216), para 48; *Petrov v Bulgaria* (n 299), para 43; *Vlasov v Russia* (n 299), para 142; *Moiseyev v Russia* (n 386), para 210; *Piechowicz v Poland* App no 20071/07 (ECtHR, 17 April 2012), para 239; *Khodorkovskiy and Lebedev v Russia* (n 330), para 638.

388 *Jankauskas v Lithuania* App no 59304/00 (ECtHR, 24 February 2005), para 21. The applicant is the same as in the later case of *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), giving him the distinction of having produced two leading ECtHR judgments relevant to legal services.

389 *Jankauskas v Lithuania* (n 388), para 21.

390 Ibid, para 22.

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legal counsel, the confidentiality of which must be respected – save for reasonable cause'.[391]

Beyond these rules regarding written communication, as regards oral communication, the Court has held in relation to Art. 5 § 4[392] that while 'visual supervision' of meetings between detainees and their lawyers is permissible under the Convention,[393] where the situation is such that the parties may have a 'genuine belief held on reasonable grounds that their discussion was being listened to'[394] this will constitute a Convention violation unless sufficiently justified by reference to the specific circumstances of the cases. As the Court put it in *Brennan v UK* (2001), 'the Court cannot but conclude that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him',[395] and that consequently 'it [was] immaterial that it [was] not shown that there were particular matters which the applicant and his solicitor were thereby stopped from discussing'.[396]

This latter point – 'that an interference with the lawyer-client privilege and, thus, with a detainee's right to defence, does not necessarily require an actual interception or eavesdropping to have taken place'[397] – is important because it clarifies the link between confidentiality, trust and effective

391 Ibid, para 22.

392 The Court has a tendency to transfer jurisprudence in this area from one article to another, thereby harmonising its case law. See eg *Khodorkovskiy and Lebedev v Russia* (n 330), para 641, *Modarca v Moldova* (n 358), para 44, and *Sarban v Moldova* App no 3456/05 (ECtHR, 04 October 2005), para 128.

393 This differentiation between sight and hearing flows from Committee of Ministers of the Council of Europe, *Resolution (73) 5 - Standard Minimum Rules for the Treatment of Prisoners*, para 93 (4), which reads 'Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official'. cf the references made in *S v Switzerland* (n 384), para 48.

394 *Oferta Plus SRL v Moldova* (n 360), para 147; *Castravet v Moldova* (n 353), para 51; *Istratii and others v Moldova* (n 385), para 91; *Modarca v Moldova* (n 358), para 89; *Cebotari v Moldova* (n 385), para 60; *Khodorkovskiy v Russia (No 1)* (n 353), para 232; *Apostu v Romania* (n 358), para 98; *Urazov v Russia* (n 385), para 86.

395 *Brennan v UK* (n 385), para 62.

396 Ibid, para 62.

397 *Oferta Plus SRL v Moldova* (n 360), para 147; *Castravet v Moldova* (n 353), para 51; *Istratii and others v Moldova* (n 385), para 91; *Modarca v Moldova* (n 358), para 89; *Cebotari v Moldova* (n 385), para 60; *Apostu v Romania* (n 358), para 98; *Urazov v Russia* (n 385), para 86; *M v the Netherlands* (n 298), para 86; *Demirtaş and Yüksekdağ Şenoğlu v Turkey* (n 384), para 105.

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provision of legal services. Confidentiality of communications is not just intended to ensure that the State does not acquire information from the lawyer-client relationship.[398] If this were so, the subjective beliefs of lawyer and client would not matter.[399] Instead, confidentiality is supposed to secure the relationship between lawyer and client by ensuring that both parties feel[400] they can speak freely, effectively securing the foundation of trust discussed above.[401] As the Court put it in *Oferta Plus SRL v Moldova* (2006):

> A genuine belief held on reasonable grounds that their discussion was being listened to might be sufficient, in the Court's view, to limit the effectiveness of the assistance which the lawyer could provide. Such a belief would inevitably

398 Notably, a restriction to situations where the State has actually acquired information would be convincing if eg the rationale for confidentiality were primarily to maintain equality of arms between parties to proceedings. For a particularly vivid example, see *Modarca v Moldova* (n 358), para 25, where the applicant complained that he had 'held discussions with his lawyer in the [prison] meeting room about certain documents relevant to his case and told him the whereabouts of those documents. When the lawyer went to pick up the relevant documents, [investigating] officers were already at the address. During the same period, he was allegedly asked by the [investigating] authorities to refrain from using impolite words about them, words which he had used in a discussion with his lawyer in the meeting room. The Government have not commented on these allegations.' See also *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020), para 62, where 't]he tax authorities subsequently used the information from the hard drive [seized at the lawyer's premises] as evidence in at least three of their disputes with Mr Mezentsev's clients', or *Moiseyev v Russia* (n 386), para 211, where 'the routine reading of all documents exchanged between the applicant and his defence team had the effect of giving the prosecution advance knowledge of the defence strategy and placed the applicant at a disadvantage vis-à-vis his opponent'.

399 Note that these are subject to a type of 'reasonableness' criterion, as the Court clarified in *Modarca v Moldova* (n 358), para 90, where it noted that it would 'consider whether an objective, fair minded and informed observer would have feared interception of lawyer-client discussions or eavesdropping in the [prison] meeting room'.

400 For another emphasis of this subjective dimension see eg *Altay v Turkey (No 2)* (n 339), para 50, where the Court emphasised that 'prisoners may feel inhibited in discussing with their lawyers in the presence of an official'.

401 That latter rationale is also the reason why confidentiality frequently goes hand-in-hand with an obligation under domestic law on the lawyer not to break this trust, often including criminal sanctions where they divulge information gained from their client.

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> inhibit a free discussion between lawyer and client and hamper the detained person's right effectively to challenge the lawfulness of his detention.[402]

This rationale is the same for other situations where lawyers communicate with detained clients, and indeed, the Court has applied this reasoning in judgments on both Art. 5 § 4 and Art. 34 and the effective exercise of the right of individual application.[403]

In later cases, the Court has been even clearer in reasoning that the rationale for protecting the relationship between lawyer and client is not primarily to prevent the State from obtaining information from within this relationship. In *Laurent v France* (2018), the Government argued that there had been no interference with the applicant's right to respect for private and family life under Art. 8 ECHR because the police officer concerned had not read the papers which the applicant had passed to his clients.[404] The Court, deciding unanimously, did not even interact with this point, merely noting that interception of notes between lawyer and client constituted an interference with Art. 8.[405] This indicates that the reason for scrutinising the State's behaviour in these situations is not primarily related to information itself, but serves to secure the parties' relationship of trust more generally. In what is perhaps even more assertive than the otherwise parallel reasoning in *Castravet v Moldova* (2007), the Court in *Laurent* did not even require that the parties had to have reasonable grounds to believe their correspondence had been read, wholly discarding all subjective criteria.

402 *Oferta Plus SRL v Moldova* (n 360), para 147. The same quote also appears in *Castravet v Moldova* (n 353), para 51; *Istratii and others v Moldova* (n 385), para 91; *Modarca v Moldova* (n 358), para 89; *Cebotari v Moldova* (n 385), para 60; *Apostu v Romania* (n 358), para 98.

403 *Oferta Plus SRL v Moldova* (n 360) and *Cebotari v Moldova* (n 385) concern Art. 34, while *Castravet v Moldova* (n 353), *Istratii and others v Moldova* (n 385), *Modarca v Moldova* (n 358) and *Apostu v Romania* (n 358) concern Art. 5 § 4. In each case, the Court also drew on case law developed under Art. 6, eg *Oferta Plus SRL v Moldova* (n 360), para 145ff.

404 *Laurent v France* (n 368), para 29.

405 Ibid, para 36. It may also have played a part that the domestic authorities had consistently treated this as an interference with free communication between lawyer and client, cf ibid, para 47.

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iii. *Covert surveillance, particularly wiretaps*

In addition to this critical view of overt surveillance, which is founded on the danger of a 'chilling effect' damaging trust and therefore the special relationship between client and lawyer, the Court, as a manifestation of the 'strengthened protection'[406] which communication between clients and lawyers attracts, is also particularly exacting as regards covert surveillance of lawyer-client interactions.

Similarly to the focus on certain procedural rules noted for overt surveillance of lawyer-client communications, particularly as regards interception of letters,[407] the Court, in relation to covert surveillance, has clarified 'minimum safeguards that should be set out in law in order to avoid abuses of power in cases where legally privileged material has been acquired through measures of secret surveillance'.[408] While understandable from the point of view of securing effective protection of Convention rights, such requirements as to the content of domestic law raise the fraught questions attached generally to legislative measures ordered by human rights courts.[409]

A particularly clear summary of the Court's jurisprudence on the requirements for covert surveillance of client-lawyer communications appears in the Third Section's 2017 judgment *Dudchenko v Russia*:

> Firstly, the law must clearly define the scope of the legal professional privilege and state how, under what conditions and by whom the distinction is to be drawn between privileged and non-privileged material. Given that the confidential relations between a lawyer and his clients belong to an especially sensitive area which directly concern the rights of the defence, it is unacceptable that this task should be assigned to a member of the executive, without supervision by an independent judge …
>
> Secondly, the legal provisions concerning the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings may or must be erased or the material destroyed must provide sufficient safeguards for

406 *RE v UK* (n 346), para 131; *Dudchenko v Russia* (n 226), para 104; *Michaud v France* (n 359), para 118.

407 Where the Court has required 'suitable guarantees' against abuse, cf *Campbell v UK* (n 216), para 48.

408 *Dudchenko v Russia* (n 226), para 105. This would tend to emphasise that for covert surveillance, the focus is on actual receipt of information to a greater degree than for overt surveillance.

409 Viz., allocation of power between the Court, domestic governments and domestic legislators, as well as the oft-cited allegation of 'judicial overreach'.

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> the protection of the legally privileged material obtained by covert surveillance. In particular, the national law should set out with sufficient clarity and detail: procedures for reporting to an independent supervisory authority for review of cases where material subject to legal professional privilege has been acquired as a result of secret surveillance; procedures for secure destruction of such material; conditions under which it may be retained and used in criminal proceedings and law-enforcement investigations; and, in that case, procedures for safe storage, dissemination of such material and its subsequent destruction as soon as it is no longer required for any of the authorised purposes …[410]

This list is noteworthy because it effectively sets out fairly detailed requirements to which national law must subscribe, reflecting a very narrow margin of appreciation. This is in keeping with the Court's dictum in *Kopp v Switzerland* (1998) that 'tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise'.[411] In practice, the Court has also resolved a number of cases related to professional secrecy by reference to the quality of domestic law, such as in *Dudchenko* itself, in which the Third Section found a violation of Art. 8[412] because under Russian law as in force at the time 'lawyers [were] subject to the same legal provisions on interception of communications as anyone else'.[413] Similarly, in *Iordachi and others v Moldova* (2009), where legislation contained a guarantee of the secrecy of lawyer-client communications but no procedure for how this was to be effectuated[414] the Court went on to unanimously find a violation of Art. 8,[415] and in *Foxley v UK* (2000), which concerned inter alia interception of legally privileged mail,[416]

410 *Dudchenko v Russia* (n 226), para 106ff.

411 *Kopp v Switzerland* (n 375), para 72.

412 *Dudchenko v Russia* (n 226), para 111 (Judge Devod dissenting). The majority, in this part of the judgment, drew heavily on the earlier Grand Chamber judgment in *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 04 December 2015).

413 *Dudchenko v Russia* (n 226), para 108. This phrasing is notable: Given that the application was not brought by a lawyer, but by a client, one would have expected the Court to refer to 'communication with lawyers' rather than attaching to the personal 'lawyers'.

414 *Iordachi and others v Moldova* App no 25198/02 (ECtHR, 10 February 2009), para 50. Note the similarity to *Golovan v Ukraine* (n 372), para 60.

415 *Iordachi and others v Moldova* (n 414), para 54.

416 Where, notably, the Court assessed only Art. 8 and, having found a breach, did 'not consider it necessary to examine the applicant's assertion that the facts of the case also give rise to an interference with the exercise of his right of individual petition pursuant to Article 34 of the Convention'. (*Foxley v UK* App no 33274/96 (ECtHR, 20 June 2000), para 47)

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the Court noted that such surveillance measures 'must be accompanied by adequate and effective safeguards', and that 'this is particularly so where, as in the case at issue, correspondence with the bankrupt's legal advisers may be intercepted'.[417]

As with the position regarding confidential communication with detainees, whether the State obtains actual knowledge of confidential information is not relevant: As the Court put it in *Kopp v Switzerland* (1998),[418] where

> [t]he Government contended that the question whether there had really been interference by the authorities with the applicant's private life and correspondence remained open, since none of the recorded conversations in which he had taken part had been brought to the knowledge of the prosecuting authorities, all the recordings had been destroyed and no use whatsoever had been made of any of them,[419]

the Court noted that 'the subsequent use of the recordings made has no bearing on [the finding that there had been an interference]'.[420]

While the aforementioned cases primarily concerned targeted covert surveillance, the recently communicated case of *Reporters Without Borders v Germany*[421] will address the question of bulk surveillance 'accidentally' catching communications between lawyers and clients, a matter not explicitly dealt with in the 2021 dyad of Grand Chamber judgments in *Centrum för Rättvisa v Sweden*[422] and *Big Brother Watch v UK*[423]. While for *Centrum för Rättvisa* the reason for this omission was presumably mainly that the relevant domestic legislation provided that intercepted data containing information 'protected by attorney-client privilege' had to be destroyed immediately,[424] the lack of discussion in the majority's opinion in *Big Brother Watch* is more noticeable. In particular, the Law Society of England and Wales, which intervened as a third party, explicitly raised this point,[425] but nonetheless the majority focused on other questions. This area will

417 Ibid, para 43. The Court went on to note 'in this connection that the lawyer-client relationship is, in principle, privileged and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature'.
418 *Kopp v Switzerland* (n 375), para 51ff.
419 Ibid, para 51.
420 Ibid, para 53.
421 *Reporters Without Borders, German Section and Härting v Germany* App no 81993/17; 81996/17.
422 *Centrum för Rättvisa v Sweden [GC]* App no 35252/08 (ECtHR, 25 May 2021).
423 *Big Brother Watch and others v UK [GC]* (n 349).
424 *Centrum för Rättvisa v Sweden [GC]* (n 422), para 37.
425 *Big Brother Watch and others v UK [GC]* (n 349), paras 321, 494.

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therefore almost certainly see further developments in the coming years, presumably in keeping with the current trend that communication between clients and lawyers is particularly protected against covert surveillance and that the Court, drawing on lawyers' function,[426] will elevate the level of protection which lawyer-client exchanges will enjoy against covert surveillance.

iv. *Search and seizure at lawyers' premises*

Beyond overt and covert surveillance, the Court has dealt with a number of cases which involved search and seizure at lawyers' premises. In terms of their interference with the relationship between lawyer and client, these cases are somewhat different than the groups of cases discussed above. Similarly to overt surveillance, search and seizure at lawyers' offices can have a particularly negative effect on trust between client and lawyer where confidentiality is not secured.[427] However, it can also be more intimidating than mere overt surveillance of communication with detainees due to the significant interference with the lawyer's professional activities combined with inability by the lawyer to influence this invasion of their rights.[428] The risk of abusive searches aimed primarily at making life difficult for lawyers who defend unpopular clients therefore looms large.[429] To counteract this, the Court has typically applied 'especially strict scrutiny',[430] frequently

426 *Dudchenko v Russia* (n 226), para 104.

427 And indeed, in some cases domestic authorities seem to have searched lawyers' premises largely out of convenience, something of which the Court has taken a particularly dim view. See eg *André and another v France* (n 359), para 47, or *Kruglov and others v Russia* (n 398), para 128.

428 Unlike in cases regarding overt surveillance, where the lawyer could – in principle – simply choose not to visit their client (as was initially the case in *Modarca v Moldova* (n 358), paras 19, 80), lawyers will typically have no way at all of influencing whether they are subject to search and seizure.

429 And indeed, Art. 18 has been invoked by applicants in a number of cases, eg *Kadura and Smaliy v Ukraine* (n 373), para 115. For a case where the search pursued no legitimate aim see *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), paras 187, 197ff. See also *Smirnov v Russia* App no 71362/01 (ECtHR, 07 June 2007), para 51, where 'the applicant claimed that the real purpose of the seizure [of a hard drive containing more than two hundred clients' files] had been to hinder his legal professional activities'.

430 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669; *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 214; *Kolesnichenko v Russia* App no 19856/04 (ECtHR, 09 April 2009), para 31;

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making reference to the *Elçi and others v Turkey* (2003) dictum that 'persecution or harassment of members of the legal profession … strikes at the very heart of the Convention system'.[431] It is also worth noting that the elevated level of protection which lawyers' offices enjoy has usually been justified by reference to the function lawyers play in the justice system as a whole; 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention'.[432]

In terms of the scope of Convention rights, the Court has consistently held that search and seizure at lawyers' offices constitute an interference with the rights guaranteed in Art. 8 § 1 of the Convention, a point which by now seems uncontroversial given the broad scope accorded to Art. 8, but which was disputed in the Court's early-case law.[433] Moreover, both the client and the lawyer independently and even simultaneously will be able to invoke a violation of professional secrecy.

Similarly to the approach taken in relation to covert surveillance, the Court has been willing to set general standards to which domestic legislation must conform, which is noticeable given the criticism frequently levelled against such quasi-legislative activity. In

> cases that have dealt with search warrants in criminal proceedings, the Court has examined whether domestic law and practice afforded adequate and effective safeguards against any abuse and arbitrariness. Elements taken into consideration are, in particular, whether the search was based on a warrant issued by a judge and based on reasonable suspicion; whether the scope of the warrant was reasonably limited; and – where the search of a lawyer's office was concerned – whether the search was carried out in the presence of an independent observ-

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Heino v Finland App no 56720/09 (ECtHR, 15 February 2011), para 43; *Yuditskaya and others v Russia* (n 350), para 27; *Annagi Hajibeyli v Azerbaijan* App no 2204/11 (ECtHR, 22 October 2015), para 68 (regarding Art. 34); *Aliyev v Azerbaijan* (n 429), para 181; *Kruglov and others v Russia* (n 398), para 125. See in a similar vein ('particularly strict scrutiny') *Golovan v Ukraine* (n 372), para 62.

431 *Elçi and others v Turkey* (n 430), para 669. This dictum, which the Court frequently uses to emphasise the public interest in the legal profession as upholding the rule of law, is discussed in detail in Chapter Five, 240ff.

432 *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 37; *Foxley v UK* (n 416), para 50; *Smirnov v Russia* (n 429), para 48; *Kolesnichenko v Russia* (n 430), para 35; *Yuditskaya and others v Russia* (n 350), para 31; *Lindstrand Partners Advokatbyra v Sweden* App no 18700/09 (ECtHR, 20 December 2016), para 95. See also eg *Golovan v Ukraine* (n 372), para 62; *Kadura and Smaliy v Ukraine* (n 373), para 142.

433 See seminally *Niemietz v Germany* (n 432).

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er in order to ensure that materials subject to professional secrecy were not removed.[434]

By now, the Court has expanded this list by criteria such as 'the severity of the offence in connection with which the search and seizure were effected' and 'the manner in which the search was executed', as well as the 'extent of the possible repercussions on the work and the reputation of the persons affected by the search'.[435] It has also gone into greater detail on the 'independent observer', noting that such an 'observer should have requisite legal qualification [and] should be also bound by the lawyer-client privilege to guarantee the protection of the privileged material and the rights of the third persons'.[436] Generally, the Court seems to consider that the presence of either a member of the local Bar association[437] or of a 'legal representative appointed by the applicant'[438] is in principle best suited to guarantee professional secrecy is observed.[439] In addition to these procedural safeguards during the search, the Court has also attached significance

434 *Lindstrand Partners Advokatbyra v Sweden* (n 432), para 95; for a recent restatement see eg *Kruglov and others v Russia* (n 398), para 125. Note that eg serious deficiency of a search warrant will 'in itself' suffice to put the search in violation of Art. 8, as in *Aleksanyan v Russia* (n 430), paras 216, 218 where the warrant authorised searching for 'documents and objects important for the investigation'.

435 *Annagi Hajibeyli v Azerbaijan* (n 430), para 69.

436 *Golovan v Ukraine* (n 372), para 63; regarding the requisite legal qualification see also *Iliya Stefanov v Bulgaria* App no 65755/01 (ECtHR, 22 May 2008), para 43, confirmed recently in *Kruglov and others v Russia* (n 398), para 132.

437 *Duyck v Belgium* App no 81732/12; 26656/15 (ECtHR, 13 April 2021), paras 22, 30; *Kırdök and others v Turkey* (n 359), para 54; *Brito Ferrinho Bexiga Villa-Nova v Portugal* (n 366), para 57; *Xavier da Silveira v France* (n 359), para 41; *Moulin v France* (n 359), para 73; *Jacquier v France (dec)* App no 45827/07 (ECtHR, 01 September 2009) 7; *Turcon v France (dec)* App no 34514/02 (ECtHR, 30 January 2007) 24. For English-language cases see eg *André and another v France* (n 359), para 43ff; *Wieser and Bicos Beteiligungen GmbH v Austria* App no 74336/01 (ECtHR, 16 October 2007), para 9; *Roemen and Schmitt v Luxembourg* App no 51772/99 (ECtHR, 25 February 2003), para 69ff. For a more critical view of the efficacy of such presence see Rostislav Xmyrov, 'Iz bljustitelja advokatskoj tajny – v svideteli obvinenija? Problemy neuregulirovannosti v UPK statusa predstavitelja advokatskoj palaty' (2021) < https://www.advgazeta.ru/mneniya/iz-blyustitelya-advokatskoy-tayny-v-svideteli-obvineniya/> accessed 08 August 2024, who also highlights the problem of whether members of the Bar association can then later be questioned as witnesses by the investigating authorities.

438 *Lindstrand Partners Advokatbyra v Sweden* (n 432), para 98.

439 See also *Robathin v Austria* App no 30457/06 (ECtHR, 03 July 2012), para 49, where 'the search was carried out in the presence of the applicant, his defence counsel and a representative of the Vienna Bar Association'.

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to 'the possibility of effective control of the measure at issue'[440] in the sense of review by a court after the fact.

This list of procedural requirements has not just been rhetoric. Instead, similarly again to the jurisprudence on covert surveillance of lawyers, the Court has actually used the 'quality of the law' requirement in a number of cases regarding search and seizure at lawyers' offices, for example in *Kadura and Smaliy v Ukraine* (2021), where 'it [had] not been shown that there were any safeguards in place against the authorities accessing, improperly and arbitrarily, information subject to legal professional privilege' and consequently 'it [had] not been shown that the interference with the applicant's rights was 'in accordance with the law".[441] Similarly, in *Sorvisto v Finland* (2009), the Fourth Section – while explicitly referring to Principle I.6 of Recommendation R(2000)21[442] – held that domestic law did not provide the requisite 'foreseeability' to be compatible with Art. 8 § 2 ECHR[443] and highlighted that 'search and seizure represent a serious interference with Article 8 rights, in the instant case correspondence, and must accordingly be based on a law that is particularly precise'.[444] Indeed, the Court even went as far as stating that 'it is essential to have clear, detailed rules on the subject, setting out safeguards against possible abuse or arbitrariness'.[445] Moreover, as already noted above, in *Kruglov and others v Russia* (2020) the Court – after referring to a host of international standards[446] and explicitly 'proceed[ing] on the assumption that the searches in all applications were lawful in domestic terms and pursued the legitimate

440 *Wolland v Norway* (n 362), para 75; for a French-language version see *Leotsakos v Greece* App no 30958/13 (ECtHR, 04 October 2018), para 37.

441 *Kadura and Smaliy v Ukraine* (n 373), para 146.

442 'All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law'. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

443 *Sorvisto v Finland* App no 19348/04 (ECtHR, 13 January 2009), paras 114, 120.

444 Ibid, para 117 For a very similar line of reasoning directed at the quality of Finnish domestic law and again making explicit reference to Recommendation R(2000)21 see *Petri Sallinen and others v Finland* App no 50882/99 (ECtHR, 27 September 2005), para 83ff. Both cases were litigated Markku Fredman, a prolific Finnish human rights litigator.

445 *Sorvisto v Finland* (n 443), para 118; *Heino v Finland* (n 430), para 43.

446 *Kruglov and others v Russia* (n 398), para 102ff, with an explicit reference in the Court's reasoning at ibid, para 125.

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aim of the prevention of crime'[447] – held that Russian law violated the Convention where professional secrecy was only protected for Bar members, 'thus leaving exposed the relationships between clients and other kinds of legal advisers'.[448]

Continuing its general tendency to shift its case law between articles where situations are sufficiently factually similar, the Court has also transferred Art. 8 case law to other Convention rights, such as Art. 34 or Art. 6. For example, in *Annagi Hajibeyli v Azerbaijan* (2015), the First Section, after setting out its case law under Art. 8 of the Convention,[449] went on to apply effectively the same criteria in the context of Art. 34 and the 'principle of effective exercise of the right of petition'.[450] Even more clearly, the Court in *Khodorkovskiy and Lebedev v Russia* (2020) explicitly noted that

> as to searches in the lawyer's office and written communications between the lawyer and his client, such situations have more frequently been analysed by the Court under Article 8 of the Convention. However, an interference with the professional secrecy of a lawyer not only affects his or her rights under Article 8; it may also obstruct effective legal assistance to a client and must accordingly be examined by the Court under Article 6 §§ 1 and 3 (c) of the Convention where the client's interests are affected.[451]

Whatever the Convention article used, the Court has therefore been clear that search and seizure operations carried out on lawyers' premises are subject to significantly stricter scrutiny than other search and seizure operations due to their interference with confidentiality and therefore, ultimately, with the client-lawyer relationship. This stricter scrutiny manifests particularly in a need for additional protective procedural arrangements, which can also require States to provide for special protection at the legislative

447 Ibid, para 124. This clarification is noteworthy because in other cases the Court has examined non-compliance with domestic law as a central part of its argument, suggesting that in the instant case it either did not want to get involved in such an analysis or, instead, chose to take the opportunity to make more general statements.

448 Ibid, para 137. In *Rozhkov v Russia (No 2)* App no 38898/04 (ECtHR, 31 January 2017), para 119, decided three years earlier, this point had still been left open.

449 *Annagi Hajibeyli v Azerbaijan* (n 430), para 69.

450 Ibid, para 74ff.

451 *Khodorkovskiy and Lebedev v Russia* (n 330), para 629; for a reclassification in the other direction see eg *Vinci Construction and GTM Génie Civil et Services v France* (n 366), para 47. Note that the blanket reference in *Khodorkovskiy and Lebedev v Russia* (n 330) to Art. 6 'where the client's interests are affected' is somewhat misleading, since the Court has also analysed cases where 'the client's interests were affected' under Art. 8.

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level. In terms of justification, the Court has noted in a number of general dicta the important role lawyers play and the need to protect them from harassment.[452] Primarily, however, the justification given for this more exigent case law has been based on the significance of the client-lawyer relationship and the need to protect this special relationship of trust.

v. *Requirements on lawyers to report on their clients ('gatekeeper' legislation)*

The youngest emanation of professional secrecy jurisprudence – that of so-called 'gatekeeper' legislation[453] – is intimately linked to a more recent regulatory approach: requiring, in certain situations, that lawyers report on their clients. In modern times, this approach – which essentially consisted of extending obligations already imposed on banks and certain other entities to cover lawyers providing similar services – first arose in the context of attempts to combat money laundering and terrorism financing, including the Financial Action Task Force's Recommendations.[454] For example, Recommendation 23 (a) of the 2012 FATF Recommendations reads that 'lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d)[455] of Recommendation 22'. Similarly, certain tax instruments such as Directive 2011/16/EU also contain obligations on legal services professionals to report certain cross-border tax structures.

452 On this point see Chapter Five, 240ff.

453 The term is a metaphor for the position of those regulated, since access to the means by which money can be laundered goes through one of the relevant professions. For criticism of the term see eg Nick Vineall, 'Why 'lawyers as gatekeepers' is a dangerous mantra' (2023) <https://www.barcouncil.org.uk/resource/why-lawyers-as-gatekeepers-is-a-dangerous-mantra.html> accessed 08 August 2024.

454 For an introduction see eg Nathanael Tilahun, 'Legal Professionals as Dirty Money Gatekeepers: The Institutional Problem' in Katie Benson, Colin King and Clive Walker (eds), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Routledge 2020).

455 'Buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities'.

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The dilemma is clear: There is tension between – on the one hand – a special relationship of trust founded on confidentiality between lawyer and client and – on the other hand – potentially requiring lawyers to break that trust and disclose information obtained from the client to the State, particularly where the fact of this disclosure must itself be kept from the client.[456] Consequently, this type of 'gatekeeper' legislation has frequently been challenged as objectionable on grounds of principle, with the argument typically running that it erodes one of the 'core values' of the legal profession and that if clients can no longer rely on lawyers to keep their secrets in one area this sows distrust between client and lawyer more generally, ultimately interfering with effective legal services.[457] On the other hand, critics may be tempted to argue that in invoking this principle, the legal profession is in reality simply trying to prevent unwanted additional regulation.[458] A third, more moderate position might be to highlight the fact that lawyers in most jurisdictions have always found themselves with conflicted loyalties as between State and client, and that this is, in essence, just a new iteration of an age-old problem, namely the potential conflict between lawyers' obligation to contribute to the rule of law and their obligations towards their clients.

Unsurprisingly, when such gatekeeper legislation was first introduced, the major legal services professional organisations fought it vigorously in both the Court of Justice of the European Union[459] and the European Court of Human Rights, which – although it decided later – is of greater relevance to the present research question. In testimony to the many points

456 As under Art. 39 § 1 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

457 And indeed, some have argued that this type of legislation is already being implemented abusively, eg Kirill Koroteev, 'When International Rules Come in Handy for an Autocratic Regime: Russia, the FATF, and the overzealous implementation of international anti money laundering recommendations', <https://verfassungsblog.de/when-international-rules-come-in-handy-for-an-autocratic-regime/> accessed 08 August 2024. For an example from outside the Council of Europe see eg International Commission of Jurists, 'Thailand: stop using counter-terrorism financing measures to reduce civil society space' (2021) <https://www.icj.org/thailand-stop-using-counter-terrorism-financing-measures-to-reduce-civil-society-space/> accessed 08 August 2024.

458 For an introduction see eg Sung Hui Kim, 'Naked Self-Interest? Why the Legal Profession Resists Gatekeeping' (2011) 63 Florida Law Review 129.

459 Case C-305/05 *Ordre des Barreaux Francophones et Germanophone and others [GC]* [2007] ECR I-5305.

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of principle raised, the judgment which ended the matter, *Michaud v France* (2012),[460] is in many ways more reminiscent in its external parameters of a Grand Chamber judgment than of that of a Chamber,[461] particularly since it raised issues concerning the fabled *Bosphorus* doctrine.[462] The facts were simple enough: The applicant – 'a member of the Paris Bar and the Bar Council'[463] – complained that French legislation transposing EU Directives 'aimed at preventing the use of the financial system for money-laundering',[464] which created a reporting obligation, violated the Convention, arguing explicitly that 'as a lawyer he was required … to report people who came to him for advice[, which he considered] to be incompatible with the principles of lawyer-client privilege and professional confidentiality' as protected by Art. 8.[465]

The Court, in its assessment, noted that 'lawyers cannot carry out [their] essential task [of defending litigants, cf preceding sentence] if they are

460 *Michaud v France* (n 359). Briefly discussing the relationship between private and public interests in *Michaud* see Emmanuel Decaux, 'L'intérêt général, « peau de chagrin » du droit international des droits de l'homme ?' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015) 126.

461 For example, the Chamber made extensive references to other international law documents (such as the UN Basic Principles on the Role of Lawyers or the CCBE Charter, both discussed in Chapter One, 34ff), admitted three third-party interveners (the CCBE, the French-Speaking Bar Council of Brussels – who had also brought the CJEU case – and the European Bar Human Rights Institute), issued a press release and even held an oral hearing, as well as delivering the judgment in another oral hearing. In addition, the topic – that of, essentially, a challenge to EU law before the European Court of Human Rights – relates to a foundational issue of Convention law, the vexed question of review of EU norms before the Strasbourg Court, which ultimately led the Luxembourg Court to veto EU accession to the Convention in the notorious Opinion 2/13 of 18 December 2014 – and indeed, eg Andreas von Arnauld, *Völkerrecht* (4th edn, C. F. Müller 2019), para 629, cites *Michaud* exclusively for its application of the *Bosphorus* doctrine. The parallel EU judgment in *Ordre des Barreaux Francophones* was heard by the ECJ as a Grand Chamber.

462 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005), essentially establishing a rebuttable presumption that acts implementing EU law will comply with the Convention.

463 *Michaud v France* (n 359), para 8.

464 Ibid, para 9. One can only guess what role this EU background played in the Court's decision-making, but the judgment came at a time of complex relations between the Luxembourg and Strasbourg Courts, given that EU accession to the Convention had not yet been ruled out.

465 Ibid, para 47.

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unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake'.[466] However, the Court also held that 'legal professional privilege … is not … inviolable',[467] and that 'its importance should also be weighed against that attached by the member States to combating the laundering of the proceeds of crime'.[468] The Court then went on to highlight that 'the obligation to report suspicions … only concerns tasks performed by lawyers, which are similar to those performed by the other professions subjected to the same obligation, and not the role they play in defending their clients', and that 'furthermore … lawyers are not [generally] subjected to the obligation where the activity in question "relates to judicial proceedings"'.[469] Moreover, the Fifth Section attached significant weight to the fact that in the French system reports were transmitted to various Bar organs, ie to 'a fellow professional who is not only subject to the same rules of conduct but also elected by his or her peers to uphold them'.[470] Based on these factors, the Court went on to find no violation of Art. 8 of the Convention.[471]

In later cases, this line of jurisprudence has been summarised as follows:

> the Convention does not prohibit the imposition on lawyers of certain obligations likely to concern their relationships with their clients. This is the case in particular where credible evidence is found of the participation of a lawyer in an offence, or in connection with efforts to combat certain practices. On that account, however, it is vital to provide a strict framework for such measures, since lawyers occupy a vital position in the administration of justice and can,

466 Ibid, para 118. Note, once again, the explicit reference to the relationship of trust between lawyer and client.

467 Ibid, para 123. The reference to *Mor v France* App no 28198/09 (ECtHR, 15 December 2011) is rather unconvincing, given that that case was not concerned with secrecy regarding information gained from the client, but with an obligation to keep documents obtained in the course of litigation secrect, which is quite a different situation with a different rationale.

468 *Michaud v France* (n 359), para 123. One wonders whether the importance which the member States attach to their goal should really be the criterion here, as opposed to the weight of the goal on a more neutral standard.

469 Ibid, para 127. This is a rather reductionist view of legal services, given that it essentially ignores anything other than litigation and perhaps arbitration. However, it does sit well with the fact that despite its rhetorical emphasis on 'lawyers' and the 'legal profession', much of the case law in reality hinges on whether or not the applicant is a human rights defender.

470 Ibid, para 129.

471 Ibid, para 132.

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> by virtue of their role as intermediary between litigants and the courts, be described as officers of the law.[472]

Despite the inherent tension between loyalty to clients and obligations to report on them, the Court has therefore not declared the latter to be incompatible with the Convention per se, but has only required that they be subject to additional procedural protection. This is particularly worth noting since, beyond a question of principle, the field also raises questions about the extent of legal services' regulation. Nonetheless, it appears that the rear-guard action by national and international lawyers' professional organisations has failed, and gatekeeper legislation is likely to be here to stay.

vi. *Enforcement of the confidentiality norm*

The foregoing case law shows that the Court in principle requires States to guarantee the confidentiality of lawyer-client communications, which it understands as a prerequisite for the special relationship of trust between client and lawyer which in turn provides the foundation for effective legal services. On this justification, it is understandable that the Court allows both clients and lawyers to enforce the professional secrecy norm. In addition to allowing clients to invoke their rights,[473] the Court has also allowed lawyers to invoke the professional secrecy norm[474] – notwithstanding dicta that legal professional privilege 'primarily impos[es] certain obligations on lawyers'[475] – and there have even been cases where both client and lawyer have simultaneously invoked the norm.[476]

While application to the client seems obvious on any analysis[477] – given that the information which is confidential will typically flow from client

472 *Altay v Turkey (No 2)* (n 339), para 56. For a more detailed analysis of the 'position' of lawyers see Chapter Five, 225ff.

473 From the plentiful case law see eg *Sorvisto v Finland* (n 443); *Chadimová v the Czech Republic* App no 50073/99 (ECtHR, 18 April 2006).

474 eg *André and another v France* (n 359), para 36ff, especially 41; *Versini-Campinchi and Crasnianski v France* (n 346), para 49.

475 *Michaud v France* (n 359), para 119.

476 eg *Petri Sallinen and others v Finland* (n 444), para 71; *Wieser and Bicos Beteiligungen GmbH v Austria* (n 437), para 67; *André and another v France* (n 359).

477 Remarkably, in *Wieser and Bicos Beteiligungen GmbH v Austria* (n 437), para 67 the Court even held that 'a lawyer's duty of professional secrecy also serves to protect the client', which is at least surprising given that if anything, the default

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to lawyer –, application *ratione personae* to the lawyer as well provides a further indication that the core rationale in this respect is still the *Campbell* doctrine that confidentiality is a prerequisite for a bilateral relationship of trust, in turn a prerequisite for effective legal services.[478] This is worth noting because in recent case law, there has been a slight tendency to shift the justification for professional secrecy, focusing instead on freedom from self-incrimination.[479] Aside from a number of other reasons why that rationale is unsatisfying, including its tendency to limit the scope of professional secrecy to criminal law, this rationale would also struggle to explain why the lawyer, in addition to the client, should be able to invoke confidentiality, given that the lawyer is not at risk of self-incrimination.[480]

Furthermore, an exception to the 'strengthened protection' which the Convention provides in relation to confidentiality underlines the rationale based on effective legal services. The special protective regime will not apply where the lawyer is also suspected of a criminal offence and is therefore the subject of an investigation.[481] Again, this sits well with the justification based upon effective legal services. Where lawyers themselves are suspected of criminal offences, they are not involved in their function as independent lawyers, but in their role as ordinary citizens. Trust and confidence as a prerequisite of effective legal services are therefore not engaged.

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position is that it protects the client, as otherwise it would ultimately tend to be just an (unjustified) privilege for lawyers. More recently, however, in *Klaus Müller v Germany* App no 24173/18 (ECtHR, 19 November 2020), para 67 the Court noted an 'obligation of secrecy [to] their client, whose protection that duty serves in the first place'.

478 *Campbell v UK* (n 216), para 46. See also, for an analysis that focuses on a number of conceptual issues flowing from this case law, Chapter Eight.

479 cf n 366 and accompanying text.

480 Note that the analysis proposed in Chapter Nine can similarly resolve this problem.

481 *Versini-Campinchi and Crasnianski v France* (n 346), para 79. This also appears to be what the Court meant when it noted that 'the Convention does not prohibit the imposition on lawyers of certain obligations likely to concern their relationships with their clients. This is the case in particular where credible evidence is found of the participation of a lawyer in an offence' in *André and another v France* (n 359), para 42, since the reference in that case relates to investigative measures against materials covered by professional secrecy where the investigation was directed against the lawyer themselves. Note also that the Court relied on the criminal investigation being directed against the lawyer themsleves, in *Duyck v Belgium* (n 437), para 28.

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II. An autonomously determined relationship between lawyer and client

If the Court, then, has been clear in establishing a vision of a special relationship between client and a freely chosen lawyer, based on mutual understanding and secured by means of freedom to communicate, and confidentially at that, it has otherwise provided very little clarification of how the relationship between lawyer and client should be arranged. How exactly client and lawyer should interact, and what the latter should do to assist the former, is largely outside the scope of current Convention jurisprudence.

There are, presumably, several reasons for this. Aside from the relatively low number of judges on the Court with experience practising as lawyers,[482] one reason may be that this is typically the domain of specialised fields of domestic law, such as domestic professional rules or domestic contract law, which the Court may be implicitly finding to be Convention-compliant. Second, as long as a relationship of mutual understanding and trust exists, attempts to impose external standards on the provision of legal services can be framed as invasive paternalism. However, there is some tension between this argument and legal services' character as a credence good,[483] since the mere fact that the client is satisfied does not necessarily mean that legal services are being provided well, which in turn is an underlying reason for State regulation of legal services via the aforementioned tools. Beyond this, a further reason for the Court's hesitancy may be that there is an inherent risk of abuse in any line of case law creating rules which govern the relationship between client and lawyer. Since the Convention directly binds only States,[484] rules relating to the internal relationship empower a potential bad-faith actor to interfere with that relationship.[485] Finally, a

482 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, 639.

483 See text to n 211.

484 For an introduction to so-called horizontal effect under the Convention see eg Justin Friedrich Krahé, 'The Impact of Public Law Norms on Private Law Relationships: Horizontal Effect in German, English, ECHR and EU Law' (2015) 2 European Journal of Comparative Law and Governance 124, 136ff.

485 And indeed, in some cases Governments have highlighted that '[t]he State had no right of direct involvement in the lawyers' activities', cf *Andreyev v Estonia* App no 48132/07 (ECtHR, 22 November 2011), para 61. See also *Siyrak v Russia* App no 38094/05 (ECtHR, 19 December 2013), para 32, where the Court '[took] note of the Government's argument that the domestic judicial authorities were in no

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certain extent of indirect determination of the relationship between lawyer and client takes place via public-interest regulations, such as combinations of reservation of certain activities to specific persons and minimum quality requirements to join the ranks of these providers, which will be dealt with in Chapter Five.[486]

The following section discusses the conditions under which the State will be responsible for the actions of lawyers (1.), before turning to the clarification which the Court has provided on what constitutes high-quality legal services (2.).

1. State responsibility for lawyers' actions?

While the Court has in principle been hesitant to set criteria relating to the provision of legal services within the relationship between client and lawyer, it has not been able to stay out of this field entirely. This is essentially due to the position taken in the 1980 case of *Artico v Italy*.[487] In that judgment, which concerned the interpretation of the term 'legal assistance' in Art. 6 § 3 (c), the Court held that 'mere nomination [of a lawyer] does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties'.[488]

Laudable and in keeping with the 'practical and effective' *Airey* maxim[489] as this may be, the finding created a complex problem. A requirement of 'effective' assistance imposes on the State an obligation of result to secure certain qualitative criteria of legal assistance. Since one of these criteria of legal assistance is independence from the State, a dilemma arises: Individu-

position to compel Ms P. to act in the best interests of the applicant's defence', and *Vamvakas v Greece (No 2)* App no 2870/11 (ECtHR, 09 April 2015), para 33, where the Government highlighted that 'the judicial authority had had no reason, or indeed competence, to intervene spontaneously in the relationship between the applicant and his lawyer'.

486 261ff.

487 *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980).

488 Ibid, para 33. Regarding the transferability of this jurisprudence from the criminal law context to a civil claim see eg *Bertuzzi v France* App no 36378/97 (ECtHR, 13 February 2003), para 30, where the Court explicitly held in this respect that 'the fact that Artico concerned proceedings of a criminal nature does not prevent the reasoning followed in that case being transposed to the present case'.

489 *Airey v Ireland* (n 303), para 24.

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als are entitled to effective legal assistance, a right guaranteed by the State, but the State simultaneously needs to ensure that such effective legal assistance is sufficiently independent from the State. In *Artico* itself, the Court emphasised that 'admittedly, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes but, in the particular circumstances, it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled'.[490] That dictum, however, essentially only acknowledged the tension outlined above without providing any resolution.

In essence, there are two potential conceptual avenues of holding the State responsible for the outcome of ensuring effective legal assistance: either to make the State directly responsible for the actions of lawyers – after all, the State is also responsible for the actions of judges, who under the terms of Art. 6 § 1 also have to be 'independent and impartial' –, or to create a kind of 'due diligence'[491] obligation on the State to ensure that generally, legal services attain a certain quality as a prerequisite of other, more explicit Convention rights like the right to legal assistance or of access to court. Under this latter approach, which appears to be the predominant one, States will not be responsible for the actions of lawyers, but instead will be responsible for the actions of State bodies such as courts or Bar associations[492] which do not take positive steps to remedy deficits in legal services of which the State has actual or constructive knowledge. This leaves the lawyer-client relationship largely untouched – the State is under no obligation to intervene to stop the lawyer providing subpar services –, but means that the State will have to step in where errors by lawyers have particularly severe consequences. An underlying assumption of this line of reasoning, however, is that all defects in legal services can be fixed, at worst by replacing the lawyer with another one – an assumption that presupposes a relatively well-functioning legal services sector, as will be discussed in Chapter Five. Moreover, if this analysis of the case law is correct, the *Artico* dictum that 'a State cannot be held responsible for every shortcoming

490 *Artico v Italy* (n 487), para 36.

491 Indeed, the term 'diligence' in securing 'the genuine and effective enjoyment of the rights guaranteed under Article 6' even appears in *RD v Poland* App no 29692/96; 34612/97 (ECtHR, 18 December 2001), para 44; *Feilazoo v Malta* App no 6865/19 (ECtHR, 11 March 2021), para 125.

492 The position of Bar associations under the Convention is discussed in Chapter Five, 286ff.

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on the part of a lawyer appointed for legal aid purposes'[493] is not just misleading, but wrong: Under the Court's current case law, a State cannot be held responsible for *any* shortcoming on the part of a lawyer appointed for legal aid purposes, because where States can be held responsible this is due to a failure of the domestic authorities to comply with their own positive obligations to ensure effective legal assistance. On that analysis, States are not being held responsible for shortcomings on the part of the lawyer. Instead, they are being held responsible for shortcomings on the part of other domestic authorities, such as domestic courts, Bar associations or anyone else involved in ensuring effective legal services.

(a) *The State's due diligence obligation to remedy severe shortcomings in legal services*

Unsurprisingly, States initially responded to the *Artico* allocation of liability by questioning in principle whether they should have any responsibility at all in cases involving poor performance of legal services, given the legal profession's independence. Perhaps the most detailed jurisprudence on the topic comes from the case law relating to the Polish provisions on (civil) legal aid as a prerequisite of access to the Polish Supreme Court regarding cassation appeals,[494] in cases such as *Siałkowska v Poland* (2007).[495] In that

493 *Artico v Italy* (n 487), para 36. The quote is a constant of the Court's case law, stretching temporally in cases from *Artico* itself all the way to eg *Feilazoo v Malta* (n 491), para 126.

494 This was a systemic problem at the time, with a large number of cases from Poland concerning essentially the same issues, cf *Arciński v Poland* App no 41373/04 (ECtHR, 15 September 2009) 12. Note that as early as *Smyk v Poland* App no 8958/04 (ECtHR, 28 July 2009) the Court regarded its own case law as settled enough that the reasoning in the latter judgment consists almost entirely of quotes of other judgments (since the procedure under Art. 28 § 1 b) ECHR, which was introduced in Protocol 14 and under which a three-judge committee can judge on the merits of an application 'if the underlying question … is already the subject of well-established case-law of the Court', was not yet available at the time), and by the time *Słowik v Poland* App no 31477/05 (ECtHR, 12 April 2011) was decided the Court only noted that '[t]he Court has already had occasion to set out at length the relevant principles derived from its case-law in this area', ibid, para 21.

495 Conducted in parallel with *Staroszczyk v Poland* App no 59519/00 (ECtHR, 22 March 2007); see *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007), para 5, which even merited an oral hearing. As regards the preceding point on the structural importance of these cases for the Polish legal order note Committee of

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case, the Government argued that it was not liable for the lawyer's actions, since

> the lawyer had been a member of an independent and self-governing professional association, which adopted its own rules of conduct and disciplinary regulations [and] the public authorities did not exercise any direct control over the methods of the lawyer's work and could not impose on a legal aid lawyer an obligation to draw up a cassation appeal.[496]

Similarly, the CCBE, which intervened in *Siałkowska*,[497] argued that

> no State Party should bear the responsibility for actions of lawyers, acting as members of independent bar associations. Only where the legal aid scheme did not adequately meet the conditions of effectiveness, should the role played by the State be assessed by the Court, in order to determine whether the State had taken all measures to ensure fair access to justice.[498]

In response, the Court reiterated and clarified its position, noting that 'a lawyer, even if officially appointed, cannot be considered to be an organ of the State'[499] and that

> given the independence of the legal profession[500] from the State, the conduct of the case is essentially a matter between the defendant and his or her counsel, whether counsel be appointed under a legal aid scheme or be privately financed,

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Ministers of the Council of Europe, *Resolution CM/ResDH(2013)147: Seven cases against Poland: Execution of the judgments of the European Court of Human Rights* (2013). Arguments related to State responsibility have also been made in a number of other cases, including *Daud v Portugal* App no 11/1997/795/997 (ECtHR, 21 April 1998), para 36, perhaps due to the obviously tense nature of a norm that attributes responsibility where there is no control.

496 *Siałkowska v Poland* (n 495), para 56.

497 The Court cited this third-party intervention quite extensively, giving it two full pages out of a 24-page judgment.

498 *Siałkowska v Poland* (n 495), para 87.

499 Ibid, para 99. The quote also appears in *Staroszczyk v Poland* (n 495), para 121; *Kulikowski v Poland* App no 18353/03 (ECtHR, 19 May 2009), para 56; *Antonicelli v Poland* App no 2815/05 (ECtHR, 19 May 2009), para 31; *Smyk v Poland* (n 494), para 54; *Arciński v Poland* (n 494), para 31; *Ebanks v UK* App no 36822/06 (ECtHR, 26 January 2010), para 72; *Mađer v Croatia* App no 56185/07 (ECtHR, 21 June 2011), para 160; *Andreyev v Estonia* (n 485), para 65. Note that the position is different for Bar associations (cf eg *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005)), as discussed in Chapter Five, 286ff.

500 It is perhaps worth noting here that in French-language judgments the Court uses the term 'indépendance du barreau', eg *Katritsch v France* App no 22575/08 (ECtHR, 04 November 2010), para 29. Similarly, in the slightly older case of *Daud v Portugal* (n 495), para 40, the Court referred to 'the fundamental principle of the independence of the Bar'.

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> and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention.[501]

The Court then went on to emphasise the independence of the legal profession,[502]

> consider[ing] that it is not the role of the State to oblige a lawyer, whether appointed under legal scheme [sic, presumably this was meant to be 'a legal aid scheme'] or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy. It is in the nature of things that such powers of the State would be detrimental to the essential role of an independent legal profession in a democratic society which is founded on trust between lawyers and their clients.[503]

On the facts of the case, the Court then went on to highlight that 'the applicable domestic regulations did not specify the time-frame within which the applicant should be informed about the refusal to prepare a cassation appeal',[504] the lawyer's refusal had been so late that 'it would have been impossible for the applicant to find a new lawyer under the legal-aid scheme',[505] and that therefore there had been a violation of Art. 6 § 1 as the

501 *Siałkowska v Poland* (n 495), para 99. Substantially identical statements appear in *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989), para 65; *Imbrioscia v Switzerland* App no 13972/88 (ECtHR, 24 November 1993), para 41; *Stanford v UK* App no 16757/90 (ECtHR, 23 February 1994), para 28; *Daud v Portugal* (n 495), para 38; *Cuscani v UK* App no 32771/96 (ECtHR, 24 September 2002), para 39; *Czekalla v Portugal* App no 38830/97 (ECtHR, 10 October 2002), para 60; *Lagerblom v Sweden* (n 238), para 56; *Sejdovic v Italy [GC]* App no 56581/00 (ECtHR, 01 March 2006), para 95; *Sannino v Italy* App no 30961/03 (ECtHR, 27 April 2006), para 49; *Kemal Kahraman and Ali Kahraman v Turkey* App no 42104/02 (ECtHR, 26 April 2007), para 35; *Güveç v Turkey* App no 70337/01 (ECtHR, 20 January 2009), para 130; *Ananyev v Russia* App no 20292/04 (ECtHR, 30 July 2009), para 52; *Prežec v Croatia* App no 48185/07 (ECtHR, 15 October 2009), para 30; *Sabirov v Russia* App no 13465/04 (ECtHR, 11 February 2010), para 44; *Pavlenko v Russia* (n 270), para 99; *Orlov v Russia* (n 212), para 108; *Jelcovas v Lithuania* (n 212), para 89; *Iglin v Ukraine* App no 39908/05 (ECtHR, 12 January 2012), para 68; *Nikolayenko v Ukraine* App no 39994/06 (ECtHR, 15 November 2012), para 57; *Yefimenko v Russia* App no 152/04 (ECtHR, 12 February 2013), para 124; *Siyrak v Russia* (n 485), para 28; *Zinchenko v Ukraine* App no 63763/11 (ECtHR, 13 March 2014), para 90; *Vasenin v Russia* App no 48023/06 (ECtHR, 21 June 2016), para 137; *Faig Mammadov v Azerbaijan* App no 60802/09 (ECtHR, 26 January 2017), para 32; *VK v Russia* (n 213), para 35.

502 *Siałkowska v Poland* (n 495), para 111.

503 Ibid, para 112.

504 Ibid, para 114.

505 Ibid, para 114.

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applicant had not had access to a court.[506] In other judgments on similar situations, the Court has similarly focused on the State's contribution to a non-Convention-compliant outcome and eg 'emphasised that it is the responsibility of the State to ensure the requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other',[507] or indeed that 'the ultimate guardian of the fairness of the proceedings was the trial judge'.[508]

The Court has also provided further elaboration on one of the reasons for why 'the conduct of the case is essentially a matter between the defendant and his or her counsel':[509] In *Ebanks v UK* (2010), the Court noted that

> in the context of any criminal proceedings, decisions must be made as to how best to present an accused's defence at trial. In many cases several options will be available and it is the responsibility of the accused to select, with the advice of counsel, the defence which he wishes to put before the court. Any defendant subsequently convicted will naturally feel aggrieved if he had an alternative defence which was not, in the event, pursued. He may convince himself, often unrealistically, that the alternative defence would have been successful where the actual defence run was not. However, it is not in the interests of justice to allow a defendant to seek to advance such alternative defence after his conviction unless there are special circumstances which give rise to a real concern that the legal representation at trial was defective in a fundamental respect.[510]

This reasoning tends to support the analysis proposed above that the rationale for the Court's restrictive stance is linked to autonomy. Ultimately, the foregoing quote sees the role of legal services as enabling informed choice by the recipient of legal services, that is to support their position by neutralising the information gap between them and the other actors of the legal system and allowing them to choose how to proceed.[511] While clients may of course later regret some of the decisions they make, allowing other actors of the legal system to overturn these without good reasons

506 Ibid, para 116ff.

507 *Kulikowski v Poland* (n 499), para 63; *Siałkowska v Poland* (n 495), para 112.

508 *Cuscani v UK* (n 501), para 39. There is a significant rhetorical similarity here to the Court's description of the State as the 'ultimate guarantor of pluralism', discussed in Chapter Six at 313. In both areas, the Court sees a task as primarily delegated to non-State actors, with a residual responsibility on the State where the outcomes reached are manifestly contrary to the Convention.

509 *Siałkowska v Poland* (n 495), para 99.

510 *Ebanks v UK* (n 499), para 82.

511 Note the parallel to *Altay v Turkey (No 2)* (n 339), para 49, discussed in Chapter One, 63ff, where the purpose of legal assistance was seen as 'to allow an individual to make informed decisions about his or her life'.

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would constitute interference with autonomy, which also extends to a right to make choices which later turn out to be poor ones. Such interference can only be justified where the legal advice provided failed to fulfil its autonomy-securing function, meaning that the client's choice was not truly autonomous. It appears from the case law that the Court thinks that this balance can best be achieved by reference to a due-diligence-style obligation, whereby the State has a positive duty to intervene only in very specific situations, but is not directly responsible for the actions of the lawyer.

(b) *The State's obligation to counter manifest failings in the provision of legal services in practice*

While the reference to the State's 'applicable domestic regulations'[512] in *Siałkowska* already provided a hint in this direction, the Court has sometimes worked even more obviously with that type of due-diligence-style obligation on the part of State authorities. The Court has noted that 'the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way',[513] focusing effectively on the position of the domestic authorities and their potential positive obligations rather than simply attributing counsel's behaviour to the State. Similarly, in *Bąkowska v Poland* (2010), the Court referred to *Siałkowska* to highlight that 'an adequate institutional framework should be in place so as to ensure effective legal representation for

512 *Siałkowska v Poland* (n 495), para 114.

513 *Kamasinski v Austria* (n 501), para 65; *Czekalla v Portugal* (n 501), para 60; *Lagerblom v Sweden* (n 238), para 56; *Mayzit v Russia* (n 226), para 67; *Sannino v Italy* (n 501), para 49; *Kemal Kahraman and Ali Kahraman v Turkey* (n 501), para 35; *Ananyev v Russia* (n 501), para 52; *Prežec v Croatia* (n 501), para 30; *Sabirov v Russia* (n 501), para 44; *Pavlenko v Russia* (n 270), para 99; *Jelcovas v Lithuania* (n 212), para 120; *Andreyev v Estonia* (n 485), para 65; *Iglin v Ukraine* (n 501), para 68; *Muscat v Malta* App no 24197/10 (ECtHR, 17 July 2012), para 56; *Nikolayenko v Ukraine* (n 501), para 57; *Siyrak v Russia* (n 485), para 28; *Zinchenko v Ukraine* (n 501), para 90; *Vasenin v Russia* (n 501), para 137; *Jemeljanovs v Latvia* (n 225), para 80; *VK v Russia* (n 213), para 35. For a French-language summary see eg *Katritsch v France* (n 500), para 29 or *Mihai Moldoveanu v Romania* App no 4238/03 (ECtHR, 19 June 2012), para 71.

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entitled persons and a sufficient level of protection of their interests'.[514] In a slightly different technique continuing the strategy of largely shielding the internal lawyer-client relationship from interference, the Court, in *Czekalla v Portugal* (2002), differentiated between a lawyer's 'injudicious line of defence or a mere defect of argumentation',[515] for which the State will not be responsible,[516] and 'negligent failure to comply with a purely formal condition'.[517] Where legal aid counsel had 'fail[ed] to comply with a simple and purely formal rule when lodging the appeal on points of law', the Court found 'a "manifest failure" which called for positive measures on the part of the relevant authorities'.[518] Moreover, the Court in *Czekalla* went on to reject the Government's argument based on 'the legal profession's independence',[519] highlighting instead that 'the circumstances of the case … imposed on the relevant court the positive obligation to ensure practical and effective respect for the applicant's right to due process'.[520]

It would appear, then, that despite allusions to the position of the lawyer, the Convention obligation in issue rests firmly with the State, even though it may be caused by the actions of the lawyer. The Court has clarified as much in cases such as *Arciński v Poland* (2009), where, in finding a shortcoming by the Warsaw Court of Appeal, it highlighted 'that the procedural framework governing the making available of legal aid … is within the control of the appellate courts'.[521] In this vein, in *Daud v Portugal* (1998), the Court found a manifest shortcoming where the domestic court was made aware – albeit in a letter written in a foreign language – that the applicant had not been contacted by his legal aid counsel more than eight months after

514 *Bąkowska v Poland* App no 33539/02 (ECtHR, 12 January 2010), para 47, cited recently in *Feilazoo v Malta* (n 491), para 125.

515 *Czekalla v Portugal* (n 501), para 65.

516 See, in this regard, *Stanford v UK* (n 501), which concerned an application to the European Court of Human Rights following a tactical decision that turned out not to have the desired effect, as well as *Faig Mammadov v Azerbaijan* (n 501), para 32, where the Court highlighted the applicant's responsibility to take active steps to ensure his participation in the proceedings.

517 *Czekalla v Portugal* (n 501), para 65. For a similar distinction in a domestic jurisdiction see eg *Arthur J S Hall v Simons* [2002] 1 AC 615 (HL), 682.

518 *Czekalla v Portugal* (n 501), para 68.

519 *Czekalla v Portugal* (n 501), para 69ff.

520 Ibid, para 71. This wording appears somewhat problematic, since for the purposes of the Convention the obligations are primarily imposed on the State as a whole, and it is up to the State itself to decide how to realise these.

521 *Arciński v Poland* (n 494), para 41.

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appointment,[522] noting that 'the [domestic] court should have inquired into the manner in which the lawyer was fulfilling his duty'.[523] Moreover, this case law is not limited to domestic courts, but will encompass all bodies whose actions have an impact on the applicant's rights.[524] As the Court summarised the State's responsibilities in *Vamvakas v Greece (No 2)* (2015):

> The Court … observes that there may be occasions when the State should act and not remain passive when problems of legal representation are brought to the attention of the competent authorities. If they are notified of such a situation, the authorities must either replace or oblige the lawyer to fulfil his duties.[525]

As such, the State's responsibility under the Convention will be engaged where a domestic court continues with a criminal case even though the State-appointed lawyers did not attend any of the hearings, since that court 'must have been aware of the lawyers' failure to fulfil their obligations'[526] meaning it would have had to take 'measures to ensure that the lawyers comply with their duties'.[527] The State will also be responsible where a State-appointed lawyer does attend and states that a defendant should be acquitted, but provides absolutely no arguments for this.[528] Conversely, where more minor deficiencies in legal services are alleged,[529] or where there was no indication that the 'errors had been brought to the attention

522 *Daud v Portugal* (n 495), para 42.

523 Ibid, para 42. This would seem closer to a State due diligence obligation, given that the focus is on the court's behaviour rather than any attribution of the lawyer's.

524 See eg *Anghel v Italy* App no 5968/09 (ECtHR, 25 June 2013) for a litany of failures by the Ministry of Justice, the Council of the Bar Association and two legal aid lawyers.

525 *Vamvakas v Greece (No 2)* (n 485), para 37. Similar statements appear in *Siałkowska v Poland* (n 495), para 100; *Staroszczyk v Poland* (n 495), para 122; *Kulikowski v Poland* (n 499), para 57; *Antonicelli v Poland* (n 499), para 32; *Smyk v Poland* (n 494), para 55; *Arciński v Poland* (n 494), para 32; *Ebanks v UK* (n 499), para 73; *Mađer v Croatia* (n 499), para 161; *Jelcovas v Lithuania* (n 212), para 90; *Muscat v Malta* (n 513), para 46; *Anghel v Italy* (n 524), para 51; *Vamvakas v Greece (No 2)* (n 485), para 37; *Feilazoo v Malta* (n 491), para 125.

526 See similarly regarding failure to appear before domestic courts – perhaps the failure which is easiest for domestic courts to notice – *Sabirov v Russia* (n 501), para 46; *Güveç v Turkey* (n 501), para 131.

527 *Kemal Kahraman and Ali Kahraman v Turkey* (n 501), para 36.

528 *Mihai Moldoveanu v Romania* (n 513), para 74.

529 cf eg *Nikolayenko v Ukraine* (n 501), para 57; *Kysilková and Kysilka v the Czech Republic* App no 17273/03 (ECtHR, 10 February 2011), para 28. For a case which concerned a particularly obstinate client who dismissed two lawyers after they refused to guarantee a positive outcome *Jemeljanovs v Latvia* (n 225).

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of the competent authorities',[530] the State will not be responsible. Indeed, a particularly good example of a domestic court complying with its due diligence obligations is *Yefimenko v Russia* (2013), where the domestic court asked repeatedly whether the applicant had had an opportunity to discuss his defence with his counsel and whether he was satisfied with the counsel he had been provided.[531] Since due to legal services' status as a credence good satisfaction and quality will not always overlap, the Court has moreover also held that ensuring assistance by one legal-aid lawyer will – in the absence of 'indications of negligence or arbitrariness on the lawyer's part in discharging [their] duties'[532] – generally suffice, since 'Article 6 of the Convention does not confer on the State an obligation to ensure assistance by successive legal-aid lawyers for the purposes of pursuing legal remedies which have already been found not to offer reasonable prospects of success'.[533]

In keeping with this focus on the State's positive obligations as regards the legal system, the Court has generally focused on a wider, more systemic perspective, noting that while 'it is impossible for a State to prevent all and any omissions by a lawyer … at the same time, it is for the State to put in place a system capable of ensuring the respect of rights guaranteed under the Convention, including the right to a fair trial'.[534] As eg *Andreyev v Poland* (2011) indicates, given that the Court highlighted that 'the failure of [the applicant's] legal-aid lawyer to duly perform his duties *and the lack of any subsequent measures to adequately remedy the situation* deprived the applicant of his right of access to the Supreme Court',[535] this reinforces the conclusion that States may be under an obligation to have the courts or other State organs remedy defects resulting from particularly severe failures

530 *Implom v Hungary (dec)* App no 8649/15 (ECtHR, 01 October 2019), para 27. See also *Gabrielyan v Armenia* App no 8088/05 (ECtHR, 10 April 2012), para 67, where the Court held that 'even assuming that the entirety of the applicant's allegations are true, it was still incumbent on him to bring the lawyer's failures to the attention of the authorities, who cannot be blamed for such failures if they were not informed of them in a timely and proper manner', and *Imbrioscia v Switzerland* (n 501), para 41.

531 *Yefimenko v Russia* (n 501), paras 26, 27 and 127, where the Court highlighted positively 'that the trial judge in the present case paid attention to the effective exercise of defence rights'.

532 *Słowik v Poland* (n 494), para 23.

533 Ibid, para 23.

534 *Andreyev v Estonia* (n 485), para 71. This is perhaps the clearest allusion to what is analysed here as a due diligence obligation.

535 Ibid, para 77 (emphasis added).

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by lawyers, rather than the State itself being liable for a failure by a lawyer. Elsewhere, the Court has phrased this as '[i]n discharging its obligation to provide parties to criminal proceedings with legal aid … the State must, moreover, display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6'.[536] Most clearly, this focus on State organs rather than attribution of lawyers' actions becomes visible in the application of the same case law to situations where the applicant does not have a lawyer: In the aforementioned *Arciński* case, the Court applied essentially the same case law to a situation where the applicant, 'who was at that time no longer represented by a lawyer',[537] had not been informed by the domestic court of the point in time when a time-limit began to run. The case shows that, despite the Court's ostensible focus on States being 'held responsible for … shortcoming[s] on the part of a lawyer',[538] what is really in issue is not vicarious liability, but the positive obligations of State organs themselves, since the same case law has been applied whether or not the applicant had a lawyer.

(c) *Conclusion: State responsibility for lawyers' actions*

Despite its rhetoric, the Court therefore does not seem to actually attribute the actions of lawyers to the State. Instead, it focuses on obligations by State bodies themselves, such as courts, Bar associations or indeed anyone involved in the State's obligations to secure effective legal assistance. As a result, the Court has typically found the State responsible for poor performance of legal services only in particularly blatant cases,[539] which all have in common that in combination with the 'manifest or sufficiently brought to the State's attention' criterion the State will neither be required nor entitled to interfere more substantially with the provision of legal services. In effect,

536 *Antonicelli v Poland* (n 499), para 34.

537 *Arciński v Poland* (n 494), para 41.

538 *Artico v Italy* (n 487), para 36.

539 cf the position for health care, where the Court held in *Powell v UK (dec)* App no 45305/99 (ECtHR, 04 May 2000) 18 that 'where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, [the Court] cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.'

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only in those cases where egregious problems with the performance of legal services are readily apparent even without interference with their independent provision will States be found responsible for legal services not reaching a certain minimum quality.

This is important because it clarifies a point regarding the status of lawyers which will return later: Despite their role in fulfilling the State's obligation to ensure access to the legal system, the Court – its rhetoric to the contrary notwithstanding – does not actually hold them to be part of the State in the sense of triggering State responsibility.[540] The tension discussed above between independent provision of legal services and human rights guarantees such as access to justice or fair trial rights, then, seems to have been resolved fairly clearly towards the former, with the State not responsible for the actions of lawyers despite the fact that the provision of legal services can be understood as a public function[541] and occurs in fulfilment of the State's obligations under eg Art. 6. Moreover, this case law reveals a second point, which will be discussed in the next section: Quality requirements for legal services are – contrary to the issues flagged in the introduction to this section – not a blind spot for the Convention. Instead, sub-par provision of legal services can under certain circumstances – when combined with a failure by the State to remedy the consequences of such defects – engage the State's responsibility, and the Court has therefore set out a number of parameters for what it considers high-quality legal services to be.

2. The Court's vision of high-quality legal services

The aforementioned jurisprudence, according to which particularly poor legal services can, under certain circumstances, trigger State responsibility to take action to remedy the effects of subpar performance, raises the question of which factors, according to the Court, determine the 'quality' of legal services. The following section sets out the outline the Court has provided in this regard. In addition to many of the cases already cited above, it also includes other indications which the Court has given as to what characteristics legal services should have. The rationale for this wider

540 See more generally on the relationship between lawyers and the State Chapter Five.

541 cf eg *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987), para 46 (b), discussed in Chapter Five at 228.

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selection of cases is that, as discussed in the preceding section, whether or not legal services are of sufficient quality is not of itself determinative of the State's responsibility, since State authorities must also have actual or constructive knowledge of potential deficits. As such, there are also cases where the Court noted doubts as to the quality of legal services, but held that in any case the State was not liable since these defects were not brought to its attention or otherwise apparent.[542] Together with less concrete statements such as obiter dicta in other cases, this ensemble of judgments shows some of the frequently implicit assumptions the Court makes about the quality legal services should attain.

This field, quality standards for legal services under the Convention, is particularly complicated for a number of reasons, not least that where the State is called upon too intensely to determine lawyers' behaviour, 'it is in the nature of things that such powers of the State would be detrimental to the essential role of an independent legal profession in a democratic society [sic][543] which is founded on trust between lawyers and their clients'.[544] Moreover, the Convention contains no clear standards as to what quality legal services must conform to, and requirements and indeed regulatory techniques[545] at the domestic level differ heavily. Clients themselves are not generally in a position to assess quality accurately due to legal services' nature as a credence good. Additionally, due to Convention litigation's typically 'vertical' individual-State structure, the Court is not particularly accustomed to resolving matters close to a horizontal situation between individuals which could arise in a similar way before a domestic civil court.[546] Despite all of these difficulties, however, a close reading of the

542 cf *Implom v Hungary (dec)* (n 530), para 27; *Gabrielyan v Armenia* (n 530), para 67; *Imbrioscia v Switzerland* (n 501), para 41. In these cases the Court left the question of the quality of legal services undecided and instead focused on the State's knowledge, which fits well with the Court's general hesitancy regarding the domain of quality requirements.

543 While of course flattering to lawyers everywhere, that the Court seriously intended 'founded on trust between lawyers and their clients' as a defining clause for 'democratic society', as the lack of comma indicates, seems unlikely.

544 *Siałkowska v Poland* (n 495), para 112.

545 eg monopolies combined with entry requirements (on this see Chapter Five, 261ff), professional rules, civil liability with or without the possibility of insurance, and so on.

546 As Governments have frequently tried to argue, for example when disputing the exhaustion of domestic remedies under Art. 35 § 1, cf eg *Smyk v Poland* (n 494),

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Court's case law provides a number of indications as to what makes for high-quality legal services.

(a) *Activity and attendance*

Most fundamentally, legal services require that the lawyer actually does something. Merely accepting a case, but doing nothing more, does not suffice. While the fact that such inactivity does not constitute 'high-quality legal services' seems rather intuitive, it has nonetheless come before the Court in a number of cases. For example, in *Artico v Italy* (1980), where 'from the very outset, the lawyer stated that he was unable to act' but was nonetheless not replaced by a different lawyer, the Court noted that 'the applicant did not receive effective assistance'.[547] However, 'the mere fact that a legal-aid lawyer can refuse to represent a defendant in proceedings before the highest court cannot be said to be, of itself, tantamount to a denial of legal assistance which is incompatible with the State's obligations under Article 6 of the Convention'.[548]

In a similar vein, lawyers appointed to act as criminal defence counsel will have to actually attend court hearings, at least where significant questions are being discussed.[549] Unfortunately, this does not appear to be a rule that has been universally observed at the domestic level, given that in cases such as *Kemal Kahraman and Ali Kahraman v Turkey* (2007), where the State-appointed lawyers did not attend any of the six hearings,[550] or *Güveç v Turkey* (2009), where 'the lawyer, who declared during the third hearing … that she would be representing the applicant from then on, failed to attend 17 of the 25 hearings',[551] lawyers took a rather cavalier approach to

para 44; *Bąkowska v Poland* (n 514), para 35; *Andreyev v Estonia* (n 485), para 53; *Implom v Hungary (dec)* (n 530), para 18.

547 *Artico v Italy* (n 487), para 33.

548 *Kulikowski v Poland* (n 499), para 63; *Antonicelli v Poland* (n 499), para 38; *Zapadka v Poland* App no 2619/05 (ECtHR, 15 December 2009), para 60; *Bąkowska v Poland* (n 514), para 47.

549 As regards hearings that essentially consist of formalities cf eg *Elif Nazan Şeker v Turkey* (n 236), para 48, where the Court highlighted that the hearings which the lawyer did not attend were 'essentially devoted to the execution of the arrest warrant' concerning a co-defendant.

550 *Kemal Kahraman and Ali Kahraman v Turkey* (n 501), para 36.

551 *Güveç v Turkey* (n 501), para 129.

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attendance.[552] *Vamvakas v Greece (No 2)* (2015), where the lawyer did not attend the hearing and later appears to have lied about having asked for it to be rescheduled,[553] seems tame by comparison. In one of the rare statements setting out exactly what counsel *should* have done, the Court noted that

> a lawyer, and in particular an officially appointed lawyer, is not exempted from due diligence when he or she decides to stand down in a particular case or is unable to attend a given hearing. In such cases, he or she must inform the authority which appointed him of the issue and take all the necessary and urgent steps to protect his or her client's interests and rights.[554]

(b) *Defence of the client's interests*

Unsurprisingly, even where lawyers do appear in court, the European Court of Human Rights does not consider that this already discharges all of their obligations. Where 'at each hearing [the applicant] was represented by a different replacement lawyer [and] there was nothing to suggest that the replacement lawyers had any knowledge of the case',[555] the requirements of Art. 6's criminal limb will not be satisfied,[556] with the Court holding that these shortcomings were 'manifest'.[557] In *Vasenin v Russia* (2016), the Court noted that

> [w]hile the effectiveness of the legal assistance does not necessarily call for a proactive approach on behalf of a lawyer and the quality of legal services cannot be measured by the number of applications or objections lodged by counsel with a court, manifestly passive conduct might at least give rise to serious doubts about the efficacy of the defence. It is particularly so, if the accused strongly disputes the accusation and challenges evidence or is unable to attend the trial and ensure his or her defence in person.[558]

Consequently, where 'the defence was essentially passive' despite possible arguments such as an alibi for the offence under investigation and grounds

552 See, in a similar vein, *Sabirov v Russia* (n 501), para 46.
553 *Vamvakas v Greece (No 2)* (n 485), para 40ff – rather clumsily, since even on his own version of the facts the lawyer had made this request in an inadmissible form.
554 Ibid, para 39.
555 *Sannino v Italy* (n 501), para 50.
556 Ibid, para 52 – perhaps somewhat unsurprisingly, given the previous trenchant remark.
557 Ibid, para 51.
558 *Vasenin v Russia* (n 501), para 142.

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to challenge the admissibility of evidence,[559] 'the legal assistance provided to the applicant at the trial was seriously deficient'.[560] In the later case of *Jemeljanovs v Latvia* (2016) the Court also used this standard of 'passive or manifestly negligent'[561] as a reference point, in this case finding no problems with defence counsel's behaviour.

All of this implies that the lawyer must make some kind of intellectual input to the case. And indeed, in *Ananyev v Russia* (2009), where 'the State-appointed lawyer did not prepare any grounds of appeal of her own and pleaded the case on the basis of grounds of appeal lodged some four years earlier by the applicant',[562] this, together with a number of other shortcomings, 'irreparably impaired the effectiveness of the legal assistance provided'.[563] Similarly, it is not enough for a defence lawyer to simply ask in a general way for the defendant to be acquitted without giving any arguments to this effect,[564] or for a lawyer present during investigative measures such as interviews 'to have shown absolute passivity',[565] before making a 'final speech … devoid of any factual or legal arguments'.[566] Beyond this, even where a defence attorney does make some oral submissions, it will not be enough if they 'neither submitted any written submissions on the merits of the accusations levelled against the applicant nor substantiated the grounds of the two arguments that he had orally presented', before lodging an appeal with no reasons and no interaction with the judgment, 'reducing [his] appointment to a mere formality'.[567] Moreover, at the investigation stage, the Court finds it 'worrying' if counsel takes no measures for their client 'beyond merely signing the record on several occasions'.[568] 'The lawyer must be able to provide effective and practical assistance, not just abstract backing via his presence, during the first interrogation by the investigating judge'.[569]

559 Ibid, para 143.
560 Ibid, para 144.
561 *Jemeljanovs v Latvia* (n 225), para 82.
562 *Ananyev v Russia* (n 501), para 55.
563 Ibid, para 55.
564 *Mihai Moldoveanu v Romania* (n 513), paras 74–75.
565 *Gabrielyan v Armenia* (n 530), para 66.
566 Ibid, para 66. The speech reads, in full, 'I find that the defendant must be acquitted', cf ibid, para 40.
567 *Elif Nazan Şeker v Turkey* (n 236), para 56.
568 *Pavlenko v Russia* (n 270), para 112.
569 *AT v Luxembourg* App no 30460/13 (ECtHR, 09 April 2015), para 87, cited with approval by the Grand Chamber in *Beuze v Belgium [GC]* (n 304), para 134.

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Instead of remaining passive, the lawyer must therefore generally take action according to the client's instructions, with the aim of empowering the client to make decisions themselves. As the Court put it in the aforementioned quote from *Ebanks*, as regards criminal proceedings, 'it is the responsibility of the accused to select, with the advice of counsel, the defence which he wishes to put before the court',[570] locating the decision firmly with the client and highlighting the 'assistance' part of 'legal assistance'. Unsurprisingly, it is therefore problematic if – without an explicit direction to this effect by the client – the lawyer '[does] not appear to act in the applicant's interest'[571] or if a defence counsel 'support[s] the position of the prosecution, rather than that of the [client]'.[572] For defence counsel, the Court has instead highlighted a 'duty to defend their clients' interests zealously'.[573]

(c) *Communication with the client*

To put the lawyer in a position to act for the client, the Court generally requires communication between lawyer and client. For the lawyer, it is therefore not an option to reject the additional protection of communication between lawyer and client discussed above, at least not without incurring the risk that the legal services will not be of sufficient quality to satisfy the Court's standards. This shows a second function of the communication guarantees highlighted above: Aside from generally providing the foundation for the relationship of 'trust and confidence' between lawyer and client, communication is also necessary as a precondition for the provision of high-quality legal services.

In the Court's case law, this significance of communication is perhaps particularly clear in the criminal law context, where the Court, in *AT v Luxembourg* (2015), noted 'the importance of consultations between the lawyer and his client upstream of the first interrogation by the investigating judges [as] an opportunity for holding crucial exchanges, if only for the

570 *Ebanks v UK* (n 499), para 82.
571 *Vasenin v Russia* (n 501), para 144.
572 Ibid, para 126.
573 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 54; *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 137; *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 47; *Radobuljac v Croatia* App no 51000/11 (ECtHR, 28 June 2016), para 61.

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lawyer to remind his client of his relevant rights',[574] and that '[a]ccordingly, the consultation between the lawyer and his client upstream of the interrogation must be unequivocally enshrined in legislation'.[575] In *Ananyev v Russia* (2009), where the lawyer 'studied [the] case file and then attended the appeal hearing, where she made oral submissions to the court on the applicant's behalf on the basis of the grounds of appeal lodged by the applicant'[576] but 'never met or otherwise communicated with the applicant'[577] there had been a manifest shortcoming regarding the applicant's effective legal representation. Similarly, in *Gilanov v Moldova* (2022) the Court 'note[d] that the result of replacing the applicant's lawyer was a considerable weakening of his position by having his case presented by a lawyer whom he had never met or instructed in any manner'.[578] In *Yefimenko v Russia* (2013), on the other hand, the Court highlighted that while it was 'uncontested that legal-aid counsel appointed for the retrial did not meet the applicant in the remand centre', it was 'common ground between the parties that counsel spoke with the applicant on several occasions before or after court hearings, including in the courthouse',[579] which together with the judge's proactive approach to ensuring that the applicant was satisfied with his legal-aid lawyer[580] sufficed to find that Art. 6 had been complied with.

The function of legal services in securing autonomy is also reflected in the Court's view that communication is not a one-off event, to be perfunctorily completed and then never repeated. Instead, the Court, in *Feilazoo v Malta* (2021), noted that

> [t]he Court will leave open the issue of the quality of the advice given to the applicant or whether pressure was exerted on him to drop his case. It suffices to note that the applicant's local legal aid representative failed to keep regular confidential lawyer-client contact … despite a reminder in the [European Court of Human Rights'] letter of 22 January 2020, making clear that as a representative she should keep the applicant informed of the proceedings before the Court

574 *AT v Luxembourg* (n 569), para 86.
575 Ibid, para 87.
576 *Ananyev v Russia* (n 501), para 53.
577 Ibid, para 54. The entire case raises serious questions of professional ethics.
578 *Gilanov v Moldova* App no 44719/10 (ECtHR, 13 September 2022), para 89.
579 *Yefimenko v Russia* (n 501), para 126.
580 Ibid, para 127.

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> at all times and maintain regular contact with him in order to receive relevant instructions and meet the Court's deadlines.[581]

Such communication also requires that lawyer and client be given sufficient time. As the Grand Chamber noted in *Sakhnovskiy v Russia* (2010), 'given the complexity and seriousness of the case, the time allotted was clearly not sufficient for the applicant to discuss the case and make sure that [his lawyer's] knowledge of the case and legal position were appropriate'.[582] Moreover, such communication appears to extend, at least in certain situations, to the exchange of documents, since in *Modarca v Moldova* (2007) the Court held that the fact that the applicant and lawyer could not easily exchange documents 'in the Court's view … rendered the lawyers' task even more difficult',[583] and that due to 'the real impediments created by the glass partition to confidential discussions and exchange of documents … the existence of the glass partition prejudice[d] the rights of the defence'.[584]

Nonetheless, where there are issues regarding communication, the Court will require that the client has suffered 'actual prejudice'[585] in the proceedings against him. Consequently, in *Mađer v Croatia* (2011), where the 'officially appointed counsel had visited [the applicant] only once, on … the 333rd day of his detention, and then only to ask for money',[586] but still 'represented the applicant during the trial stage of the proceedings, attended all the hearings before the trial court and actively participated by making relevant proposals and putting questions to the witnesses', their lack of contact 'did not prejudice the applicant's defence rights to a degree incompatible with the requirements of a fair trial'.[587] In its reasoning, the Court focused on the fact 'that the record containing the applicant's alleged confession was part of the case file and that counsel had the opportunity, even without consulting the applicant in person, to study the case file and

581 *Feilazoo v Malta* (n 491), para 127. The Court appears to have been singularly unimpressed by both the lawyer's and the Government's handling of the case, given that it explicitly noted at para 129 that 'it cannot go unnoticed that the behaviour of the legal representative and the lack of any action by the State authorities to improve the situation led to the prolongation of the proceedings before the Court, despite the fact that the case had been given priority', and went on to find a violation of Art. 34.

582 *Sakhnovskiy v Russia [GC]* (n 212), para 102. See similarly ibid 106.

583 *Modarca v Moldova* (n 358), para 94.

584 Ibid, para 95.

585 *Mađer v Croatia* (n 499), para 163.

586 Ibid, para 162.

587 Ibid, para 167.

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prepare his line of defence on that basis',[588] meaning that the lawyer did have access to a part of the information regarding the case even without direct communication. Moreover, an underlying factor for the Court may have been that 'neither in his appeal to the Supreme Court nor in his constitutional complaint did the applicant advance any new arguments which had not been previously submitted by his officially appointed defence counsel',[589] which the Court seems to have taken as an indication that the lawyer managed to effectively represent the client even in the absence of direct communication. Conversely, in *Prežec v Croatia* (2009) the Court explicitly emphasised that 'the fact that a lawyer … lodged an appeal on behalf of the applicant could not have remedied' the fact that 'neither of the [State-appointed] lawyers mentioned had visited the applicant in prison or made any other contact with him', 'since [the lawyer who filed the appeal] could hardly have been acquainted with the applicant's version of events in view of the fact that the applicant had remained silent during the trial'.[590]

(d) *Preparation of the case*

In addition to the time spent communicating with the client, counsel must be given sufficient time to prepare the case outside of lawyer-client meetings. For example, in *Daud v Portugal* (1998) the Court found a Convention violation where 'the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel' and the second lawyer had had only three days to prepare the defence.[591] Similarly, in *Mihai Moldoveanu v Romania* (2012) the Court noted that 'il est difficile d'imaginer comment [l'avocat], qui avait été informé sur-le-champ de sa nomination, a pu préparer une quelconque défense de l'intéressé',[592] which ties in to the idea that the lawyer must be able to make a meaningful intellectual contribution.

588 Ibid, para 166.
589 Ibid, para 167.
590 *Prežec v Croatia* (n 501), para 31.
591 *Daud v Portugal* (n 495), para 39.
592 *Mihai Moldoveanu v Romania* (n 513), para 74. 'It is difficult to imagine how this lawyer, who had been informed of his appointment on the spot, could have prepared any defence of the applicant' (author's translation).

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(e) *Lawyers' expertise*

This intellectual contribution, it appears, is to be based on qualifications greater than those of the general public.[593] While the Court does not make this explicit, its case law reveals several underlying assumptions about lawyers' qualification in terms of knowledge of the law. It is clear from the Court's case law that the Court takes the position that lawyers should have some minimum amount of knowledge that goes beyond that of laypersons.[594] This finding is not as trivial as it sounds given that eg many systems of procedural law also permit representation by non-lawyers without any further quality requirements in at least some circumstances, and in past eras there have been attempts to draft laws in such a way that even non-professionals can utilise them. In *Anghel v Italy* (2013), the Court explicitly noted that 'the Court considers that knowledge of simple procedural formalities falls within the ambit of a legal representative's competencies just as much as knowledge of substantive legal issues',[595] a finding it repeated in *Feilazoo v Malta* (2021).[596] Implicitly, such additional knowledge also underlies much of the Court's case law on procedural matters, such as eg the *Salduz v Turkey [GC]* (2008) line of cases, in which the Court focuses on 'access to a lawyer at the pre-trial stage' as a requirement of 'equality of arms',[597] and highlights that 'one of the lawyer's main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself ... and for his right to remain silent'.[598] This necessarily presupposes knowledge of what the Court referred to in the same judgment as 'increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence',[599] since a lawyer without such detailed knowledge would

593 For a discussion of the permissibility of restrictions on legal services on the basis of minimum requirements of formalised education see Chapter Five, 261ff.

594 cf eg the reference in *Jemeljanovs v Latvia* (n 225), para 90, which concerned a litigant in person, that 'the legal issues were not of particular complexity ... [and] [n]o other questions of law which could only be settled by a legal professional were raised'.

595 *Anghel v Italy* (n 524), para 61.

596 *Feilazoo v Malta* (n 491), para 126.

597 See eg *Beuze v Belgium [GC]* (n 304), para 125 with further references.

598 Ibid, para 128, with reference to *Salduz v Turkey [GC]* (n 304), *Dvorski v Croatia [GC]* (n 227), and *Blokhin v Russia [GC]* App no 47152/06 (ECtHR, 23 March 2016) (omitted).

599 *Beuze v Belgium [GC]* (n 304), para 127.

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not be able to ensure equality of arms. Similarly, in *Buzescu v Romania* (2005) the Court explicitly referred to 'protect[ing] the public by ensuring the competence of those carrying on the legal profession' as a 'legitimate aim'.[600]

Furthermore, the Court also takes an at least permissive, and likely positive, view of specialisation in certain areas of law.[601] For example, this is reflected in its case law finding it permissible to reject appointment of counsel due to lack of expertise in eg criminal defence,[602] but also in the case law discussed in Chapter Five regarding the permissibility of restricting rights of audience before certain appellate courts to certain lawyers with additional qualifications.[603]

This idea that lawyers must be more qualified in legal matters than the general public also manifests in another way that is unrelated to their provision of legal services to others. This is the consistent trend in the Court's case law to apply stricter scrutiny to individual applications brought by lawyers, focusing on their additional qualifications, which has been a constant feature of the Court's case law for decades. As early as *Melin v France* (1993), the Court,

> in order to resolve [the present] question … has had regard to the very specific circumstances of the case. Mr Melin had practised as a lawyer and had worked in the chambers of a lawyer of the Conseil d'État and Court of Cassation Bar … Being well versed in the routines of judicial procedure, he must have known that the latter is subject to relatively short time-limits …[604]

In the follow-up case of *Vacher*, the Court explicitly highlighted 'the very special circumstances of [*Melin v France*]' and in particular the fact that 'Mr Melin had practised as a lawyer and had in addition worked in the

600 *Buzescu v Romania* (n 499), para 93. Note that this aim does not appear to be mandatory, however, given the Court's general deference to States on the question of monopoly provisions, cf *Kruglov and others v Russia* (n 398), para 137. The point is discussed in greater detail in Chapter Five, 261ff.

601 This is notable because there are also jurisdictions which proceed prima facie from the fiction that any qualified lawyer is able to take any case, such as eg Germany (cf s 3 Federal Code for Lawyers, English translation available at https://www.gesetze-im-internet.de/englisch_brao/index.html, accessed 08 August 2024).

602 *Dudchenko v Russia* (n 226), para 154. Regarding reasoned refusal to admit lay persons to the defence see eg *Mayzit v Russia* (n 226), para 68.

603 cf Chapter Five, 261ff.

604 *Melin v France* App no 12914/87 (ECtHR, 22 June 1993), para 24. See similarly *Diémert v France* App no 71244/17 (ECtHR, 30 March 2023), para 45.

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chambers of a member of the Conseil d'Etat and Court of Cassation Bar',[605] distinguishing *Melin* and underlining that the stricter scrutiny in that case had been a result of the applicant's legal training.

The Court also seems more willing to find applications by lawyers inadmissible. This concerns, for example, exhaustion of domestic remedies,[606] but also substantive points under the 'manifestly ill-founded' limb of Art. 35 § 3 (a) ECHR. In *Labbé v France (dec)* the Court found that the applicant, 'professionnel du droit',[607] should have anticipated certain legal arguments from the opposing party and that therefore his right to equality of arms had not been violated;[608] in *Zerouala v France (dec)* the Court held that the applicant, due to her profession as a lawyer, could not claim to be unaware of the practice of the courts and of the rules governing the provision of legal services;[609] in *Stoica v France (dec)* the law in question was rendered more foreseeable by the fact that the applicant was a lawyer who specialised in exactly the field in issue;[610] and in *Meyer v Switzerland (dec)* the Court found that a lawyer could be taken to have judged the consequences of a failure to challenge a court decision against him,[611] a line of reasoning also applied in *Misson v Belgium (dec)*.[612] What all of these cases have in common is that the Court clearly assumes that lawyers have a higher level of qualification in legal matters than the general public, a position that may be based on implicit assumptions about the regulation of legal services

605 *Vacher v France* App no 20368/92 (ECtHR, 17 December 1996), para 26.

606 *Wasmuth v Germany* App no 12884/03 (ECtHR, 17 February 2011), para 79, where the Court, with explicit reference to the applicant's status as lawyer, found that he could not make an argument under Art. 14 ECHR where he had not invoked the corresponding domestic provision, Art. 3 of the German Basic Law.

607 'Legal professional' (author's translation).

608 *Labbé v France* App no 36966/08 (ECtHR, 12 October 2010) 8.

609 *Zerouala v France (dec)* App no 46227/08 (ECtHR, 03 May 2011) 9.

610 *Stoica v France (dec)* App no 46535/08 (ECtHR, 20 April 2010) 7. See, in a similar vein, *Delande v Belgium (dec)* App no 14192/88 (Commission Decision, 14 December 1988), *Tropkins v Latvia (dec)* App no 54711/00 (ECtHR, 03 May 2001) 8, *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004), para 33, *Michaud v France* (n 359), para 97, *Konstantin Stefanov v Bulgaria* App no 35399/05 (ECtHR, 27 October 2015), para 62; *Versini-Campinchi and Crasnianski v France* (n 346), para 83; *Martins Pereira Penedos v Portugal (dec)* App no 74017/17 (ECtHR, 22 November 2022), para 96; and *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* App no 53600/20 (ECtHR, 09 April 2024), para 79. The Court applies a similar approach to cases involving judges, cf *Guz v Poland* App no 965/12 (ECtHR, 15 October 2020), para 79.

611 *Meyer v Switzerland (dec)* App no 46787/99 (ECtHR, 13 September 2001) 6.

612 *Misson v Belgium (dec)* App no 41357/98 (ECtHR, 10 May 2001) 8.

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which will be discussed in Chapter Five.[613] For present purposes, it suffices that high-quality legal services, according to the Court, require a certain additional level of expertise.

(f) *Lawyers' independence*

Expertise on its own, however, is not the only personal characteristic which counsel must have. The Court also places significant emphasis on 'independence', which extends both to independence from the State, and, crucially, to independence from the client.[614] While the Court has gone to great lengths to emphasise the former dimension,[615] the latter point is less immediately obvious, and particularly does not appear to have been made explicit in the Court's case law. However, aside from arguably underlying the allusions to emotional distance from the case at hand in cases such as *Correia de Matos*[616] and *Airey v Ireland*,[617] it is implicit in cases such as eg *Siałkowska*. The lawyer's independence from the client is clear from the fact that the Court '[could] not but endorse th[e] conclusion' that 'it was permissible for a legal aid lawyer assigned to a civil case to refuse to prepare and lodge a cassation appeal' where this offered no prospects of success[618] and did not criticise the domestic court's observation 'that the notion of legal assistance could not be identified with a simple obligation

613 Chapter Five, 261ff.

614 On the permissibility of domestic rules depriving conflicted lawyers of standing see *Rivera Vazquez and Calleja Delsordo v Switzerland* App no 65048/13 (ECtHR, 22 January 2019), para 44ff.

615 cf the Court's general points on the legal profession, discussed in Chapter Five, 223ff.

616 *Correia de Matos v Portugal [GC]* (n 215), para 153: 'The Court can accept that a member State may legitimately consider that an accused, at least as a general rule, is better defended if assisted by a defence lawyer who is dispassionate and technically prepared … It further accepts that even a defendant trained in advocacy, like the applicant, may be unable, as a result of being personally affected by the charges, to conduct an effective defence in his or her own case'.

617 *Airey v Ireland* (n 303), para 24, noting that 'marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court'.

618 *Siałkowska v Poland* (n 495), para 113.

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of a lawyer to act in accordance with the client's wishes'.[619] Indeed, to hold any other way would have effectively done away with what is often termed lawyers' 'filtering function', ie that of contributing to the efficiency of justice by advising clients not to take clearly unmeritorious cases to court, which the Government referred to explicitly in *Bąkowska v Poland*.[620]

While the Court in *Siałkowska* did not examine in detail the relationship between the obligation to act in the client's interests and lawyers' independence from their clients, the subsequent case of *Jelcovas v Lithuania* (2011)[621] provided a little more detail. In that case the Court, faced with a similar question of not following a client's desire to initiate litigation, noted 'that there is no indication of … the applicant's defence lawyer … being negligent or superficial in drawing his conclusion as to the possibility of success of the civil litigation', and that this conclusion was supported by 'identical decisions of the domestic courts, which … upheld the lawfulness of the applicant's detention'.[622] The Court then 'observe[d] that it is not for a domestic court to oblige a lawyer, whether appointed under a legal-aid scheme or not, to lodge any remedy contrary to his or her opinion as to the prospects of success of such a remedy, all the more so in the present case as the conclusion was clearly preceded by the lawyer's analysis of the case-file'.[623] While this reasoning does appear slightly more differentiated than that in *Siałkowska*, given that the Court at least mentioned whether the lawyer's appraisal of the case had been founded on proper analysis, it does seem somewhat worrying that 'analysis of the case-file' is merely an additional argument rather than a precondition for the 'opinion as to the prospects of success'. Nonetheless, explicitly mentioning this issue at all is a step towards certain minimum quality requirements: In the prior cases on Polish legal aid Judge Bonello in his separate opinions[624] stressed that the Court's case law did not ensure sufficiently that clients would be pro-

619 Ibid, para 43. In the parallel case of *Staroszczyk v Poland* (n 495) the matter is dealt with at para 82. For a case where client and lawyer disagreed extensively as to how to conduct the defence see *Jemeļjanovs v Latvia* (n 225).

620 *Bąkowska v Poland* (n 514), para 41.

621 Which even has the explicit heading 'Alleged violation of Article 6 §§ 1 and 3 of the Convention on account of quality of legal representation', *Jelcovas v Lithuania* (n 212), para 111.

622 Ibid, para 92.

623 Ibid, para 92.

624 *Kulikowski v Poland* (n 499); *Antonicelli v Poland* (n 499); *Smyk v Poland* (n 494); *Bąkowska v Poland* (n 514).

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tected from 'the often merciless mercy of one legal-aid adviser, cheerfully unrestrained by the most minimal checks and balances' and that clients' 'fundamental right of access to a court [hung] solely on the goodwill of a lawyer almost coerced to work for a pittance'.[625] Although Bonello made the point that 'it ha[d] not been pointed out by the respondent Government that any legal-aid lawyer ha[d] ever been sanctioned for a capricious refusal to lodge a cassation appeal',[626] his opinions failed to convince the rest of the bench, and Bonello ultimately 'reluctantly join[ed] the majority, solely in the interest of avoiding fragmentation in decision making, and those of collegiality and judicial certainty'.[627]

(g) *The client's contribution*

Despite these extensive points relating to the situation and responsibilities of the lawyer, that is not to say that the Court sees legal services as a one-way street, although naturally the client's obligations are less extensive. Instead, the Court has held in a variety of contexts that 'it is the responsibility of the interested party to display special diligence in the defence of his/her interests'.[628] As part of this, the Court, in assessing the quality of the legal services the client has received, will also take into consideration whether a client 'follow[ed] his case conscientiously and maintain[ed] effective contact with his nominated representatives'.[629] Where 'the applicant failed to make any contact with … the legal-aid lawyer', 'the Court [could not] consider that the responsibility for pursuing the appeal lay with the legal-aid lawyer', but instead with the client themselves.[630] Similarly, in *Implom v Hungary (dec)*, where 'there [was] no indication that the

625 *Kulikowski v Poland* (n 499) 25.

626 Ibid 25, his intention presumably being to question the efficacy of such sanction mechanisms rather than to claim that there had never been any incidences of poor performance.

627 *Bąkowska v Poland* (n 514) 13.

628 *Feilazoo v Malta* (n 491), para 131. See similarly *Muscat v Malta* (n 513), para 59, *Anghel v Italy* (n 524), para 63, and a number of judgments that concern the relationship between individuals and the courts.

629 *Anghel v Italy* (n 524), para 63.

630 *Muscat v Malta* (n 513), para 58. See similarly *Homann v Germany (dec)* App no 12788/04 (ECtHR, 09 May 2007) 9, where the Court noted that 'it does not appear to restrict in a disproportionate way the applicant's access to court that the domestic courts considered that he should have contacted his lawyer without undue delay in

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applicant shared with his lawyers the information regarding the time-limits indicated in the above court decisions, or supplied them with the relevant documentation' and had not argued that he 'did anything to even establish contact with the lawyers before the time-limits for lodging the relevant appeals expired', the Court found that the applicant had not displayed the required diligence and 'doubt[ed] … whether the errors which resulted in the applicant's appeals being dismissed without being examined on the merits were imputable to his legal aid lawyers'.[631]

(h) *Sources of quality standards*

As regards the foundation of the aforementioned quality criteria, the Court has not drawn only on the Convention, presumably due to the lack of explicit Convention standards in this area. Instead, the Court has chosen the area of minimum quality of legal services to draw most heavily on the instruments developed at the international and European levels and discussed in Chapter One, making reference to documents such as the CCBE Code of Conduct or Recommendation R(2000)21[632] in what is presumably an attempt to overcome the lack of direct standards in the Convention and delineate what exactly high-quality legal services will require.[633] For example, in *Siałkowska* itself, the Court cited both the CCBE Code of Conduct[634] and Recommendation R(2000)21[635] in a section entitled 'Relevant Non-Convention Material'. While it is likely that these materials were partly included due to the third-party intervention by the Council of Bars and

order to be informed about the further course of his proceedings or to mandate him to lodge an appeal'.

631 *Implom v Hungary (dec)* (n 530), para 26.

632 Recommendation R(2000)21 is discussed in Chapter One, 38ff.

633 In many cases, the Court cites documents such as these in the 'Relevant non-Convention Material' section, but then does not explicitly refer to them in the reasoning itself. Far from indicating that these documents had no impact on the Court's decision, this reluctance to cite directly in the 'Merits' section may arise from the Court's unwillingness – or inability, given the multi-judge groups deciding – to clarify where exactly these standards sit in its reasoning when compared to other factors.

634 *Siałkowska v Poland* (n 495), para 48ff.

635 Ibid, para 55ff. It also cited additional materials such as Recommendation R(81)7 'on measures facilitating access to justice' and R(93)1 'on effective access to the law and to justice for the very poor'.

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Law Societies of Europe,[636] they contained a host of provisions relevant to the case, not least the general prohibition on withdrawing from a case at an inopportune moment reflected in Article 3.1.4 of the CCBE Code of Conduct.[637]

Similarly, in *VK v Russia* (2017), the Court referred to the CCBE Code of Conduct[638] and highlighted that

> the conduct of [the applicant's lawyer] as a professional and her ability to maintain a certain legal and factual position during the hearing must have been guided by the applicable provisions of the professional codes of conduct … These sets of corporate rules and principles maintain that the essential basis of a relationship between a lawyer and a client is trust and that a lawyer may refuse to follow a client's instructions only in certain limited circumstances.[639]

(i) *Domestic rules on professional negligence*

While these cases show that the Court is clearly aware that legal services need to be performed to a certain quality level to fulfil their function, the Court simultaneously does not seem to see restrictive domestic rules on professional negligence claims against lawyers as particularly problematic. While the Second Section's admissibility decision in *Patel v UK (dec)*, which touched upon inter alia the English immunity at the heart of the House of Lords' *Arthur JS Hall v Simons* judgment,[640] did not shed much light on this – the European Court of Human Rights preferring instead to focus on the fact that the applicant had voluntarily ended the litigation –,[641] the subsequent judgment in *Popivčák v Slovakia* (2011) was more illuminating.

That case, like many professional negligence claims, turned on the applicant's former lawyer's failure to comply with a deadline. When the applicant brought a professional negligence claim against the lawyer, the domestic courts of ordinary jurisdiction held that they could not assess what the outcome of the administrative proceedings in which the lawyer had acted would have been. Therefore, they held that the applicant could

636 Ibid, para 79ff.
637 Cited by the Court at ibid, para 52.
638 *VK v Russia* (n 213), para 21. This is notable in itself given that the Federal Chamber of Lawyers of the Russian Federation was only an observer at the CCBE, cf https://www.ccbe.eu/structure/members/, accessed 18 April 2023.
639 Ibid, para 37.
640 *Arthur J S Hall v Simons* (n 517).
641 *Patel v UK (dec)* App no 38199/97 (ECtHR, 19 February 2002) 8.

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not establish any actual damage, and dismissed his claim.[642] Despite this fairly clear refusal by the domestic courts to engage in an analysis of a central element of the applicant's claim, the Third Section found no violation of the Convention, holding that '[the applicant's] subsequent claim against the lawyer was examined by the courts while neither Article 6 nor any other provision of the Convention can be interpreted as guaranteeing the right to a successful outcome of a private action in law'.[643] In a strongly worded dissent, Judge Šikuta, joined by Judge Myjer, pointed out that the fact that the courts dealing with the negligence claim had had no jurisdiction to examine whether there had been any damage led to 'a total structural and systemic impossibility for such claims … even to be argued before Slovakian courts, let alone to succeed'.[644] While they therefore argued that there *had* been a violation of 'Article 6 § 1 of the Convention and the rule of law in general',[645] since 'the lawyer's professional liability is an inherent key feature of [the privileged relationship of confidence between the lawyer and the client]',[646] the majority rejected the application. This would seem to indicate that the Court defers rather strongly to States as regards professional negligence, in keeping with a generally more deferential approach where matters of private law are concerned,[647] and that the Convention at least does not require the existence of professional negligence liability on the part of lawyers where they violate their professional duties.

(j) *Conclusion: The Court's vision of high-quality legal services*

Taken together, the preceding case law shows that despite the difficulties discussed initially, the Court actually *has* given at least a rough outline of what quality legal services must conform to. Lawyers must be learned in the law and independent, must communicate with their clients, take instructions from them and then make an intellectual contribution to the case. Conversely, the client will also need to put the lawyer in a position to do so, and cannot simply hand the case to a lawyer and then withdraw entirely.

642 *Popivčák v Slovakia* App no 13665/07 (ECtHR, 06 December 2011), para 59.
643 Ibid, para 61.
644 Ibid 13.
645 Ibid 13.
646 Ibid 14.
647 Krahé (n 484) 136ff, particularly at 137.

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This case law of a relationship based on mutual contributions to pursue the client's goals, based on the relationship of trust and understanding discussed above, sits well with the hints that appear in parts of the Court's case law that the ultimate function of legal services in the Convention system may be to secure autonomy.[648]

III. Conclusion: Convention protection for the internal dimension of legal services

To sum up, then, the Court has elevated the protection of the internal dimension of the 'special' relationship between client and lawyer.

Primarily, and in keeping with the idea that in the spirit of autonomy lawyer and client are in principle best placed to determine their relationship themselves, this consists of protecting the foundation of this relationship, trust between client and lawyer (I.). That, in turn, requires – in principle – free choice of lawyer, freedom to communicate between client and lawyer, and the assurance that such communication will be confidential.

Beyond this foundation of trust, the Court has been reticent regarding the internal dimension of the provision of legal services (II.). For the most part, it has exercised restraint in indicating Convention requirements as to how legal services must be provided. Nonetheless, it has held that under some circumstances the State may have an obligation to step in where legal services are performed particularly poorly. Confusingly, the Court has phrased this as the State being responsible for shortcomings on the part of the lawyer, but focused its own analysis on the behaviour of the State's own organs. While the Court has thus given pointers on a variety of issues relating to the quality of legal services, the main thrust of its jurisprudence appears to be to secure the preconditions for effective legal services, and then leave the rest up to the parties. If the function of legal services is to secure the client's autonomy,[649] this is consistent.

648 Chapter One, 63.
649 Chapter One, 63.

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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.

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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.

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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.

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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.

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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'.

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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.

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> 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.

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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.'

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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.

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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.

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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.

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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.

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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.

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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

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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'.

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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.

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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

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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.

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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.

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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.

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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.

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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

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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.

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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'.

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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.

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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.

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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]

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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.

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(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.

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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.

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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.

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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.

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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.

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> 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'.

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> 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'.

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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.

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(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.

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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.

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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.

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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.

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> 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.

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> 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]

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 …'.

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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.

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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).

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(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

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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.

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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

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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.

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Chapter Four: Legal Services and Lawyers' Private Interests

As has been shown in Chapter Two and Chapter Three, there is thus extensive case law protecting the client's private interests[929] in legal services. In addition, however, there is also case law on lawyers' private interests in being able to provide legal services.

Since, where lawyers are acting in a particular case, the Court typically argues by reference to the client's interests, the case law on lawyers' private interests consists largely of judgments on the position of individual lawyers prior to their taking any specific case. Here, lawyers are being protected in their own right, perhaps modified by reference to the general importance of the profession of lawyer, but not as a means of protecting a specific other individual.

The chapter is split into two parts. A first section discusses the Court's case law on lawyers' private interest in providing legal services (I.); a second section discusses the Court's case law on lawyers as 'watchdogs' (II.), ie commenting publicly on cases in which they are not involved in a professional capacity. This latter section also provides a transition to Chapter Five, which discusses the way the Court reflects the public interest in legal services.

I. The Court's case law protecting the provision of legal services

Legal services require someone to provide them. As regards individuals' right to engage in the provision of legal services, the Court has set out a number of pointers. However, similar to the preceding sections, it has not typically related these cases to each other as concerning the provision of legal services. Instead, it has generally contextualised cases by reference to similar situations under the same article – frequently concerning similar claims by other professions – rather than to other situations concerning lawyers. To the extent that the Court has effectively set out vital preconditions for the existence of a legal services sector, the Court seems to have done so largely unwittingly, without paying specific attention to the fact that

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

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lawyers are important not only in their own interests, but also as part of the public interest in the rule of law, and without greater reference to the specific role of lawyers. Conversely, the present study will attempt to group these cases more specifically according to the role of lawyers, focusing on the way the Court protects their private interests.

1. Protection of access to the legal profession

Art. 8 ECHR protects the right of access to the profession of lawyer.[930] As the Court put it in *De Moor v Belgium* (1994): 'Where legislation lays down conditions for the admission to a profession and a candidate for admission satisfies those conditions, he has a right to be admitted to that profession'.[931] Indeed, even the status as a legal trainee will be protected by Art. 8.[932] The point forms part of the bedrock of the protection of individual lawyers and is so clearly established that, by now, Governments typically do not even contest it.[933]

2. Protection of exercise of the legal profession

In addition to Art. 8 ECHR protecting the right of access to the profession of lawyer, the established exercise of eg a law firm can fall under Art. 1 of Protocol 1.[934] To quote the Court's translation of *Döring v Ger-*

930 *Bigaeva v Greece* App no 26713/05 (ECtHR, 28 May 2009), para 31; *Mateescu v Romania* App no 1944/10 (ECtHR, 14 January 2014), para 20; *Biagioli and Biagioli v San Marino (dec)* App no 8162/13 (ECtHR, 08 July 2014), para 100; *Lekavičienė v Lithuania* App no 48427/09 (ECtHR, 27 June 2017), para 38. For examples where the Court used Art. 8 as the standard against which to measure disbarment see *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 34ff, and *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 86ff. Where non-admission to the Bar due to specific statements has been concerned, the Court has even used Art. 10, cf *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), para 53.

931 *De Moor v Belgium* App no 16997/90 (ECtHR, 23 June 1994), para 43.

932 *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 58.

933 eg *Bagirov v Azerbaijan* (n 930), para 90.

934 *Döring v Germany (dec)* App no 37595/97 (ECtHR, 09 November 1999); *Olbertz v Germany (dec)* App no 37592/97 (ECtHR, 25 May 1999) 7; *Wendenburg and others v Germany (dec)* App no 71630/01 (ECtHR, 06 February 2003) 23; *Lederer v Germany (dec)* App no 6213/03 (ECtHR, 22 May 2006) 6.

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many (dec) (1999), 'by setting up his law practice and running it successfully, the applicant had built up a clientele; this had in many respects the nature of a private right and constituted an asset, and hence a possession within the meaning of the first sentence of Article 1'.[935] Later, the Court changed this wording slightly, but kept the conclusion the same, finding in *Buzescu v Romania* (2005) that '[t]he applicability of Article 1 of Protocol No. 1 … extends to law practices and their goodwill, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets, being possessions within the meaning of the first sentence of this provision'.[936] Elsewhere, the Court has highlighted that 'the practicing lawyer's … practice depends on long-standing ties to his or her clients'.[937] As a result, in *Angerjärv and Greinoman v Estonia* (2022) the Court 'acknowledge[d] that the right of the applicants – members of the Bar Association – to practise as lawyers is a "civil right" within the meaning of Article 6 § 1 of the Convention' and further observed that lawyers' 'right to practise their profession' 'entails advising and representing or defending clients both within and outside court proceedings'.[938]

3. Protection of lawyers' professional reputation

In line with this emphasis on the (general) relationship between lawyers and their clientele, a lawyer's professional reputation will be protected under Art. 8,[939] although this has not generated very much case law.[940] Given this protection, interference with the Art. 10 rights of those who criticise

935 *Döring v Germany (dec)* (n 934), unpaginated translation available via HUDOC, http://hudoc.echr.coe.int/eng?i=001-5642, accessed 08 August 2024.

936 *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005), para 81.

937 *Helmut Blum v Austria* App no 33060/10 (ECtHR, 05 April 2016), para 65.

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

939 *Kucharczyk v Poland (dec)* App no 72966/13 (ECtHR, 24 November 2015), para 31ff. The Committee ignored entirely the fact that legal services are a credence good.

940 Perhaps the closest recent case, although from the point of view of a person making an accusation against an (in-house) lawyer, is *Matalas v Greece* App no 1864/18 (ECtHR, 25 March 2021), where the Court at para 45 'found that accusing L.P. of being unprofessional and of engaging in behaviour contrary to ethics in a document made known to a restricted number of persons was not only capable of tarnishing her reputation, but also of causing her harm in both her professional and social environment. Accordingly, the accusations attained a level of seriousness sufficient to harm L.P'.s rights under Article 8 of the Convention'.

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lawyers can be justified by reference to Art. 10 § 2 and the 'protection of the reputation or rights of others'.[941] However, the Court has also held 'that a lawyer's behaviour in the exercise of his profession, particularly during court proceedings held in public, is a matter of public interest',[942] and so restrictions on freedom to comment on lawyers' behaviour will be harder to justify. Nonetheless, lawyers will not generally be classed as 'public figures' for Art. 8 purposes, as the First Section in its admissibility decision in *Spirovska and Spirovski v North Macedonia* (2020) held that even a practising lawyer who had previously been a judge of the Constitutional Court would be classed as a private person.[943]

While lawyers' professional reputation is therefore protected under the Convention, notwithstanding the frequent references to lawyers as 'officers of the court'[944] it does not appear that Art. 10 § 2's 'authority of the judiciary' limb will protect them. In *Semik-Orzech v Poland* (2011), a case in which a journalist applied to the Court after having lost civil defamation proceedings regarding a lawyer's professional reputation, the Government explicitly argued that '[t]he restrictions imposed on the applicant had been necessary as they had met a pressing social need, namely the protection of the legal profession'[945] and that '[t]his profession played a special role in the system of administration of justice'.[946] Nonetheless, the Court merely referred to the legitimate aim of protecting 'the reputation or rights of others',[947] and otherwise did not engage with the Government's argument regarding the public-interest dimension of the legal profession. Similarly, in *Aquilina and others v Malta* (2011) the Court also referred only to 'the reputation or rights of others',[948] and did not interact with the structural role of lawyers, and in the 2022 case of *Mesić v Croatia*, which concerned criticism of a lawyer for having carried out his professional activities, the Court equally identified only the 'reputation or rights' of the lawyer

941 cf *Aquilina and others v Malta* App no 28040/08 (ECtHR, 14 June 2011), para 39; *Semik-Orzech v Poland* App no 39900/06 (ECtHR, 15 November 2011), para 47.
942 *Aquilina and others v Malta* (n 941), para 46; *Semik-Orzech v Poland* (n 941), para 51.
943 *Spirovska and Spirovski v North Macedonia (dec)* App no 52370/14 (ECtHR, 15 September 2020), para 23.
944 cf Chapter Five, 227ff.
945 NB not just the protection of the individual lawyer.
946 *Semik-Orzech v Poland* (n 941), para 38.
947 Ibid, para 47.
948 *Aquilina and others v Malta* (n 941), para 39.

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concerned as the legitimate aim of the interference.[949] This is somewhat surprising, as there is also an argument to be made that even de lege lata, the protection of legal services can be part of 'maintaining … the authority of the judiciary' in the sense of Art. 10 § 2,[950] which would have tended towards including the protection of legal professionals 'against gravely damaging attacks that are essentially unfounded'[951] in the protection of the 'authority of the judiciary'. Nonetheless, the Court did not follow this reasoning, a point that is particularly noticeable since in two of these cases the Court did make extensive reference to the public-interest role of the press,[952] arguably rendering its balancing a little one-sided. Given that the Court takes a rather restrictive position as regards lawyers' own freedom of expression outside a courtroom context,[953] there is also a potential issue regarding equality of arms between lawyers and the press here.

4. Occasional reinforcement by reference to the public interest

Protection of access, exercise and reputation are arguably common to many professions.[954] However, for lawyers the Court has also at times[955] reinforced the level of protection they will enjoy by drawing on their general role in acting in favour of clients, an argument closely related to the public interest in legal services as a requirement of the rule of law, which separates the provision of legal services from many other professional activities where there is no comparable public interest. A particularly good example of this reliance on the services lawyers provide to their clients is *Smirnov v Russia* (2007). In that case, 'the applicant claimed that the real purpose of

949 *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022), para 78.
950 See Chapter Nine, 474.
951 cf *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 128, as regards the protection of the judiciary.
952 *Aquilina and others v Malta* (n 941), para 43; *Semik-Orzech v Poland* (n 941), para 41ff.
953 cf Chapter Five, 227ff.
954 cf eg *Van Marle and others v Netherlands [Plenary]* App no 8543/79 and others (ECtHR, 26 June 1986), para 41 regarding accountants, a foundational judgment which the Court has drawn on fairly extensively in many of the cases regarding lawyers.
955 Note however eg *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014) (discussed in Chapter Three at 188), where the Court did not elevate the level of Art. 2 protection lawyers enjoy.

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the seizure [of a computer central unit containing more than two hundred clients' files] had been to hinder his legal professional activities'.[956] The Court, while expressing doubts as to whether Russian criminal procedural law[957] complied with Art. 1 Protocol 1's 'quality of the law' requirement,[958] noted that given the possibility of copying the files, it '[could] not discern any apparent reason for continued retention of the central unit', but that 'nevertheless, the computer had been retained by the domestic authorities … for more than six years'.[959] After noting 'that the computer was the applicant's professional instrument', the Court went on to highlight that 'the retention of the computer not only caused the applicant personal inconvenience but also handicapped his professional activities; this, as noted above, might have had repercussions on the administration of justice'.[960] 'Having regard to [these] considerations', the Court went on to find 'that the Russian authorities failed to strike a "fair balance" between the demands of the general interest and the requirement of the protection of the applicant's right to peaceful enjoyment of his possessions', and that therefore there had been a violation of Art. 1 Protocol 1.[961]

The reasoning in *Smirnov*, which has also been applied in later cases,[962] is notable because the Court's main line of argument related closely to the public interest in the applicant's work as a lawyer. In effect, it focused not only on his rights, but also on his role in securing the rights of his clients, and the detrimental effect on their rights potentially engendered by a measure which significantly impeded their lawyer's ability to represent their interests. The Court therefore seems to have elevated the level of

956 *Smirnov v Russia* App no 71362/01 (ECtHR, 07 June 2007), para 51.

957 Which provided for 'broad [prosecutorial] discretion not accompanied by efficient judicial supervision', cf ibid, para 56.

958 Ibid, para 56.

959 Ibid, para 58. One wonders how relevant the argument regarding the clients' files was after this much time, since it appears to assume that the clients were happy to wait until their representative had gone all the way to Strasbourg. This lapse of time is a general problem in much of the Court's case law, cf eg *Namazov v Azerbaijan* (n 930), para 27, where almost seven years elapsed between the final domestic judgment and the European Court of Human Rights' finding of a violation.

960 *Smirnov v Russia* (n 956), para 58.

961 Ibid, para 59. The Court also went on to find a violation of Art. 1 Protocol 1 taken in conjunction with Art. 13 because the applicant had no effective remedy against the failure to return the computer, since the domestic courts declared an application to this effect inadmissible and advised the applicant to apply to a higher prosecutor.

962 *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020), para 144.

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protection afforded to the applicant precisely *because* of the fact that he provided legal services, something it does not seem to do in relation to other professional activities.

5. Protection against disbarment

If these groups of cases have concerned admission to, and exercise of, the profession, a third point of significance for the position of individual lawyers is exit from the profession. Where removal by disbarment is concerned, the Court has also applied enhanced scrutiny under Art. 8, 'keeping in mind that the disbarment sanction constitute[s] the harshest disciplinary sanction in the legal profession, having irreversible consequences on the professional life of a lawyer'.[963] The Court has therefore required domestic authorities to explain why a violation of professional obligations was 'such a serious misconduct that it justified the harshest disciplinary sanction'.[964] The Court also noted that where

> in a series of cases it has noted a pattern of arbitrary arrest, detention or other measures taken in respect of government critics, civil society activists and human rights defenders … against this background … 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.[965]

The Court is therefore clearly aware of the potential for abuse of disbarment proceedings, and consequently accords higher protection in this area.

Finally, the Court has also applied a more exacting standard as regards the 'quality of law' governing lawyers,[966] at least as regards laws providing for the incompatibility of certain professions with the profession of lawyer.[967] The Court has paid particularly close attention to Convention

963 *Bagirov v Azerbaijan* (n 930), para 101. As discussed in Chapter Five, 277ff, this is a reductionist view given the different impact that disbarment will have in different systems, but one can certainly agree that disbarment has consequences on the professional life of a lawyer.

964 Ibid, para 101.

965 Ibid, para 103.

966 Note that these stricter principles regarding quality of law for laws regarding lawyers stand in contrast to the laxer approach the Court takes to foreseeability where lawyers challenge laws more generally, cf Chapter Two, 144.

967 *Mateescu v Romania* (n 930), para 32, which can therefore have a similar effect to disbarment in the sense that they prevent a prima facie suitable candidate from exercising law professionally.

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compliance of norms governing the status of lawyers,[968] and has also highlighted doubts where disciplinary norms were drafted excessively broadly.[969]

II. A 'watchdog' function for lawyers?

While, to the extent that the legal position of an identifiable lawyer is concerned, the foregoing is still primarily concerned with private interests, there is a further subset of cases that sits at the intersection between these private interests and the public-interest role of legal services in society more generally: Do lawyers, in a way similar to journalists,[970] enjoy elevated protection of freedom of expression in a role as 'watchdogs', tasked with bringing instances of unlawful behaviour to public attention with the aim of enabling the public to demand lawful behaviour?[971] These cases are different to those in which lawyers act in the defence of an identifiable client because they concern public rather than private interests,[972] which inter alia means that the 'unity of proceedings' argument[973] which the Court has emphasised elsewhere will not apply in the same way. Lawyers' contributions here will usually be less focused on a particular case and more on a certain general topic of public interest to which the additional qualifications lawyers bring are relevant. Unlike the cases discussed above where lawyers were acting on behalf of a client, these cases do not require

968 Note eg the in-depth assessment of a German legislative reform abolishing exclusive rights of audience in most of the higher courts in *Wendenburg and others v Germany (dec)* (n 934).

969 *Bagirov v Azerbaijan* (n 930), para 74. In this area much will hinge on context and case law, since a number of jurisdictions have rather broad norms on which to base disciplinary proceedings, but those have often been clarified through decades of case law – the question is discussed in greater detail in the section on disciplinary law in Chapter Five, 275ff.

970 For the press, the Court explicitly uses the term 'public watchdog', cf *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985), para 58 and recently *Mammadov and Abbasov v Azerbaijan* App no 1172/12 (ECtHR, 08 July 2021), para 61. The Court's case law on the media is discussed in greater detail in Chapter Six, 309ff.

971 For the CCBE's argument in *Morice v France [GC]* (n 951) see Chapter Three, 178ff.

972 Although, as eg the applicant argued in *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998), para 24, these questions may at times be linked.

973 Chapter Three, 169.

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the lawyer speaking out be personally involved with the case at all. A function as a public 'watchdog' is also possible where the lawyer has no connection to a specific case raising the problem;[974] in these cases, lawyers are pursuing a public, not a private, interest.

1. The public interest in lawyers' expertise

In this sense, lawyers are concerned here in their public-interest role of upholding the rule of law beyond private interests, which can require them to call attention to potential threats. Both Recommendation R(2000)21[975] and the UN Basic Principles,[976] which have been referred to in these cases in the Court's case law,[977] stress lawyers' right to take part in public discussions on matters concerning the law, and at the domestic level there is frequently even an obligation on lawyers to defend the constitutional order.[978] The view taken in those documents is that lawyers, beyond their duties furthering the private interests of their clients, have a general public-interest responsibility by virtue of their specific qualifications to call public attention to dangers to the rule of law. To the extent that such public debate is triggered as a result of a specific case,[979] there can be tension here between the Court's desire to keep all matters related to legal disputes within the courts[980] and the need for a public debate on questions of general importance. As highlighted above, this is particularly relevant for those contexts where there are more widespread problems with the legal system, since the *Morice* separation between freedom of expression

974 To this extent, the Grand Chamber's argument in *Morice v France [GC]* (n 951), para 148, holds good only where lawyers actually are 'directly involved in [the functioning of the administration of justice] and in the defence of a party'.

975 Committee of Ministers of the Council of Europe, *Recommendation R(2000)21 on the Freedom of Exercise of the Profession of Lawyer* (2000), Principle I.3. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

976 United Nations, *Basic Principles on the Role of Lawyers* (1990), para 23, discussed in Chapter One, 34ff.

977 The provisions are cited in *Hajibeyli and Aliyev v Azerbaijan* (n 930), paras 39, 40.

978 cf eg for German *Rechtsanwälte* s 12a Federal Code for Lawyers (BRAO), under which they swear an oath including reference to upholding the constitutional order.

979 Take eg *Bagirov v Azerbaijan* (n 930), where the applicant, against the backdrop of his client's death in custody, had highlighted general problems with police violence in Azerbaijan.

980 cf Chapter Three, 171ff.

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in proceedings and outside them assumes a justice system that functions well enough to provide effective protection in legal proceedings.[981] Acting as public 'watchdogs' may therefore bring lawyers into conflict with their discretion obligations[982] and their obligation to 'maintain public confidence' in the judiciary,[983] necessitating further clarification as to how this tension is to be resolved.

For matters relevant to the rule of law, lawyers' contributions will often be essential to allow a debate to even take place. For many legal matters, the information gap between lawyers and the general public means that a public discussion will only truly be possible with the facilitation of lawyers to explain the situation at hand and reduce complexity to the point where non-lawyers can form an opinion.[984] In this sense, the press, for example, will not always be able to fulfil its functions without the help of legal experts who can explain the case at hand and who inter alia possess the skills to unpick and critique legal reasoning. Among many other examples, this is particularly clear from those cases which concern lawyers 'whistle-blowing' on alleged judicial impropriety, such as *Pais Pires de Lima v Portugal* (2019)[985] or *LP and Carvalho v Portugal* (2019)[986]. Especially in borderline cases, lawyers are much more likely to be able to identify and call out problematic judicial conduct than the public at large, which typically lacks

981 An underlying assumption which the Court has not to date engaged with, focusing instead on apodictic statements such as that 'the courts must enjoy public confidence', *Gumenyuk and others v Ukraine* App no 11423/19 (ECtHR, 22 July 2021), para 52.

982 eg *Ottan v France* App no 41841/12 (ECtHR, 19 April 2018), discussed in Chapter Three, 176ff, or, as regards litigation secret, *Mor v France* App no 28198/09 (ECtHR, 15 December 2011).

983 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45, discussed in detail in Chapter Five, 227ff.

984 For example, it seems unlikely that the fact that so many of the cases concerning lawyers also clarify points related to Art. 6 § 1 and an 'independent and impartial' tribunal is just a coincidence – instead, it seems rather more likely that lawyers' additional expertise means that they are able to see potential problems more clearly. For a recent example from a different context note that eg the *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021) case was brought by a practising lawyer.

985 *Pais Pires de Lima v Portugal* App no 70465/12 (ECtHR, 12 February 2019), where at para 43 the applicant explicitly argued that all citizens had the moral duty to denounce situations they considered to be illegal and that this duty was all the more important for lawyers, bearing in mind the role lawyers played in the administration of justice.

986 *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019).

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both experience and skills in this regard. For these cases, the intervention of legal experts effectively becomes a precondition for a public debate.

2. *Reznik v Russia*

The 2013 case of *Reznik v Russia,*[987] which dealt inter alia with a debate focused on the legality of certain criminal procedural measures, provides an illustrative example. That case concerned statements made by high-profile Russian lawyer Henri Markovich Reznik, then-President of the Moscow City Bar,[988] in relation to the way Mikhail Khodorkovskiy's counsel had been treated.[989] Among a number of other procedural irregularities, it had been alleged that, following a visit by one of Mr Khodorkovskiy's lawyers, the prison officers at *Matrosskaya Tishina* prison had examined documents subject to professional secrecy and searched the lawyer in violation of the obligation that such a search be performed by a member of the same sex.[990] At a later stage, the Ministry of Justice asked the Moscow City Bar to disbar said lawyer, which Mr Reznik, in his function as president of the local Bar association, publicly criticised.[991] When, in a later debate on a television talk show, the presenter 'asked the applicant about the relationship between the Moscow City Bar and the Ministry of Justice',[992] the applicant highlighted in relation to the case of Khodorkovskiy's counsel that '[t]here were no grounds for carrying out a search (*обыск*) which, by the way, was performed by men who rummaged (*шарили*) about the body of the woman lawyer. … There is nothing, absolutely nothing, in Ms. A'.s records that could warrant her disbarment'.[993] In response, the *Matrosskaya*

987 *Reznik v Russia* App no 4977/05 (ECtHR, 04 April 2013).
988 Ibid, para 5.
989 As attentive readers will have noticed, the criminal proceedings surrounding the YUKOS case form the backdrop to a number of cases relevant to the provision of legal services, including *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008); *Khodorkovskiy v Russia (No 1)* App no 5829/04 (ECtHR, 31 May 2011); *Khodorkovskiy and Lebedev v Russia* App no 11082/06; 13772/05 (ECtHR, 25 July 2013); *Khodorkovskiy and Lebedev v Russia (No 2)* App no 51111/07; 42757/07 (ECtHR, 14 January 2020).
990 *Reznik v Russia* (n 987), para 9. The incident in question itself is discussed by the Court in *Khodorkovskiy v Russia (No 1)* (n 989), para 199.
991 *Reznik v Russia* (n 987), para 10.
992 Ibid, para 13.
993 Ibid, para 13 (emphasis and untransliterated Cyrillic in original).

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Tishina prison and two of its warders lodged defamation claims against the applicant,[994] alleging inter alia that he had used the legal term 'search'[995] incorrectly, since what had taken place had merely been an 'inspection'.[996] Their action was upheld by the Moscow City Court,[997] which ordered the applicant to pay a symbolic sum in a decision against which the applicant complained to the European Court of Human Rights.

Before the Court, the Government advanced, in particular, that the applicant's statement had been an (incorrect) factual allegation rather than a value judgment, and that

> taking into account that 'the Russian public traditionally regarded the authorities and their representatives with mistrust', the audience would have been more inclined to believe the words of a well-known lawyer than those of the acting head of a department of the Ministry of Justice. The applicant could not be held accountable for his statements to the standard of a journalist because he was seen as an official disseminating verifying information.[998]

The Government also submitted that the applicant was 'an experienced lawyer who should know the difference between a "search" and an "inspection"' and that 'his statements had amounted to a negative assessment of [the prison warder's] performance of their professional duties and had groundlessly tarnished the professional reputation of the remand prison'.[999] The applicant, on the other hand, highlighted that '[t]he presenter had not introduced him in his official capacity as the President of the Moscow Bar and his part in the discussion had been that of a lawyer and human rights defender, and a long-standing member of the Moscow Helsinki Group',[1000] effectively invoking his role in public debate, and that '[f]or lay people the

994 Ibid, para 15. On the former, see now *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), referring inter alia to *Reznik* and holding, at para 47, that 'civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of "the protection of the reputation … of others" under Article 10 § 2 of the Convention'. A quantification of this problem can be found in Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1, 15.

995 'Obysk'.

996 'Osmotr'.

997 *Reznik v Russia* (n 987), para 21.

998 Ibid, para 29.

999 Ibid, para 33.

1000 Ibid, para 33.

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nuances of the legal meaning of the terms "search" and "inspection" were indistinguishable and could as well be used as synonyms'.[1001]

The Court, in its assessment of whether the interference with the applicant's right to freedom of expression under Art. 10 had been 'necessary in a democratic society', began by highlighting that '[t]he criminal proceedings against [Mikhail Khodorkovskiy] and the strategy of his defence were matters of intense public and media attention', and that '[t]he request to have a member of his defence team disbarred must have sparked a further wave of public interest'.[1002] Given that the debate thus concerned questions of public interest, where restriction would generally require 'very strong reasons', the Court criticised that the Moscow City Court had not engaged in any balancing exercise whatsoever.[1003]

The Court then referred once again to the 'special status of lawyers', but rejected the Government's insistence on technical usage of the terms 'search' and 'inspection',[1004] since the applicant had been 'speaking for the benefit of a lay audience of television viewers, rather than to a legal forum'.[1005] It then focused in particular on the spontaneous situation of a debate televised live,[1006] and the fact that neither the prison warders nor the remand centre itself had been mentioned by name.[1007] The Court further noted that it had already 'examined the incident involving Ms A. in the application lodged by her client',[1008] and that these findings together with the decision by the Moscow Bar Council not to disbar the lawyer 'constituted a sufficient factual basis for the applicant's statement'.[1009] Highlighting 'chilling effect' and referring to *Nikula v Finland* (2002),[1010] the First Section then held that '[i]n sum, … the applicant was entitled to state his opinion in a public forum on a matter of public interest and that his

1001 Ibid, para 38.
1002 Ibid, para 43.
1003 Ibid, para 43.
1004 Ibid, para 44.
1005 Ibid, para 44.
1006 Ibid, para 44.
1007 Ibid, para 45. As regards the latter, one wonders how significant this point was given the highly publicised nature of the case and the notoriety of *Matrosskaya Tishina* prison.
1008 Ibid, para 47, with reference to *Khodorkovskiy v Russia (No 1)* (n 989), paras 199–201.
1009 *Reznik v Russia* (n 987), para 47.
1010 Ibid, para 50. 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.

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statements had a factual foundation'.[1011] Together with the complete lack of engagement with the applicant's right to freedom of expression on the part of the Moscow City Court, this led the Court to find a violation of Art. 10 of the Convention.

Reznik, in this regard, indicates several things as regards lawyers' role as public watchdogs. First, the Court appeared to attach comparatively robust protection to the applicant's freedom of expression, noting particularly the highly publicised nature of the case.[1012] Furthermore, it did not make substantial reference to its case law distinguishing between lawyers' speech in the courtroom or elsewhere,[1013] under which lawyers' freedom of expression outside of acting in the courtroom will generally be protected to a lesser extent than in proceedings themselves.[1014] One reason for this may be that the applicant in *Reznik* was not formally representing anyone, even though he does seem to have seen himself as obliged to defend the rights of other lawyers. Despite a passing reference to 'the usual restrictions on the conduct of members of the Bar',[1015] the Court in *Reznik* appeared not to limit the applicant's rights at all as a result of his position as a lawyer, even though at the time of the statements the domestic proceedings to which they related were still ongoing. In this sense, it is not clear how consistent this is with the tendency the Court has shown elsewhere to try to keep legal matters closely confined to the courts. If *Reznik* appears to imply that freedom of expression for lawyers commenting on widely-publicised cases in which they are not formally involved will be particularly protected, that does seem to recognise a certain 'watchdog' function on the part of lawyers which may give additional protection to their freedom of expression.

3. Lawyers' freedom to comment

In keeping with this, the Court has held specifically on freedom of expression for lawyers that lawyers 'are certainly entitled to comment in public on

1011 Ibid, para 51.
1012 Ibid, para 43 – although to the extent that this seems to indicate that protection will be less strong where it is the lawyer who brings a problem to public attention, this rationale is not necessarily convincing.
1013 cf Chapter Three, 158ff.
1014 cf Chapter Three, 170ff.
1015 *Reznik v Russia* (n 987), para 44.

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the administration of justice',[1016] as long as their criticism does not overstep 'certain bounds', one of which is 'insult'.[1017] It has also highlighted 'the public's right to receive information about questions arising from judicial decisions'.[1018] In substance, if not in name, these arguments underpin a similar 'watchdog' role to that which journalists exercise. For example, in *Amihalachioaie v Moldova* (2004), when assessing the Convention compliance of a contempt-of-court offence for a lawyer's vocal criticism of a decision by the Moldovan Constitutional Court, the Court

> note[d] that the applicant's comments were made on an issue of general interest in the context of a fierce debate among lawyers that had been sparked off by a Constitutional Court decision on the status of the profession that had brought to an end the system whereby lawyers were organised within a single structure, the Moldovan Bar Council, which was an association chaired by the applicant.[1019]

In *Foglia v Switzerland* (2007) it similarly highlighted that the information in issue had concerned a case already present in the media and that therefore the statements made could be seen to respond to the public's right to receive information on the activities of the judicial authorities.[1020] In *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* (2011), the Court also separated between private and public interests, rejecting the Government's argument that the applicants had only defended their own personal interests and instead emphasising that the critical article in question had been made in the course of a debate on the functioning of the judiciary, which was 'manifestly' a question of public interest.[1021] Moreover, in *Ottan v France* (2018),[1022] the Court highlighted that the applicant's statement

1016 *Schöpfer v Switzerland* (n 972), para 33; *Nikula v Finland* (n 983), para 46; *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004), para 28; *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), para 174; *Schmidt v Austria* App no 513/05 (ECtHR, 17 July 2008), para 36; *Reznik v Russia* (n 987), para 44; *Kincses v Hungary* App no 66232/10 (ECtHR, 27 January 2015), para 38; *Morice v France [GC]* (n 951), para 134; *Peruzzi v Italy* App no 39294/09 (ECtHR, 30 June 2015), para 51; *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 45.

1017 *Bagirov v Azerbaijan* (n 930), para 78.

1018 *Schöpfer v Switzerland* (n 972), para 33; *Nikula v Finland* (n 983), para 46; *Amihalachioaie v Moldova* (n 1016), para 28; *Schmidt v Austria* (n 1016), para 36; *Kincses v Hungary* (n 1016), para 38.

1019 *Amihalachioaie v Moldova* (n 1016), para 35.

1020 *Foglia v Switzerland* App no 35865/04 (ECtHR, 13 December 2007), para 97.

1021 *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* App no 1529/08 (ECtHR, 29 March 2011), para 47.

1022 Discussed in Chapter Three, 176ff.

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'[could] be regarded as a general assertion concerning the organisation of the criminal-justice system by a lawyer "echoing more general debates within society"'.[1023] While the Court has not used the term 'watchdog' explicitly, which is in itself noticeable given the expansive tendency in the Court's case law in this regard,[1024] a contribution to a public debate on a matter of general interest therefore appears to tend to increase the protection that statements by lawyers will enjoy under Art. 10.

4. Limits to lawyers' freedom to comment

Conversely, where no public debate has been concerned, the Court has also highlighted this as a central part of its reasoning. For example, in *Ţuluş v Romania (dec)* the Court highlighted that the statements in issue had not been made with the goal of criticising the functioning of the judiciary or of attracting public attention to the professional conduct of a judge, and had therefore neither contained a political message nor concerned potential irregularities in the judge's exercise of his office.[1025] It also appears that the Court will apply a more restrictive position where only an individual case, rather than a matter of wider public significance, is concerned. Of course, individual cases may also raise questions of public interest. However, despite the blanket holding eg 'that the public has a legitimate interest in the provision and availability of information about criminal proceedings',[1026] the Court appears to exercise a more restrictive position as regards problems confined to an individual case, emphasising lawyers' professional obligation to remain taciturn over the importance

1023 *Ottan v France* (n 982), para 66.

1024 cf eg the categories of individuals listed in European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights - Freedom of expression* (2021), para 283ff, as well as *Magyar Helsinki Bizottság v Hungary [GC]* App no 18030/11 (ECtHR, 08 November 2016), para 166, discussed in Chapter Six at 331.

1025 *Ţuluş v Romania (dec)* App no 23562/13 (ECtHR, 17 December 2019), para 26.

1026 *July and SARL Libération v France* App no 20893/03 (ECtHR, 14 February 2008), para 66, drawing on Recommendation R(2003)13 of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings. Similar references appear in eg *Giesbert and others v France* App no 68974/11 and others (ECtHR, 01 June 2017), para 92; *Novaya Gazeta and Milashina v Russia* App no 45083/06 (ECtHR, 03 October 2017), para 64; *Ottan v France* (n 982), para 61.

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of their contributions to public debate. This would seem to explain why, in *Schöpfer v Switzerland* (1998), the Court did not follow the applicant's arguments based on his function as a public watchdog to elevate the level of Convention protection the applicant enjoyed. In *Schöpfer*, the applicant claimed 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'.[1027] He argued that '[h]is criticisms had been justified, since they had been aimed not at an isolated case but at a longstanding practice contrary to the Convention', and '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'.[1028] The Court, however, did not interact with these arguments. While it did not refute the claims directly, its silence on these matters is itself revealing: Given that the applicant did not use all remedies available[1029] and the remedy exercised did 'prov[e] effective with regard to the complaint in question',[1030] it seems the Court simply did not think that there was any wider, systemic issue at stake,[1031] and that therefore this was not a case of a lawyer acting as a 'watchdog' at all.[1032] Rather than seeing this case as a question of the public interest in the sense of revealing a wider problem, the Court seems to have seen it as largely specific to its own facts and therefore best dealt with in the courts of law rather than those of public opinion. Similarly,

1027 *Schöpfer v Switzerland* (n 972), para 25. The case is discussed in greater detail in Chapter Three, 171ff.

1028 Ibid, para 25. Presumably, it did not help the applicant's case that he argued that 'he had expressed his opinion not only as a lawyer but also as a politician', cf ibid.

1029 Ibid, para 34.

1030 Ibid, para 31.

1031 Note that the Commission also found that 'the applicant had exaggerated his grievances, by asserting for instance that for years the Hochdorf district authority had been flagrantly violating the laws of the Canton of Lucerne and human rights', ibid, para 27.

1032 See similarly *Hempfing v Germany (dec)* App no 14622/89 (Commission Decision, 07 March 1991) 8, where the Commission noted that 'les restrictions à la liberté d'expression ne doivent pas décourager les membres [des professions liberales] de contribuer à la discussion publique des questions concernant la vie de la collectivité', 'restrictions on freedom of expression should not discourage members [of the liberal professions] from contributing to public discussion of issues affecting the life of the community' (author's translation), and then highlighted that the applicant's circular letter had not been connected to any public debate or been aimed at informing the public or its addressees of any general problem.

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in *Karpetas v Greece* (2012), where the applicant had made accusations of corruption against the Greek judiciary for what he considered excessively lenient bail conditions,[1033] the Court noted that there had been no sufficient factual basis for these statements, particularly since the applicant had not even attempted to establish evidence of the truth of his allegations.[1034] The lack of evidence of a wider problem therefore meant that the restrictions on lawyers' freedom of speech prevailed over any potential 'watchdog' function.

5. The public interest in comment by lawyers

Of course, whether or not a statement contributes to a public debate is a general criterion in determining the level of protection which Art. 10 will afford.[1035] What is specific to lawyers is the explicit link to public interests related to a well-functioning legal system. One such point has been the general right to 'comment in public on the administration of justice'[1036] discussed above, arguably a rather specific sub-manifestation of freedom of expression.[1037] Moreover, in other cases the Court has explicitly drawn a link to the public-interest role lawyers fulfil. In *Hajibeyli and Aliyev v Azerbaijan* (2018), the Court 'reiterate[d] that the freedom of expression of lawyers is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice',[1038] and explicitly 'dr[e]w the Government's attention to Recommendation R(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, which clearly

1033 A sum of roughly 600 EUR compared to charges of extortion, assault occasioning actual bodily harm and carrying and using a weapon, *Karpetas v Greece* App no 6086/10 (ECtHR, 30 October 2012), para 9, 11.

1034 Ibid, para 78.

1035 On the Court's interpretation of Art. 10 more generally see Chapter Six, 310ff.

1036 cf n 1016.

1037 Discussing difficulties in treating such rights to speak on specific issues as deriving from the human right to freedom of expression Chapter Eight, particularly at n 2076.

1038 *Hajibeyli and Aliyev v Azerbaijan* (n 930), para 60. See for similar renditions of this statement *Morice v France [GC]* (n 951), para 135; *Bono v France* (n 1016), para 45; *Radobuljac v Croatia* App no 51000/11 (ECtHR, 28 June 2016), para 61.

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stated that lawyers should enjoy freedom of expression'.[1039] Finally, lawyers are unique in being subject to particular restrictions on their conduct,[1040] by which the media, which lacks a public-law status as 'officer of the court', is not bound.

There is therefore a certain amount of tension between the restrictions on lawyers' freedom of expression and their (potential) role as public watchdogs. Given that the Court has generally permitted lawyers' freedom of expression to be subjected to greater limitations than that of other individuals,[1041] lawyers will have to take particular care when speaking out on matters they regard as being of public interest, since they remain subject to their discretion obligations and may find their rights restricted by a later finding that the case at hand was not one of 'public interest'.[1042] To some extent, this tension is already apparent from the Court's dictum that lawyers 'are certainly entitled to comment in public on the administration of justice'[1043] itself – the Court clearly thinks there is enough reason to doubt[1044] this that it is worth stressing lawyers' freedom of expression, at least for the specific sub-set of cases concerning 'the administration of justice'.

While there are therefore significant differences between the situations of lawyers and of journalists, where the Court has explicitly interacted with this 'watchdog' function,[1045] lawyers and journalists may be less far apart than the lack of reference in cases regarding lawyers might make it appear.[1046] While the Court has not made positive reference to its case law on journalists applying to lawyers as well, it *has* made reference to its case law on the public-interest function of lawyers – particularly the need to guard against 'chilling effect'[1047] – in the case law on journalists. Some of the cases on journalists make reference to the *Elçi and others v Turkey* (2003) and *Nikula v Finland* (2002) dicta, which will be examined in greater detail

1039 *Hajibeyli and Aliyev v Azerbaijan* (n 930), para 60. Recommendation R(2000)21 is discussed in Chapter One, 38ff.
1040 cf Chapter Five, 227ff.
1041 Chapter Three, 170ff.
1042 cf eg *Coutant v France (dec)* App no 17155/03 (ECtHR, 24 January 2008).
1043 See n 1016.
1044 And there is, see Chapter Eight.
1045 cf n 970, as well as the discussion in Chapter Six, 309ff.
1046 See, for a comparison in greater detail, Chapter Six.
1047 On this concept see Chapter Six, 335ff.

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in Chapter Five[1048] and which concern the general position of lawyers in society and their role in serving public interests. For example, when dealing with the question whether penalties imposed on two journalists for defamation in the course of their reporting on a murder case were 'excessive in the circumstances or … of such a kind as to have a "chilling effect" on the exercise of media freedom', the Grand Chamber, in *Pedersen and Baadsgaard v Denmark [GC]* (2004), cited three cases 'mutatis mutandis'[1049]: *Wille v Liechtenstein [GC]* (1999), which concerned disagreement on a point of constitutional law between Hans-Adam II, Prince of Liechtenstein, and the President of the Liechtenstein Administrative Court,[1050] *Nikula* and *Elçi*. Moreover, *Pedersen and Baadsgaard* is not the only case to make such a citation. In *Kaperzynski v Poland* (2012) and *Wizerkaniuk v Poland* (2011), the Court, to support its statement that '[t]he chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident',[1051] equally cited (once again 'mutatis mutandis') the combination of *Nikula* and *Elçi*, although this time it also included several other cases with no connection to legal matters. The Court, it appears, seems to have seen the situation as regards journalists as similar enough to that concerning lawyers to merit this cross-citation, making it all the more surprising that there is no such transfer of the 'watchdog' function in the other direction, particularly in light of the Court's expansion of that category beyond its traditional application to journalists in a narrow sense.[1052]

This complex jurisprudence on lawyers' potential function as 'watchdogs' shows the close relationship between lawyers' functions in protecting their own private interests and their defence of the wider public interest in the rule of law. While lawyers' actions on behalf of specific clients aim to further those clients' private interests (as well as, perhaps, the lawyer's interest in exercising their profession), their statements on cases in which they are not involved mix the lawyer's own private interests and the public interest in the rule of law, which is closely inter-related with the question

1048 225ff.

1049 *Pedersen and Baadsgaard v Denmark [GC]* App no 49017/99 (ECtHR, 17 December 2004), para 93. 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.

1050 *Wille v Liechtenstein [GC]* App no 28396/95 (ECtHR, 28 October 1999), para 9ff.

1051 *Wizerkaniuk v Poland* App no 18990/05 (ECtHR, 05 July 2011), para 68; *Kaperzyński v Poland* App no 43206/07 (ECtHR, 03 April 2012), para 70.

1052 cf n 1024 and accompanying text.

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of what place lawyers properly occupy in a society based on the rule of law. This question of the relationship between legal services and the public interest forms the topic of the next chapter, Chapter Five.

III. Conclusion: Legal services and lawyers' private interests

In keeping with the classic idea that human rights further the interests of the rights holder,[1053] the Court has also developed case law which protects lawyers' private interests, though this is not necessarily particularly expansive. Even where they are not acting for an identifiable client (and furthering that person's private interests), lawyers' access to and continued membership of the profession will be protected, as will certain elements of their exercise of the profession as well as their professional reputation. However, it is noticeable that much of this case law does not highlight that the profession of lawyer, unlike the other professions which the Court frequently draws on for inspiration, also furthers the important public interest in the rule of law. This public interest becomes more visible in the Court's case law concerning lawyers commenting on cases they are not involved in professionally, where they fulfil something of a 'watchdog' function. However, due to the Court's restrictive case law on lawyers speaking outside of judicial proceedings, there may be a certain need for lawyers to exercise caution here.

1053 Chapter Eight, 399ff.

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Chapter Five: The Public Interest in Legal Services in the Court's Case Law

The previous chapters have focused on the way the Court protects the private interests of clients (Chapter Two and Chapter Three) and of lawyers (Chapter Four) in the provision of legal services.[1054] However, as noted in Chapter One, there is also a significant public interest in legal services because they are an essential component of the rule of law and the administration of justice. This chapter discusses the ways in which the Court reflects this public interest in legal services in its case law.

While the Court's case law based on private interests in legal services is certainly important, it arguably addresses the role of legal services only incompletely. The cases discussed in Chapter Two to Chapter Four may actually be the cases that concern less severe problems: Problems are isolated rather than endemic, lawyers exist, they meet certain minimum quality requirements, they take on cases, notwithstanding occasional problems. The issue, to use language developed to describe the Court's various functions, is largely individual rather than constitutional[1055] in that it concerns the provision of legal services in an individual case, rather than the availability of high-quality legal services generally, notwithstanding a certain amount of overlap.[1056] Ironically enough, it is the category of isolated problems, not that of more widespread problems, on which the Court has been most clear, even though for the fulfilment of human rights systemic problems impairing the legal services sector's ability to fulfil its functions are more dangerous than problems in individual, isolated cases.[1057]

This area is significantly more challenging to address from a human rights perspective than the protection of the private interests of clients and

1054 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1055 For this by now somewhat outdated debate see eg Steven Greer and Luzius Wildhaber, 'Revisiting the Debate About 'Constitutionalising' the European Court of Human Rights' (2012) 12 Human Rights Law Review 655, as well as the references in Chapter Seven, n 1877ff.

1056 See eg cases such as *Golovan v Ukraine* App no 41716/06 (ECtHR, 05 July 2012), discussed in Chapter Two, 100ff, in which the Court criticised a general legislative arrangement.

1057 For an analysis and critique of the background to this approach see Chapter Seven.

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lawyers. This is because, as will be discussed in detail in Chapter Eight, human rights are traditionally understood as primarily furthering the private interests of the rights holder. However, many of the points relating to the public interest are less closely linked to private interests. What if Bar associations are insufficiently independent and admit only 'politically reliable' lawyers to the profession?[1058] What if the provision of legal services is so unattractive economically that nobody chooses this career path?[1059] And what exactly is the position of lawyers if they are not part of the State but nonetheless have special abilities and responsibilities within the machinery of justice? These questions are not easily amenable to an analysis in terms of the position of individual rights holders. Nonetheless, despite being difficult to analyse within a traditional subjective human rights framework, the answers given to these questions determine whether or not legal services can fulfil the role which the Court clearly – as has been shown in Chapter Two to Chapter Four – accords to them. Simply ignoring them is not, therefore, an option.

Moreover, in keeping with a public-interest role for legal services, the Court, despite its focus on private interests, has shown a certain awareness that beyond individual lawyers there is an entire segment of society which deals in the provision of legal services. While this also surfaces in other contexts, it becomes particularly clear in the case law on freedom of expression for lawyers acting in individual cases.[1060] Although in both *Nikula v Finland* (2002)[1061] and *Steur v the Netherlands* (2003)[1062] the Court still focused on the impact of restrictions on the position of the lawyer concerned in that individual case, by the time of the 2005 Grand Chamber judgment in *Kyprianou v Cyprus [GC]* the Court had expanded its perspective. In *Kyprianou*, the Grand Chamber stressed that '[t]he imposition of a custodial sentence would inevitably, by its very nature, have a "chilling

1058 cf eg the Court's thinly veiled criticism in *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 49, where 'the Presidents of the disciplinary commission and the ABA openly criticised the applicant for his frequent appearances in the media and his affiliation to an opposition political party, which were not related to the subject matter of the disciplinary proceedings instituted against him'.

1059 As the Government alleged in *Appas v Greece (dec)* App no 36091/06 (ECtHR, 04 December 2008) 7, *Svintzos v Greece (dec)* App no 2209/08 (ECtHR, 24 September 2009) 4, would have happened for certain sparsely populated regions without a system limiting lawyers' standing on a regional basis.

1060 See Chapter Three, 154ff.

1061 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 54.

1062 *Steur v the Netherlands* App no 39657/98 (ECtHR, 28 October 2003), para 44.

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effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole'.[1063] Similarly, reference to 'la profession d'avocat dans son ensemble' has appeared in French-language cases,[1064] and in other cases and contexts the Court has referred to 'the independence of the legal profession from the State'.[1065] The Court consequently seems aware that there is a community of lawyers which is in some way important and goes beyond mere aggregation of the individuals who provide legal services.

This section therefore discusses the Court's case law focusing on the public interest in legal services. It begins with a discussion of the two most explicit lines of case law reflecting the public interest in legal services (I.), before turning to the more specific statements the Court has made on how States should regulate legal services (II.).

I. The 'special status of lawyers'[1066] as part of the 'very heart of the Convention system'[1067]

The Convention applies in a modified way where lawyers are concerned. Their status is somehow different from that of other individuals.[1068] Where lawyers themselves have applied to the Court, that much is clear from the ubiquitous emphasis in the case law on 'the applicant's status as an advocate',[1069] 'the applicant's status as a lawyer',[1070] the applicant's 'capacity as

1063 *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), para 175. See more generally on chilling effect Chapter Six, 335ff.

1064 *Pais Pires de Lima v Portugal* App no 70465/12 (ECtHR, 12 February 2019), para 64; *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019), para 71.

1065 cf the *Kamasinski* line of cases (discussed in Chapter Two, 126), *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989), para 65, see recently eg *X v the Netherlands* App no 72631/17 (ECtHR, 27 July 2021), para 47.

1066 *Nikula v Finland* (n 1061), para 45.

1067 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669.

1068 For the conceptual problems related to such role-bearer rights see Chapter Eight, 419ff.

1069 *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018), para 54.

1070 *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005), para 114; *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 146; *Ottan v France* App no 41841/12 (ECtHR, 19 April 2018), para 58; *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), para 215. See similarly *Kopp v Switzerland* App no 13/1997/797/1000 (ECtHR, 25 March 1998), para 75.

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defence counsel',[1071] 'la qualité d'avocat du réquerant'[1072] or to their acting 'en sa qualité d'avocat'.[1073] Indeed, a number of cases contain separate sections separated by headings dedicated exclusively to determining whether the applicant is acting as a lawyer for Convention purposes.[1074] But what is this modified position?

If the title to the present subsection is a mélange of two different quotes, that is because the Court has two main text blocks regarding the more general importance of lawyers to the rule of law and the administration of justice. These, for the purposes of the present study, will be termed the *Nikula* dictum and the *Elçi* dictum, after the cases which popularised them, and read, respectively, as follows:

> The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.[1075]

The *Elçi* dictum reads as follows:

> The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential

1071 *Nikula v Finland* (n 1061), para 51. Distinguishing on this point see eg *Konstantin Stefanov v Bulgaria* App no 35399/05 (ECtHR, 27 October 2015), para 68.

1072 *Sagropoulos v Greece* App no 61894/08 (ECtHR, 03 May 2012), para 54; *Leotsakos v Greece* App no 30958/13 (ECtHR, 04 October 2018), para 42; *LP and Carvalho v Portugal* (n 1064), para 65.

1073 *François v France* App no 26690/11 (ECtHR, 23 April 2015), para 53; *Rodriguez Ravelo v Spain* App no 48074/10 (ECtHR, 12 January 2016), para 43; *Cazan v Romania* App no 30050/12 (ECtHR, 05 April 2016), para 41; *Laurent v France* App no 28798/13 (ECtHR, 24 May 2018), para 47; *LP and Carvalho v Portugal* (n 1064), para 67. Once again, the Court's diction is more consistent in the French than in the English versions of the cases.

1074 cf eg *Morice v France [GC]* (n 1070), para 146; *Ottan v France* (n 1070), para 58; *Čeferin v Slovenia* (n 1069), para 54. From the French-language case law see eg *Versini-Campinchi and Crasnianski v France* App no 49176/11 (ECtHR, 16 June 2016), para 75; *LP and Carvalho v Portugal* (n 1064), para 65. For a decision distinguishing the *Nikula* dictum on the basis that the applicant was not acting as a lawyer for Convention purposes see eg *Ursulet v France (dec)* App no 56825/13 (ECtHR, 08 March 2016), para 48.

1075 *Nikula v Finland* (n 1061), para 45.

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> component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.[1076]

To this day, both of these quotes appear in the Court's case law.[1077] It is therefore worth paying closer attention to their development and use.

1. 'The special status of lawyers'[1078]

Arguably the core tenet of the *Nikula* dictum, taken from a 2002 judgment, is that '[t]he special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts'.[1079] This passage forms one of the central pillars of the Court's jurisprudence regarding legal services. But what is a 'special status' within the context of a human rights regime?[1080] Does the Convention not ostensibly simply oblige the High Contracting Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I' of the Convention,[1081] with the only relevant status that of being *homo sapiens*?

For context, and before proceeding to a more detailed inspection of the Court's jurisprudence on this matter, it is worth noting that the peculiar situation in which lawyers find themselves – as non-State actors providing a public service, replete with obligations both to their client and to more abstract ideals such as 'justice' or, more mundanely, the judicial system[1082] – is frequently reflected in domestic rules echoing this ambiguous position. In many domestic systems, this mid-way position has led to doctrines

1076 *Elçi and others v Turkey* (n 1067), para 669.
1077 The last citation of the *Nikula* dictum at the time of writing is *Rogalski v Poland* App no 5420/16 (ECtHR, 23 March 2023), para 39; the last citation of the *Elçi* dictum is *Namazli v Azerbaijan* App no (ECtHR, 20 June 2024), para 35.
1078 *Nikula v Finland* (n 1061), para 45.
1079 Ibid, para 45.
1080 See also Chapter Eight, 419ff.
1081 Art. 1 ECHR.
1082 Some of this terminology may also flow from the fact that the French 'la justice' denotes both abstract ideas of equity and the totality of organs tasked with applying the law, cf eg https://dictionnaire.lerobert.com/definition/justice, accessed 08 August 2024.

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frequently translated into English as the idea that lawyers are 'officers of the court'.[1083]

This rationale holds true in the Convention context as well: As has already been shown in a variety of areas, lawyers' role of guiding non-State individuals through the State's legal system locates them at the intersection between the State and non-State spheres. Lawyers do not wield State power; yet their role as participants in the business of justice means that they are intimately linked to State functions, particularly where they have additional benefits such as particular rights or protection by a monopoly. Lawyers are in the peculiar situation of acting within the ambit of the State's obligation to ensure access to legal services,[1084] but nonetheless, according to the Court, being independent from the State, as is clear from the *Kamasinski*[1085]/*Czekalla*[1086]/*Siałkowska*[1087]/*Staroszczyk*[1088] line of cases,[1089] in which the Court also highlighted explicitly that lawyers are not State organs.[1090] As the Court put it in *Bigaeva v Greece* (2009):

> L'avocat exerce … une profession libérale qui est, pour autant, en même temps une fonction mise au service de l'intérêt public. Sur ce point, la Cour rappelle que sa jurisprudence relève cette particularité de la profession d'avocat : si elle admet, d'une part, que cette profession n'est pas assimilée à celle d'un poste dans la fonction publique … elle souligne, d'autre part, que l'avocat est un auxiliaire de la justice, ce qui entraîne des obligations spécifiques dans l'exercice de ses fonctions …[1091]

1083 Typically referred to as 'auxiliaires de la justice' in French, cf for the Court's case law eg *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987), para 46 b), although, at the domestic-law level, there are significant differences between the doctrines.

1084 Perhaps particularly clear ibid, para 46 (b): '[T]he contribution of avocats to the administration of justice involves them in the operation of a public service', or *Bigaeva v Greece* App no 26713/05 (ECtHR, 28 May 2009), para 39, cited below.

1085 *Kamasinski v Austria* (n 1065), para 65.

1086 *Czekalla v Portugal* App no 38830/97 (ECtHR, 10 October 2002), para 60.

1087 *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007), para 99.

1088 *Staroszczyk v Poland* App no 59519/00 (ECtHR, 22 March 2007), para 121.

1089 See Chapter Two, 122ff.

1090 *Siałkowska v Poland* (n 1087), para 99.

1091 *Bigaeva v Greece* (n 1084), para 39 (citations omitted). 'Lawyers exercise a liberal profession which is, however, at the same time a function in the service of the public interest. On this point, the Court recalls that its case law notes this particularity of the profession of lawyer: if it admits, on the one hand, that this profession is not assimilated to that of a position in the civil service … it underlines, on the other hand, that the lawyer is an auxiliary of justice, which entails specific obligations in the exercise of his functions …' (author's translation).

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In a nutshell, it may be that what the Court means by the *Nikula* dictum is a reception into the Convention environment of a similar doctrine on lawyers' ambiguous status. Although it has not expounded a comprehensive theory in this respect, the Court has clarified that it considers lawyers 'officers of the court',[1092] and that this brings with it special responsibilities. As the Fifth Section recently put it in *Namazov v Azerbaijan* (2020), concisely summarising the Court's case law on the point,

> [t]he specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct. Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court[.][1093]

The quote is noticeable for a number of reasons. For example, is it convincing that the specific status of lawyers (which would then somehow pre-exist) gives them a central position in the administration of justice as intermediaries between the public and the courts, rather than their central position as intermediaries giving them a specific status?[1094] Moreover, it is worth highlighting that while the Court directly sets out requirements – discreet, honest and dignified – which make lawyers 'subject to restrictions on their professional conduct', whether and to what extent lawyers will enjoy any corresponding 'exclusive rights and privileges' is left to the level of domestic law.[1095] Even this brief inspection shows that the doctrine seems to raise more questions than it answers. Nonetheless, the quote regarding the

1092 A term used at times in the Court's case law since *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994), para 46.

1093 *Namazov v Azerbaijan* (n 1058), para 46, with reference to *Morice v France [GC]* (n 1070), paras 132–33.

1094 Arguably, the phrasing in *André and another v France* App no 18603/03 (ECtHR, 24 July 2008), para 42, reprised in *Altay v Turkey (No 2)* App no 11236/09 (ECtHR, 09 April 2019), para 56, and *Särgava v Estonia* App no 698/19 (ECtHR, 16 November 2021), para 89, is rather more convincing, although it remains the exception rather than the rule: '[l]awyers occupy a vital position in the administration of justice and can, by virtue of their role as intermediary between litigants and the courts, be described as officers of the law', neatly reversing the chain of reasoning.

1095 And indeed, the extent to which lawyers have 'exclusive rights and privileges' varies drastically as between the Council of Europe States, with both the starting point that only lawyers may provide legal services and the starting point that anyone may provide legal services unless prohibited existing at the domestic level.

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'special'[1096] (or 'specific')[1097] status of lawyers – an inconsistent translation of an expression that, in French, is consistently given as 'le statut spécifique des avocats'[1098] – has by now become a constant feature of the Court's jurisprudence.

1096 Cases using the 'special status' phrasing include *Tuğluk and others v Turkey (dec)* App no 30687/05 (ECtHR, 04 September 2018), para 35; *Kincses v Hungary* App no 66232/10 (ECtHR, 27 January 2015), para 34; *Reznik v Russia* App no 4977/05 (ECtHR, 04 April 2013); *Coutant v France (dec)* App no 17155/03 (ECtHR, 24 January 2008) 10; *Kyprianou v Cyprus [GC]* (n 1063), para 173; *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004), para 27; *A v Finland (dec)* App no 44998/98 (ECtHR, 08 January 2004) 11; *Wingerter v Germany (dec)* App no 43718/98 (ECtHR, 21 March 2002) 7; *Nikula v Finland* (n 1061), para 45; *Lindner v Germany (dec)* App no 32813/96 (ECtHR, 09 March 1999) 9; *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998), para 29; as well as *Peruzzi v Italy* App no 39294/09 (ECtHR, 30 June 2015), para 50, *Fuchs v Germany (dec)* App no 29222/11 (ECtHR, 27 January 2015), para 39, *Ignatius v Finland (dec)* App no 41410/02 (ECtHR, 17 January 2006) 5, *Böhm v Germany (dec)* App no 66357/01 (ECtHR, 16 December 2003) 4, *Steur v the Netherlands* (n 1062), para 36, which cite *Nikula v Finland* (n 1061) verbatim, and *Igor Kabanov v Russia* App no 8921/05 (ECtHR, 03 February 2011), para 52, *Furuholmen v Norway* App no 53349/08 (ECtHR, 18 March 2010) 10, which cite *Kyprianou v Cyprus [GC]* (n 1063) verbatim.

1097 Cases using the 'specific status' phrasing include *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* App no 68273/14; 69271/14 (ECtHR, 22 December 2020) (n 1077), para 88; *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 78; *Correia de Matos v Portugal [GC]* App no 56402/12 (ECtHR, 04 April 2012), para 139; *Radobuljac v Croatia* App no 51000/11 (ECtHR, 28 June 2016), para 60; *Morice v France [GC]* (n 1070), para 132.

1098 *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* (n 1097), para 88; *Tuğluk and others v Turkey (dec)* (n 1096), para 35; *Tuheiava v France (dec)* App no 25038/13 (ECtHR, 28 August 2018), para 33; *Correia de Matos v Portugal [GC]* (n 1097), para 139; *Cazan v Romania* (n 1073), para 41; *Rodriguez Ravelo v Spain* (n 1073), para 40; *Morice v France [GC]* (n 1070), para 132; *Mor v France* App no 28198/09 (ECtHR, 15 December 2011), para 42; *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* App no 1529/08 (ECtHR, 29 March 2011), para 46; *Alfantakis v Greece* App no 49330/07 (ECtHR, 11 February 2010), para 27; *Coutant v France (dec)* (n 1096) 10; *Foglia v Switzerland* App no 35865/04 (ECtHR, 13 December 2007), para 85; *Kyprianou v Cyprus [GC]* (n 1063), para 173; *Amihalachioaie v Moldova* (n 1096), para 27; *Nikula v Finland* (n 1061), para 45; *Mattei v France (dec)* App no 40307/98 (ECtHR, 15 May 2001) 14; *Schöpfer v Switzerland* (n 1096), para 29.

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(a) Casado Coca *and the origins of the* Nikula *dictum*

While the Court now uses it as something of a panacea, the statement originally goes back to the rather specific context of the 1994 case *Casado Coca v Spain*. *Casado Coca* concerned domestic rules largely prohibiting advertising by lawyers, a prohibition that was common to many jurisdictions at the time, although most of these have subsequently relaxed their rules to some extent.[1099] The applicant, a Barcelona-based lawyer, had placed advertisements in several newspapers and had also written directly to companies to offer them his services.[1100] Spanish law as in force at the time, however, contained a prohibition on lawyers' advertising.[1101] This led to disciplinary sanctions against the applicant,[1102] against which he applied to the European Commission of Human Rights, which in a nine-nine split[1103] decided that there had been a breach of Art. 10.[1104]

The first major point of controversy between the Parties – after the Court had established that Art. 10 could, in principle, cover commercial expression[1105] – was whether the ban on advertising pursued one of the legitimate aims listed in Art. 10 § 2 ECHR. The Government and Commission considered that the ban was intended to protect the rights of the public and of other members of the Bar, and therefore served the 'protection of

1099 And indeed in *Casado Coca v Spain* (n 1092) itself the Court at para 23 made reference to a draft law liberalising these rules, as well as a general tendency already noted by Judge Pettiti in his concurring opinion in *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985).

1100 *Casado Coca v Spain* (n 1092), para 7. According to the Commission's findings '[t]he applicant's notice set out particulars that were wholly neutral (his name, occupation and business address and telephone number) and did not contain information that was untrue or offensive to fellow members of the Bar', ibid, para 49. The Court did not examine the letters directly addressed to clients separately, although in some jurisdictions this type of direct marketing would fall to be judged differently than general newspaper articles.

1101 Ibid, para 22ff. The applicant made extensive argument that the interference had nonetheless not been 'prescribed by law', an argument which the Court rejected and which is not of particular interest to the present study as it was specific to the technical way in which the ban had been drafted.

1102 Ibid, para 8.

1103 The president's vote deciding, cf Rule 18 (2) of the Rules of Procedure of the European Commission on Human Rights.

1104 *Casado Coca v Spain [Commission]* App no 15450/89 (Commission Decision, 01 December 1992), para 66.

1105 This, incidentally, is the point for which the case has been most frequently cited subsequently.

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the rights of others'.[1106] The Court slightly modified this, noting that it '[did] not have any reason to doubt that the Bar rules complained of were designed to protect the interests of the public while ensuring respect for members of the Bar',[1107] before noting that

> [i]n this connection, the special nature of the profession practised by members of the Bar must be considered; in their capacity as officers of the court they benefit from an exclusive right of audience and immunity from legal process in respect of their oral presentation of cases in court, but their conduct must be discreet, honest and dignified. The restrictions on advertising were traditionally justified by reference to these special features.[1108]

While that statement with its balance between rights and duties related specifically to the Spanish Bar at the time, attentive readers will have noticed that the Court, in the modern version of the *Nikula* doctrine, has simply applied the same criteria, claiming that lawyers' conduct must be discreet, honest and dignified, but that lawyers are compensated for this by 'exclusive rights and privileges',[1109] a contention that may not be universally true.[1110] However, aside from the difficulties that simply moving this assessment from the domestic level to the Convention without adjusting for context poses, even in the specific context of *Casado Coca* itself that statement arguably begged the question. Art. 10 § 2 does not contain any of the elements the Court cited. While it seems that the Court took the aim to be 'the protection of the rights of others' in the sense of protecting members of the public, it is not clear what difference the special features cited by the Court make to this aim. Most importantly, the vague reference to the fact that 'restrictions on advertising were traditionally justified by reference to these special features' – which explicitly does not state that the Court itself considers this to be a justification – on its own does not set out a legitimate aim.

1106 *Casado Coca v Spain* (n 1092), para 44.
1107 Ibid, para 46.
1108 Ibid, para 46.
1109 *Morice v France [GC]* (n 1070), para 133.
1110 Notably, the recent cases of *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 75, and *Correia de Matos v Portugal [GC]* (n 1097), para 140, justify the 'duties and restrictions' by reference to the 'special role of lawyers' directly, without reference to any exclusive rights and privileges, although they do cite the older case law containing that latter dictum. However, since the subsequent case of *Tuğluk and others v Turkey (dec)* (n 1096), para 35, continues the traditional line of justification, classing this as a shift in case law would be jumping to conclusions.

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Instead, the statement may have been a response to the Government's argument, which 'also pointed out that advertising had always been found to be incompatible with the dignity of the profession, the respect due to fellow members of the Bar and the interests of the public'.[1111] However, the mere fact that it 'had always been found to be incompatible' is hardly an argument, and the justifications raised do not appear directly in Art. 10 § 2. The kindest interpretation of the Court's reaction is perhaps that the Court was trying to explain why stronger restrictions on advertising for lawyers than for other services providers might be legitimate aims under the Convention, but if so, one would have expected the Court to close some of the gaps in the logical chain by reference to eg, the information deficit frequently cited to justify such restrictions. In fact, the Court may have been trying to pave the way for its later assessment of whether the interference was 'necessary in a democratic society'. Similarly, in the subsequent admissibility decision in *Lindner v Germany (dec)*, the Fourth Section cited *Casado Coca* before going on to find that 'the restrictions on advertising by lawyers, as applied in the applicant's case, served this general purpose of ensuring an appropriate professional conduct of lawyers'.[1112]

In its assessment in *Casado Coca* of whether the interference was 'necessary in a democratic society', the Court then went on to apply the doctrine of margin of appreciation, holding that

> [t]he wide range of regulations and the different rates of change in the Council of Europe's member States indicate the complexity of the issue. Because of their direct, continuous contact with their members, the Bar authorities and the 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 between the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices.[1113]

'In view of the above', the Court went on, 'the Court holds that at the material time – 1982-83 – the relevant authorities' reaction could not be considered disproportionate to the aim pursued'.[1114] While formally it therefore did not rule on whether a ban at the time of the judgment itself

1111 *Casado Coca v Spain* (n 1092), para 44.
1112 *Lindner v Germany (dec)* (n 1096) 8.
1113 *Casado Coca v Spain* (n 1092), para 55. Much the same quote appears in the subsequent admissibility decision in *Lindner v Germany (dec)* (n 1096) 9.
1114 *Casado Coca v Spain* (n 1092), para 56.

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would have violated the Convention, the Court did give a hint[1115] as to what the result might have been by including both a number of subsequent legislative developments in Spain itself[1116] and a reference to a pan-European development:[1117]

> In most of the States parties to the Convention, including Spain, there has for some time been a tendency to relax the rules as a result of the changes in their respective societies and in particular the growing role of the media in them. The Government cited the examples of the Code of Conduct for Lawyers in the European Community (Strasbourg, 28 October 1988)[1118] and the conclusions of the Conference of the European Bars (Cracow, 24 May 1991); while upholding the principle of banning advertising, these documents authorise members of the Bar to express their views to the media, to make themselves known and to take part in public debate.[1119]

While the decision itself thus ultimately hinged on what might have been within the State's margin of appreciation in '1982-83',[1120] the Court did make a broader statement in the run-up to this conclusion which is significant particularly due to its aforementioned impact on subsequent case law:

> The applicant and the Commission argued that commercial undertakings such as insurance companies are not subject to restrictions on advertising their legal consulting services.
>
> In the Court's opinion, however, they cannot be compared to members of the Bar in independent practice, whose special status gives them a central position

1115 Which is largely in keeping with its statement in *Barthold v Germany* (n 1099), para 58 that a total ban on advertising for veterinary surgeons was 'not consonant with freedom of expression [because] [i]ts application risk[ed] discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing to some degree, an advertising effect'.

1116 *Casado Coca v Spain* (n 1092), para 23ff.

1117 *Casado Coca v Spain* (n 1092), para 54. However, even in *Brzank v Germany (dec)* App no 7969/04 (ECtHR, 23 October 2007) 6 and *Heimann v Germany (dec)* App no 2357/05 (ECtHR, 23 October 2007) 6, the Court still held that 'considering the wide range of regulations and the changes occurring in the Council of Europe's Member States, the bar authorities and the domestic courts, because of their direct, continuous contact, are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved', merely repeating what it had already found in *Casado Coca*.

1118 This is now the CCBE's Code of Conduct for European Lawyers.

1119 *Casado Coca v Spain* (n 1092), para 54. It is worth repeating that the Commission narrowly found a violation, cf ibid (n 1104), para 61ff.

1120 *Casado Coca v Spain* (n 1092), para 56.

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> in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in Bar councils.[1121]

This was the birth of the *Nikula* doctrine, and set the tone for the Court's subsequent jurisprudence. The 'special status' which gives lawyers 'a central position in the administration of justice as intermediaries between the public and the courts' went on to become a core tenet of the Court's jurisprudence, and is mentioned in practically all of the major cases discussed herein, putting it on an equal footing with the *Elçi* dictum which will be discussed below.[1122] If the *Casado Coca* quote arose in the very specific context of explaining why lawyers are different to 'commercial undertakings such as insurance companies',[1123] it has nonetheless been transposed into a wide variety of other contexts without noticeable modification. The phrase that lawyers' 'special status gives them a central position in the administration of justice as intermediaries between the public and the courts' has become ubiquitous and is now used as part of one of the Court's two general text blocks on the significance of lawyers.[1124]

(b) *The* Nikula *dictum as a means of restricting rights*

In keeping with its origin in the context of a case on additional restrictions, this 'special status' has almost exclusively been used to further narrow the rights of lawyers. In *Schöpfer v Switzerland* (1998), the Court built upon the *Casado Coca* dictum by adding that as

> the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence, … [r]egard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein,[1125]

1121 Ibid, paras 53–54 (paragraph numbering omitted).
1122 *Elçi and others v Turkey* (n 1067), para 669, cf 240ff below.
1123 *Casado Coca v Spain* (n 1092), para 53.
1124 cf the references in n 1096 and n 1097.
1125 *Schöpfer v Switzerland* (n 1096), para 29. The case is discussed in detail in Chapter Three, 171ff.

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and that therefore freedom of expression for lawyers could be restricted to a greater extent than that of persons without a 'special status'. Citing *Schöpfer*, the Third Section in *Mattei v France (dec)* (2001) noted that

> [l]a Cour rappelle à cet égard le statut spécifique des avocats placés dans une situation centrale dans l'administration de la justice … Elle considère que cette situation a pu légitimement entraîner des limitations aux libertés de parole et de réunion de la requérante, mise en examen pour tentative d'extorsion de fond dans un contexte terroriste et considère, dès lors, que les mesures prises dans le cadre du contrôle judiciaire étaient justifiées par les faits reprochés à l'intéressée et les circonstances dans lesquelles ces faits avaient été commis.[1126]

This quote is noteworthy because it jumps straight from the 'special status' to additional restrictions, without even mentioning that such a 'special status' could also be interpreted to provide additional rights – particularly since the applicant in *Mattei* complained that due to a prohibition on leaving Paris she had been unable to continue representing her clients in Corsica,[1127] explicitly making a link to her role in securing their defence rights.[1128] Similar rationales moving from special status to additional restriction also appear in other cases,[1129] including many of the cases on freedom of expression outside the courtroom.[1130]

While the wording of a 'special status' is neutral enough, it seems, then, that in reality its main thrust is 'less protection'. This is, inter alia, apparent from the Court's wording in *Reznik v Russia*.[1131] In *Reznik*, the Court noted that

1126 *Mattei v France (dec)* (n 1098) 14 (reference to *Schöpfer* omitted). 'The Court recalls in this respect the special status of lawyers, who occupy a central position in the administration of justice. It considers that this situation may legitimately have led to restrictions on the applicant's freedom of speech and assembly, since she was under investigation for attempted extortion in a terrorist context, and therefore considers that the measures taken in the context of judicial supervision were justified by the facts with which she was charged and the circumstances in which those facts were committed.' (author's translation)

1127 Ibid 3.

1128 Ibid 7. As discussed in Chapter Three at 181, the Court rejected this submission, arguing that the applicant – unlike her clients – was neither 'charged with a criminal offence' within the meaning of Art. 6 § 3 nor a 'victim' in the sense required by Art. 34 ECHR.

1129 eg *Lindner v Germany (dec)* (n 1096) 9 or *Tuğluk and others v Turkey (dec)* (n 1096), para 35.

1130 See Chapter Three, 170ff.

1131 The case is discussed in greater detail in Chapter Four, 211ff.

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> [t]he applicant is a professional lawyer and the President of the Moscow Bar. Admittedly, the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts, and such a position explains the usual restrictions on the conduct of members of the Bar. However, as the Court has repeatedly emphasised, lawyers are entitled to freedom of expression too and they have the right to comment in public on the administration of justice provided that their criticism does not overstep certain bounds.[1132]

This juxtaposition of the 'special status' with lawyers' freedom of expression shows particularly clearly that in general, the 'special status' restricts rights instead of expanding them, something that is questionable when compared to other statements in the Court's jurisprudence such as the *Elçi* dictum. Nonetheless, using the 'special status' to restrict lawyers' rights appears as the overall trend from the case law, with *Peruzzi v Italy* (2015)[1133] perhaps serving as a particularly vivid example. In that case, the Court highlighted that

> [a] particular aspect of the present case is that, at the material time, the applicant was a lawyer and his dispute with X had arisen in the context of his professional activity. In its *Nikula* judgment … the Court summarised as follows the specific principles applicable to the legal professions',[1134]

before going on to cite only the paragraph in *Nikula* which set out additional restrictions on freedom of expression by lawyers. Noticeably, the judgment focused heavily on additional restrictions, but did not mention that lawyers' freedom of expression can also serve public interest reasons,[1135] setting the stage well for the finding that the applicant's defamation conviction for statements relating inter alia to general problems in the Italian justice system had not been a violation of the Convention.[1136]

1132 *Reznik v Russia* (n 1096), para 44.

1133 *Peruzzi v Italy* (n 1096).

1134 Ibid, para 50.

1135 cf Chapter Four, 208.

1136 Arguably, the Joint Dissenting Opinion of Judges Wojtyczek and Grozev is rather more convincing than the majority opinion, particularly since it does indeed seem questionable whether an angry letter by a lawyer to a judge's colleagues will really have 'a real impact on the image of the judge concerned among that judge's colleagues', cf *Peruzzi v Italy* (n 1096) 19. In particular, the majority's reasoning in this respect is in tension with *Mikhaylova v Ukraine* App no 10644/08 (ECtHR, 06 March 2018), para 93, where the Court, noting that only court staff had heard the impugned statements, argued that 'all those present were, by virtue of their position and training, unlikely to have been susceptible to the applicant's sweeping and emotional criticism of the judge'.

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This tendency for the 'special status' to be used primarily to restrict lawyers' rights may also parallel the use of similar doctrines at the domestic level. For example, in *Namazov v Azerbaijan*, where the Court found that disbarment of a lawyer with extensive activities related to the political opposition had violated Art. 8 ECHR, the Government, seeking to defend the disbarment, 'stressed the key role played by the lawyers in the administration of justice'[1137] and argued that this justified sanctioning the applicant for his sharp language.[1138] Once again, similar considerations appear in a number of freedom of expression cases.[1139]

These cases show the potential for the 'special status' doctrine to be used to restrict lawyers' rights. While the Court has at times also relied on lawyers' semi-public status to strengthen their position, in these cases, it has done so without including the *Nikula* dictum. A notable example is *Campbell v UK* (1992). In that case, when the Government argued 'that the professional competence and integrity of solicitors could not always be relied on [and] added that they not infrequently broke their disciplinary rules',[1140] the Court responded that

> [i]t must also be borne in mind that solicitors in Scotland are officers of the court and are subject to disciplinary sanctions by the Law Society of Scotland for professional misconduct [and that] [i]t has not been suggested that there was any reason to suspect that the applicant's solicitor was not complying with the rules of his profession.[1141]

Similarly, in *Khodorkovskiy and Lebedev v Russia* (2013) the Court drew on lawyers' position to elevate their protection, noting that

> [t]o have a reasonable cause for interfering with the confidentiality of lawyer-client written communications the authorities must have something more than a sweeping presumption that lawyers always conspire with their clients in disregard of the rules of professional ethics and despite the serious sanctions which such behaviour entails,[1142]

1137 *Namazov v Azerbaijan* (n 1058), para 39.
1138 For a similar argument by the French government see *Ezelin v France* App no 11800/85 (ECtHR, 26 April 1991), para 49.
1139 eg *Morice v France [GC]* (n 1070), para 41.
1140 *Campbell v UK* App no 13590/88 (ECtHR, 25 March 1992), para 51.
1141 Ibid, para 52.
1142 *Khodorkovskiy and Lebedev v Russia* App no 11082/06; 13772/05 (ECtHR, 25 July 2013), para 640.

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and in *Forum Maritime SA v Romania* (2007) the Court highlighted in its reasoning regarding access to certain documents that the applicant's lawyer would have been bound by professional secrecy obligations in any case.[1143]

In essence, these cases show the flipside of the disciplinary law provisions which will be discussed below:[1144] Giving lawyers additional rights in specific situations, in these cases, was justified by reference to the fact that they are also subject to elevated standards of behaviour, in keeping with the idea, if not the wording, of *Nikula*. However, it is worth stressing that the Court does not typically refer to the 'special status' jurisprudence in this context, and eg the reference to 'specific status' to reinforce the position of lawyers in the joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque in *Ibrahim and others v UK [GC]* (2016) failed to convince the Grand Chamber's majority.[1145] Similarly, in a case that did not concern 'additional' rights, but merely the general right to assembly and association under Art. 11 ECHR, the Court made no reference to a specific status and simply held that

> freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion.[1146]

Once again, the reference to 'avocat' seems to have been entirely in terms of that status in principle legitimising additional restrictions on rights.

As a final point, it is worth noting that despite the rhetorical emphasis in the French version on 'avocats',[1147] a term rather narrower and more status-based than 'lawyers', these principles are also likely to apply – perhaps in modified form – to others providing similar services. While the only case so far to indicate this directly is a 2003 admissibility decision, the Third Section in that case decided that the aforementioned

> principles likewise apply to the applicant. As a tax consultant he represented his clients before the tax offices and tax courts and in this way acted as an intermediary between the public and the tax authorities just as an attorney does in the general judicial system. He was accordingly subject to monitoring and

1143 *Forum Maritime SA v Romania* App no 63610/00; 38692/05 (ECtHR, 04 October 2007), para 136.

1144 275ff.

1145 *Ibrahim and others v UK [GC]* App no 50541/08 and others (ECtHR, 13 September 2016) 104.

1146 *Ezelin v France* (n 1138), para 53.

1147 cf n 1098.

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> supervisory powers vested in tax consultant chambers that are comparable to those of bar councils. In this way he assumed a role comparable to that of a lawyer.[1148]

While that reasoning seems to attach quite strongly to Bar membership, that the Court does not require this for its 'special status' doctrine seems clear: *Nikula* itself concerned an applicant who was not a member of the Bar.[1149] Most recently, in the judgment of *Mikhaylova v Ukraine* (2018),[1150] which concerned statements in court by a legal representative who was not a lawyer under domestic law,[1151] the Court made no direct statement on the issue. Instead, it simply referred to a number of cases concerning both freedom of expression for lawyers in the courtroom and for witnesses,[1152] but did not clarify whether it saw the applicant as subject to any kind of special status. That side-stepped the question, and as such there is no certainty as to who exactly will be subject to the 'special status' to which the Court has referred.[1153]

The exigencies of legal services, particularly the fact that independence is a quality requirement and the way lawyers as private individuals facilitate access to the State justice system, therefore lead to an ambiguous position for lawyers, somewhere between State and non-State. The Court has referred to this as a 'special status', which generally justifies additional restrictions on their rights. While this *Nikula* doctrine therefore tends to decrease the protection which legal services will enjoy by allowing for greater restrictions on lawyers, there is also another dictum on the position of lawyers: the *Elçi* dictum, which is discussed in the next section.

2. 'The very heart of the Convention system'[1154]

'The special status of lawyers [which] gives them a central position in the administration of justice as intermediaries between the public and the

1148 *Böhm v Germany (dec)* (n 1096) 5.
1149 *Nikula v Finland* (n 1061), para 53.
1150 *Mikhaylova v Ukraine* (n 1136).
1151 Ibid, para 95.
1152 Ibid, para 83ff.
1153 One plausible analysis might also be that the Court is trying to move away from a line of reasoning that hinges so heavily on 'status', although given the established nature of the *Nikula* dictum it is too early to tell in this respect.
1154 *Elçi and others v Turkey* (n 1067), para 669.

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courts'[1155] has then been shown to be used primarily to justify additional restrictions on the rights of lawyers, rather than to protect their position. If the individually-worded *Nikula* dictum tends to reduce rights, the opposite appears to be true for the public-interest *Elçi* dictum.

Due to its significance to the Court's case law, this quote is worth reprising. In its original, taken from a 2003 judgment concerning alleged harassment of lawyers for their human rights work,[1156] it reads as follows:

> The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.[1157]

The dictum has been used in modified variants in a total of ten further judgments,[1158] with the most recent reasoned case being *Namazli v Azerbaijan* (2024).[1159] Typically, it has been reduced to a modified version of its third and fourth sentence, and is usually given as '[t]he Court has repeatedly held that persecution and harassment of members of the legal profession strikes at the very heart of the Convention system',[1160] followed

1155 *Nikula v Finland* (n 1061), para 45.

1156 *Elçi and others v Turkey* (n 1067), para 3.

1157 Ibid, para 669. There does not appear to be a French-language version of the *Elçi* dictum, since all of the cases using it were decided in English.

1158 *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 214; *Kolesnichenko v Russia* App no 19856/04 (ECtHR, 09 April 2009), para 31; *Heino v Finland* App no 56720/09 (ECtHR, 15 February 2011), para 43; *Golovan v Ukraine* (n 1056), para 62; *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; *Yuditskaya and others v Russia* App no 5678/08 (ECtHR, 12 February 2015), para 27; *Annagi Hajibeyli v Azerbaijan* App no 2204/11 (ECtHR, 22 October 2015), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020) (n 1077), para 125; *Namazli v Azerbaijan* (n 1077), para 35. Reference to *Elçi* has been made in more than just these cases; these are simply the ones which contain the *Elçi* dictum verbatim, suggesting that it was particularly important to the Court's reasoning.

1159 *Namazli v Azerbaijan* (n 1077), para 35.

1160 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; *Yuditskaya and others v*

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by a reference to 'especially strict scrutiny' for the area under consideration (frequently 'searching of lawyers' premises').[1161]

These cases all share two notable features. First, with the exception of *Heino v Finland* (2011), they all concern States which in the past have been plausibly accused of harassment of human rights defenders,[1162] or where – as in *Aliyev v Azerbaijan* (2018) – the Court itself noted that '[its own] judgments reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law'.[1163] Second, in all of these cases the Court found violations of the Convention provision under scrutiny.[1164] These factors set the *Elçi* dictum apart significantly from that in *Nikula*, which has appeared in a wide variety of contexts, as regards a number of countries and in judgments both finding violations and those finding no violation.

(a) Elçi and others v Turkey

In *Elçi* itself, the 16 applicants,

> who [were] all Turkish lawyers, alleged that in November and December 1993 they were taken into detention by law enforcement officers on the pretext of involvement in criminal activities, but in reality because they had represented

Russia (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* (n 1158), para 125; *Agora and others v Russia* App no 28539/10 and others (ECtHR, 13 October 2022), para 8.

1161 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Yuditskaya and others v Russia* (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* (n 1158), para 125.

1162 Of the remaining ten cases, one concerns Turkey (*Elçi* itself), six concern the Russian Federation, two concern Azerbaijan and one concerns Ukraine.

1163 *Aliyev v Azerbaijan* (n 1070), para 223.

1164 Art. 5 § 1: *Elçi and others v Turkey* (n 1067), para 685; Art. 6 § 3 (c): *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; Art: 8: *Aleksanyan v Russia* (n 1158), para 218; *Kolesnichenko v Russia* (n 1158), para 36; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056); *Yuditskaya and others v Russia* (n 1158), para 32; *Aliyev v Azerbaijan* (n 1070), para 189; *Kruglov and others v Russia* (n 1158), para 138; *Agora and others v Russia* (n 1160), para 12; *Namazli v Azerbaijan* (n 1077), para 54; Art. 34: *Annagi Hajibeyli v Azerbaijan* (n 1158), para 79.

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> clients before the State Security Court and been involved in human rights work.[1165]

The applicants also complained of maltreatment, arbitrary searches and seizures and hindrance of their right to make complaints to the Convention organs.[1166] The case raised, in particular, the principle of non-identification of lawyer and client,[1167] with one of the applicants having been 'accused of being the PKK's lawyer',[1168] to which he 'insisted that he had no relations with the PKK other than in his authorised professional capacity as a defence lawyer',[1169] and another being 'accused of assisting PKK detainees by … not charging fees for his work'.[1170]

After having found a violation of Art. 3 in both its procedural and substantive limbs,[1171] the Court turned its attention to Art. 5 § 1, highlighting that article's purpose of protecting individuals from arbitrariness.[1172] It then expounded the text block cited above, underlining the role of the legal profession, followed by a summary of the three-week period in 1993 during which the various applicants had been rounded up and arrested, essentially on the strength of incriminating statements made by a former PKK member turned crown witness. After an extensive critique of domestic law, the Court found that it

> ha[d] not been sufficiently shown that the applicants' apprehension and their detention by the gendarmerie … was duly authorised by a Prosecutor in accordance with the requirements of domestic law or 'in accordance with a procedure prescribed by law' within the meaning of Article 5 § 1 of the Convention,[1173]

1165 *Elçi and others v Turkey* (n 1067), para 3.
1166 Ibid, para 3.
1167 Well put in the UN Basic Principles on the Role of Lawyers at para 18: 'Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.' The UN Basic Principles are discussed in Chapter One, 34ff.
1168 *Elçi and others v Turkey* (n 1067), para 29.
1169 Ibid, para 29.
1170 Ibid, para 66, 243. For similar reference to a potential violation of the principle of non-identification see *Kruglov and others v Russia* (n 1158), para 121, where '[i]n twelve applications the applicants' only connection to the criminal cases had been the fact that they had provided legal services to an individual or a legal person involved in those criminal proceedings'.
1171 *Elçi and others v Turkey* (n 1067), para 649.
1172 Ibid, para 667.
1173 Ibid, para 682.

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finding a violation of Art. 5 § 1 'in respect of all the applicants'.[1174] The Court also went on to find a violation of Art. 8 regarding the searches.[1175]

The Court then turned to former Art. 25 (now Art. 34),[1176] the right to individual petition, and referred back to its general dictum on 'the central role of the legal profession' in a paragraph in which, '[m]ore generally, the Court expresse[d] its concern as to the inevitable chilling effect that this case must have had on all persons involved in criminal defence work or human rights protection in Turkey'.[1177] Nonetheless, it noted that '[h]owever, the Court must limit its conclusion to the facts of the present applications'.[1178] Based upon this, 'the Court [did] not find, on balance, that there ha[d] been a significant hindrance in the applicant's right of individual petition in breach of (former) Article 25 of the Convention'.[1179]

(b) Elçi *as protecting the legal profession*

Elçi is noticeable because it seems to be the first case in which the Court had to deal with measures against a larger group of lawyers, who alleged that they had been specifically targeted for reprisal as a result of exercising their professional functions. The applicants in that case alleged a systematic campaign of harassment of lawyers taking on sensitive cases, particularly those related to the PKK, referring in their application 'to the unresolved murder of 6 lawyers between 1993 and 1995, as well as the criminal prosecution of 48 lawyers practising in defence work'.[1180] The case was therefore not just one of interference with these lawyers specifically, as individuals; instead, the selection of the lawyers who had been arrested suggested that one goal of the impugned measures was to intimidate any lawyer from taking the relevant cases, in line with the 'chilling effect … on all persons

1174 Ibid, para 685.
1175 Ibid, para 669.
1176 Ibid, para 701.
1177 Ibid, para 714. 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.
1178 Ibid, para 714. Note that in more recent case law, cf eg *Aliyev v Azerbaijan* (n 1070), para 223, the Court has been much more comfortable including the general context of a case in its reasoning.
1179 *Elçi and others v Turkey* (n 1067), para 715.
1180 Ibid, para 656.

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involved in criminal defence work or human rights protection in Turkey'[1181] that the Court identified. In *Elçi* itself, it seems clear that the Court's aim was not just to protect the individuals concerned – who, after all, had not been targeted for any reason specific to their persons, but for their work as criminal defence attorneys, that is, for their *role* –, but to lay down a firm position prohibiting interference with the legal profession as a whole.

This public-interest context to the *Elçi* dictum fits well with a certain trend. The fact that the Court makes reference to the *Elçi* dictum with its greater emphasis on the public-interest 'role of the legal profession',[1182] rather than on the 'special status of lawyers'[1183] as individuals from the *Nikula* dictum, only in those cases where it then finds a violation tends to suggest that protection against systemic issues will be particularly elevated. Interference with the position of individual lawyers in isolated cases does not seem to attract use of the 'especially strict scrutiny' the *Elçi* dictum comports. However, where the Court is faced with credible allegations of 'persecution or harassment of members of the legal profession', seriously deficient domestic laws[1184] or even itself observes that its own case law 'reflect[s] a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law',[1185] the Court's 'especially strict scrutiny' will lead to a finding that the Convention has been violated.

That would tend to indicate that where the Court is of the opinion that problematic cases related to legal services are not limited to isolated incidents, but reflect more widespread problems with the role of legal services, this will be an attack on a pillar of the rule of law which will always lead to a finding of a Convention violation. In turn, that suggests that the legal profession as a whole – in the sense of the totality of lawyers available to take certain cases – will enjoy an elevated level of Convention

1181 Ibid, para 714. Note that similar problems continue, cf the open letter by a delegation of 27 bar associations published in November 2023, Law Society, 'Widespread mistreatment of lawyers in Turkey' (2023) <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/Widespread%20mistreatment%20of%20lawyers%20in%20Turkey> accessed 08 August 2024.

1182 *Elçi and others v Turkey* (n 1067), para 669.

1183 *Nikula v Finland* (n 1061), para 45

1184 cf *Heino v Finland* (n 1158); *Golovan v Ukraine* (n 1056); *Kruglov and others v Russia* (n 1158).

1185 *Aliyev v Azerbaijan* (n 1070), para 223.

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protection over and above that discussed above which individual lawyers will enjoy.[1186] While the framing of these cases remains within the individual, subjective-rights-oriented classical logic of the Convention regime,[1187] it seems possible that the applicants in these cases are benefitting from a different norm: the norm that the legal services sector in the sense of the totality of persons providing legal services is particularly protected under the Convention as part of 'the very heart of the Convention system'.[1188] While isolated cases regarding interference with the provision of legal services will be largely treated on their own merits, where the Court has the impression that a State is no longer complying properly with its obligation to ensure the availability of legal services this will be a Convention violation.

Moreover, this analysis would also explain the difference in wording between the *Nikula* and *Elçi* dicta. In this regard, it is noticeable that the *Nikula* line of cases place their emphasis squarely on the lawyer as an individual with a certain position. Conversely, the *Elçi* dictum takes 'the legal profession' as its point of departure, and indeed the sentence on 'the freedom of lawyers', which uses more individual wording, has been omitted in all but one of the subsequent references to *Elçi*.[1189] Even in the context of protection against 'persecution or harassment', the recipients of this additional protection are defined by reference to their role or group membership, the fact that they are 'members of the legal profession'. One possible analysis of this language is that it implies a sort of derivative status, where the *Elçi* dictum offers protection not so much in the recipients' own right, but as a result of their belonging to the group of lawyers.[1190]

1186 Note, for example, that even *Cazan v Romania* (n 1073) (discussed in Chapter Three, 183ff), in which the Court found a violation of a lawyer's Art. 3 rights, did not contain any reference to more general structural issues concerning harassment of lawyers in Romania.

1187 On this see Chapter Seven, 355ff.

1188 A point once again illustrated by *Aliyev v Azerbaijan* (n 1070), para 223, since otherwise it is unclear why the Court would attach significance to cases other than the one at hand. A similar alternative analysis of these cases is proposed in Chapter Nine.

1189 *Namazli v Azerbaijan* (n 1077), para 35. Omitted in *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; *Yuditskaya and others v Russia* (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* (n 1158), para 125.

1190 On the difficulties of reconciling role-based protection with traditional conceptions of human rights see Chapter Eight, 423ff.

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Simultaneously, that sits well with the main thrust of the Court's argument: Individual lawyers are being protected because 'the legal profession' as a whole is essential to maintaining the rule of law, even if there is a certain amount of fungibility at the level of the individual lawyer. One possible analysis, then, is that what the Court is actually trying to protect is the legal profession as a whole, and that the protection of individual lawyers is a part of this rather than a goal in its own right.

The comparatively recent case of *Annagi Hajibeyli v Azerbaijan* (2015)[1191] provides a particularly clear example of this wider public-interest dimension to the *Elçi* dictum. In that case, when dealing with the Government's (unsuccessful) application to have the case struck out on the basis of a unilateral declaration, the Court drew on *Rantsev v Cyprus and Russia* (2010)[1192] and explicitly clarified its own 'constitutional' role, albeit in relation to a complaint under Art. 3 of Protocol 1:

> Finally, the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States …[1193]

The Court then went on to note that, as regards parliamentary elections, the 'relatively numerous complaints brought before the Court … appea[r] to disclose an existence of systematic or structural issues which call for adequate general measures to be taken by the authorities',[1194] and ultimately went on to find a violation on this point.[1195] It then turned to the applicant's complaint that the case file relating to the application before the Court had been seized by the domestic authorities during a search of his representative's professional premises,[1196] where the applicant argued that

1191 *Annagi Hajibeyli v Azerbaijan* (n 1158).
1192 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 07 January 2010), para 197.
1193 *Annagi Hajibeyli v Azerbaijan* (n 1158), para 36. Note the contrast to *Elçi and others v Turkey* (n 1067), para 714, '[h]owever, the Court must limit its conclusion to the facts of the present applications'.
1194 *Annagi Hajibeyli v Azerbaijan* (n 1158), para 38.
1195 Ibid, para 55.
1196 Ibid, para 56.

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his representative's arrest was '"part of the (recent) serious crackdown on civil society in Azerbaijan, including the lawyers and human rights (activists)"'.[1197] In its examination of that point, the Court then referred to the *Elçi* dictum.[1198] Although, as discussed in Chapter Three,[1199] it explicitly

> [left] 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 and part of a crackdown campaign against human-rights lawyers and activists,[1200]

the Court did 'tak[e] the view that lack of access to the applicant's case file must have had a "chilling effect" on the exercise of the right of individual petition by the applicant and his representative, and that it cannot realistically be argued otherwise'.[1201] While the Court therefore did not explicitly comment on the potential existence of a structural issue, the pains it took to emphasise that it was *not* speaking about such a structural issue themselves leaves little doubt about its position.

(c) Aliyev v Azerbaijan *and the public interest in legal services*

While the Court in *Annagi Hajibeyli* was still able to ostensibly sidestep the issue of systemic problems, the later case of *Aliyev v Azerbaijan* (2018), brought by the representative in the *Annagi Hajibeyli* case, raised the problem directly. *Aliyev v Azerbaijan* concerned a variety of investigative measures (including a search of his home and office and, ultimately, his detention) against 'a well-known human-rights lawyer and civil-society activist'.[1202] At the time in question, the applicant 'represent[ed] applicants before the Court in a large number of pending cases'[1203] and was also the chairman of an NGO with the functions of 'raising legal awareness,

1197 Ibid, para 59.
1198 Ibid, para 68.
1199 cf Chapter Three, 194.
1200 *Annagi Hajibeyli v Azerbaijan* (n 1158), para 70.
1201 Ibid, para 77.
1202 *Aliyev v Azerbaijan* (n 1070), para 7.
1203 Ibid, para 7. For example, he was also the representative (as well as one of the applicants) in *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), cf ibid para 2, and represented the applicants in *Annagi Hajibeyli v Azerbaijan* (n 1158), para 2, and *Fatullayev v Azerbaijan (No 2)* App no 32734/11 (ECtHR, 07 April 2022), para 2.

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organisation of training programmes for lawyers, human-rights defenders and journalists and preparation of reports relating to various human-rights issues in Azerbaijan'.[1204] The Court, after finding a violation of Art. 8 regarding the search, also found a violation of Art. 18 taken in conjunction with Art. 8 because the measures directed against the applicant had been applied for a purpose other than those listed in Art. 8 § 2.

As part of its assessment under Art. 18 in conjunction with Art. 8, the Court was keen to highlight 'the applicant's status'.[1205] In particular, it noted that

> it is not disputed between the parties that the applicant is a human-rights defender and, more specifically, a human-rights lawyer … In line with the international materials cited above … the Court attaches particular importance to the special role of human-rights defenders in promoting and defending human rights, including in close cooperation with the Council of Europe, and their contribution to the protection of human rights in the member States. The Court also takes note of the fact that the applicant is the legal representative before the Court in a large number of cases and has submitted on behalf of the Association communications to the Committee of Ministers concerning the execution of the Court's judgments.[1206]

It then noted that

> the applicant's situation cannot be viewed in isolation. Several notable human-rights activists who have cooperated with international organisations for the protection of human rights, including, most notably, the Council of Europe, have been similarly arrested and charged with serious criminal offences entailing heavy prison sentences. These facts support the applicant's and the third parties' argument that the measures taken against him were part of a larger campaign to 'crack down on human-rights defenders in Azerbaijan, which had intensified over the summer of 2014'.[1207]

The Court then drew on the aforementioned to establish a violation of Art. 18.

> The totality of the above circumstances – specifically, the applicant's status as a lawyer representing applicants before the Convention institutions, the nature and substance of the charges brought against him, the statements made by

1204 *Aliyev v Azerbaijan* (n 1070), para 8.

1205 Ibid, para 208.

1206 Ibid, para 208.

1207 Ibid, para 214, with reference to *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), para 161. Again, note the contrast to *Elçi and others v Turkey* (n 1067), para 714, '[h]owever, the Court must limit its conclusion to the facts of the present applications'.

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> public officials, the arbitrary manner in which the search and seizure took place, the general context of the legislative regulation of NGO activity, the repercussions on the applicant's right to freedom of association and the general situation concerning human-rights activists in the country – indicates that the authorities' actions were driven by improper reasons and the actual purpose of the impugned measures was to silence and to punish the applicant for his activities in the area of human rights as well as to prevent him from continuing those activities.[1208]

In *Aliyev*, the Court clearly stated the view that the problems at stake were not individual, but systemic. Indeed, the Court even took the opportunity to include a separate section on Art. 46 of the Convention to clarify 'the type of individual and/or general measures that might be taken in order to put an end to the situation [the Court] has found to exist'.[1209] After finding that

> the measures taken against the applicant, in particular his arrest and pre-trial detention were aimed at silencing and punishing him for his activities in the area of human rights as well as at preventing him from continuing his work as a human-rights defender in breach of Article 18 of the Convention,[1210]

the Court noted that it had found similar violations in a number of other cases concerning Azerbaijan,[1211] where it had likewise

> concluded that the actual purpose of the arrest and pre-trial detention was either to silence and punish the applicants for criticising the Government or for their active social and political engagement … or to silence and punish the applicants for their activities in the area of human rights or in the area of electoral monitoring.[1212]

Having highlighted this, the Court went on to directly find the existence of a systemic problem:

> The Court notes with concern that the events under examination in all five of [the aforementioned] cases cannot be considered as isolated incidents. The reasons for the above violations found are similar and inter-connected. In fact, these judgments reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law.[1213]

1208 *Aliyev v Azerbaijan* (n 1070), para 215.
1209 Ibid, para 222.
1210 Ibid, para 223.
1211 Ibid, para 223.
1212 Ibid, para 223 (citations omitted).
1213 Ibid, para 223.

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Moreover, the Court underpinned this finding by reference to external sources, noting that

> [t]his pattern of the use of arbitrary detention in retaliation for the exercise of the fundamental rights to freedom of expression and association has also been the subject of comment by the Council of Europe Commissioner for Human Rights … and other international human-rights organisations.[1214]

It then found that

> the domestic courts, being the ultimate guardians of the rule of law, systematically failed to protect the applicants against arbitrary arrest and continued pre-trial detention in the cases which resulted in the judgments adopted by the Court, limiting their role to one of mere automatic endorsement of the prosecution's applications to detain the applicants without any genuine judicial oversight.[1215]

Clearly finding that even these direct words were not enough, the Court then

> [found] it necessary to restate that as the Convention is a constitutional instrument of European public order, the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle.[1216]

While highlighting that the issue of supervising the execution of judgments fell primarily to the Committee of Ministers,[1217] the Court then

> consider[ed] that having regard to the specific group of individuals affected by the above-mentioned pattern in breach of Article 18, the necessary general measures to be taken by the respondent State must focus, as a matter of priority, on the protection of critics of the government, civil society activists and human-rights defenders against arbitrary arrest and detention.[1218]

1214 Ibid, para 223, with reference to the Concluding observations on the fourth periodic report of Azerbaijan adopted by the United Nations Human Rights Committee (ibid, para 79) and the Report of the Special Rapporteur on the situation of human rights defenders on his mission to Azerbaijan (ibid, para 80).

1215 Ibid, para 224.

1216 Ibid, para 225.

1217 Ibid, para 226.

1218 Ibid, para 226. Compare and contrast *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014), discussed in Chapter Three, 188ff.

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(d) Elçi *in the Court's case law*

Although in the passage on Art. 46 in *Aliyev* the Court no longer made reference specifically to lawyers, all of the above focuses heavily on systemic issues in the protection of human rights defenders. It is noticeable that, for this systemic problem, the Court drew on *Elçi* and not *Nikula* – even though there was surely an argument to be made that 'the special status of lawyers' and their 'central position in the administration of justice as intermediaries between the public and the courts',[1219] their 'special role … as independent professionals'[1220] was being interfered with.[1221] Indeed, one might even have expected this, given that the Court explicitly referred to 'the applicant's status'[1222] several times, 'not[ing] that it is not disputed between the parties that the applicant is a human-rights defender and, more specifically, a human-rights lawyer'.[1223] However, no reference to *Nikula* appears in *Aliyev* – and indeed it seems that where public-interest questions are at stake, *Elçi* will be used exclusively. None of the cases in which the *Elçi* dictum appears make any sort of reference to a 'special status' in the *Nikula* sense; instead, cases appear to be classed as either falling into the *Nikula* line of cases of matters concerning individual lawyers, or into the *Elçi* line of cases of matters affecting the legal profession more generally, with corresponding variations in the level of protection the Convention affords.

Moreover, the risk of a 'chilling effect'[1224] on the provision of legal services, including for politically sensitive cases, seems to be a common denominator of the cases using the *Elçi* dictum. For example, *Aleksanyan v Russia* (2008) concerned the former head of *Yukos*' legal department, who had later represented Mikhail Khodorkovskiy and Platon Lebedev in the criminal proceedings against them.[1225] The case, therefore, had particular

1219 *Nikula v Finland* (n 1061), para 45.
1220 *Namazov v Azerbaijan* (n 1058), para 46.
1221 Indeed, in her Explanatory Memorandum to the Draft Recommendation on a European Convention on the Profession of Lawyer, Rapporteur Lahaye-Battheu cites the *Nikula* dictum in this protective, public-interest sense, Sabien Lahaye-Battheu, *The case for drafting a European convention on the profession of lawyer, PACE Doc. 14453 Report* (2017), para 6.
1222 *Aliyev v Azerbaijan* (n 1070), para 208, 215.
1223 Ibid, para 208.
1224 On this term see Chapter Six, 335ff.
1225 *Aleksanyan v Russia* (n 1158), para 7, with the Court explicitly highlighting representation 'in criminal proceedings which are now the subject of complaints before

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political sensitivity, and the applicant even alleged a violation of Art. 18.[1226] The Court first found inhuman and degrading treatment contrary to Art. 3 due to the domestic authorities' arbitrary refusal to allow the applicant medical treatment for an advanced case of AIDS.[1227] It then turned its attention to a search of the applicant's premises, where the Court highlighted the *Elçi* dictum and noted that 'the search warrants at issue were formulated in excessively broad terms',[1228] which

> gave the authorities unfettered discretion in deciding what documents to seize, and did not contain any reservation in respect of privileged documents, although the authorities knew that the applicant was a Bar Member and could have possessed documents conferred to him by his clients.[1229]

The Court therefore found a violation of Art. 8 of the Convention,[1230] as well as later finding that 'by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, the Russian Government failed to honour its commitments under Article 34 of the Convention'.[1231] The case, therefore, highlighted what the Court saw as a particularly problematic stance on the part of the Government concerned. Similarly, in *Kolesnichenko v Russia* (2009) the Court also used the *Elçi* dictum in respect of investigative measures against a defence attorney which did not seem to further the investigation in any way, but instead seemed to be a blanket collection of any materials the applicant might have been using for his activities as a lawyer.[1232] In *Heino v Finland* (2011), the Court used the *Elçi* dictum to justify why the quality of the law governing searches of attorneys' offices was particularly important,[1233] underlining a point it had made two years earlier in the *Sorvisto v Finland* (2009) judgment, but without the *Elçi* dictum.[1234] The Court therefore found that since Finnish

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the Court', referring to *Khodorkovskiy v Russia (No 1)* App no 5829/04 (ECtHR, 31 May 2011), *Lebedev v Russia* App no 4493/04 (ECtHR, 25 October 2007) and *Khodorkovskiy and Lebedev v Russia* (n 1142). The latter also makes use of the *Elçi* dictum at para 632.

1226 *Aleksanyan v Russia* (n 1158), para 174, which the Court did not find it necessary to examine separately, cf ibid, para 220.

1227 Ibid, para 155, 158.

1228 Ibid, para 216.

1229 Ibid, para 216.

1230 Ibid, para 218.

1231 Ibid, para 232.

1232 *Kolesnichenko v Russia* (n 1158), para 27, 31-34.

1233 *Heino v Finland* (n 1158), para 43.

1234 *Sorvisto v Finland* App no 19348/04 (ECtHR, 13 January 2009), para 118.

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law did 'not provide sufficient judicial safeguards either before the granting of a search warrant or after the search',[1235] it did not satisfy the minimum requirements to be 'in accordance with the law' for the purposes of Art. 8 § 2 of the Convention, a finding which the Court also made in relation to Ukrainian law in *Golovan v Ukraine* (2012).[1236] In keeping with this tendency to use *Elçi* in cases revealing wider, systemic deficits, *Kruglov and others v Russia* (2020) hinged on the problematic finding that 'Russian law at the material time did not provide for procedural safeguards to prevent interference with professional secrecy' in the course of criminal investigations,[1237] in addition to containing allusions to improper use of investigative measures since data-storage devices essential to the applicants' ability to provide legal services had been seized and retained for long periods 'for unexplained reasons'.[1238] What the cases using *Elçi* share, therefore, is a particular importance to public interests in the sense of concerning issues likely to affect the ability of the legal services sector generally to fulfil its constitutional functions, which at times has also been reflected in third-party interventions.[1239]

Although use of the *Elçi* dictum to criticise general problems is therefore generally consistent in the later cases, there is one significant difference between the original *Elçi* dictum and its subsequent use. While the original *Elçi* dictum focused on 'especially strict scrutiny by the Court',[1240] most of the later cases make reference to the fact that because 'persecution and harassment of members of the legal profession strikes at the very heart of the Convention system', 'the searching of lawyers' premises should be sub-

1235 *Heino v Finland* (n 1158), para 46.

1236 *Golovan v Ukraine* (n 1056), para 65, discussed, as regards professional secrecy, in Chapter Two at 100. A similar finding for Russian law results from *Kruglov and others v Russia* (n 1158), para 137, as regards non-Bar members.

1237 *Kruglov and others v Russia* (n 1158), para 132. Note that in *Kruglov*, the Court – in contrast to *Heino* and *Golovan* –, did not focus on 'quality of the law', but instead found that 'the searches in the present cases impinged on professional confidentiality to an extent that was disproportionate to the legitimate aim being pursued', ibid, para 136.

1238 Ibid, para 145.

1239 *Golovan v Ukraine* (n 1056), para 50, featuring a third-party intervention by the Union Internationale des Avocats; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 61, featuring a third-party intervention by the International Commission of Jurists.

1240 *Elçi and others v Turkey* (n 1067), para 669.

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ject to especially strict scrutiny',[1241] whereupon the Court 'ha[d] to explore the availability of effective safeguards against abuse or arbitrariness under domestic law and check how those safeguards operated in the specific case under examination'.[1242] The focus in these later cases was consequently less on scrutiny specifically by the European Court of Human Rights, but by the domestic courts, exhorting the latter to exercise 'especially strict scrutiny'. In subsequent cases, the *Elçi* dictum has therefore not only been used to protect legal services by means of judgments of the European Court of Human Rights itself, but instead – in line with the principle of subsidiarity – also to demand stronger protection at the domestic level; in the cases concerned the domestic courts had either not been able to act[1243] or had granted excessively broad search warrants without serious scrutiny of the application.[1244] In this regard, use of the *Elçi* dictum may be symptomatic of a wider tendency in the Court's case law: the realisation, from the late 1990s and the corresponding surge in case numbers onwards, that without effective defence of human rights at the domestic level the Convention system will rapidly overload and break down.

1241 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Yuditskaya and others v Russia* (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; slightly rephrased in *Kruglov and others v Russia* (n 1158), para 125.

1242 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Yuditskaya and others v Russia* (n 1158), para 27; *Kruglov and others v Russia* (n 1158), para 125.

1243 As in *Heino v Finland* (n 1158), para 44, where 'there was no independent or judicial supervision when granting the search warrant as the decision to authorise the order was taken by the police themselves', leading to a situation in which '[t]he applicant's right to respect for her home was thus violated by the fact that there was no prior judicial warrant and no possibility to obtain an effective judicial review a posteriori of either the decision to order the search or the manner in which it was conducted', ibid, para 45, a 'situation … aggravated by the fact that the search took place in an attorney's office'. See also *Kruglov and others v Russia* (n 1158), para 137, as regards non-Bar-member lawyers.

1244 *Aleksanyan v Russia* (n 1158), para 216; *Kolesnichenko v Russia* (n 1158), para 32; *Yuditskaya and others v Russia* (n 1158), para 28-30; *Kruglov and others v Russia* (n 1158), paras 127, 129. *Golovan v Ukraine* (n 1056), para 60, is perhaps something of a special case, since the Court simply assumed that 'the current status of the domestic law thus afforded the authorities full discretion' (ibid, para 60), based on its assumption that the Ukrainian law that 'documents relating to a lawyer's professional activity may not be examined, divulged or seized without the lawyer's consent' (ibid, para 35) had to be subject to unwritten exceptions, cf Chapter Two, n 372 and accompanying text.

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Finally, in terms of the Court's reasoning, the aforementioned separation between individual and public-interest issues is also supported by the fact that two cases from the *Elçi* line of cases make explicit reference to international (soft-law) materials on the position of lawyers, which also typically focus on lawyers as a prerequisite of the rule of law rather than simply as bearers of certain private interests.[1245] The first of these two cases is *Elçi* itself, where the UN Basic Principles on the Role of Lawyers were mentioned,[1246] without, however, the Court clarifying what weight (if any) it gave these. Moreover, the recent case of *Kruglov and others v Russia* contains reference to the UN Basic Principles,[1247] Recommendation R(2000)21[1248] and Recommendation R(2018)2121,[1249] which made reference to a number of further materials in the context of the drafting of a 'European Convention on the Profession of Lawyer'.[1250] Both *Kruglov*[1251] and *Aliyev*[1252] also contain reference to soft-law documents on the protection of human rights defenders.[1253] In addition to highlighting the Court's desire to display its findings in these highly controversial cases as the result of a broad, pan-European[1254] consensus, these references to quasi-legislative

1245 eg United Nations, *Basic Principles on the Role of Lawyers* (1990), penultimate preambulatory paragraph; Committee of Ministers of the Council of Europe, *Recommendation R(2000)21 on the Freedom of Exercise of the Profession of Lawyer* (2000), preamble, although it is also worth noting that individual parts of these documents have also been cited in some of the cases from the *Nikula* line of cases. These documents are discussed in Chapter One, 34ff.

1246 *Elçi and others v Turkey* (n 1067), para 564.

1247 *Kruglov and others v Russia* (n 1158), para 104.

1248 Ibid, para 103.

1249 Ibid, para 105.

1250 Specifically, the Court mentioned 'the Council of Bars and Law Societies of Europe's Charter of Core Principles of the European Legal Profession, the International Association of Lawyers' Turin Principles of Professional Conduct for the Legal Profession in the 21st Century and the International Bar Association's Standards for the Independence of the Legal Profession, International Principles on Conduct for the Legal Profession and Guide for Establishing and Maintaining Complaints and Discipline Procedures', ibid, para 105. On the project of a European Convention on the Profession of Lawyer see Chapter One at 47.

1251 Ibid, para 104.

1252 *Aliyev v Azerbaijan* (n 1070), para 88ff.

1253 Note that similarly to the *Nikula* dictum it appears that the *Elçi* dictum will not require Bar membership to apply, since eg in *Kruglov* the Court went from reference to the *Elçi* dictum to the finding that even non-Bar member legal representatives had to have some level of additional protection under the Convention (*Kruglov and others v Russia* (n 1158), para 125ff, particularly at para 137).

1254 And, as concerns the UN Basic Principles, even global.

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materials suggest that the Court is aware that it is departing from the narrow confines of the case at hand.

The Court's case law, then, reveals a difference between interference with the rights of individual lawyers (which may or may not be justified, as the case may be) and interference with 'the legal profession', which can never be justified. In these latter cases, the Court will draw on the *Elçi* dictum and apply 'especially strict scrutiny' – which, given that the Court has never, to date, moved from here to a finding of 'no violation', will effectively mean that the Court will find a violation of the Convention.

That suggests, then, that the Court's case law may actually contain a hierarchy of norms.[1255] While interference with the activities of individual lawyers can be justified subject to certain conditions, where the State's activities have an impact on legal services *generally* this can never be justified. On this view, the question becomes more about distinguishing between these two groups of cases.

3. 'The legal profession'

The above, then, indicates that in addition to the rights of clients and of lawyers, there is a third, more diffuse element in the Court's case law: 'the legal profession'. This is perhaps the most difficult part of the Court's case law to analyse, at least on a traditional analysis based only on Convention rights.[1256] 'The legal profession' is neither an individual, a non-governmental organisation nor a group of (identifiable) individuals within the meaning of Art. 34 and therefore unable to bring individual applications.[1257] Nor is 'the legal profession' part of the State, given the clear position that the Court has taken that 'a lawyer, even if officially appointed, cannot be considered to be an organ of the State'.[1258] On the other hand, 'the legal profession' is also clearly not a legal nullity; the Court, in its case law, has made a number of references to how it expects 'the legal profession' to be.

1255 For greater detail on the different duties the Convention imposes on States in this area see Chapter Nine.

1256 Discussing this see Chapter Eight.

1257 For an analysis that questions whether all Convention norms must comport rights in this way see Chapter Seven.

1258 *Siałkowska v Poland* (n 1087), para 99, and the section on State responsibility for the actions of lawyers in individual cases in Chapter Two, 122ff.

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These include, first and foremost, independence. As the Grand Chamber put it in *Morice v France* (2015), 'independence of the legal profession … is crucial for the effective functioning of the fair administration of justice'.[1259] 'Independence of the legal profession', moreover, has also come up in a number of other cases, particularly in those regarding effective legal aid.[1260] This 'independence' appears to be primarily directed against the State. While for those cases relating to effective legal aid the Court has said as much directly (referring to 'the independence of the legal profession from the State'),[1261] as regards the *Morice* line of cases it appears clear from the context. In *Morice*, the Court noted that '[t]he question of freedom of expression is related to the independence of the legal profession'.[1262] While the Court did not clarify as much, it seems from the situation on which the Court was adjudicating that it was trying to avoid or limit situations in which State authorities would have to decide on whether or not a lawyer was permitted to make certain statements.

In addition to being 'independent', this 'legal profession' must be able to 'provide effective representation'. In a number of cases on freedom of expression in the courtroom,[1263] the Court has highlighted that '[f]or the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation',[1264] using this to justify greater protection for lawyers' statements in the courtroom.

1259 *Morice v France [GC]* (n 1070), para 135. The quote also appears in *Siałkowska v Poland* (n 1087), para 111, *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 45, *Radobuljac v Croatia* (n 1097), para 61, and *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.

1260 HUDOC lists this phrase in a total of 82 cases, the first of which is the *Kamasinski v Austria* (n 1065) judgment discussed above (ibid, para 65, and Chapter Two, 122ff). In keeping with the *Kamasinski* case, most cases using the phrase 'independence of the legal profession' relate to the State's responsibility in cases regarding allegedly deficient provision of legal aid.

1261 Ibid, para 65.

1262 *Morice v France [GC]* (n 1070), para 135; *Bono v France* (n 1259), para 45; *Radobuljac v Croatia* (n 1097), para 61; *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.

1263 See Chapter Three, 158ff.

1264 *Kyprianou v Cyprus [GC]* (n 1063), para 175; *Kincses v Hungary* (n 1096), para 34; *Morice v France [GC]* (n 1070), para 132; *Helmut Blum v Austria* App no 33060/10 (ECtHR, 05 April 2016), para 64; *Radobuljac v Croatia* (n 1097), para 60; *Jankauskas v Lithuania (No 2)* (n 1110), para 74; *Lekavičienė v Lithuania* App no 48427/09 (ECtHR, 27 June 2017), para 51; *Correia de Matos v Portugal [GC]* (n

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Furthermore, this 'legal profession' has a certain amount of 'dignity': As regards freedom of expression for lawyers, the Court has explicitly referred to 'the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession'.[1265] This latter point, dignity, is particularly important because it appears that the dignity of this ill-defined agglomeration can be opposed to the rights of individual lawyers.[1266] The Court has explicitly held that lawyers 'are subject to restrictions on their professional conduct, which must be discreet, honest and dignified'.[1267]

Finally, as regards the collective term of 'the legal profession', the Court has of late shown greater awareness of the significance of collectives of lawyers. In recent cases, it has made reference to 'professional associations of lawyers'.[1268] The first of these references came in *Jankauskas v Lithuania (No 2)* (2017), where the Court 'reiterate[d] that professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently'.[1269] The Court has since

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1097), para 139; *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* (n 1097), para 88.

1265 *Schöpfer v Switzerland* (n 1096), para 33; *Nikula v Finland* (n 1061), para 46; *Wingerter v Germany (dec)* (n 1096) 6; *A v Finland (dec)* (n 1096) 11; *Amihalachioaie v Moldova* (n 1096), para 28; *Schmidt v Austria* App no 513/05 (ECtHR, 17 July 2008), para 36; *Kincses v Hungary* (n 1096), para 38.

1266 On this point see also Chapter Nine, 470ff.

1267 *Morice v France [GC]* (n 1070), para 133; *Radobuljac v Croatia* (n 1097), para 60; *Tuğluk and others v Turkey (dec)* (n 1096), para 35; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78. See also, with minor linguistic variations, *Casado Coca v Spain* (n 1092), para 46; *Steur v the Netherlands* (n 1096), para 38; *Böhm v Germany (dec)* (n 1096) 5; *Ignatius v Finland (dec)* (n 1096) 5; *Veraart v the Netherlands* App no 10807/04 (ECtHR, 30 November 2006), para 51; *Ayhan Erdoğan v Turkey* App no 39656/03 (ECtHR, 13 January 2009), para 26; *Jankauskas v Lithuania (No 2)* (n 1110), para 75; *Lekavičienė v Lithuania* (n 1264), para 52; *Correia de Matos v Portugal [GC]* (n 1097), para 140; *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* (n 1097), para 88.

1268 This term seems to have been taken from the Preamble to Council of Europe Recommendation R(2000)21 on the freedom of exercise of the profession of lawyer, discussed in Chapter One, 38ff.

1269 *Jankauskas v Lithuania (No 2)* (n 1110), para 78. Given the close connection to the Bar Association in that case, it appears the Court will use 'professional associations of lawyers' as a synonym for Bar associations.

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reprised this statement in three cases against Azerbaijan.[1270] Moreover, the Court has also referred to 'Bar Associations', who 'perform a self-regulation function'.[1271] While this does mean the Court has used several different terms to describe collectives of lawyers, it seems from the context that these are intended as synonyms: In both of the cases which make explicit reference to both 'professional associations of lawyers' and 'Bar associations', the Court moved fluidly from one term to the other, indicating that it understands them as substantially the same. However, since Bar associations *are* part of the State for Convention purposes,[1272] such 'professional associations of lawyers' are clearly not the same as 'the legal profession'.

These points are all rather abstract. However, the Court has, in a variety of judgments, provided indication of how it would like to see them operationalised. The following section examines these specific arrangements for 'the legal profession' in greater detail, focusing in particular on the extent and methods by which this 'legal profession' should be regulated.

II. Specific arrangements for legal services?

The Court, then, has stressed extensively how important lawyers and the provision of legal services are to the Convention system. Without legal services meeting certain quality criteria, full realisation of the Convention's goals is not possible. To ensure this, many domestic legal systems regulate the market for legal services, on the premise that State intervention is needed to ensure that the corresponding policy goals are met. Such regulation, however, is also subject to the fox-henhouse tension, discussed above, that one of the roles of legal services is to protect against the State. As a result, and as the Court has emphasised consistently, 'independence' is an important criterion for legal services, leading to a complex relationship between regulating the market for legal services and ensuring that lawyers remain independent.

1270 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

1271 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60. See also *Jankauskas v Lithuania (No 2)* (n 1110), para 78.

1272 See below 288ff.

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These areas may initially seem entirely beyond the ambit of human rights law.[1273] However, given that the availability of high-quality legal services, which is a key requirement for the realisation of human rights, may depend on them, they are of crucial importance to the Convention rights. The following section therefore examines the assumptions the Court makes as regards the regulation of legal services, beginning with the extent to which the market for legal services should be regulated (1.) and following up with the question of how such regulation should be effected (2.).

1. A (partially) regulated market for legal services?

The first question, then, refers to the Court's position on regulating the legal services market in general. For example, should (certain) legal services be reserved to certain groups of persons, themselves subject to additional requirements as regards competence or personal qualities? While some systems in the Council of Europe States make extensive reservation in this regard, others assume that market forces will generate appropriate results, with both too much and too little restriction on the provision of legal services potentially generating harmful outcomes. Given the specificities of legal services which the Court has emphasised, the following section assesses whether the Court prefers an at least partially regulated market, perhaps with certain activities reserved to certain groups, which are themselves subject to additional requirements as regards competence or personal qualities.

(a) *Reservation of the provision of legal services*

From the case law, there is some indication that the Court assumes that legal services will in principle be regulated. In the two most recent cases on the legal profession in Azerbaijan, the Court merely made statements '[a]s regards the regulation of the legal profession',[1274] without dealing with the question of whether and to what extent such regulation is compatible in principle with the Convention. Similarly, in the *Nikula* dictum on the

1273 At least if one focuses exclusively on rights and corresponding directed duties. For an alternative analysis see Chapter Seven.

1274 *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

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'special status of lawyers' and their 'central position in the administration of justice',[1275] the Court has justified 'restrictions on [lawyers'] professional conduct' by reference to the 'exclusive rights and privileges' that they supposedly enjoy, which again indicates broad approval for the regulation of legal services.

If regulation is therefore generally permissible, the obvious follow-up question is to what extent it is permissible under the Convention to reserve certain legal services to certain groups, reservations that the majority of Council of Europe countries make to a greater or lesser degree.[1276] To put it in terms more familiar in a human rights context: To what extent is it permissible to prohibit the general public from providing certain services? The point is all the more pressing since, as with many such reservations, even in the Court's case law there have been allegations of abuse,[1277] and increased regulation can be used as an excuse to interfere with the legal profession by States acting in bad faith.[1278]

Once again, the Court's statements have been largely oblique. Given that the Court uses the *Nikula* dictum consistently despite the fact that a lack of exclusive rights and privileges would seem to question the basis for additional restrictions on lawyers' professional conduct, the Court seems to take as its point of departure systems with robust reservations on certain legal services, 'exclusive rights and privileges', to use the Court's diction.

1275 cf 227ff.

1276 See for an introduction eg European Commission for the Efficiency of Justice, *European judicial systems: CEPEJ Evaluation Report - Part 1: Tables, graphs and analyses*, 2020) 71, although this focuses on monopolies on legal representation and largely ignores monopolies on out-of-court legal services.

1277 See eg *De Moor v Belgium* App no 16997/90 (ECtHR, 23 June 1994), paras 10, 46, and *Misson v Belgium (dec)* App no 41357/98 (ECtHR, 10 May 2001) 2. In both cases, the applicants alleged – not entirely unreasonably, given the justifications given by the local Bar authorities for refusing to admit them – that the Bar associations had been trying to use their power of admission to keep the number of practising lawyers in the region artificially low and thereby ensure their economic gain. Furthermore, the applicant in *Turczanik v Poland* App no 38064/97 (ECtHR, 05 July 2005), para 32ff, even managed to secure a decision by the Office for the Protection of Competition and Consumers finding that 'the Bar Association engaged in monopoly practices restraining competition in the service provision market', which, however, was ultimately overturned.

1278 cf eg Human Rights House Foundation, 'International standards and mechanisms must protect all lawyers regardless of Bar membership' (2021) <https://humanrighthouse.org/articles/international-standards-and-mechanisms-must-protect-all-lawyers-regardless-of-bar-membership/> accessed 08 August 2024.

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Unsurprisingly, the Court does not, in principle, seem to disagree with reservation of legal services to certain groups, and indeed seems to see this as the norm rather than the exception, particularly since eg where the applicant does not fulfil the criteria under domestic law to provide legal services, the Court will, inter alia, not see their position as protected by Art. 1 of Protocol 1.[1279]

Despite this underlying preconception of a legal services sector with a significant number of reserved activities, as regards the question of who, under the Court's case law, may be allowed to provide legal services, the States will enjoy an extremely wide margin of appreciation. Across the Council of Europe, there are a wide variety of different regulatory models, ranging from near-total reservation[1280] to almost total deregulation of the legal services market.[1281] However, in the Court's case law there are significantly fewer cases on provision of legal services by non-Bar members than by those who belong to the Bar. This may be a result of the Court's focus on traditional roles for lawyers, such as criminal litigation, where such reservations are more frequent,[1282] as well as the fact that much of the older case law was developed before the largely deregulated legal services markets joined the Convention.

The Court has not voiced overt criticism of either of these conceptual points of departure. Instead, in *Kruglov*, as regards the comparatively deregulated legal services market in the Russian Federation, it held that '[i]t is for States to determine who is authorised to practise law within their jurisdictions, and under what conditions'.[1283] Even though, as noted, the latter model questions the foundations of some of the Court's case law,[1284] the Court has not objected to it. Instead, it has interacted with a wide range of different reservation provisions, without usually questioning their general permissibility under the Convention. While, in addition to the historical reasons identified above, this position is in keeping with the Court's generally more permissive standard of review where States make policy choices, it does seem somewhat ironic that despite the larger number of persons affected, abstract prohibitions restricting the provision of legal

1279 *Hoerner Bank GmbH v Germany (dec)* App no 33099/96 (ECtHR, 20 April 1999) 5.
1280 eg Germany.
1281 eg, while it was still a Member State, the Russian Federation.
1282 cf European Commission for the Efficiency of Justice (n 1276) 71.
1283 *Kruglov and others v Russia* (n 1158), para 137.
1284 Notably the *Nikula* line of cases with their focus on 'exclusive rights and privileges'.

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services seem subject to less scrutiny than interference with individual cases. In essence, this means that for States attempting to interfere with the provision of legal services it would be simpler to limit the number of lawyers severely, rather than resorting to harassment in individual cases; from this point of view, the legal profession as a whole arguably seems to enjoy a level of protection weaker than that which individual lawyers enjoy, in stark contrast to the *Elçi* dictum.[1285]

i. *Reservations based on qualification*

The type of reservation that comes up most frequently in the Court's case law is that of certain minimum qualifications, frequently combined with requirements such as admittance to a professional organisation such as a Bar association.[1286]

Given that such reservations can limit Convention rights, it is worth clarifying, first and foremost, that the Court is of the opinion that restrictions on the provision of legal services can in principle be justified. This is clear eg from *Bigaeva v Greece* (2009), where the Court noted that while the refusal to admit the applicant to the Bar examination constituted an interference with her private life, that interference had been provided for by law and had pursued the legitimate aim of the prevention of disorder, since its goal was to regulate access to the Bar and therefore to a profession which participated in the good administration of justice.[1287] Implicitly, the Court therefore also accepted the reservation for which Greek law in principle provided, given that the Court made no criticism in this respect, a finding perhaps even clearer in *Buzescu v Romania* (2005), where the Court explicitly found 'protect[ing] the public by ensuring the competence of those carrying on the legal profession' to be a legitimate aim for Convention purposes.[1288] Similarly, in a number of other cases surrounding the field of restrictions on who may provide certain legal services, the Court has raised no general issues as regards such restrictions, or has even noted

1285 Discussed at 240ff.
1286 Frequently, these also convey a particular status that comes with a reserved title.
1287 *Bigaeva v Greece* (n 1084), para 31.
1288 *Buzescu v Romania* (n 1070), para 93.

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that ensuring minimum qualification is a legitimate aim.[1289] Elsewhere, the Court has approved a regulated market, as in *Buzescu v Romania*, where it noted that the Romanian Union of Lawyers, which was 'invested with administrative as well as rule-making prerogatives', 'pursue[d] an aim of general interest in relation to the legal profession by exercising a form of public control over, for instance, registration with the Bar'.[1290]

From the Court's point of view, restrictions intended to correct the market failure caused by legal services' status as a credence good are also unproblematic. For example, 'the legal requirement for defence counsel to hold a law degree' is not a violation of Art. 6 § 3 (c) ECHR,[1291] 'since the particular legal qualifications can be required to ensure the efficient defence of a person … and the smooth operation of the justice system'.[1292] Similarly, the Court has found reservation of legal services before eg superior courts compatible with the Convention.[1293] This was particularly clear in the Grand Chamber's judgment in *Meftah and others v France* (2002), where the Court even noted that '[a]dmittedly, the aim of [the applicants] is above all to challenge the monopoly enjoyed by members of the *Conseil d'Etat* and Court of Cassation Bar, a monopoly the Government consider to be justified by the special nature of the proceedings in question'.[1294] It then went on to find that

> it is clear that the special nature of proceedings before the Court of Cassation, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations … and that such a reservation does not deny

1289 cf eg *Hoerner Bank GmbH v Germany (dec)* (n 1279) 5, '[t]out d'abord, la modification de la loi sur le conseil juridique poursuivait un but d'intérêt général : réglementer la profession de conseil juridique, en garantissant au public la compétence de ceux qui l'exercent', 'firstly, the amendment of the Legal Advice Act pursued a legitimate aim in the public interest: to regulate the profession of legal advisor in order to guarantee to the public the competence of those practicing it' (author's translation). Note that the Court also went on to find that subjecting the relevant probate activity in question to a requirement of prior authorisation was not disproportionate to the legitimate aim pursued.

1290 *Buzescu v Romania* (n 1070), para 78.

1291 *Shabelnik v Ukraine* App no 16404/03 (ECtHR, 19 February 2009), para 39; *Zagorodniy v Ukraine* App no 27004/06 (ECtHR, 24 November 2011), para 52.

1292 *Zagorodniy v Ukraine* (n 1291), para 53.

1293 As the European Commission for the Efficiency of Justice (n 1276) 71 notes, restrictions on legal services typically increase from instance to instance.

1294 *Meftah and others v France [GC]* App no 32911/96 and others (ECtHR, 26 July 2002), para 45 (emphasis in original).

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> applicants a reasonable opportunity to present their cases under conditions that do not place them at a substantial disadvantage.[1295]

In later judgments, the Court has summarised this line of its case law by noting that

> the requirement that an appellant be represented by a qualified lawyer before the court of cassation, such as applicable in the present case, cannot, in itself, be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as a highest court examining appeals on points of law and it is a common feature of the legal systems in several member States of the Council of Europe.[1296]

This case law has also been upheld where the applicant has wanted to choose a representative who, while a member of the Bar, did not have standing specifically before the appellate court concerned.[1297] While such a reservation of legal services before superior courts is therefore permissible, there is, conversely, no obligation to create such a reservation. In other cases, the Court has also approved systems which do not restrict access in this way,[1298] and explicitly permitted a move to abolish such a system in *Wendenburg and others v Germany (dec)*.[1299]

In addition to these judgments concerning reservation of certain activities, the Court has also held that it is permissible to reserve certain titles. As such, titles which evoke a certain amount of additional expertise can

1295 Ibid, para 47.

1296 *Staroszczyk v Poland* (n 1088), para 128. See also *Arciński v Poland* App no 41373/04 (ECtHR, 15 September 2009), para 35, *Smyk v Poland* App no 8958/04 (ECtHR, 28 July 2009), para 58, *Anghel v Italy* App no 5968/09 (ECtHR, 25 June 2013), para 54.

1297 *Vogl v Germany (dec)* App no 65863/01 (ECtHR, 05 December 2002), approving the German system of limited standing rights before the Federal Court of Justice Civil Division.

1298 cf eg *Rivera Vazquez and Calleja Delsordo v Switzerland* App no 65048/13 (ECtHR, 22 January 2019) with reference to the standing rules regarding the Swiss Federal Supreme Court, which in principle also permits litigants in person.

1299 *Wendenburg and others v Germany (dec)* App no 71630/01 (ECtHR, 06 February 2003). The case is noticeable in that the Court preferred this general point to the more specific question of whether there had been an interference with the applicants' rights, where it expressed serious doubts but left the question open (ibid 24). Moreover, the case is also notable for the significant variations in the number of lawyers practising in each field, which in some areas were in the low double digits, ibid 17.

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be reserved to those who fulfil certain requirements, as is clear from the admissibility decision in *Heimann v Germany (dec)*.[1300]

Moreover – and in keeping with the Court's *Nikula* dictum justifying 'exclusive rights and privileges' by reference to additional burdens – reservations can also be made conditional on performing certain additional obligations. It is not impermissible to expect lawyers to maintain their qualifications through continuing professional development obligations; in the admissibility decision in *Krikorian v France (dec)*, where the applicant argued that continued learning obligations constituted degrading treatment in the Art. 3 sense,[1301] the Court did not even dignify this rather absurd submission with a response. Moreover, such reservation may also be contingent on additional contributions to the administration of justice, such as handling certain cases in the public interest. Where, for example, a pupil *avocat* was required to act without remuneration,[1302] the Court did not find that this constituted 'compulsory labour' within the meaning of Art. 4 § 2.[1303] Additional responsibilities for those who enjoy an exclusive right to perform certain activities are therefore in principle permissible.

ii. *Reservations based on personal standing*

Beyond these reservations based upon a minimum level of (legal) qualification, a number of States also make reservations based on personal standing. In the Court's case law, these have typically come in two forms, either attached to certain professions deemed incompatible or attaching directly to features such as the applicant's 'character'.

For example, the Court in *Lederer v Germany (dec)* found it permissible to ban all civil servants from Bar membership as insufficiently 'independent', even those who – like German university professors – had other guarantees of independence under domestic law. Given that the Court considered that it was undeniable that the measure pursued a legitimate aim, that of guaranteeing the independence of the legal profession in the interest of the good administration of justice, this did not constitute a

1300 *Heimann v Germany (dec)* (n 1117) 7.
1301 *Krikorian v France (dec)* App no 6459/07 (ECtHR, 26 November 2013), para 47.
1302 *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983), para 24.
1303 See also *Graziani-Weiss v Austria* App no 31950/06 (ECtHR, 18 October 2011), para 42.

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Convention violation.[1304] As the Court put it, there was an incompatibility in principle between the status of permanent civil servant, characterised by the pre-eminence of the public law link which united them with the State, and that of lawyer, the latter exercising an essentially liberal profession and occupying a central role as an independent officer of the court.[1305] The respondent State had not therefore exceeded its (wide)[1306] margin of appreciation. Similarly, in *Lykourezos v Greece* (2006) the Court did not question the Convention-compliance of a total ban on members of parliament being members of the Bar,[1307] but merely focused on the specifics of the case and the fact that the applicant had been deprived of his seat in parliament despite having been elected in full accordance with the prior legal rules, which had not contained absolute incompatibility.[1308] While therefore generally permissible, it does seem that the Court will require such incompatibility rules to be rather clear, given that in *Mateescu v Romania* (2014) it found a violation of Art. 8 because

> the wording of the legal provisions regulating the practice of the profession of lawyer was not sufficiently foreseeable to enable the applicant … to realise that the concurrent practice of another profession, not enumerated among those excluded by the law, entailed the denial of his right to practise as lawyer.[1309]

In addition to these formal rules on incompatibility with other professions, the Court has also ruled on whether it is permissible to restrict provision of legal services to those with a certain 'good character'. For example, in *Döring v Germany (dec)* the Court found it permissible to ban an ex-GDR judge who had participated in a number of politically motivated trials[1310] from becoming an attorney, noting inter alia that lawyers were persons

1304 *Lederer v Germany (dec)* App no 6213/03 (ECtHR, 22 May 2006) 8.
1305 Ibid 7.
1306 Ibid 8.
1307 *Lykourezos v Greece* App no 33554/03 (ECtHR, 15 June 2006), para 53: 'In the instant case, the applicant has invited the Court to censure the absolute nature of the disqualification in question, and especially the wide interpretation given to it by the Special Supreme Court in the absence of the implementing legislation envisaged by the Constitution. Nevertheless, however interesting those aspects of this case may be, it is not the Court's task to state its view on the general prohibition on practising any profession; it confines itself to observing that this blanket prohibition, created by the new Article 57 of the Constitution, introduces a disqualification that is rarely encountered in other European States.'
1308 Ibid, para 57.
1309 *Mateescu v Romania* App no 1944/10 (ECtHR, 14 January 2014), para 32.
1310 *Döring v Germany (dec)* App no 37595/97 (ECtHR, 09 November 1999) 2.

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who, by reason of the nature of the functions they exercised within the rule of law, were subject to particularly high standards of integrity and morality[1311] and that these restrictions also aimed to protect the public by guaranteeing the integrity and morality of those exercising the profession of attorney.[1312] Similarly, in *Kayasu v Turkey* (2008), in which following his dismissal as a prosecutor the applicant was also banned from working as an attorney,[1313] the Court made no allusion, critical or otherwise, to this point despite the applicant's direct insistence on it. Moreover, the Court has also found that 'it is clearly within the margin of appreciation afforded to the Contracting States to provide by law that members of the profession of lawyers who no longer have appropriate financial resources and have been declared bankrupt should no longer exercise that profession'.[1314] The Court has also found no violation of the Convention where a domestic rule restricts admission to the Bar to nationals of that country and EU citizens.[1315]

In line with this, it is also permissible for States to have rules that being convicted of certain criminal offences will lead to automatic disbarment. For example, in *Biagioli and Biagioli v San Marino (dec)*, the applicant's 'disbarment was a result of his having been found guilty of a criminal offence, namely making false declarations in public documents, for which he was sentenced to two years imprisonment'.[1316] The Court 'consider[ed] that in providing for the impugned sanction (applied by the relevant organs), which was established by the legislator and not subject to individual discretion, the respondent State did not overstep its margin of appreciation', 'not only because of the criminal element but particularly because of the relation between the offence at issue and the mentioned professions' of lawyer and notary.[1317]

1311 Ibid 7, 'personnes qui, de par la nature des fonctions qu'elles exercent au sein d'un l'Etat [sic] de droit, sont soumis à des exigences d'intégrité et de moralité particulièrement élevées'.

1312 Ibid 7, although as discussed Chapter Three at 198 the Court did also highlight the exceptional circumstances of German reunification.

1313 *Kayasu v Turkey* App no 64119/00; 76292/01 (ECtHR, 13 November 2008), paras 46, 53.

1314 *Klein v Austria* App no 57082/00 (ECtHR, 03 March 2011), para 53.

1315 *Bigaeva v Greece* (n 1084), para 40.

1316 *Biagioli and Biagioli v San Marino (dec)* App no 8162/13 (ECtHR, 08 July 2014), para 103.

1317 Ibid, para 103.

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Beyond these legal limitations on the legal profession, there are also de facto limitations on compatibility between the legal profession and judicial functions which arise from other areas of the Court's case law. For instance, while the Court has been keen to highlight that it is possible 'that legislation and practice on the part-time judiciary in general can be framed so as to be compatible with Article 6',[1318] this is an area where States will have to be particularly careful if they want to avoid their part-time judges falling foul of Art. 6 § 1's 'independent and impartial' limb. As regards lawyers sitting as part-time judges, these cases have usually concerned doubts arising from previous interactions, whether between the part-time judge and the defendant State[1319] or regarding interactions between the lawyers concerned outside of their judicial roles.[1320]

Finally, personal reservations intended to promote access to justice are also permissible according to the Court. In the admissibility decisions in *Appas v Greece (dec)* and *Svintzos v Greece (dec)*, the Court upheld Greek procedural rules limiting standing before courts to lawyers registered with the local Bar association on the basis that these had pursued the aim of incentivising lawyers to set up their practice in more remote areas, thereby securing access to justice for underprivileged regions,[1321] which the Court explicitly classed as a legitimate public-interest aim.[1322]

iii. *Liberalising tendencies*

While the Court thus takes a tolerant position in terms of reservations, and eg the *Nikula* dictum seems to indicate that the Court assumes that such restrictions will exist at the domestic level, the Court has also not objected to liberalisation at the domestic level.

1318 *Wettstein v Switzerland* App no 33958/96 (ECtHR, 21 December 2000), para 41; *UTE Saur Vallnet v Andorra* App no 16047/10 (ECtHR, 29 May 2012), para 48; similar wording in *Steck-Risch and others v Liechtenstein* App no 63151/00 (ECtHR, 19 May 2005), para 39. For an instance of a similar problem where a lawyer later joined the judiciary see *Meznaric v Croatia* App no 71615/01 (ECtHR, 15 July 2005).

1319 eg *UTE Saur Vallnet v Andorra* (n 1318), which concerned a case in which the part-time judge was a partner of a law firm which advised the defendant government.

1320 eg *Wettstein v Switzerland* (n 1318), in which the part-time judge had, in the course of his main profession as a lawyer, previously acted against one of the parties' lawyers, giving rise to doubts as to his impartiality.

1321 *Appas v Greece (dec)* (n 1059) 7; *Svintzos v Greece (dec)* (n 1059) 4.

1322 *Appas v Greece (dec)* (n 1059) 10; *Svintzos v Greece (dec)* (n 1059) 5.

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For example, in *Wendenburg and others v Germany (dec)*,[1323] which concerned a change in German procedural law allowing all lawyers access to the appellate courts,[1324] the Court found the complaint manifestly ill-founded where the applicants 'complained under Article 1 of Protocol No. 1 that the change of law abolishing exclusive rights of audience in the courts of appeal had deprived them of their means of existence, thereby violating their right to property' and 'hindered them in the exercise of their profession and adversely affected their family life' contrary to Art. 8 because they had been 'deprived … of their livelihood'.[1325] Given the extensive reasoning adduced by the domestic Federal Constitutional Court in striking down the system of exclusive rights of audience as unconstitutional, and emphasising heavily the fact that there had even been a transitional period allowing the applicants to prepare for the loss of their monopoly,[1326] the Court found that, leaving open the question of whether there had been an interference with the applicant's rights under Art. 1 Protocol 1, this had in any case been proportionate.[1327] Moreover, the Court also does not object to the provision of legal services by non-Bar lawyers, as a variety of cases in which such lawyers have acted show.[1328]

(b) *A sustainable economic basis?*

These reservations, of course, essentially create an oligopoly. Competition on the legal services market is limited to the market participants.[1329] This raises a closely related question, the economic dimension of legal services. A legal services sector that can fulfil its constitutional tasks needs a sustainable economic basis, even if professional organisations of lawyers typically present this as a subordinate factor.[1330] The experts which protection of hu-

1323 *Wendenburg and others v Germany (dec)* (n 1299).
1324 Replacing the prior and highly fragmented system by which, in some states, only those lawyers registered with exclusive rights of audience were allowed to plead before the courts of appeal.
1325 *Wendenburg and others v Germany (dec)* (n 1299) 19.
1326 Ibid 26.
1327 Ibid 26. The Court did not examine Art. 8 separately.
1328 eg *Rozhkov v Russia (No 2)* App no 38898/04 (ECtHR, 31 January 2017); *Mikhaylova v Ukraine* (n 1136).
1329 And may be further limited by rules such as mandatory pricing arrangements.
1330 cf eg the criticism by the Romanian National Bar Association in *Mateescu v Romania* (n 1309), para 14, that 'in wanting to practise both professions [that of

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man rights requires need some level of minimum income to allow them to keep engaging in their activities. Simultaneously, this economic dimension of legal services involves a number of difficult questions of balancing: Lawyers need to be able to earn their keep, but if legal services are paid for by clients they need to be affordable enough to fulfil the requirements of access to justice. These are complex questions that touch upon the relationship between lawyers, clients and the State.

Moreover, in terms of how they balance these various interests, the Council of Europe States differ drastically. Category 7.1 of the World Justice Report[1331] regarding Civil Justice 'measures the accessibility and affordability of civil courts, including whether people … can access and afford legal advice and representation'. As the European Court of Human Rights has remarked in cases such as *Steel and Morris v UK* (2005),[1332] the cost of legal advice and representation can be a factor preventing the effective exercise of human rights. While some Council of Europe States score highly on 'People can access and afford civil justice', with the Netherlands, Denmark and Germany occupying the first, third and fourth place out of the 140 countries surveyed, other States do less well, with Moldova coming 80th and the United Kingdom coming 89th. On the other hand, the profession of providing legal services needs to remain attractive enough to encourage individuals to undertake this career path, which requires that it is possible to make a living this way. Since there is therefore a clear connection between the economics of legal services and public functions, it is worth inquiring into the limits of the State's margin of appreciation in this regard.

Despite this crucial importance, the economic side of legal services is one of the areas least illuminated in the Court's case law, in keeping with the difficulties in framing this essential precondition of a functioning legal services sector in terms of a violation of a Convention obligation towards any one individual.[1333] In fact, the question of a sustainable economic basis for the legal services sector has been hardly asked, let alone answered, which

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lawyer and of doctor], the applicant demonstrated only his extreme mercantilism [sic], as he "minimised the importance of these professions, treating them as mere sources of income"'.

1331 Available at https://worldjusticeproject.org/rule-of-law-index/factors/2022/Civil%20Justice/, accessed 08 August 2024.

1332 *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 February 2005).

1333 And in keeping with the fact that the Court generally seems to just assume that legal services will exist at the domestic level. Both points are discussed in greater detail in Chapter Seven and Chapter Eight.

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is all the more noticeable given that in a number of cases applicants have alleged that the legal services provided to them were of poor quality due to the lawyers' inability – or unwillingness – to devote sufficient attention to a matter that was poorly remunerated.[1334] However, in other cases, the Court has dealt with the economic side of legal services without exhibiting any awareness that sufficient economic preconditions are a necessary prerequisite of a functioning legal services sector.[1335]

At times, the Court has at least shown an implicit awareness that lawyers need to have some way of enabling them to make enough money to remain in that profession. This is clear from, for example, the admissibility decisions in *Appas v Greece (dec)* and *Svintzos v Greece (dec)*, where the Court classed rules creating a financial incentive to set up law firms in underprivileged areas as a legitimate public-interest aim.[1336] Moreover, the question of the legal profession's economic basis also underlies some of the cases on freedom of expression for lawyers outside the courtroom. This is most obviously true for those cases which, like *Casado Coca v Spain* (1994),[1337] concern advertising directly, but also for other cases, where domestic authorities have sometimes taken the view that lawyers speaking out in public were in reality simply trying to circumvent domestic prohibitions on advertising[1338] in order to increase their income. Nonetheless, the Court has held in a number of cases that (severely) restricting advertising by lawyers can be permissible,[1339] given that, in the Court's view, this concerns the general question of unfair competition, an area 'which the Court has regarded as complex and fluctuating and in which thus a certain margin of appreciation appears essential'.[1340]

As regards general systems for remuneration of lawyers, the Court has not voiced any preferences. Its case law is replete with both private

1334 *Jelcovas v Lithuania* App no 16913/04 (ECtHR, 19 July 2011), para 22, which the Court dismissed at para 130. Note also Judge Bonello's vocal criticism in the Polish cases on legal aid, eg *Antonicelli v Poland* App no 2815/05 (ECtHR, 19 May 2009) 16, where, in his concurring opinion, he made reference to legal-aid lawyers in Poland being 'almost coerced to work for a pittance'.

1335 *Klein v Austria* (n 1314), where the Court showed no awareness that the purpose of the pension scheme in questions was inter alia to ensure lawyers' independence.

1336 *Appas v Greece (dec)* (n 1059) 10; *Svintzos v Greece (dec)* (n 1059) 5.

1337 *Casado Coca v Spain* (n 1092), particularly at para 44ff.

1338 *Schöpfer v Switzerland* (n 1096), para 14.

1339 cf eg *Brzank v Germany (dec)* (n 1117).

1340 *Heimann v Germany (dec)* (n 1117) 6.

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fee agreements[1341] and systems which eg fix certain minimum fees or payscales.[1342] Similarly, as regards legal services performed at the level of the Court itself, the Court has awarded costs for a variety of different remuneration models.[1343] Generally, it seems as though the Court may be willing to accord a comparatively wide margin of appreciation in cases regarding extent of fees under domestic law, in keeping with the rather specific nature of this point, often finding that it is enough that the domestic courts' decisions were sufficiently reasoned and did not disclose any arbitrariness.[1344] An underlying reason in this regard may be the Court's position that disputes regarding remuneration between a lawyer and their client do not arise from 'private and family life' within the meaning of Art. 8, and are litigation between individuals over which the Court does not have jurisdiction *ratione materiae,*[1345] although it is worth noting the general tendency of Art. 8 to expand over the years.[1346]

In general, it seems, then, that the Court has not provided much clarification on the economic dimension of legal services, nor addressed the related wide disparities in access to justice across the Council of Europe States. This stands in stark contrast to the practical significance of economic questions, which, after all, require fine balancing to ensure both the survival of the legal profession and access to justice for individuals.[1347] Similarly to many other areas concerning complex policy choices, the Court has not issued much by way of statements, but instead seems to largely just hope for the best.

1341 *Kandarakis v Greece* App no 48345/12 and others (ECtHR, 11 June 2020), para 60.

1342 *Konstantin Stefanov v Bulgaria* (n 1071), para 25; *Marčan v Croatia (dec)* App no 67390/10 (ECtHR, 13 September 2016).

1343 cf eg Jens Meyer-Ladewig and Kathrin Brunozzi, 'Art. 41' in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention - Handkommentar* (4th edn, Nomos 2017), para 33.

1344 *Marčan v Croatia (dec)* (n 1342), para 40.

1345 *SCP Huglo, Lepage & Associés, Conseil v France (dec)* App no 59477/00 (ECtHR, 11 February 2003) 9.

1346 cf eg *Denisov v Ukraine [GC]* App no 76639/11 (ECtHR, 25 September 2018).

1347 *Airey v Ireland* App no 6289/73 (ECtHR, 09 October 1979) being a classic case – ultimately, Johanna Airey's problem only arose through the combination of lawyers' fee structure and her inability to pay these fees herself.

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2. A separate administrative regime for legal services?

The creation of a regulated market in the sense of restriction of legal services to certain persons raises the question how this special legal regime is administered. If lawyers, in their professional role,[1348] are a separate category of persons subject to different rules, does that imply a separate administrative-law regime regulating 'the legal profession'[1349]? In essence, the Court's case law in this area consists of two limbs. One relates to a special set of rules ensuring that those protected by these reservations comply with certain minimum behavioural standards – disciplinary law ((a).). The other ((b).) relates to the administrative structures by which these rules are applied, termed 'Bar associations' here regardless of varying domestic nomenclature.[1350]

(a) *Separate disciplinary rules?*

Given the Court's assumption of 'exclusive rights and privileges' which justify the restrictions on lawyers' professional conduct,[1351] one point of major significance is ensuring that only those who comply with these restrictions reap the benefits of the exclusive rights and privileges. In essence, the question is that of disciplinary law, in the sense of a separate body of domestic-law rules that aim to secure the public interest in the 'proper' exercise of the legal profession and apply only to those individuals that exercise it. Paraphrasing the goals of provisions of domestic law, the Court has described the aim of this area of law as 'protect[ing] the honour and reputation of the profession, as well as maintaining the trust the public places in the legal profession'.[1352] Conceptually, disciplinary law shores up the reservations discussed above, since the legal profession typically receives the advantage of reservation of certain activities at the price of increased regulation of individual lawyers by means of a separate set of rules.

1348 On role-bearer rights from a conceptual point of view see Chapter Eight, 419ff.

1349 On the latter term see 257ff.

1350 cf Chapter One, 65ff.

1351 See 227ff.

1352 *Biagioli v San Marino (dec)* App no 64735/14 (ECtHR, 13 September 2016), para 55. See also *Müller-Hartburg v Austria* App no 47195/06 (ECtHR, 19 February 2013), para 45.

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i. *Disciplinary law as a particularly sensitive area*

Disciplinary law is a sensitive area because it is particularly open to abuse. It frequently contains sanctions which interfere with or prohibit the exercise of the legal profession and can therefore be used to harass those who take politically unpopular cases, making it particularly dangerous to human rights defenders.[1353] It consequently comes as no surprise that disciplinary law figures prominently in a number of international soft-law documents, such as Recommendation R(2000)21[1354] or the UN Basic Principles,[1355] which have also been referred to by the Court.[1356] Moreover, questionable use of disciplinary rules has similarly surfaced in the Court's jurisprudence.[1357]

A proper understanding of the Court's case law on disciplinary proceedings, however, necessitates two contextual notes. The first of these is that disciplinary law is heavily inter-related with the general domestic rules on the provision of legal services. Taking this one element out of the context of the general regulation of legal services at the national level is therefore somewhat myopic. This is perhaps clearest for the term 'disbarment', which, in an international context, is something of a false friend. Disbarment ostensibly means a similar thing in most systems – exclusion from a professional organisation of lawyers coupled with the loss of certain privileges.

1353 This is also frequently stressed as an argument in favour of limiting restrictions on legal services, since otherwise human rights defenders may be subject to regulation by authorities acting in bad faith.

1354 Where one of the six 'Principles' is devoted to disciplinary proceedings, cf Committee of Ministers of the Council of Europe, Principle VI. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

1355 Where the final section, which contains four of the 29 paragraphs, falls under the heading 'Disciplinary proceedings', cf UN Basic Principles on the Role of Lawyers, para 26ff. The UN Basic Principles are discussed in Chapter One, 34ff.

1356 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 39ff; *Namazov v Azerbaijan* (n 1058), para 30ff; *Bagirov v Azerbaijan* (n 1097), para 39ff; *Demirtaş and Yüksekdağ Şenoğlu v Turkey* App no 10207/21; 10209/21 (ECtHR, 06 June 2023), para 64. Indeed, in *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60, *Namazov v Azerbaijan* (n 1058), para 50, and *Bagirov v Azerbaijan* (n 1097), para 101, the Court even 'consider[ed] it necessary to draw attention to Recommendation R(2000)21' explicitly.

1357 See eg *Bagirov v Azerbaijan* (n 1097), but also *Reznik v Russia* (n 1096), para 43, where the Russian Ministry of Justice had asked the Moscow City Bar to disbar one of Mikhahil Khodorkovskiy's lawyers on grounds that the Bar classed as spurious.

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However, disbarment's practical impact differs drastically because the underlying restrictions on providing legal services are not the same. While in a system in which in principle *all* legal services are restricted to Bar members,[1358] expulsion from the Bar is effectively equivalent to a ban on providing legal services, in other systems the impact may be far less drastic.[1359] This is an important contextual factor: While in some systems disbarment means the end of a lawyer's career, in others it may only exclude certain types of restricted activity and may therefore be less severe in its effects.

Nonetheless, similarly to many of the other problems that hinge on a more holistic view of the relevant country's legal profession, this is not a problem the Court has visibly engaged with. None of the judgments surveyed for the present study set out the context of reserved activities at the domestic level,[1360] even though this is crucial to understanding the severity of the sanction in practice. In the absence of identical rules on reserved activities, disbarment in one jurisdiction cannot be equated with disbarment in another jurisdiction, but nonetheless the Court has held comprehensively that 'disbarment … cannot but be regarded as a harsh sanction, capable of having a chilling effect on the performance by lawyers of their duties as defence counsel'[1361] and has claimed that disbarment has

1358 Such as Germany, cf s 3 of the Act on Out-of-Court Legal Services, English translation available at http://www.gesetze-im-internet.de/englisch_rdg/, accessed 08 August 2024.

1359 Note eg the Russian Government's submission in *Igor Kabanov v Russia* (n 1096), para 49 that the disbarred applicant 'could act as a legal representative of a party to proceedings even without being a member of the bar', the Government's argument that 'even though the Bar Association may expel a member as a disciplinary measure, this does not prevent the person from acting as legal counsel in court proceedings or from practicing law in others fields' in *A v Finland (dec)* (n 1096) 7, or the Government's argument in *Jankauskas v Lithuania (No 2)* (n 1110), para 53 that the case was different from *Bigaeva v Greece* (n 1084) 'because the applicant had actually had the possibility to work in the legal area' in a variety of roles.

1360 There is a passing reference to this in *Bagirov v Azerbaijan* (n 1097), para 116, but this concerns the application of Art. 41 and was not part of the Court's reasoning regarding the merits of the case.

1361 *Namazov v Azerbaijan* (n 1058), para 50; see also *Bagirov v Azerbaijan* (n 1097), para 83, and *Igor Kabanov v Russia* (n 1096), para 55, where this quote appears to originate from. The key, perhaps, is in the term 'defence counsel', since that appears to be the area where activities are most strongly reserved, cf European Commission for the Efficiency of Justice (n 1276) 71. 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.

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'irreversible consequences on the professional life of a lawyer'.[1362] All of this is not to say that disbarment is anything other than a severe sanction; the point, for present purposes, is simply that disbarment in a system with a broad reservation of legal services is not the same as disbarment in a system with a narrow one, and that, more generally, the context of the specific system of reservation in the country in question is significant.

A second preliminary note concerns the purpose of disciplinary law. This is all the more important because, at times, the Court seems to confuse it with criminal law, treating disciplinary law as a milder version of criminal sanctions rather than as a system of rules with different purposes.[1363] Of particular note is the cryptic statement in *Schmidt v Austria* (2008):

> Finally, the Court notes that in contrast to the case of Nikula ..., what was at stake was not a criminal penalty but a disciplinary sanction. The Court reiterates that the special position of lawyers as intermediaries between the public and the courts explains the usual restrictions on the conduct of members of the Bar. Given the key role of lawyers it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.[1364]

It seems from context that the Court may have meant that criminal penalties will be harder to reconcile with the Convention than disciplinary sanctions, in keeping with its holding in *Nikula* that '[i]t is ... 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'.[1365] If this is the case, however, it mistakes the fundamentally different nature of criminal and disciplinary sanctions, which pursue different goals. Disciplinary law aims to uphold certain quality standards among lawyers. Disciplinary provisions deal not so much with punishment for past incidents, but with the question of who in future is

1362 *Bagirov v Azerbaijan* (n 1097), para 101.

1363 cf eg *Kyprianou v Cyprus [GC]* (n 1063), para 180, *Mikhaylova v Ukraine* (n 1136), para 95 (where the Court appears to have called disciplinary measures 'a less severe sanction' on the same scale) and the points made in Chapter Three at n 736. This is somewhat surprising given that in other contexts the Court has heard extensive explanations as to the different nature of criminal and disciplinary sanctions, cf eg *Müller-Hartburg v Austria* (n 1352), para 37, and that one would think that the differences between the two sanction mechanisms are fairly obvious.

1364 *Schmidt v Austria* (n 1265), para 42.

1365 *Nikula v Finland* (n 1061), para 55.

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suitable to provide legal services.[1366] By nature, they are forward- rather than backward-facing in the sense of being aimed at preventing future harms. As such, situations may arise that call for both criminal and disciplinary sanctions,[1367] but equally many situations are conceivable which call for only one of the two responses.[1368] Disciplinary sanctions, when compared to criminal sanctions, are not a 'less severe' form – they pursue a different purpose.

To the extent that disciplinary law aims to uphold certain general requirements for the legal profession, it is closely linked to the public interest in legal services conforming to a certain quality. Despite the Court's sometimes confusing statements as to the relationship between criminal and disciplinary sanctions, when the Court pays closer attention it does seem to be aware that these two are fundamentally different. For example, it has held that Article 4 of Protocol 7, the right not to be tried or punished twice, does not prohibit disciplinary proceedings following a criminal conviction.[1369] In a similar vein, the Court has also explicitly held that Art. 6 § 1 does not apply to disciplinary proceedings under its criminal head,[1370] nor will Art. 7 of the Convention apply.[1371] This position regarding lawyers harmonises well with the position regarding disciplinary proceedings against civil servants,[1372] reflecting lawyers' singular semi-public status.

1366 As the Solicitors Regulation Authority puts it in its guidance on parallel investigations (https://www.sra.org.uk/solicitors/guidance/investigations-parallel/, accessed 08 August 2024) 'the character and purpose of civil, criminal and regulatory proceedings are different. The purpose of disciplinary proceedings against a person convicted of a criminal offence is not to punish them a second time for the same offence, but to protect the public and to maintain high professional standards and public confidence'.

1367 The classic example perhaps being misappropriation of clients' moneys.

1368 For example, criminal behaviour not likely to bring the profession into disrepute will not call for disciplinary sanctions, while violations of professional standards without violating the criminal law will not call for criminal ones.

1369 cf *Müller-Hartburg v Austria* (n 1352), para 63, confirmed in *Helmut Blum v Austria* (n 1264), para 59. In German-language jurisdictions, this is frequently referred to as the 'disciplinary-law surplus' or '*disziplinärer Überhang*', cf *Müller-Hartburg v Austria*, para 28.

1370 *Zerouala v France (dec)* App no 46227/08 (ECtHR, 03 May 2011) 7; *Müller-Hartburg v Austria* (n 1352), para 49; *Helmut Blum v Austria* (n 1264), para 59; *Biagioli v San Marino (dec)* (n 1352), para 51ff.

1371 *Brown v UK (dec)* App no 38644/97 (ECtHR, 24 November 1998) 5ff.

1372 *Moullet v France (dec)* App no 27521/04 (ECtHR, 13 September 2007); *Vagenas v Greece* App no 53372/07 (ECtHR, 23 August 2011).

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ii. *Disciplinary law as a component of the Court's vision*

Having clarified both the need to contextualise disciplinary proceedings and the need to separate them from criminal proceedings, it is now possible to turn to the Court's case law on disciplinary proceedings in greater detail. In keeping with its general position assuming a regulated market for legal services, the Court sees the existence of disciplinary law as a legitimate concern, indeed even as a necessary ingredient in its view of the regulation of the legal profession. In *Bono v France* (2015), the Fifth Section clarified that 'it is certainly the task of the judicial and disciplinary authorities, in the interest of the smooth operation of the justice system, to take note of, and even occasionally to penalise, certain conduct of lawyers'.[1373] Similarly, in *Tuheiava v France (dec)*, a Committee of the Fifth Section highlighted that a visit by a member of the Bar to ascertain whether professional rules were being followed contributed to the defence and preservation of the relationship of confidence between a lawyer and their clients,[1374] and in *Biagioli and Biagioli v San Marino (dec)* the Court highlighted that 'the disbarment of the second applicant … pursued the legitimate aim of protecting the public by ensuring the integrity of those carrying out the legal profession and also the proper administration of justice'.[1375] In *Helmut Blum v Austria* (2016), which concerned an interim measure withdrawing the applicant lawyer's right to represent clients before certain courts in criminal proceedings,[1376] the Court even 'acknowledge[d] that situations can arise in which it can be justified to take interim measures to protect public interests and the reputation of a legal profession',[1377] and 'accept[ed] the Government's argument that the measure aimed to protect public interests and the reputation of the legal profession and therefore the administration of justice itself'.[1378]

1373 *Bono v France* (n 1259), para 55. The Court does not clarify what it means by 'take note of … certain conduct of lawyers'.

1374 *Tuheiava v France (dec)* (n 1098), para 33, author's translation. The original reads 'La Cour considère dès lors que la visite du bâtonnier, garant de la déontologie de son barreau, s'inscrivait notamment dans le cadre de la défénse et de la préservation de cette relation de confiance entre un avocat et ses clients'.

1375 *Biagioli and Biagioli v San Marino (dec)* (n 1352), para 102.

1376 *Helmut Blum v Austria* (n 1264), para 32.

1377 Ibid, para 64.

1378 Ibid, para 64. Similarly, in *Bagirov v Azerbaijan* (n 1097), para 97, the Court accepted that the applicant's disbarment for statements made in court 'had pursued the legitimate aim of "the prevention of disorder" within the meaning of Article 8 § 2

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(1) *Lower requirements for 'quality of the law'*

If all of this tends towards a generally permissive view as regards disciplinary law, that is not merely limited to principle, but also manifests in a more relaxed standard as regards the 'quality of the law' requirement for lawyers' disciplinary codes. In part this can be explained by the Court's general tendency to assume that lawyers are particularly able to foresee the content of laws,[1379] but in part the Court also seems to apply less strict scrutiny. In a number of States, even those with comparatively strong human-rights track-records, disciplinary codes for lawyers are couched in vague language, frequently using open terms such as the legal profession's 'dignity',[1380] 'honour' or 'reputation',[1381] or indeterminate obligations such as that to show 'proper respect' towards the judiciary.[1382] In addition to historical reasons, this is typically based on the need to allow disciplinary authorities to react flexibly to problems as they arise. Despite arguable problems as regards foreseeability, the Court has typically tolerated these rules. While in the early days of the Court's case law this may have been based on something of a European consensus on such indeterminate rules, which were offset in practice by sufficient case law to clarify their concrete ambit and by an independent and impartial judiciary, where these conditions are not met, such indeterminate clauses are far more open to abuse than more concrete rules listing specifically which types of behaviour will be prohibited.

A partial relaxation of this 'quality of the law' standard, however, does not mean arbitrariness is permitted. In *Hajibeyli and Aliyev v Azerbaijan* (2018), the Court reiterated that refusal to grant the applicants access to

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of the Convention, since it concerns the regulation of the legal profession which participates in the good administration of justice'.

1379 cf Chapter Two, n 610ff and accompanying text and, specifically noting that 'a lawyer … could reasonably have been expected to be familiar with the dense range of provisions relating to lawyers' professional ethics', *Demertzis v Greece (dec)* App no 12766/15 (ECtHR, 04 April 2023), para 11.

1380 *Hempfing v Germany (dec)* App no 14622/89 (Commission Decision, 07 March 1991) 282; *Foglia v Switzerland* (n 1098), para 35. See similarly *Lindner v Germany (dec)* (n 1096) 6, and *Veraart v the Netherlands* (n 1267), para 35.

1381 *Malek v Austria* App no 60553/00 (ECtHR, 12 June 2003), para 33; *Müller-Hartburg v Austria* (n 1352), para 24. For an example of the potential for abusing such clauses see eg *Bagirov v Azerbaijan* (n 1097), para 27ff.

1382 cf *Rodriguez Ravelo v Spain* (n 1073), para 25. See also *Furuholmen v Norway* (n 1096) 8.

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the legal profession could not be based 'on grounds not envisaged by the relevant domestic legislation'.[1383] The Court even

> consider[ed] it necessary to draw the Government's attention to Recommendation R(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, which clearly stated that lawyers should enjoy freedom of expression and that decisions concerning access to the profession should be subject to review by an independent and impartial judicial authority.[1384]

(2) *Procedural rights in disciplinary law*

Moreover, while Art. 6 § 1 does not apply to disciplinary proceedings under its criminal head,[1385] which leads to a number of procedural safeguards not applying, the Court has nonetheless highlighted the importance of procedural rights in disciplinary proceedings, particularly where disbarment is concerned.[1386]

Under the Court's constant case law, revocation of admission to the Bar concerns the determination of a civil right in the sense of Art. 6 § 1,[1387] since disciplinary proceedings in which the right to continue to exercise a profession is or may be at stake fall under Art. 6 § 1's civil limb.[1388] Art. 6 § 1 ECHR can therefore apply to proceedings before Bar associations where they affect 'a lawyer's civil right to continue exercising his or her profession',[1389] which extends even to interim proceedings where these can be 'considered to determine effectively the civil right at stake'.[1390] While this criterion is fairly obviously fulfilled in cases where, as in *Müller-Hartburg v Austria* (2013), the sanction at issue actually is being struck off the

1383 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.
1384 Ibid, para 61. Recommendation R(2000)21 is discussed in Chapter One, 38ff.
1385 *Müller-Hartburg v Austria* (n 1352), para 49, as well as the other cases listed in n 1370.
1386 *Namazov v Azerbaijan* (n 1058), para 49.
1387 *Albert and Le Compte v Belgium* App no 7299/75; 7496/76 (ECtHR, 10 February 1983), para 48; *De Moor v Belgium* (n 1277), para 47; *Scheiber v Germany (dec)* App no 60585/00 (ECtHR, 06 November 2003) 6.
1388 *Biagioli v San Marino (dec)* (n 1352), para 49; *Müller-Hartburg v Austria* (n 1352), para 39; *Helmut Blum v Austria* (n 1264), para 60. This case law continues to the present day, cf recently *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021), para 183 with reference to *Malek v Austria* (n 1381).
1389 *Müller-Hartburg v Austria* (n 1352), para 48.
1390 *Helmut Blum v Austria* (n 1264), para 66.

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register,[1391] the Court has held elsewhere that it will suffice that a temporary or permanent suspension of the right to practice is a hypothetically possible outcome of the procedure, even if the charge itself is so minor as to render this outcome unlikely.[1392] Elsewhere, it has sufficed that 'when the proceedings were started, expulsion from the bar was not impossible'.[1393] Depending on domestic regulatory techniques, which typically on paper permit a wide spectrum of possible sanctions to allow domestic bodies to react appropriately to the severity of the individual case, in practice this means that many, if not most, disciplinary proceedings against lawyers will fall within the ambit of Art. 6 § 1.

To date, the most important elements of Art. 6 § 1 protection in disciplinary proceedings appear to have been related to length of proceedings.[1394] However, there has also been some debate on the 'independent and impartial tribunal' guarantee,[1395] and as regards certain procedural guarantees. In this latter respect, the Court has held in particular that in principle Art. 6 § 1 will give the right to an oral hearing in disciplinary proceedings against a lawyer,[1396] and that this will apply even to interim measures

1391 *Müller-Hartburg v Austria* (n 1352), para 40.

1392 *Hurter v Switzerland (dec)* App no 53146/99 (ECtHR, 08 July 2004) 5; *Landolt v Switzerland (dec)* App no 17263/02 (ECtHR, 31 August 2006) 5; *Foglia v Switzerland* (n 1098), para 62.

1393 *A v Finland (dec)* (n 1096) 9.

1394 cf *Müller-Hartburg v Austria* (n 1352), para 56, where the Court found a violation where proceedings lasted nine years and eleven months, *Schmidt v Austria* (n 1265), para 24 (violation where proceedings lasted eight years and one month), *Malek v Austria* (n 1381), para 37 (violation where proceedings lasted six years and seven months) as well as *Goriany v Austria* App no 31356/04 (ECtHR, 10 December 2009), where the Court focused on the fact that, faced with a mountain of complaints against the applicant, the disciplinary authorities had shown no interest in avoiding delays. There appears to have been something of a structural problem in Austria in this regard, as the Court alludes to in *Schmidt v Austria* (n 1265), para 27.

1395 *Lindner v Germany (dec)* (n 1096) 11, with reference to *Albert and Le Compte v Belgium* (n 1387), which established that professional disciplinary bodies must 'either themselves comply with the requirements [of Article 6 § 1], or they do not so comply but are subject to subsequent review by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1'.

1396 *Hurter v Switzerland* App no 53146/99 (ECtHR, 15 December 2005), para 35. Regarding Switzerland's historical difficulties with this point and the (invalid) reservation declared upon accession to the Convention see *Weber v Switzerland* App no 11034/84 (ECtHR, 22 May 1990), para 38.

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where 'not only legal or highly technical questions had to be taken into consideration'.[1397]

iii. *Delegation to professional bodies*

A special feature that has caused particular debate in relation to Art. 6 § 1 is the fact that in many domestic systems lawyers are involved in their own disciplinary procedures. The Convention gives States significant leeway in this regard. Where States have a first instance outside their ordinary judicial structures – such as a professional body hearing cases at first instance – those bodies will not necessarily even have to comply with the requirements of Art. 6 § 1 themselves, as long as there is a means of challenging them before a judicial authority that does satisfy the requirements of Art. 6 and has full jurisdiction.[1398]

Commonly, in a bid to ensure 'independence' of the legal profession, as well as to increase expertise, lawyers are involved as judges at some point in the disciplinary process, which can raise problems under Art. 6 § 1 particularly as regards the 'independent and impartial' tribunal if there is no such possibility of a full appeal. Indeed, in *Landolt v Switzerland (dec)* the applicant even pressed the point regarding the involvement of lawyers, arguing that since the members of the body that had decided his case did not necessarily have to be licensed as lawyers, they were therefore not competent to judge his compliance with the rules of professional conduct, and that hence the disciplinary body composed of the presidents of the courts was not sufficiently impartial. The Court, however, argued that the presidents of the courts had neither common nor contrary interests to those of the lawyers and did not agree.[1399] While in *Landolt* the applicant

1397 *Helmut Blum v Austria* (n 1264), para 72.

1398 *Le Compte, Van Leuven and De Meyere v Belgium* App no 6878/75; 7238/75 (ECtHR, 23 June 1981), para 51; *Buzescu v Romania* (n 1070), para 60; *Landolt v Switzerland (dec)* (n 1392) 6. Further detail on what 'full jurisdiction' will mean for these purposes is provided in eg *Biagioli v San Marino (dec)* (n 1352), para 58ff.

1399 *Landolt v Switzerland (dec)* (n 1392) 8, 'L'absence de brevet d'avocat n'implique nullement que les juges ne seraient pas compétents pour apprécier si un comportement particulier constitue une infraction aux règles déontologiques', 'the absence of a practising certificate in no way implies that judges would not be competent to assess whether a particular behaviour constitutes a breach of the rules of professional conduct' (author's translation).

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criticised a conflict of interests with judicial functions, there have been other cases in which applicants were dissatisfied with the very fact that their peers, other lawyers, had been called upon to judge them.[1400]

Moreover, the Court has implicitly endorsed an obligation on lawyers to cooperate with their regulators where the latter are contemplating disciplinary proceedings. This seems to follow from *Jankauskas v Lithuania (No 2)* (2017), in which the Court emphasised that

> [n]otwithstanding the absence of an explicit, written requirement to indicate previous, even expired, conviction when applying to the Bar, the Court does not find it unreasonable that the domestic authorities should conclude that such an obligation flowed from notions of honesty and ethics and the idea that the relationship between an advocate and the Bar Association must be based on mutual respect and good-will assistance,

and that the Bar Association therefore had a right to 'full information about a person wishing to become an advocate'.[1401] 'In that connection, the Court note[d] that in its Recommendation R(2000)21, the Committee of Ministers of the Council of Europe has emphasised that the profession of an advocate must be exercised in such a way that it strengthens the rule of law'.[1402]

iv. *Conclusion: Separate disciplinary rules for lawyers*

As has been shown, much suggests that the Court's implicit view of legal services is that of a regulated market. Disciplinary rules form a key element in this regulatory structure, but there is tension with independence, which is a quality requirement for legal services which the Court has also explicitly identified. While the Court therefore sees disciplinary rules as a legitimate concern, subject to certain rules as regards, in particular, the procedures by which such regulation is enforced, a key point is how rules

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1400 *Versteele v Belgium (dec)* App no 12458/86 (Commission Decision, 18 January 1989) 122, where the application argued that 'particularly in such a small Bar, lawyers with interests conflicting with those of the applicant must be regarded as unfavourable to him', as well as the challenge brought in *De Moor v Belgium* (n 1277), para 51.

1401 *Jankauskas v Lithuania (No 2)* (n 1110), para 78.

1402 Ibid, para 77. The quote also appears in *Lekavičienė v Lithuania* (n 1264), para 54, which the Fourth Section decided on the same day, and is reprised in *Correia de Matos v Portugal [GC]* (n 1097), para 141. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

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controlling behaviour by the legal profession can be reconciled with the latter's 'independence', which is discussed in the next section.

(b) *The role of Bar associations*

Given the assumption that legal services will be a regulated market, with a separate set of provisions regulating market entry and standards for those participating in the market, the question arises how this market should be administered. The point is all the more complicated because high-quality legal services, in the Court's view, must be independent from the State. While the assumption of a regulated market implies State involvement, the requirement of independence militates against it.

A number of the international documents mentioned in Chapter One attempt to resolve this tension by means of specific administrative arrangements. Frequently, this is done by granting a certain measure of 'independence' to regulators for the legal profession, often combined with involvement by lawyers themselves, reflecting ideas of self-regulation. The underlying assumption, roughly speaking, is as follows: The interests of the State, particularly of the executive, can conflict with the interests of clients and their lawyers, especially where these are involved in adversarial proceedings against the State, as is frequently the case in human rights work. Letting the State regulate lawyers therefore risks enabling the State to use its regulatory powers abusively to prevent the effective exercise of legal services against the State. To remedy this conflict of interest, so the reasoning goes, lawyers should be regulated by an organisation independent of the State. Frequently, this is taken to mean that lawyers should be trusted to regulate themselves – yet in self-regulation the threat of regulatory capture looms large.

For these and for historical reasons,[1403] domestic law often creates professional bodies invested with legal powers devoted exclusively to representing and regulating lawyers. References to these professional associations, which will be termed Bar associations for short here,[1404] are not uncommon in the Court's case law despite the seemingly incongruous inclusion of references

1403 Further references to the development of lawyer guilds in Leslie Levin and Lynn Mather, 'Beyond the Guild: Lawyer Organizations and Law Making' (2019) 18 Washington University Global Studies Law Review 589, 591.

1404 cf Chapter One, 65ff.

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to specific administrative structures in a legal instrument designed to secure individual rights. Perhaps particularly clear is *Jankauskas v Lithuania (No 2)* (2017), where the Court noted that 'professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently, and that respect towards professional colleagues and self-regulation of the legal profession are paramount',[1405] drawing a link between the individual lawyer's independence and the self-regulation of the legal profession.[1406] Similar points have also come up in other recent cases concerning the situation in Azerbaijan.[1407]

This part of the Court's case law is complex. Given that human rights are largely understood as concerning primarily the realisation of private interests,[1408] questions of administrative structure are, on a traditional understanding, at best on the fringes and at worst beyond the mandate of a human rights court. The fiction typically underlying the Convention is that the Court will assess only whether the Convention guarantees have been fulfilled, and that – outside explicit provisions such as eg the 'independent and impartial tribunal established by law',[1409] which, however, do not exist for legal services – how States go about ensuring this result is their choice. In essence, the Court will usually mandate obligations of result in the sense that a Convention-compliant *outcome* must be reached, but it is generally up to States to work out how they want to get there. Seen in this light, explicit statements on how States must administer their community of lawyers seem out of place in a human rights context to the extent that the Court is not mandating just a specific human rights outcome, but also the way this must be achieved, ie by means of (independent) lawyers and (potentially) 'self-regulation of the legal profession'.

Moreover, a further difficulty in these cases is that as regards clients, lawyers and Bar associations there are two groups of actors that act on behalf of others. Only clients can act exclusively in their own interests.

1405 *Jankauskas v Lithuania (No 2)* (n 1110), para 78. Note that this wording is close to Recommendation R(2000)21, particularly the fourth preambulatory paragraph.

1406 Arguably, this skips several steps, since independence of the individual lawyer on its own would prima facie call only for independence of the regulator, not necessarily *self*-regulation.

1407 *Jankauskas (No 2)* is reprised almost word-for-word in *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

1408 See, in greater detail, Chapter Eight.

1409 On different possible analyses of this limb of Art. 6 § 1 see Chapter Seven, 366ff.

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Lawyers act on behalf of clients; Bar associations are supposed to act in the public interest, as well as on behalf of lawyers' and clients' interests. Here, rights are granted not primarily to further the interests of the rights holder, but also to further the interests of others. This gives rise to complicated conceptual questions.[1410]

The following sections deal with the Court's case law on Bar associations, beginning with their position as part of the State (i.), and then turning to the Court's statements concerning the 'independence' of Bar associations (ii.).

i. *Bar associations as part of the State*

Lawyers, as has been shown, are not part of the State according to the Court.[1411] Bar associations, however, are. Notwithstanding certain degrees of independence at the domestic level, Bar associations will generally form part of the State at least if they wield public-law competencies such as controlling admission to the legal profession or disciplining lawyers. Despite the fact that Bar associations are frequently composed of, elected by and tasked with representing the interests of lawyers, the Court will still generally[1412] class Bar associations as part of the State. Bar associations do not participate in lawyers' non-State status, despite their role in representing lawyers' interests, but are, for Convention purposes, part of the State much like any other administrative body, which manifests in a number of ways.[1413] This means that the dividing line between the State and non-State spheres runs in between lawyers and their professional organisations; while the former are not part of the State, the latter will be.

1410 See Chapter Eight, particularly at 419ff.

1411 cf the position the Court took in the cases regarding provision of legal aid (Chapter Two, 122ff) and the memorable quote from *Siałkowska* that 'a lawyer, even if officially appointed, cannot be considered to be an organ of the State', *Siałkowska v Poland* (n 1087), para 99.

1412 The Court's reasoning often focuses on the specific arrangements at the domestic level – to the extent ascertainable, there have not yet been any cases where the Court has rejected the State's responsibility for the actions of a Bar association.

1413 eg their ability to trigger State responsibility under the Convention, the application of Art. 6 § 1 to Bar disciplinary proceedings, and their lack of standing under Art. 34, all of which are discussed in greater detail below.

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(1) *State responsibility for Bar associations*

That Bar associations are, for Convention purposes, part of the State has been established as far back as *van der Mussele v Belgium* (1983).[1414] In that case, the Legal Advice and Defence Office of the Antwerp Bar appointed the applicant, a pupil *avocat*, to a case as defence counsel.[1415] The applicant complained that, since 'he had not been entitled to any remuneration or reimbursement of his expenses', there had been both '"forced or compulsory labour" contrary to Article 4 § 2 of the Convention and … treatment incompatible with Art. 1 of Protocol No 1'.[1416] The respondent government, however, argued that 'it was … not answerable for any infringements of the Convention's guarantees that might be occasioned by implementation of the professional rules' because these had been 'freely adopted by the Ordres des avocats themselves' without the Belgian State's involvement.[1417]

'[C]ounsel for the Government did not revert [to this argument] at the hearings before the Court'.[1418] Nonetheless, the Court thought it significant enough to dedicate a discrete passage of the 22-page judgment to, under the separate heading 'responsibility of the Belgian state'.[1419] The Court noted its – still rather rudimentary, given that *Airey* had been decided only a little over four years earlier – case law on 'the obligation to grant free legal assistance', pointing out that '[t]he Belgian State … lays the obligation by law on the Ordres des avocats' and that therefore '[s]uch a solution cannot relieve the Belgian State of the responsibilities it would have incurred under the Convention had it chosen to operate the system itself'.[1420] The Court then held that

> [i]n addition, the Belgian Bars, bodies that are associated with the exercise of judicial power, are, without prejudice to the basic principle of independence

1414 *Van der Mussele v Belgium* (n 1302).

1415 Ibid, para 10.

1416 Ibid, para 24. He also complained under Art. 14 taken in conjunction with Art. 4. For a recent case involving similar arguments see *Dănoiu and others v Romania* App no 54780/15 and others (ECtHR, 25 January 2022).

1417 *Van der Mussele v Belgium* (n 1302), para 28.

1418 Ibid, para 29, presumably because it was rejected by the Commission.

1419 Ibid, para 28ff.

1420 Ibid, para 29. Implicitly, this also rejects the notion of a relative quality of public-ness – conceptually, it would also have been possible to characterise the relationship between the Legal Advice and Defence Office and the applicant lawyer independently of the relationship between that Office and recipients of legal advice.

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> necessary for the accomplishment of their important function in the community, subject to the requirements of the law. The relevant legislation states their objects and establishes their institutional organs; it endows with legal personality in public law each of the Councils of the twenty-seven local Ordres and the General Council of the National Ordre …
>
> The responsibility of the Belgian State being thus engaged in the present case, it has to be ascertained whether that State complied with the provisions of the Convention.[1421]

While the reference to being 'subject to the requirements of the law' is hardly a helpful criterion, given that in a State based on the rule of law everyone, even private individuals, is or should be 'subject to the requirements of the law', and there is arguably something of a logical disconnect in merely stating that the responsibility is 'thus engaged' without explaining *why* it is engaged, it seems as though the Court took a holistic view, focusing particularly on the fact that the Belgian Bars were 'associated with the exercise of judicial', and thereby 'public', 'power'.[1422] This suggests that the Court will generally see Bar associations that exercise at least some State functions as part of the State for the purposes of the Convention.

Van der Mussele, moreover, was not the only case in which the Government tried to absolve itself of responsibility for the actions of a Bar association. In a similar vein to *van der Mussele*, in *Casado Coca* (1994) the Government

> submitted that if there was an interference, it did not come from a 'public authority' within the meaning of Article 10, para 1. The Barcelona Bar Council's written warning … could be regarded as an internal sanction imposed on Mr Casado Coca by his peers. The Spanish State had merely ratified, in the form of a royal decree, the statute drawn up by the members of the Bar themselves, under Article 31 of which professional advertising was banned.[1423]

The Court, in a reprise of *van der Mussele*, rejected this argument:

> Like the applicant and the Commission, the Court notes, however, that section 1 of the 1974 Law on professional associations states that they are public-law corporations … In the case of the Bars, this status is further buttressed by their purpose of serving the public interest through the furtherance of free, adequate legal assistance combined with public supervision of the practice of the profession and of compliance with professional ethics … Furthermore, the impugned decision was adopted in accordance with the provisions applicable

1421 Ibid, para 29–30.

1422 See similarly *Dösemealti Belediyesi v Turkey (dec)* App no 50108/06 (ECtHR, 23 March 2010) 7.

1423 *Casado Coca v Spain* (n 1092), para 38.

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> to members of the Barcelona Bar and an appeal against it lay to the competent courts … These courts and the Constitutional Court, all of which are State institutions, upheld the penalty … That being so, it is reasonable to hold that there was an interference by a 'public authority' with Mr Casado Coca's freedom to impart information.[1424]

While this presented something of a mélange of arguments, given that there is some ambiguity regarding which 'interference by a "public authority"' the Court was referring to,[1425] the reasoning itself would tend to indicate that, similarly to *van der Mussele*, the Court considered the Bar association as a public authority for the purposes of the Convention. Ultimately, it would otherwise have been unnecessary to make any statements as to the Bar association, given that judgments by the domestic courts are indisputably 'interference by a "public authority"'. The fact that the Court nonetheless included argument as to the public status of Bar associations indicates that they, too, will be public authorities for the purposes of the Convention.

This approach has also been confirmed in later cases in which the State has been held responsible for the actions of Bar associations,[1426] for example in *Buzescu v Romania* (2005), where the Court, after making reference to *van der Mussele* and *Costello-Roberts* (2003),[1427]

> point[ed] out that the UAR [the Romanian Union of Lawyers, cf para 3] is legally constituted by Law no. 51/1995 and invested with administrative as well as rule-making prerogatives. The UAR pursues an aim of general interest in relation to the legal profession by exercising a form of public control over, for instance, registration with the Bar, and its decisions are subject to the jurisdiction of the administrative courts … The Court also takes note, as a subsidiary argument, of the classification of the UAR in the domestic case-law as a public authority that performs administrative acts and fulfils a public service role. It therefore concludes that State responsibility is engaged as a result of the administrative decisions of the UAR of which the applicant complains.[1428]

1424 Ibid, para 39 (citations omitted).

1425 Viz., the initial decisions by the Bar association or the subsequent decisions by the State courts upholding them. See similarly classing 'sanctions … as upheld by the Federal Court of Justice and the Federal Constitutional Court' as 'an interference by a "public authority"' *Lindner v Germany (dec)* (n 1096) 8.

1426 For another Belgian case, see eg *H v Belgium* (n 1083).

1427 Given that *Costello-Roberts* only contains the apodictic statement that 'the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals' (*Costello-Roberts v UK* App no 13134/87 (ECtHR, 25 March 1993), para 27) before itself referring to *Van der Mussele*, this arguably did not add very much.

1428 *Buzescu v Romania* (n 1070), para 78.

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This also tends to suggest that the core criterion will indeed be whether the Bar association exercises State powers, but that generally, where Bar associations exercise at least some oversight functions, their actions will engender State responsibility. Indeed, by the time *Klein v Austria* (2011) was decided and the Government argued that the State could not be held responsible for the regulations established by

> the Chamber of Lawyers, which represented the interests of lawyers [and] had been established as a self-governing body with compulsory membership and democratic structures, in which the individual members had the opportunity to exert influence on the tenets of the group and, thus, also on the statutes of its pension scheme,[1429]

the Court merely laconically replied that 'the Chamber of Lawyers is not a private association but a public law body, and measures taken by that body therefore engage the responsibility of Austria as a State'.[1430]

(2) *Legal consequences of the State's responsibility for Bar associations*

Bar associations, to the extent they wield public power, will therefore count as part of the State irrespective of whether, under domestic law, they enjoy guarantees of independence which mean central government cannot (fully) control their actions. This classification as public bodies, with the State responsible for Bar associations' actions, has a number of consequences.

The first of these is that Art. 6 § 1 will apply, even beyond the disciplinary proceedings which have already been discussed above.[1431] The Court has held that Art. 6 § 1's guarantees also apply as regards, for example, admission to the Bar.[1432] Accordingly, in a case in which the Bar association took approximately six years to fully process the applicant's accession to the Bar, Art. 6 § 1 had been violated in its length-of-proceedings limb.[1433]

1429 *Klein v Austria* (n 1314), para 37.
1430 Ibid, para 46.
1431 275ff.
1432 *H v Belgium* (n 1083); *De Moor v Belgium* (n 1277).
1433 *Turczanik v Poland* (n 1277), para 38. The total time period was 15 years and five months (with a nine-year period during which the applicant appears not to have pursued his registration), with the limitation to six years *ratione temporis* resulting from the fact that Poland only recognised the right of individual petition on 1 May 1993.

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Furthermore, rules adopted by Bar associations will also typically be classed as 'law' for the purposes of the Convention. To borrow the argument from *Barthold v Germany* (1985):[1434] Where independent rule-making power is traditionally enjoyed by way of parliamentary delegation and is 'exercised by the Council under the control of the State, which in particular satisfies itself as to observance of national legislation',[1435] as is the case for many Bar associations, such rules will count as 'law' and can therefore justify interference with Convention rights if the other requirements of Convention compliance are met. While *Barthold* itself concerned a council of veterinary surgeons,[1436] the reasoning which the Court adduced is readily transferable to situations where Bar associations are explicitly or implicitly vested with rule-making power under domestic law.[1437]

Similarly, the classification of Bar associations as part of the State for Convention purposes is also reflected in the fact that Art. 11 ECHR, which deals only with private associations, will not apply to them,[1438] at least as long as 'the provisions governing the activities of professional regulatory bodies' do not 'prevent practitioners from forming together or joining professional associations'.[1439] In this regard, the Court has held that Bar associations cannot be considered as 'associations' in the sense of Art. 11 § 1, since they are essentially public in nature, and that therefore Art. 11 is not applicable in cases concerning mandatory membership of a Bar association.[1440] Going one step further, the Court has also found that where the applicants, acting without State authorisation, had simply set up their own

1434 *Barthold v Germany* (n 1099).

1435 Ibid, para 46.

1436 Ibid, para 46.

1437 Which, indeed, reflects an option contained in a number of provisions of international instruments, eg UN Basic Principles on the Role of Lawyers, para 26 or Council of Europe Recommendation R(2000)21, Principle VI.1. Both documents are discussed in Chapter One, 34ff.

1438 *A and others v Spain (dec)* App no 13750/88 (Commission Decision, 02 July 1990). Although, as the Commission noted at para 2, this does not prevent lawyers from relying on Art. 11 to form further associations of professionals, such as region- or subject-specific interest groups. See also *National Notary Chamber v Albania (dec)* App no 17029/05 (ECtHR, 06 May 2008) 5ff.

1439 *A and others v Spain (dec)* (n 1438), para 2 with reference to *Le Compte, Van Leuven and De Meyere v Belgium* (n 1398).

1440 *A and others v Spain (dec)* (n 1438), para 1. *Bota v Romania (dec)* App no 24057/03 (ECtHR, 12 October 2004) 9; *National Notary Chamber v Albania (dec)* (n 1438) 6. In *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 42, the Court sidestepped the issue by 'consider[ing] that the applicants' complaint does not raise a separate issue

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'Bar association',[1441] Art. 11 did apply due to the non-public nature of that organisation,[1442] but that the organisation's dissolution was compatible with the Convention since it served the legitimate aim of both the prevention of disorder and the protection of the rights and freedoms of others[1443] and was proportionate to that aim.[1444]

(3) *In particular: No standing for Bar associations under Art. 34 ECHR*

As a corollary of their actions triggering the State's responsibility under Art. 34, Bar associations are themselves precluded from bringing claims under Art. 34 ECHR because such complaints are incompatible *ratione personae* with the Convention.[1445]

While one might have guessed as much given the typically binary State/non-State divide in the Court's case law,[1446] Bar associations' close intertwinement with non-State lawyers raises some doubts in this respect, particularly since – similarly to media organisations, which *can* bring claims under Art. 34[1447] – the Court treats independence as a key requirement for Bar associations. That Bar associations, moreover, can make a significant contribution to the functioning of the Convention system is reflected not least in the recent change to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, which were amended in July 2022 to make it possible for

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under Article 11 of the Convention and falls to be examined solely under Article 10 of the Convention'.

1441 For a similar case from Ukraine which does not appear to have reached the European Court of Human Rights see International Commission of Jurists, *Between the Rock and the Anvil: Lawyers under Attack in Ukraine* (2020) 13.

1442 *Bota v Romania (dec)* (n 1440) 8. The Court went as far as noting that '[l]a Cour estime d'emblée que la dissolution de l'association 'Bonis Potra' constitue, sans conteste, une ingérence dans l'exercice du droit de ses membres à la liberté d'association', 'the Court considers from the outset that the dissolution of the "Bonis Potra" association unquestionably constitutes an interference with the exercise of its members' right to freedom of association' (author's translation).

1443 Ibid 8.

1444 Ibid 9.

1445 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* App no 34118/11 (ECtHR, 21 May 2013), para 59. See also *Kotov v Russia [GC]* App no 54522/00 (ECtHR, 03 April 2012), para 94.

1446 On this see Chapter Eight, 406ff.

1447 *Radio France and others v France (dec)* App no 53984/00 (ECtHR, 23 September 2003) 23. This point is discussed in greater detail in Chapter Six at 334.

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'bar associations, law societies or other lawyers' associations' to submit communications in relation to the implementation of judgments.[1448] Nonetheless, the Court clearly enunciated its restrictive position in the First Section's 2013 decision in *Ordre des Avocats Défenseurs*, where the eponymous Monaco Bar association challenged Moneyval-inspired anti-money laundering rules. The Court, after hearing extensive argument from the applicant, respondent, the CCBE, the Ordre français des avocats du barreau de Bruxelles[1449] and the Consiglio Nazionale Forense, set out in just over a page that the applicants, in any case, did not have standing.[1450]

Notably, in *Ordre des Avocats Défenseurs*, the applicant itself had interacted extensively with the question of its standing, aware of the difficulties in this regard and trying to secure a change in law.[1451] In particular, the applicant highlighted that under domestic law it was not classed as a public body[1452] and argued that its pursuit of a goal in the 'general interest',[1453] combined with the special nature of the legal profession which the European Court of Human Rights had highlighted elsewhere, justified giving it the ability to 'act against arbitrary infringements by public powers'.[1454] The applicant also argued that the fact that it was charged with

1448 Committee of Ministers of the Council of Europe, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, CM/Del/Dec(2006)964/4.4-app4consolidated* (2022).

1449 Which readers will recognise from the Case C-305/05 *Ordre des Barreaux Francophones et Germanophone and others [GC]* [2007] ECR I-5305 judgment that led up to *Michaud v France* App no 12323/11 (ECtHR, 06 December 2012), discussed in Chapter Two, 115ff.

1450 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 55ff. This obviated any need to interact with the applicant's argument that the disclosure obligations in the anti-money laundering obligations violated Art. 8 in its 'professional secrecy' dimension, Arts 6 §§ 1, 3 and Art. 7 to the extent that the sanctions under the legislation were insufficiently defined, and is also the reason why the case was not included in Chapter Two in the section on 'gatekeeper' provisions.

1451 The latter point is particularly clear in the third-party intervention at para 45.

1452 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 32ff, reprising one of the criteria from *Van der Mussele v Belgium* (n 1302), para 29, and *Buzescu v Romania* (n 1070), para 78.

1453 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 33, 'poursuite d'un but d'intérêt général' (author's translation). This argument, however, given the reference in *Buzescu v Romania* (n 1070), para 78, may have also cut the other way.

1454 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 33 (author's translation).

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maintaining discipline and enforcing the legislation at issue meant it should be able to challenge this legislation before the Court.[1455] Nonetheless, the First Section's decision was firm in rejecting these arguments, instead maintaining the classic position that Bar associations are not generally entitled to bring applications under Art. 34. Given both the potential problems that permitting Bar associations to bring claims in their own right could raise and the fact that the decision has been subsequently applied,[1456] *Ordre des Avocats Défenseurs* seems unlikely to be overturned in the near future.

Although the Court's own justification was laconic, one of the underlying reasons for the refusal to allow Bar associations standing under Art. 34 may well have been a desire to prevent strategic public-interest legislation, and indeed the Court in *Ordre des Avocats Défenseurs* explicitly noted that the applicant was effectively complaining about a violation of the rights of others.[1457] Nonetheless, the impact of the case law denying standing to Bar associations should not be overstated. First, Bar associations retain the ability to make third-party interventions, which some organisations are happy to use.[1458] Second, since the decision-makers in professional organisations will frequently be members of the legal profession themselves, it will often be easy for them to find a lawyer to bring a test case.[1459] Finally, the impact of this lack of standing is further reduced by the specific weight which the Court will give to the actions of Bar associations in its reasoning, which will

1455 Ibid, para 34. Again, given the Court's case law, this was more likely to cut the other way.

1456 eg *Bursa Barosu Başkanlığı and others v Turkey* App no 25680/05 (ECtHR, 19 June 2018), para 112ff, and *Halkların Demokratik Partisi v Turkey (dec)* App no 78850/16 (ECtHR, 03 November 2020) 16ff.

1457 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 61. Note that the Government attempted a similar line of argument in *Michaud v France* (n 1449), para 49.

1458 For example, the German Federal Bar Association has intervened as a third-party in several cases concerning Germany, including *Sommer v Germany* App no 73607/13 (ECtHR, 27 April 2017), para 5, or the recent applications in *Kock and others v Germany* App no 1022/19 and *Jones Day v Germany* App no 1125/19, which concern the compatibility with Art. 8 of a search of a law firm and seizure of documents and electronic data in the course of the automobile emissions scandal, while the French National Bar Council and Paris Bar Association recently intervened in *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022).

1459 A particularly good example being *Michaud v France* (n 1449), para 8, where the applicant lawyer was a member of both the Paris Bar and the Bar Council. The case also dealt with anti-money-laundering legislation and therefore featured many of the same arguments as *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445).

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be discussed in greater detail below[1460] due to the arguably self-regulatory notions that underpin it. Rather than actually adversely affecting their position, the jurisprudence preventing Bar associations from bringing Art. 34 applications may therefore be more of an attempt to ensure that the line between State and non-State in the context of Art. 34 remains clear.

Despite classing Bar associations as part of the State, the Court reflects their special position between individual lawyers and the rest of the State in a different way, though not one that protects the individual lawyer: It seems that lawyers will generally enjoy a lower level of protection as against their own Bar association, and consequently Bar associations will have more scope for action without violating Convention rights than eg central government would. The clearest case on this is perhaps the 2018 admissibility decision in *Tuheiava v France (dec)*.[1461] In that case, the chairman of the local Bar association had been alerted to a number of irregularities regarding the applicant lawyer's practice, including a number of complaints by former clients amid significant difficulties in reaching him.[1462] In an effort to ensure that the applicant comply with his professional duties, the chairman visited his office and examined certain documents. Given that it had proved impossible to reach the applicant, this occurred in the latter's absence.[1463] The applicant considered this a violation of Art. 8.[1464]

The Committee noted several important points. First, applying the Court's constant jurisprudence, it reaffirmed that French Bar associations, for the purposes of Art. 8 § 2, were 'public authorities',[1465] which it based not just on domestic law, but also on the public interest Bar associations pursue: the promotion of legal assistance, combined with control of the exercise of the profession and respect for professional rules,[1466] the latter being the public interest in which the chairman had acted in the present case.[1467] The Committee then went on to find that this visit constituted an interference with Art. 8 of the Convention.[1468] This sits well with the jurisprudence discussed above, under which the dividing line between State and

1460 299ff.
1461 *Tuheiava v France (dec)* (n 1098).
1462 Ibid, para 2.
1463 Ibid, para 2.
1464 Ibid, para 8.
1465 Ibid, para 25.
1466 Ibid, para 25 (author's translation).
1467 Ibid, para 26.
1468 Ibid, para 26.

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non-State runs between the individual practitioner and the Bar association, regardless of the latter's role in eg protecting their members against the State and ostensible claims of 'independence'.

After setting out the Court's case law on search and seizure at lawyers' offices, particularly as regarded procedural safeguards and the presence of third parties, the Committee then distinguished this case law by highlighting that in the instant case, it had been the Chairman of the Bar association himself who had conducted the visit in the course of an investigation in the field of disciplinary law.[1469] According to the Committee, there had consequently not been a risk to professional secrecy, since the Chairman was himself a lawyer subject to professional secrecy obligations, which his peers had even elected him to defend.[1470] The Court then highlighted that, quite to the contrary, the Chairman's visit had been intended to secure the relationship of confidence between a lawyer and his clients,[1471] and that this was the legitimate task of the Bar association. Given the importance of protecting the applicant's clients, the Chairman's visit had not been disproportionate to the goal pursued, rendering the application manifestly ill-founded.[1472]

To some extent, *Tuheiava* questions the foundation underlying the Court's reasoning on Bar associations. Overall, the Court has clearly rejected the idea that Bar associations are somehow fiduciaries of lawyers' rights, at least at the Convention level, and has instead consistently classed them as part of 'the State', at least in those jurisdictions where Bar associations wield a form of public power. This position has been criticised as not sufficiently reflecting Bar associations' important function of protecting their members – individual lawyers – against the State,[1473] a criticism further supported by the contrary position that the Court has taken as regards media organisations, where it has classed even public-law bodies as lying outside the State for Convention purposes due to the level of independence

1469 Ibid, para 31.
1470 Ibid, para 32. Noticeably, this re-introduces the opposition between the totality of lawyers and 'the State' that the Court had earlier rejected when classing the Bar association as a public body.
1471 Ibid, para 33.
1472 Ibid, para 35.
1473 cf eg *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445).

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required for the media.[1474] Despite this arguably comparable situation, the Court has been consistent in maintaining a formal separation between Bar associations as being bound by the Convention guarantees, and individual lawyers as being entitled by them.

Nonetheless, while maintaining this formal separation, the argument adduced as to Bar associations' proximity to the interests of their members has still surfaced indirectly: The Court – as seen in eg *Tuheiava*, the decision just discussed – has highlighted the particular importance of lawyers' professional organisations. On the whole, it seems that lawyers' protection against their own Bar associations will be weaker than against other State bodies, which is in keeping with a tendency to concentrate questions affecting lawyers – for example regarding the limits of permissible speech[1475] – with Bar associations. That brings us to our next point: the extent to which Bar associations should themselves decide matters regarding the legal profession, or, to put it differently, the extent to which they should be self-regulating.

ii. *The 'independence' of Bar associations – self-regulation?*

The Court is clear that Bar associations generally form part of the State, not of civil society. Nonetheless, in the four cases mentioned above which feature the *Jankauskas (No 2)* dictum, it has also emphasised their 'independence' and their 'self-regulation', which is, in the Court's diction, 'paramount'.[1476] 'Self-regulation', of course, is a vague term, but there is nonetheless some indication as to how it is understood by the Court.

This is the second area in which *Tuheiava* is relevant: The Court's reasoning was based to a large extent on the Chairman's position as having been elected by his peers to fulfil the task of defending a variety of principles important to legal services. The Court, in *Tuheiava*, indicated that not only does it generally see this type of self-regulation as desirable, but even that it will be more hesitant to find Convention violations where it is a professional body so constituted which acts in relation to lawyers. In effect,

1474 *Radio France and others v France (dec)* (n 1447) 22ff, discussed in Chapter Six at 334.

1475 Chapter Three, 167, as well as 284ff.

1476 *Jankauskas v Lithuania (No 2)* (n 1110), para 78; *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

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it seems the Court will apply reduced scrutiny to matters that are 'internal' to the legal profession in the sense of concerning self-regulatory matters.

While *Tuheiava* is only a Committee decision, it fits well with an overarching tendency in the Court's case law to show particular trust towards lawyers' regulatory bodies. The Court, in the *Jankauskas (No 2)* dictum, called explicitly for (an undefined form of) self-regulation, but beyond this, the Court has also generally seemed to implicitly assume that the more lawyers are involved in matters concerning the legal profession, the better, particularly where these lawyers are elected by their peers. Even outside the rather specific situation in *Tuheiava* of the bâtonnier himself performing a search, the Court generally classes the presence of another lawyer and particularly a member of the Bar association as a procedural measure which pulls towards Convention compliance for searches of lawyers' premises.[1477] Similarly, in *Michaud v France* (2012), the Court attached great weight to the fact that 'lawyers [did] not transmit [anti-money-laundering] reports directly to the FIU, but, as appropriate, to the President of the Bar Council of the *Conseil d'Etat* and the Court of Cassation or to the Chairman of the Bar of which the lawyer is a member'[1478] and that this 'constitute[d] a guarantee when it comes to protecting legal professional privilege'.[1479]

Generally, the Court seems less likely to find a violation in cases where interference with the position of a lawyer flows from the actions of another lawyer. This is an interesting finding. It indicates that the Court seems to think that lawyers are particularly trustworthy, or at least more trustworthy than eg members of the executive.[1480] In its case law on search and

1477 See eg *Roemen and Schmitt v Luxembourg* App no 51772/99 (ECtHR, 25 February 2003), para 69ff; *Wieser and Bicos Beteiligungen GmbH v Austria* App no 74336/01 (ECtHR, 16 October 2007), para 9; *Iliya Stefanov v Bulgaria* App no 65755/01 (ECtHR, 22 May 2008), para 43; *André and another v France* (n 1094), para 43ff; *Jacquier v France (dec)* App no 45827/07 (ECtHR, 01 September 2009) 7; *Xavier da Silveira v France* App no 43757/05 (ECtHR, 21 January 2010), para 41; *Golovan v Ukraine* (n 1056), para 63; *Robathin v Austria* App no 30457/06 (ECtHR, 03 July 2012), para 49; *Brito Ferrinho Bexiga Villa-Nova v Portugal* App no 69436/10 (ECtHR, 01 December 2015), para 57; *Kruglov and others v Russia* (n 1158), para 132.

1478 *Michaud v France* (n 1449), para 129 (emphasis in original). The case is discussed in greater detail in Chapter Two at 115ff.

1479 Ibid, para 130.

1480 That this assumption may not necessarily be justified, as cases such as *Hajibeyli and Aliyev v Azerbaijan* (n 1203) show, is discussed below at 302ff.

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seizure,[1481] the Court has at times explicitly underlined that the bâtonnier did not make any complaints.[1482] In addition, as regards more generalised action, the Court, in its line of cases on professional secrecy in Moldovan prisons, gave significant weight to the many strikes by the Moldovan Bar association, moving from an initially hesitant position[1483] to later finding Convention violations.[1484]

Moreover, a particularly clear example of this emphasis on the assessment of other lawyers arises in relation to disciplinary law: In cases that do not concern disciplinary proceedings themselves, but sanctions by other State bodies which attach to lawyers' behaviour, the Court will frequently attach significant weight to whether the Bar association thought it necessary to take disciplinary steps against the lawyer concerned. This preponderance of disciplinary law introduces an element of self-regulation in the sense of concentrating the assessment as to the severity of a breach of professional duties with the Bar association. Where the Bar association did not think disciplinary sanctions were necessary, the State will have a harder time showing that they were.

In keeping with the Court's focus on lawyers' freedom of expression,[1485] this is particularly clear in those cases concerning controversial statements made by lawyers. In these cases, the Court has often made reference to the outcome (or absence) of disciplinary proceedings by the Bar association in assessing whether a criminal conviction constituted a violation of Art. 10. In *Bono v France* (2015), the Court highlighted that 'the judges had not considered it appropriate to ask the Principal Public Prosecutor to refer

1481 Chapter Two, 110ff.

1482 *Turcon v France (dec)* App no 34514/02 (ECtHR, 30 January 2007) 24.

1483 *Sarban v Moldova* App no 3456/05 (ECtHR, 04 October 2005), paras 126, 130, in which the Court found no violation. The cases are discussed in Chapter Two, 104ff.

1484 *Oferta Plus SRL v Moldova* App no 14385/04 (ECtHR, 19 December 2006), para 149; *Modarca v Moldova* App no 14437/05 (ECtHR, 10 May 2007), para 91; *Istratii and others v Moldova* App no 8721/05 and others (ECtHR, 27 March 2007), para 93; *Cebotari v Moldova* App no 35615/06 (ECtHR, 13 November 2007), para 62; *Castravet v Moldova* App no 23393/05 (ECtHR, 13 March 2007), para 93. Confirming the weight this had in the Court's reasoning see *Apostu v Romania* App no 22765/12 (ECtHR, 03 February 2015), para 100.

1485 See Chapter Three, 154ff.

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the matter to the disciplinary bodies',[1486] and in *Morice* it noted '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'.[1487] Similar references by the Court that disciplinary authorities had not classed a certain form of behaviour as requiring disciplinary sanctions and that the behaviour could therefore not be particularly serious also appear in a number of other cases,[1488] and the Court even noted that contrary to the Government's suggestion, it could not completely ignore this fact in *Radobuljac v Croatia*.[1489] Particularly where the other set of proceedings is a private prosecution[1490] rather than one instituted by a more neutral authority, the Court will typically take a position rather more protective of lawyers.[1491] In a related form of reliance on the position of domestic Bar associations, the Court has also used subsequent disbarment as an indicator that legal assistance in earlier cases did not satisfy the client's rights (in violation of professional rules).[1492]

The Court therefore gives particular weight to the position Bar associations have taken, in effect reflecting the core idea of self-regulation that lawyers are best-placed or at least particularly well-placed to judge the behaviour of other lawyers. However, this position is based on an unspoken assumption: the assumption that the Bar associations are indeed pursuing the public-interest goals that they should be pursuing. Where this is not the case, rendering them independent is likely to only aggravate matters, as is clear from eg *Turczanik v Poland* (2005), where the Bar association, whose 'authorities were clearly determined to disregard a decision given by a competent higher court',[1493] appears to have relied on its independent status to shield it from the applicant's attempts to seek legal redress against extensive feet-dragging in processing his application to join the Bar.

1486 *Bono v France* (n 1259), para 55. And indeed (para 19) 'the Disciplinary Board of the Paris Bar Association [had] dismissed all the charges against the applicant' initially.

1487 *Morice v France [GC]* (n 1070), para 173, discussed in Chapter Three, 173ff.

1488 eg *Mor v France* (n 1098), para 60, concerning litigation secret.

1489 *Radobuljac v Croatia* (n 1097), para 68.

1490 Or indeed, as one sometimes has the impression in cases such as *Foglia v Switzerland* (n 1098), para 27, or *Mor v France* (n 1098), a potential SLAPP lawsuit.

1491 See eg *Mor v France* (n 1098); *Nikula v Finland* (n 1061).

1492 *Utvenko and Borisov v Russia* App no 45767/09; 40452/10 (ECtHR, 05 February 2019), para 183ff, discussed in Chapter Two at 79ff.

1493 *Turczanik v Poland* (n 1277), para 51.

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Similarly, the Court's emphasis on Bar associations will only work where these actually are sufficiently independent. Without this, 'self-regulation' is in fact different to direct regulation in name only, and involving other lawyers that are not independent from the State will add little by way of protection. While there are a number of cases where Bar associations have tried to protect their members against State authorities,[1494] there are also more problematic cases, in which it is not clear that the Bar association was acting in the interests of upholding the rule of law. As such, it is noticeable that in *Igor Kabanov v Russia* (2011), one of the few judgments where the Court did *not* follow the Bar association's assessment,[1495] there were also significant doubts as to the independence of the Bar association.[1496]

A case in which this problematic dimension of Bar associations' independence arose particularly clearly is *Hajibeyli and Aliyev v Azerbaijan* (2018),[1497] in which the Court also highlighted limitations on self-regulation in the sense that domestic law must provide clearly for reasons to refuse accession to the legal profession, rather than simply leaving the question of whether or not to admit candidates to the Bar association's unfettered discretion. In *Hajibeyli and Aliyev v Azerbaijan*, domestic rules provided simply that 'the Presidium of the [Azerbaijani Bar Association] deals with matters related to admission to the ABA', and that it took decisions in the presence of two-thirds of its members and by simple majority.[1498] The Government submitted that this was a sufficient legal basis to refuse to admit the applicants to the Bar,[1499] similarly to the domestic courts, which 'also failed to provide any reason for the refusal to admit the applicants to the ABA, finding that it was a matter falling within the exclusive competence of the legal profession'.[1500] The Court, on the other hand, noted that it could not

1494 Cases such as *Bono v France* (n 1259), para 22, where the Chairman of the Paris Bar association appealed against a decision issuing the applicant with a reprimand, and *Reznik v Russia* (n 1096) (discussed in the section on lawyers as public watchdogs, Chapter Four, 208ff) spring to mind.

1495 The applicant was disbarred by his Bar association, a decision which the Court did not find 'commensurate with the seriousness of the offence, considering the alternatives available', cf *Igor Kabanov v Russia* (n 1096), para 56.

1496 In ibid, the relevant Bar Council copied large parts of the President of the Supreme Court's complaint word-for-word into its disbarment decision.

1497 *Hajibeyli and Aliyev v Azerbaijan* (n 1203).

1498 Ibid, para 38.

1499 Ibid, para 56.

1500 Ibid, para 59.

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> accept the Government's and the domestic courts' argument, which would deprive lawyers of any effective protection in respect of the Presidium's possible interference with their freedom of expression by refusing to grant them access to the legal profession on grounds not envisaged by the relevant domestic legislation,[1501]

and that therefore 'the interference in question was not 'prescribed by law' within the meaning of Article 10 § 2 of the Convention'.[1502] It seems, then, that at least the question of who to admit to the legal profession cannot be left to self-regulation on a case-by-case basis, but must have a basis set down in law; moreover, the case underlines States' responsibility for Bar associations, since in the instant case the Court attributed responsibility to the State even where the Bar association's discretion had been totally unfettered under domestic law. Together with *Namazov v Azerbaijan*, where the Court noted that it

> [could not] overlook the fact that the Presidents of the disciplinary commission and the [Azerbaijani Bar Association] openly criticised the applicant for his frequent appearances in the media and his affiliation to an opposition political party, which were not related to the subject matter of the disciplinary proceedings instituted against him,[1503]

these examples show that independence for Bar associations will not automatically mean that these pursue the interests of a functioning legal profession.

As regards self-regulation, it is moreover noteworthy that there is a certain disconnect in the Court's reasoning. In full, the *Jankauskas (No 2)* quote reads as follows:

> In that connection, the Court also reiterates that professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently …, and that respect towards professional colleagues and self-regulation of the legal profession are paramount.[1504]

1501 Ibid, para 60.

1502 Ibid, para 61.

1503 *Namazov v Azerbaijan* (n 1058), para 49.

1504 *Jankauskas v Lithuania (No 2)* (n 1110), para 78. The wording in *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60, *Namazov v Azerbaijan* (n 1058), para 46, *Bagirov v Azerbaijan* (n 1097), para 78, does not differ notably.

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However, independence does not necessarily require self-regulation, it merely requires independent regulation.[1505] The latter does not necessarily mean that lawyers must regulate themselves, it merely means that their regulation should, to the extent possible, be shielded from improper interference by other public authorities. There are also other arrangements which can ensure this,[1506] and indeed, given the risk of regulatory capture discussed above, past years have shown a certain willingness to reconsider whether the legal profession should be self-regulating. However, once again the Court seems to treat 'Bar associations' as largely monolithic, noting in *Hajibeyli and Aliyev v Azerbaijan* that 'Bar Associations perform a self-regulation function',[1507] which, while true for some Bar associations, will not necessarily be true for all.

In keeping with this emphasis on self-regulation, the Court sees no difficulties with legislation that imposes a single, exclusive system of Bar associations in the interests of strengthening regulation and the protection of individual lawyers by ensuring that there can be no competition between Bar associations.[1508] In *Bota v Romania (dec)*, the applicant had decided to create an association called the 'Romanian Constitutional Bar',[1509] pass himself off as a 'Bar member' and offer legal services on this basis.[1510] On an action by the Romanian Union of Lawyers, the statutory Bar association, this association was then disbanded for pursuing unlawful aims. The Court held that dissolving the organisation had pursued a legitimate aim, since the domestic courts had based their judgment on the importance of the role assigned to lawyers in the justice system and the necessity of securing the quality of legal assistance and had therefore served the prevention of

1505 For the Court's position as regards regulation of audiovisual media see eg *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), particularly at para 222, discussed in Chapter Six, 323ff.

1506 For an introduction see eg Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar Publishing 2013).

1507 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.

1508 For a controversial proposal in Turkey see eg Human Rights Watch, 'The Reform of Bar Associations in Turkey: Questions and Answers' (2020) <https://www.hrw.org/news/2020/07/07/reform-bar-associations-turkey-questions-and-answers> accessed 08 August 2024; for the problematic situation in Ukraine see eg International Commission of Jurists (n 1441) 12ff. In the Court's case law, the problem formed the backdrop to *Amihalachioaie v Moldova* (n 1096), para 9ff.

1509 *Bota v Romania (dec)* (n 1440) 2.

1510 Ibid 3.

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disorder or crime as well as the protection of the rights of others.[1511] In particular, the Court highlighted that since the members of the association had assumed for themselves powers which had been within the exclusive competency of the Romanian Union of Lawyers dissolving the association had been proportionate. Nonetheless, the events leading up to the subsequent admissibility decision in *Ţuluş v Romania (dec)* indicate that the 'Romanian Constitutional Bar' must have kept operating until at least 2011.[1512]

On the whole, there is therefore evidence to support the conclusion that the Court takes a positive view of regulation of lawyers by other lawyers. This is clear not only from explicit statements focusing on the ambiguous term 'self-regulation', but also from the general tendencies of the Court's case law. In general, where interference with lawyers' rights emanates from other lawyers or from structures elected by them, it will be easier for States to justify such interference. Notably, this is the case as regards criminal sanctions attaching to lawyers' freedom of expression: Where the relevant disciplinary body has not seen fit to institute disciplinary proceedings, the Court has tended to see this as an indication that the statements did not merit criminal sanctions either. This case law therefore privileges States that secure the independence of the legal profession, which the Court has called for elsewhere, by entrusting that profession with its own regulation.

III. Conclusion: The public interest in legal services in the Court's case law

In addition to case law protecting the client's (Chapter Two and Chapter Three) and the lawyer's (Chapter Four) private interests in legal services, the Court's case law therefore also reveals some awareness of the public interest in legal services. This manifests both in more abstract explanations of the significance of legal services to the Convention (discussed in this chapter at I.) and in a number of more specific lines of case law in which the Court has discussed how States should best reflect the public interest in legal services (II.), which concern, for example, the regulation of the market for legal services and a separate administrative regime for lawyers.

From the perspective of lawyers, this case law reflecting the public interest in legal services can lead both to elevation and to additional restriction of rights. The Court has gone to great lengths to emphasise that

1511 Ibid 8.

1512 *Ţuluş v Romania (dec)* App no 23562/13 (ECtHR, 17 December 2019), para 4.

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lawyers and the legal profession are special both in terms of their legal status as 'officers of the court' and their 'central role … in the administration of justice and the maintenance of the rule of law'. In line with this particular importance, the Court has made a number of oblique statements regarding matters such as the extent to which legal services can or should be regulated and how such regulation should be organised in terms of administrative law. On traditional analyses of human rights, which largely see human rights in terms of what they do for the rights holder,[1513] this case law is not easy to explain, since in essence the Court argues by reference to what the lawyer's rights do for other people. After a brief comparison to the Court's case law on the media,[1514] where rights holders similarly fulfil important functions in the interests of others, the remaining chapters of this study provide a more general critique of the Court's approach to public interests under the Convention and explore whether there are other, more convincing, alternatives.

1513 See Chapter Eight.
1514 Chapter Six.

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Chapter Six: 'Essential' to the Convention System: Comparing Legal Services and the Media

Legal services, as has been shown, serve both private and public interests,[1515] which makes them sit somewhat uneasily with traditional approaches that see human rights primarily in terms of what they do for the rights holder (see Chapter Eight). In an attempt to find ways of better addressing this tension, this chapter examines how the Court has dealt with a similar situation where human rights are equally exercised not only in the interests of the rights holder,[1516] but in the interests of others: the media and journalists, whose activities further not only their own interests, but also the audience's right to freely receive information and the public interest in pluralism and democracy.

This chapter discusses (I.) how the Court's case law on the media deals with this comparable complex of interests, highlighting that the case law on the media is significantly more developed than that on legal services. Following this overview, the chapter assesses similarities and differences between legal services and the media (II.), with a view to identifying the potential and limitations of transferring (some of) the Court's case law on the media to the protection of legal services under the Convention.

I. A template for legal services? The Court's case law on the media

On the Court's view, the media, like legal services, are 'essential'[1517] for the Convention system. As for legal services, there is therefore an important public interest in ensuring that the media can fulfil the activities demanded of them to achieve the overarching goals of protection of human rights,

1515 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1516 Which has led to a burgeoning debate in moral theory on whether the protection of journalists can be properly classed as a question of human rights, which is discussed in Chapter Eight, 419ff.

1517 Compare *Bladet Tromsø and Stensaas v Norway [GC]* App no 21980/93 (ECtHR, 20 May 1999), para 59, which concerns the media, to the description of legal services in *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669, discussed in detail in Chapter Five, 240ff.

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democracy and the rule of law. Moreover, the activities of the media, like those of lawyers, also further the rights of other Convention-rights holders, specifically, in the case of the media, the right to receive information. Finally, as with legal services, a quality requirement for the media is that these functions be fulfilled with a high degree of independence: While the public interest requires that these activities be performed, the State is (at least without a large number of additional safeguards) prohibited from simply stepping in and performing them itself, since they require independence from the State. This separates the media and legal services from other public services, such as eg healthcare, which, while equally essential to certain Convention rights such as Art. 2 ECHR, do not contain similar independence requirements prohibiting the State from directly undertaking the activity required by the human right.[1518]

Convention protection of the media thus exhibits a number of constraints similar to the Convention protection of legal services and consequently provides a fruitful source of comparison and contrast. The more developed case law on the media is a potential repository of techniques transferable to legal services, and could therefore in principle help shed light on the question of how best to analyse Convention protection of legal services. Following a general discussion of the role the Court has assigned to the media in the Convention system (1.), the current section goes into greater detail on the Court's case law securing the media's ability to fulfil these functions (2.).

1. The Court's view of the media's function in the Convention system

In the Court's view, when the media act, they act not only in their own private interests. Instead, they fulfil a key role without which the Convention system cannot work: to enable plurality and debate as preconditions of democracy, and, more widely, the further Convention goals of human rights and the rule of law.

On this basis, the Court sees the purpose of freedom of expression as essentially twofold: In the somewhat dated language of *Handyside v UK*

1518 Although note that in any case Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, CH Beck 2021), § 20, para 25 argue that the Convention does not impose an obligation on the State to maintain a functioning healthcare system.

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[Plenary] (1976), '[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man'.[1519] Freedom of expression is therefore justified not only by reference to the interests of the person exercising it, but also as securing a public interest (in the sense of an interest which all members of the community have in common) in a democratic society, as well as, at times, other Convention principles such as that of the rule of law.[1520] Indeed, the Court has referred to 'the key importance of freedom of expression as one of the preconditions for a functioning democracy'.[1521] Based upon this analysis of the rationale underpinning Art. 10 ECHR, the Court has explicitly focused on contribution to public debate as a factor strengthening the applicant's position, noting that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'[1522] and that 'there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest'.[1523]

> A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions.[1524]

1519 *Handyside v UK [Plenary]* App no 5493/72 (ECtHR, 07 December 1976), para 49, see recently eg *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), para 177, where the Court referred to these 'general principles' as 'well established in the Court's case-law'.

1520 On this latter point and the role of eg court reporting in supporting the rule of law see, for example, *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995), para 34, as well as *Aquilina and others v Malta* App no 28040/08 (ECtHR, 14 June 2011), discussed in Chapter Four at 204.

1521 *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000), para 43; *Ringier Axel Springer Slovakia, as v Slovakia (no 4)* App no 26826/16 (ECtHR, 23 September 2021), para 26; *Khadija Ismayilova v Azerbaijan* App no 65286/13; 57270/14 (ECtHR, 10 January 2019), para 49, with further references.

1522 *Lingens v Austria [Plenary]* App no 9815/82 (ECtHR, 08 July 1986), para 42, see recently eg *Cheltsova v Russia* App no 44294/06 (ECtHR, 13 June 2017), para 95.

1523 Consistent case law since *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996), para 58, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 215.

1524 *Axel Springer AG v Germany [GC]* App no 39954/08 (ECtHR, 07 February 2012), para 91.

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Where the former function of contributing to a public debate is being fulfilled, the Court 'will examine in scrupulous detail'[1525] while, where there is no such contribution, no additional protection will be granted.[1526] There is therefore, to quote the relevant heading in *NIT SRL v Moldova [GC]* (2022), a separate Convention regime for 'journalistic reporting on political issues and other matters of public concern'.[1527] The Court has summarised this elsewhere as 'the privileged position accorded by the Court in its case law to political speech and debate on questions of public interest'.[1528]

For this latter limb, debate on matters of public interest, the media are particularly important. There is an 'interest of democratic society in securing a free press',[1529] which 'will weigh heavily in the balance in determining … whether the restriction was proportionate to the legitimate aim pursued'.[1530] This passage highlights clearly that the Court grounds the protection it grants to the media not on eg the relevant journalist's private interests, but on the contribution which freedom of expression makes to public debate, ie the extent to which exercise of the human right advances the interests of persons other than the rights holder.[1531] Subsequently, this idea that the human right is being exercised not (exclusively) in a private interest, but in a public one, has been phrased even more clearly: In later cases, the Court, at the beginning of its proportionality analysis, has held

1525 *Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland* App no 34124/06 (ECtHR, 21 June 2012), para 56.

1526 cf eg *NIT SRL v Moldova [GC]* (n 1519), para 216, where the Court rejected elevated protection while noting that '[t]he Court is therefore not persuaded by the applicant company's submission that by conducting news reporting in the way it did in its news bulletins that were monitored, NIT had contributed to political pluralism in the media in any meaningful way'.

1527 Ibid, para 178.

1528 *Magyar Helsinki Bizottság v Hungary [GC]* App no 18030/11 (ECtHR, 08 November 2016), para 163. Note that the protection applied will be the same for both categories as 'there is no warrant in [the Court's] case-law for distinguishing … between political discussion and discussion on other matters of public concern', cf *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992), para 64.

1529 Consistent case law since *Goodwin v UK [GC]* App no 17488/90 (ECtHR, 27 March 1996), para 45, see recently eg *Sedletska v Ukraine* App no 42634/18 (ECtHR, 01 April 2021), para 62. For the conceptual problems this causes for theories of human rights based on the interests of the rights holder see Chapter Eight, 419ff.

1530 *Goodwin v UK [GC]* (n 1529), para 40, see recently eg *MAC TV sro v Slovakia* App no 13466/12 (ECtHR, 28 November 2017), para 39.

1531 This point is discussed from a conceptual perspective in Chapter Eight.

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that the 'interests to be weighed … are both public in nature'.[1532] Indeed, the Court itself has used the systemic term 'function', focusing heavily on 'the essential *function* the media fulfil in a democratic society'.[1533] This is all the more noteworthy since there have also been conflicts between the European Court of Human Rights and domestic courts proceeding on more individualistic[1534] theories of human rights that focused on the right as advancing the private interests of the rights holder.[1535]

Given this public interest in the media being able to perform their role, the State is responsible for making sure that they can. Presumably, this responsibility is a legal obligation, since the State, in the Court's diction, is the 'ultimate guarantor of pluralism',[1536] which extends to ensuring pluralism in the media. The State is thus under a public-interest obligation

1532 *Stoll v Switzerland [GC]* App no 69698/01 (ECtHR, 10 December 2007), para 116; *Pentikäinen v Finland [GC]* App no 11882/10 (ECtHR, 20 October 2015), para 94; *Erdtmann v Germany (dec)* App no 56328/10 (ECtHR, 05 January 2016), para 21; *Selmani and others v the former Yugoslav Republic of Macedonia* App no 67259/14 (ECtHR, 09 February 2017), para 76.

1533 *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 72 (emphasis added). The quote appears with minor variations (particularly concerning the terms 'media' and 'press') since *Bladet Tromsø and Stensaas v Norway [GC]* (n 1517), para 59 and has recently been cited eg in *Novaya Gazeta and others v Russia* App no 11971/10; 48557/10 (ECtHR, 14 December 2021), para 57. For a summary in French, see eg *Görmüş and others v Turkey* App no 49085/07 (ECtHR, 19 January 2016), para 40 ('la presse joue un rôle essential dans une société démocratique').

1534 On this term see Chapter Eight, 399ff.

1535 cf the *Von Hannover* saga (*Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004); *von Hannover v Germany (No 2) [GC]* App no 40660/08; 60641/08 (ECtHR, 07 February 2012), in which the European Court of Human Rights applied a systemic understanding of freedom of expression to reduce the level of protection afforded to Art. 10 rights where the debate in question was classed as not concerning a legitimate matter of public concern. For a discussion, see eg Antje von Ungern-Sternberg, 'Autonome und funktionale Grundrechtskonzeptionen – Unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' in Nele Matz-Lück and Mathias Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem* (Springer 2012). Discussing these different approaches in detail see Chapter Eight.

1536 cf *Informationsverein Lentia and others v Austria* App no 13914/88 and others (ECtHR, 24 November 1993), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 184. Note that this is not limited to *media* pluralism, but relates generally to pluralism in society since '[t]he harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion', cf *Berkman v Russia* App no 46712/15 (ECtHR, 01 December 2020), para 45. See, for an overview of the Court's general case law on the State's role as guarantor

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to ensure the proper functioning of this segment of society,[1537] which comports a number of further obligations which will be summarised below. Particularly, this relates to securing a certain minimum level of activity. In light of the Convention interest in debate on matters of public concern, 'the most careful scrutiny on the part of the Court is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern,'[1538] or, to put it in other words, are capable of having a 'chilling effect' on freedom of expression.[1539] This is so because there is a public interest under the Convention in this activity being exercised, and being exercised freely.

The basic structure of Convention media freedoms, particularly the Court's analysis of freedom of expression in terms of what it does for public interests and the rights of persons other than the rights holder, therefore shows significant parallels to the situation of legal services.[1540] The following section provides an overview of the rough outlines of the Court's case law,[1541] laying the foundation for a comparison between the Court's case law on media and on legal services both in terms of black-letter law and of the argumentative techniques used.

2. Case law securing the media's ability to fulfil their Convention functions

In the Court's view, independent media are a conditio sine qua non, part of a 'precondition',[1542] of the Convention system because without them, public

of pluralism, eg Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia 2016) 94ff.

1537 Framing this in the language of undirected duties see Chapter Seven at 375.

1538 *NIT SRL v Moldova [GC]* (n 1519), para 178.

1539 cf eg ibid, para 228. The significance of this focus on 'chilling effect', which indicates the Court's desire to secure a minimum activity level, is discussed below at 335ff.

1540 Although with the notable difference that there does not appear to be a parallel 'acting in individual cases' dimension to the media case law, due, essentially, to the lack of a link to identifiable rights holders for the mass-media fulfilling their role in political discourse. The problem is discussed in greater detail below at 341ff.

1541 Given the great expanse of the Court's case law on the media, the following section concentrates primarily on judgments by the Grand Chamber as well as select Chamber judgments.

1542 *Özgür Gündem v Turkey* (n 1521), para 43; *Ringier Axel Springer Slovakia, as v Slovakia (no 4)* (n 1521), para 26.

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debate is impossible. They therefore require specific protection, which leads to a separate Convention regime where debate on matters of public interest is concerned,[1543] as well as for the actors that facilitate such debate. For these, the Court itself has explicitly highlighted 'the enhanced protection afforded to press freedom under Article 10 of the Convention'.[1544]

(a) *The State as the 'ultimate guarantor of pluralism'*

Drawing on the State's role as the 'ultimate guarantor'[1545] of pluralism, the Court has found that the State has potentially wide-ranging Convention obligations to ensure the functioning of public debate and, more specifically, of the media as facilitators thereof. 'In such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism'.[1546] This is because '[the Court] takes as its starting point the fundamental truism: there can be no democracy without pluralism'.[1547] Since '[a] situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media … undermines the fundamental role of freedom of expression in a democratic society',[1548] the State must proactively introduce market regulation preventing this outcome. Since '[g]enuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice', '[g]iven

1543 On this limitation see also 311ff.

1544 *NIT SRL v Moldova [GC]* (n 1519), para 215.

1545 cf n 1536.

1546 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* App no 38433/09 (ECtHR, 07 June 2012), para 134, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 186, 192. For an attempt at unpicking what the Court means with the open term 'pluralism' see Florian Oppitz, *Theorien der Meinungsfreiheit: Eine vergleichende Untersuchung richterlicher Grundrechtsdogmatik* (Nomos 2018) 111ff.

1547 *Manole and others v Moldova* App no 13936/02 (ECtHR, 17 September 2009), para 95; see also *NIT SRL v Moldova [GC]* (n 1519), para 185. Indeed, as a comparative aside, Art. 11 § 2 of the European Union's Charter of Fundamental Rights explicitly provides that '[t]he freedom and pluralism of the media shall be respected', in language that seems closer to the type of undirected duty discussed in Chapter Seven at 375.

1548 *Manole and others v Moldova* (n 1547), para 98, with reference to *VgT Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001).

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the importance of what is at stake under Article 10, the State must be the ultimate guarantor of pluralism'.[1549]

The State is therefore obliged to regulate to secure the functioning of the media sector with a view to ensuring the specific goal of pluralism, although it retains the wide margin of appreciation that regulation addressing potentially conflicting policy goals brings with it: 'The Contracting States should therefore in principle enjoy a wide discretion in their choice of the means to be deployed in order to ensure pluralism in the media'.[1550] As long as States are fulfilling their 'guarantor' role, they appear to generally be able to rely on a wider margin of appreciation, since what is important from the Court's point of view is the result, not how States achieve it.[1551] Nonetheless, the Court has at times set out rather detailed regulatory objectives. For example, in *Manole and others v Moldova* (2009), it held that:

> The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment.[1552]

It then noted that

> [i]n this connection, the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe … provide guidance as to the approach which should be taken to interpreting Article 10 in this field,[1553]

drawing on the soft-law documents that made up 20 pages of the 73-page judgment[1554] to indicate to the Moldovan Government how to comply with its obligations under the much more abstract Art. 10 ECHR, thereby 'hardening' these soft-law standards into directly binding obligations.

1549 *Manole and others v Moldova* (n 1547), para 99.
1550 *NIT SRL v Moldova [GC]* (n 1519), para 193.
1551 cf eg ibid, para 194 and the focus on whether 'the relevant national legal norms and their application in the concrete circumstances of a given case seen as a whole produced effects that were compatible with the Article 10 guarantees and were attended by effective safeguards against arbitrariness and abuse'.
1552 *Manole and others v Moldova* (n 1547), para 100.
1553 Ibid, para 102.
1554 Ibid, para 51ff.

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(b) *The obligation to create 'a favourable environment for participation in public debate'*

In addition to this case law on 'a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism',[1555] 'the positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear'.[1556] The Court's reference to the State as the 'ultimate guarantor' thus brings with it concrete obligations on the State to ensure that the exchange of different ideas and opinions can and does actually take place. This is based, inter alia, on the Court's assumption that the media market is subject to market failure without State intervention:

> To ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.[1557]

(c) *The independence of the media*

Given the media's role as facilitators of such public debate, they must be able to act independently. This equally manifests in a number of strands of the Court's case law: In light of the requirement of independence, journalists have the right to determine themselves how best to perform

1555 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 134, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 186, 192.

1556 *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECtHR, 29 January 2015), para 68. The quote goes back to *Dink v Turkey* App no 2668/07 and others (ECtHR, 14 September 2010), para 137 ('un environnement favorable à la participation aux débats publics de toutes les personnes concernées'), and has recently been cited in eg *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), para 9.

1557 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 130; *NIT SRL v Moldova [GC]* (n 1519), para 185.

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their functions,[1558] and it is not for State bodies,[1559] nor indeed for the Court,[1560] to determine how journalists should best fulfil their tasks. This freedom is essentially a corollary of journalists' independence from the State: If journalists are to be truly independent, all State interference with how they go about their activities must, in principle, be avoided. As a result and to avoid interference in particular by the courts, their 'journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation'.[1561] In a similar vein, authorities that regulate the media need to be independent.[1562]

(d) *The obligation to protect the media against State and non-State attacks*

Moreover, the importance of journalists and of their independence to the Convention system means that the State is under an enhanced obligation to protect them, both against State and against non-State actors.[1563] The Court has explicitly mentioned 'safeguards to be afforded to the press [which] are of particular importance',[1564] and has also focused on a number of additional protective features for individual journalists, which cannot be justified purely by reference to their individual interests, but are typically justified by reference to the importance of the functions which journalists

1558 From the rich case law see only eg the Grand Chamber judgments in *NIT SRL v Moldova [GC]* (n 1519), para 183, 193; *von Hannover v Germany (No 2) [GC]* (n 1535), para 102, and *Jersild v Denmark [GC]* App no 15890/89 (ECtHR, 23 September 1994), para 31.

1559 cf eg *Szurovecz v Hungary* App no 15428/16 (ECtHR, 08 October 2019), para 74.

1560 cf eg *Bozhkov v Bulgaria* App no 3316/04 (ECtHR, 19 April 2011), para 48, 'it is not for the Court to substitute its own views for those of the press as to the appropriate timing of publication of a news story'.

1561 *Prager and Oberschlick v Austria* (n 1520), para 38; *Bladet Tromsø and Stensaas v Norway [GC]* (n 1517), para 59; see recently eg *Samoylova v Russia* App no 49108/11 (ECtHR, 14 December 2021), para 77.

1562 *NIT SRL v Moldova [GC]* (n 1519), para 205.

1563 cf eg *Pentikäinen v Finland [GC]* (n 1532), para 89; *Gongadze v Ukraine* App no 34056/02 (ECtHR, 08 November 2005), para 168; *Najafli v Azerbaijan* App no 2594/07 (ECtHR, 02 October 2012), para 66ff; *Khadija Ismayilova v Azerbaijan* (n 1521), para 164; *Mazepa and others v Russia* App no 15086/07 (ECtHR, 17 July 2018), para 45.

1564 Constant case law, cf *Jersild v Denmark [GC]* (n 1558), para 31, see recently eg *Mammadov and Abbasov v Azerbaijan* App no 1172/12 (ECtHR, 08 July 2021), para 61.

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exercise, that is, ultimately, to protect the activities which they engage in. As such, where the applicant exercises the functions of a 'public watchdog',[1565] they will be particularly protected.

As regards threats from the State, this protective obligation manifests, inter alia, in additional restrictions on the State's ability to conduct search and seizure operations at journalists' offices.[1566] Moreover, the Court has noted that 'public measures preventing journalists from doing their work may raise issues under Article 10'.[1567] Since 'it cannot be disputed that the physical ill-treatment by State agents of journalists while the latter are performing their professional duties seriously hampers their exercise of the right to receive and impart information',[1568] the State will have to take particular care where it takes measures that may adversely affect journalists' activities in this way.[1569] However, the Court has been keen to stress that media activity does not give a general right to break the law, particularly the criminal law.[1570]

As regards threats from private actors, the Court has noted that

> the key importance of freedom of expression as one of the preconditions for a functioning democracy is such that the genuine, effective exercise of this freedom is not dependent merely on the State's duty not to interfere, but may call for positive measures of protection, even in the sphere of relations between individuals.[1571]

As such, the Court has developed a distinct line of case law 'concerning respondent States' obligations to investigate criminal offences against journalists',[1572] in which it is 'of the utmost importance to investigate whether the threat was connected to the applicant's professional activity and by whom it had been made'.[1573] The Court has therefore derived from Article 10 of the

1565 cf eg *Bozhkov v Bulgaria* (n 1560), para 42 or, from the French-language case law, eg *Görmüş and others v Turkey* (n 1533), para 72.
1566 cf eg *Ernst and others v Belgium* App no 33400/96 (ECtHR, 15 July 2003).
1567 *Najafli v Azerbaijan* (n 1563), para 68.
1568 Ibid, para 68.
1569 cf eg *Butkevich v Russia* App no 5865/07 (ECtHR, 13 February 2018), para 130.
1570 *Stoll v Switzerland [GC]* (n 1532), para 102; *Pentikäinen v Finland [GC]* (n 1532), para 91.
1571 *Khadija Ismayilova v Azerbaijan* (n 1521), para 158 with further references.
1572 Ibid, para 119.
1573 Ibid, para 120 – note that in this regard, the judgment in *Khadija Ismayilova* corrects the criticism made by Judges Nussberger and Vehabović in their Joint Partly Dissenting Opinion in *Huseynova v Azerbaijan* App no 10653/10 (ECtHR, 13 April 2017) 28.

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Convention a 'positive obligation' to 'establi[sh] an effective system for the protection of journalists',[1574] and has, in relevant cases, highlighted that the victim's status 'as a journalist' put him 'at particular risk of falling victim to an unlawful attack',[1575] that 'the authorities, primarily prosecutors, ought to have been aware of the vulnerable position in which a journalist who covered politically sensitive topics placed himself/herself *vis-à-vis* those in power at the material time',[1576] or that a failure to protect a critical journalist against an attack by an ultranationalist group not only violated the substantive obligations contained in Art. 2, but also Art. 10.[1577]

(e) *Protecting the public's right to receive information*

The reasoning for this elevated protection is that in fulfilling their functions of enabling public debate, the media are acting not only to realise their own human rights, but also those of the recipients of the information, since Art. 10 § 1 ECHR explicitly also guarantees 'freedom … to receive and impart information'.[1578] While the Court has at times phrased public debate merely as an 'interest of democratic society',[1579] over time it has drawn more concrete links to specific human rights norms and has highlighted that the public, which itself consists of human-rights holders, has a right to receive information.[1580] The activity in question, the provision of information and opinions on matters of public interest, is therefore protected both by human rights to provide these services and human rights to receive them. At times, the Court even appears to give precedence to the latter rights despite the fact that the 'public' is not directly involved in the case at Strasbourg,[1581] as in *Selmani and others v Former Yugoslav Republic of Macedonia* (2017), where the Court noted that '[t]hose were important

1574 *Khadija Ismayilova v Azerbaijan* (n 1521), para 158.
1575 *Kılıç v Turkey* App no 22492/93 (ECtHR, 28 March 2000), para 66; see similarly *Dink v Turkey* (n 1556), para 135.
1576 *Gongadze v Ukraine* (n 1563), para 168.
1577 *Dink v Turkey* (n 1556), para 138.
1578 cf eg the long line of cases recently summarised by the Grand Chamber in *NIT SRL v Moldova [GC]* (n 1519), para 184.
1579 cf n 1529 and *Goodwin v UK [GC]* (n 1529), para 45.
1580 Constant jurisprudence since *Informationsverein Lentia and others v Austria* (n 1536), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 184.
1581 Although of course the State is charged with pursuing the public's interests.

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elements in the exercise of the applicants' journalistic functions, which the public should not have been deprived of in the circumstances of the present case'.[1582] In keeping with this departure from merely the applicant's own rights as a standard of review,[1583] the Court has explicitly held that '[t]he [national] courts must therefore take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general'.[1584]

(f) *Elevated protection only for 'responsible journalism'*

This additional protection is not attached to a particular status, but is engaged as long as the applicant performs the functions of a journalist,[1585] which is particularly clear from cases such as *Man and others v Romania (dec)*.[1586] There, the Court did not provide elevated protection to the applicant journalists where there was no link to journalists' function of contributing to public debate since the applicants 'were accused of a crime which essentially consisted of refraining from imparting information of public interest in exchange for personal gain'.[1587] In line with this functional approach, the additional protective regime identified above will also only apply where media actors act in accordance with established professional standards. Where applicants do not fulfil these minimum standards described as 'responsible journalism',[1588] they also do not benefit from additional protection. A model example is *Haldimann and others v Switzerland* (2015), where the Court dealt extensively with whether the way the report in question had been made 'was capable of contributing to the public

1582 *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 84.
1583 Which suggests that the analysis proposed in Chapter Nine for legal services might also be fruitfully applied to the media.
1584 *Bozhkov v Bulgaria* (n 1560), para 51.
1585 cf eg *Butkevich v Russia* (n 1569), para 131.
1586 *Man and others v Romania (dec)* App no 39273/07 (ECtHR, 19 November 2019).
1587 Ibid, para 130, where the Court also noted at para 131 that 'because of the nature of the criminal acts under investigation, the current case differs essentially from cases where journalists' right to impart information had been breached'.
1588 *Flux and Samson v Moldova* App no 28700/03 (ECtHR, 23 October 2007), para 26, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 180.

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debate on [the] issue'[1589] and made a detailed assessment of the applicant journalists' conduct.[1590] In that regard, the Court highlighted

> that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism.[1591]

Where these minimum standards of professional behaviour are not met, no additional protection will apply.

Moreover, where violations of professional standards are alleged, that can in principle also justify revocation of licenses required under domestic law if there are such licensing requirements. This is frequently the case, for example, in relation to television or radio stations, due to historical technical limitations. Nonetheless, removal of such a license is classed as the most severe possible sanction for a failure to meet professional standards, and is therefore only to be used restrictively,[1592] once again marking the Court's tendency to particularly protect media activities.

(g) *Pluralism as a justification for restricting rights*

While all of the aforementioned shows additional *protection* of Convention rights in order to secure the media's ability to fulfil their functions, the Court has also allowed the State to rely on its responsibility to secure functioning public debate to justify *restrictions* on the rights of applicants acting in a regulated market. For example, in *NIT SRL v Moldova [GC]*, the Grand Chamber noted that it had already 'accepted that the ability of a country's licensing system to contribute to the quality and balance of programmes constitutes a sufficient legitimate aim for an interference', and 'also accepted that interferences seeking to preserve the impartiality

1589 *Haldimann and others v Switzerland* App no 21830/09 (ECtHR, 24 February 2015), para 57.

1590 Ibid, para 61ff. See similarly *Bozhkov v Bulgaria* (n 1560), para 51, where the Court, after an extensive analysis, noted that '[h]aving regard to the above factors, the overall context of the case and the important public interest involved, the Court is satisfied that the applicant acted as a responsible journalist'.

1591 *Haldimann and others v Switzerland* (n 1589), para 61. Constant case law since *Bladet Tromsø and Stensaas v Norway [GC]* (n 1517), para 65, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 180.

1592 *NIT SRL v Moldova [GC]* (n 1519), paras 218, 222.

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of broadcasting on matters of public interest' and 'measures intended to ensure the audience's right to a balanced and unbiased coverage of matters of public interest in news programmes' all pursue legitimate aims.[1593]

Moreover, the Court has paid particular attention to the passage in Art. 10 § 2 that '[t]he exercise of these freedoms … carries with it duties and responsibilities'. While that is easily reconcilable both with the wording and with the non-absolute nature of Art. 10, the Court has gone one step further and held that the media have 'tasks', which sits somewhat uneasily with the traditional idea that the State has tasks and individuals have rights since human rights protect the position of the rights holder.[1594] Such 'tasks' include, specifically, those of 'purveyor of information and public watchdog'[1595] and of imparting information and ideas on areas of public interest.[1596]

(h) *Expanding case law to other actors fulfilling similar functions to journalists*

Finally, the strong focus on function reflected in the case law displayed above also influences the scope of the Court's case law: By now, and in light of the decrease in technical barriers which has widened the spectrum of those able to contribute to public debate beyond traditional press outlets,[1597] the Court has extended much of its case law developed regarding journalists to other actors fulfilling similar functions, such as non-governmental organisations and bloggers.[1598]

1593 Ibid, para 174.
1594 See the discussion in Chapter Eight.
1595 *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985), para 58, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 129. See, for a particularly clear example, *Bozhkov v Bulgaria* (n 1560), para 43, where the Court held that '[t]here can be no doubt that this was a question of considerable public interest … and that the publication of information about it formed an integral part of the task of the media in a democratic society'.
1596 *Lingens v Austria [Plenary]* (n 1522), para 41.
1597 cf, in this vein, the Joint Concurring Opinion of Judges Sajó and Vučinić in *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECtHR, 25 June 2013).
1598 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 159, 168.

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II. The Court's case law on the media and on legal services: Similar problems, different analyses

As readers of Chapter Two to Chapter Five will no doubt already have noted, a number of the lines of case law regarding the media resemble those regarding legal services. This is despite the fact that, as a general rule, the Court's case law on the media is more developed and exhibits greater clarity, particularly as regards the wider public interest with which, for legal services, the Court tends to struggle more.

Building on the overview of the case law on the media, this section compares and contrasts the Court's case law on the media and on legal services, highlighting which areas the Court deals with in a similar way and where there are differences. This enquiry proceeds in three parts. A first part (1.) deals with similarities in the actual black-letter law of the Convention, comparing the features of the protective regimes applied to the media and to legal services. A second part (2.) deals with the Court's reasoning, comparing, in particular, the arguments which the Court attaches weight to in deciding the cases brought before it. Finally, a third part (3.) draws together the aforementioned developments to assess to what extent the Court's case law on the media can be fruitfully drawn on to resolve (some of) the problems identified in the Court's case law on legal services.

1. Media and legal services: Doctrinal similarities

In the Court's case law, both the media and legal services involve the exercise of Convention rights not exclusively in the interests of the rights holder, but also in the interests of others and in the public interest. The exercise of human rights by lawyers and by the media is thus protected inter alia for its systemic value.[1599] These rights serve not (only) to fulfil the autonomously determined goals of those exercising them, but equally to further a certain pre-defined public goal. As a result, both legal services and the media have a certain fiduciary nature: Rights are exercised in the interest and on behalf of other rights holders. In the case of the media, this is the part which the Court refers to as the public's right to receive information on matters of public interest. In the case of legal services, it

1599 See Chapter Eight.

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is, to date, typically the rights of an identifiable client or clients.[1600] In both cases, the activity in question is protected by the complex of rights both to provide a service and rights to receive it.[1601] This dual function of the rights at stake, to simultaneously further the interests of the rights holder and other public or third-party interests, gives rise to a complex net of considerations that can conflict as well as complement each other. Given that, seen at this level of abstraction, media and legal services share a number of significant features, it is unsurprising that the case law on both types of human rights defender displays some similar traits – which in turn make the divergences in the Court's case law all the more noticeable.

(a) *Structural differences between the case law on media and on legal services*

It is worth noting at the outset that despite the aforementioned similarities, there are also key structural differences between the situation of the media and that of legal services. As will be seen below, the resemblances between the case law on the media and on legal services are, by and large, concentrated on what has been termed the 'external' dimension of legal services in Chapter Three; conversely, there does not appear to be an equivalent for the media to the elevated protection provided for what was termed the 'internal' dimension of legal services (discussed in Chapter Two). This presumably flows from a factual difference in the way the cases arise: The activities of the media, unlike legal services, are not typically individualised and provided on the basis of a 'relationship', but instead, as the term 'mass' media makes clear, are provided without any particular connection between provider and recipient. As a result, the Court's case law protecting

1600 Although note that there is, of course, an argument to be made that the Court's case law on media focusing on 'the public's right' could equally be applied to the right to receive legal services.

1601 For German law, Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 331 notes as many as four possible roots for subjective rights related to broadcasting: '(1) individual rights to broadcast, (2) individual rights to acquire information and form opinions, (3) rights of those working in broadcasting, and (4) rights of social groups to express their views through broadcasting media'.

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a special relationship between provider and recipient[1602] exists only for legal services, but not for the media.[1603]

Moreover, there are also areas where there is no parallel case law because the problem only arises for one of the two fields of law. This is, for example, the case concerning Art. 34 protection of lawyers,[1604] since the media cannot be involved as representatives in the right of individual application. To a lesser extent, this also concerns the Court's case law on administrative arrangements.[1605] Since licensing requirements for the media are far less common than for lawyers, there is little case law echoing the Court's jurisprudence on 'self-regulation' and on 'the role of Bar associations', although notably, where regulation does come into play, the Court, for the media, seems to have contented itself with 'independent', rather than 'self-regulating',[1606] arrangements. For much the same reasons, there does not appear to be case law echoing the protection of access to the profession of lawyer,[1607] since the media professions, which have no direct link to the exercise of public power or a State-conferred monopoly, are not usually subject to specific State-controlled access requirements in the same way that legal professions often are.

(b) *Special legal regimes for both the media and legal services*

Turning to the concrete similarities of the Court's case law on the media and on legal services, a first point that is common to both in principle, though not necessarily in its details, is that the Court applies a separate regime of Convention law for those engaging in these activities. Where cases involve the media or legal services, the Court will apply the Convention in a different way to reflect its vision of the importance of these activities for the Convention system as a whole.

1602 See Chapter Two.
1603 Which, presumably, is also the reason why the Court resolves 'media' cases almost entirely via freedom to provide rather than freedom to receive – in the absence of individualised recipients, human rights analysis struggles in these cases, cf below 341ff.
1604 See Chapter Three, 190ff.
1605 For legal services see Chapter Five, 260ff.
1606 cf Chapter Five, 305 and *NIT SRL v Moldova [GC]* (n 1519), para 222.
1607 See Chapter Four, 201ff, although note that that case law is largely unspecific to lawyers.

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i. *Protection against the State*

At its most basic, this relates to specific case law on the protection of both the media and lawyers against State interference. As critically diagnosed by Judge Walsh in his Dissenting Opinion in *Goodwin v UK* (1996), 'the Court … has decided in effect that under the Convention a journalist is by virtue of his profession to be afforded a privilege not available to other persons'.[1608] This is evident from cases such as *Magyar Helsinki Bizottság v Hungary [GC]* (2016), where the Court explicitly separated between 'everyone' and 'the press': 'While Article 10 guarantees freedom of expression to "everyone", it has been the Court's practice to recognise the essential role played by the press in a democratic society … and the special position of journalists in this context'.[1609] While the Court has not been as clear regarding legal services, the case law analysed in the previous chapters shows that, similarly to the media, the Convention applies in a different way where legal services are being provided, which the Court in some areas, for example in *Čeferin v Slovenia* (2018), has also explicitly referred to as 'increased protection'.[1610]

Within this special regime, the first common denominator to both fields of law is case law designed to make it more difficult for the State to interfere. Both the media[1611] and lawyers[1612] benefit from specific protection against State action, which manifests as the State having very limited scope to restrict activities performed in the ambit of the functions of the media or legal services. In this regard, the case law on search and seizure (and the related 'chilling effect') is particularly noteworthy, since the Court's case law frequently refers to cases concerning lawyers in cases brought by journalists and vice versa.[1613] For the media, this additional protection manifests as increased protection against threats from State and non-State actors,[1614]

1608 *Goodwin v UK [GC]* (n 1529), Separate Dissenting Opinion of Judge Walsh, para 1, although Walsh was arguably advocating a functional approach, which the Court has since adopted, cf cases such as *Youth Initiative for Human Rights v Serbia* (n 1597).

1609 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 165.

1610 *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018), para 57. The case is discussed in greater detail in Chapter Three at 164ff.

1611 See 319ff.

1612 See Chapter Three, 183ff.

1613 See Chapter Four, 219ff, Chapter Two, 110ff.

1614 See 319ff.

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where the Court will frequently focus on the relationship between threats and the applicant's professional activities as a journalist.[1615] However, for legal services, it appears to be limited to additional protection against the State, where cases such as *Cazan v Romania*[1616] and *François v France*[1617] show a clear emphasis on elevated protection.[1618] As regards physical attacks by non-State actors,[1619] the Court has not held that the State has any special protective obligations towards lawyers, despite minority arguments to the contrary.[1620] The Court's requirement that States 'establi[sh] an effective system for the protection of journalists'[1621] therefore does not have an equivalent for lawyers. The Court, to date, has not provided any indication as to the rationale for this differentiation, nor is it clear that threats from non-State actors are necessarily less dangerous to the role lawyers fulfil.

ii. *Independence*

While protection against threats is thus somewhat different, a further limb of protection that is common to both the media and legal services is that those performing the activity in question are, in principle, granted the right to decide independently how to do so, presumably in an attempt to avoid giving the State – and, therefore, potentially bad-faith actors – a right to control the activities of such human rights defenders. Journalists have the right to determine themselves how to go about their work, protected by an elevated threshold for State interference through the Court's jurisprudence granting the media the right to 'a degree of exaggeration'.[1622] Similarly, the Court is loath to allow State authorities to define how legal services should

1615 cf eg *Najafli v Azerbaijan* (n 1563), para 68; *Khadija Ismayilova v Azerbaijan* (n 1521), para 120.

1616 *Cazan v Romania* App no 30050/12 (ECtHR, 05 April 2016), discussed in Chapter Three at 183ff.

1617 *François v France* App no 26690/11 (ECtHR, 23 April 2015), discussed in Chapter Three at 189.

1618 See Chapter Three, 183ff.

1619 cf Chapter Three, 188ff.

1620 cf the Joint Partly Concurring and Partly Dissenting Opinion by Judges Lazarova Trajkovska and Pinto de Albuquerque in *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014), discussed in Chapter Three at 188.

1621 *Khadija Ismayilova v Azerbaijan* (n 1521), para 158, discussed at n 1574 and accompanying text.

1622 See 318.

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be effectuated,[1623] and eg where lawyers act in court proceedings, they will be entitled to a particularly large degree of freedom of expression.[1624] To quote *Nikula*, 'it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument',[1625] which gives lawyers 'a certain latitude regarding arguments used in court'.[1626] While the caveat regarding 'supervision by the bench' might initially seem different to the situation as regards the media, it is arguably simply a more explicit version of the case law that applies to both groups – for the media, just as for legal services, the Court has been clear that freedom of expression still has limitations.[1627]

iii. *Differences regarding protection and restriction of rights?*

While the existence of the aforementioned special regimes is indeed a key similarity between the Court's case law on the media and the case law on legal services, there is one notable difference between the two: In contrast to the case law on the media, which consistently elevates Convention protection, the case law on legal services is less unequivocal. While freedom of expression for lawyers will be subject to particular protection as regards freedom of expression in court, lawyers, unlike the media, will also have their freedoms restricted on the basis of their role. This is particularly evident as regards freedom of expression out of court,[1628] where restrictions, justified by reference to the *Nikula v Finland* (2002) doctrine on the 'special status of lawyers',[1629] go beyond those applicable to other human-rights

1623 cf Chapter Two, 121ff, focusing on the 'autonomously determined relationship' between provider and recipient of legal services.

1624 See Chapter Three, 158ff, key cases being eg *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002) and *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005).

1625 *Nikula v Finland* (n 1624), para 54, discussed in Chapter Three at 159.

1626 *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 133, discussed in Chapter Three at 173ff.

1627 cf, for journalistic freedom, *Couderc and Hachette Filipacchi Associés v France [GC]* App no 40454/07 (ECtHR, 10 November 2015), para 144, and for 'a lawyer's freedom of expression in the courtroom' *Kyprianou v Cyprus [GC]* (n 1624), para 174, discussed in Chapter Three at 161ff.

1628 Discussed in Chapter Three at 171ff.

1629 cf eg *Morice v France [GC]* (n 1626), para 132ff. The *Nikula* doctrine is discussed in detail in Chapter Five, 227ff.

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holders. This divergence between the special regimes applied to the media and to legal services was clearly enunciated in *Morice v France [GC]* (2015). There, the Grand Chamber explicitly rejected the suggestion made by the CCBE to align lawyers' freedom of expression with that of the media, noting that 'in view of the specific status of lawyers and their position in the administration of justice the Court takes the view, contrary to the argument of the CCBE …, that lawyers cannot be equated with journalists',[1630] focusing instead on lawyers' role as 'protagonists in the justice system'[1631] to determine that lawyers' freedom of expression outside of court would be more restricted than that of other persons. In this way, the special regime regarding legal services consisting of both enhanced protection and additional restrictions is formalised via the Court's 'officers of the court' doctrine, whereas the media are subject to no restrictions based explicitly on their role. While arguments based on the role of lawyers are frequently used to restrict their rights, this does not appear to be the case as regards the media.

The best explanation for this ostensible divergence of case law – consistently elevated protection for the media, a mix-bag for lawyers – is presumably the following: It is primarily a difference of technique, not of outcome. The difference can be understood as being whether limitation to the particular role is applied at the level of restriction – which appears to be the case for legal services – or at the prior level of scope, which appears to be the case for the media. For both lawyers and the media, the Court has an implicit view of which parts of the role are 'essential' for the Convention system (for example, on the Court's view, freedom of expression of lawyers in court) and which parts are not important in the same way. Additional protection will apply only where the human-rights holder is acting within the scope of what the Court perceives their 'essential'[1632] role to be, whereas outside this area no additional protection will be applied.

On this analysis, the ostensible divergence between the media and legal services disappears if one construes the case law correctly. For lawyers, the separation between a role that is particularly protected and other activities that are not is formalised through the 'officers of the court' doctrine and the *Nikula* dictum. For the media, it initially seems as though there is no equivalent type of restriction. However, this is because the Court, for media

1630 Ibid, para 148.
1631 Ibid, para 148.
1632 In the sense of necessary for the Convention system, see n 1517.

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cases, resolves the same problem not via an emphasis on additional restrictions, but by adopting a more limited view of the scope of protection. The Court's emphasis on the content of the statements concerned, clear from its focus on 'journalistic reporting on political issues and other matters of public concern',[1633] which the Court consistently applies as a requirement to engage its case law specifically protecting the media, effectively fulfils the same function of defining a role which will be particularly protected, but does so at the level of scope, rather than that of restriction. As a result, it may superficially seem as though the role of the media is used to restrict rights far less frequently than the role of lawyers – but this is due to the fact that the Court takes a more restrictive view of when the enhanced protective regime will be engaged in the first place. In fact, the results in both areas are similar, achieved for legal services via additional restrictions within the enhanced protective regime and for the media by a narrow definition of the requirements for that regime to be engaged.

This latter point is significant because the Court's increased focus on scope, rather than restrictions, for the protection of the media has allowed it to obtain greater clarity regarding the requirements for this protective regime to come into play. Unlike for legal services, where there is some remaining ambiguity in the Court's rhetoric as to whether special protection will apply based upon a certain status or based on the functions exercised,[1634] the Court's focus in media cases is explicitly on granting additional protection based on function rather than on status.[1635] This has been shown, inter alia, by the expansion of those to whom such protection will apply in line with the similar expansion of phenomena such as citizen journalism, and indeed, in *Magyar Helsinki Bizottság* the Grand Chamber explained at length that

> the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate and … may be characterised as a social 'watchdog' warranting similar protection under the Convention as that afforded to the press.[1636]

1633 cf eg *NIT SRL v Moldova [GC]* (n 1519), para 178, discussed at 312ff.

1634 See Chapter One, particularly at 60ff.

1635 Given that media members do not necessarily *have* a specific status, the risk of confusion in these cases was arguably lower than in many of the cases concerning lawyers.

1636 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 166.

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Continuing this explicitly functional approach, the Court then

> considere[ed] that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public 'watchdog' … The Court would also note that … the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned.[1637]

This focus on increased protection where a certain function is being fulfilled is a constant feature of the Court's case law on the media,[1638] and is significantly clearer than the Court's case law regarding protection of legal services.

In line with this closer awareness of function, the Court has also been much clearer in identifying that the media are not a monolithic group. While the Court, for legal services, focuses its rhetoric largely on 'lawyers' as a whole with no further differentiation, ignoring the fact that not all lawyers are human rights defenders,[1639] the Court's focus in its media case law on criteria such as 'political speech or … debate on matters of public interest'[1640] allows it to link its specific case law not to the media as a whole, but to the media when fulfilling functions essential to the Convention system, ie enabling public debate as a precondition of democracy. This is an approach which is significantly more advanced than that applied to legal services: Rather than focusing on superficial similarities and applying a different set of norms regardless of whether the function essential for the Convention system is actually being fulfilled, the Court's differentiated case law on the media allows it to limit that case law to situations where what is at stake is actually a particular public interest under the Convention.

The core doctrinal parallel between the Court's case law on the media and on legal services, then, is this: In both areas, the Court has identified a (partly implicit) role which it considers 'essential' to the Convention system.[1641] For the media, this is, roughly speaking, enabling political debate on matters of public interest, whereas for legal services the Court, with some variations, sees it mainly as the role lawyers play in litigation.[1642]

1637 Ibid, para 168.
1638 cf eg *Szurovecz v Hungary* (n 1559), para 63.
1639 On this see Chapter One, 36ff.
1640 *NIT SRL v Moldova [GC]* (n 1519), para 215, see 311.
1641 On role-bearer rights from a conceptual point of view see Chapter Eight, 419ff.
1642 See now particularly clearly *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022), para 109, where the Court only mentioned the importance of lawyers

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Where human-rights holders act within what the Court has defined as these roles, their human rights protection will be increased; however, as soon as they leave this role, their protection will not be increased, and may, in the case of lawyers, even be more restricted than that afforded to the general public.

iv. *The Court's greater awareness of the public interest in the media*

While this relates to the protection of individual members of the media or the legal profession while exercising their role, there are moreover significant differences in the way the Court approaches the overarching environment in which these roles are exercised, which largely reflect the Court's generally greater awareness of the public-interest importance of the media. As regards particularly audiovisual media, where States typically have a regulatory framework that serves, inter alia, to prevent market failure and secure pluralism, the Court has made clear statements regarding the States' regulatory obligations[1643] and their role as 'ultimate guarantor', even going so far as to require States to create 'a favourable environment for participation in public debate'.[1644] For legal services, no such statements exist. Instead, the Court seems to be largely unaware that the way legal services are regulated can have a significant impact on the protection of human rights under the Convention. Equally, the Court has not highlighted any kind of 'guarantor' role on the part of the State allocating it responsibility to ensure the availability of legal services, despite the Convention arguably imposing such an obligation on the States. The Court's legal-services case law is a far cry from the clarity of the media case law, where the Court explicitly holds that it is ultimately the State's task to guarantee that the segment of society that is essential for the Convention rights can fulfil its tasks, and that, consequently, the State is legally obliged to put in place reg-

'professional duties' related to 'the rights of the accused and the right of access to a court, which are essential components of the right to a fair trial guaranteed by Article 6 § 1 of the Convention'.

1643 cf 315ff and the Court's constant jurisprudence that '[i]n such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism' (*Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 134), as well as the discussion of *Manole and others v Moldova* (n 1547).

1644 *Uzeyir Jafarov v Azerbaijan* (n 1556), para 68, discussed at 317.

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ulation ensuring this outcome. For the media, the Court has held explicitly that the State has an obligation to ensure that this activity, essential to the Convention, take place, whereas for the legal services sector it has not to date found a hard-law obligation on the State to guarantee the existence of legal services.

Finally, this wider lack of awareness of the role that regulation plays in affecting the legal services sector's ability to fulfil its functions also manifests in different case law as regards professional organisations. As discussed in Chapter Five,[1645] Bar associations, as a rule, are not entitled under the Court's case law to bring Art. 34 applications since for Convention purposes they are treated as part of the State.[1646] Given the function professional organisations play in protecting their members against the State, this finding is open to debate.[1647] As such, it is noteworthy that for media organisations the Court takes a different view:[1648] Even where such organisations are organised as public bodies, they will nonetheless be entitled to seek recourse before the Court under Art. 34.[1649] While, as has been previously argued,[1650] the problems caused by Bar associations' inability to rely on Art. 34 should perhaps not be overstated, it is a notable difference that the Court secures the independence of the media, but not the 'independence of the legal profession', which it has taken such pains to highlight,[1651] by allowing these professional organisations to apply to the Court.

1645 294ff.

1646 cf eg *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* App no 34118/11 (ECtHR, 21 May 2013), discussed in Chapter Five at 294.

1647 See Chapter Five, 296.

1648 Which, however, may also be premised on the fact that they do not exercise public power in the narrow sense of eg the regulatory roles discussed in Chapter Five at 291ff, cf eg *Österreichischer Rundfunk v Austria* App no 35841/02 (ECtHR, 07 December 2006), para 49ff.

1649 cf eg *Radio France and others v France (dec)* App no 53984/00 (ECtHR, 23 September 2003); *Österreichischer Rundfunk v Austria* (n 1648), the latter focusing on the existence of 'a framework which ensures the Austrian Broadcasting's editorial independence and its institutional autonomy', para 53.

1650 Chapter Five, 296.

1651 cf eg Chapter Two, 122ff, Chapter Five, 299ff.

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2. Media and legal services: The Court's analyses

All of these similarities in individual strands of the Court's case law on the media and legal services are manifestations of a more significant commonality between the two: their 'essential'[1652] nature for the Convention, which is reflected in the Court trying to secure a minimum level of the given activity taking place. The Court has not been this clear for either area, but the fact that this is its main concern – securing a minimum activity level – is clear from a choice of wording that appears for both media and legal services, and indeed, at least for the Grand Chamber, rarely appears *outside* these areas:[1653] That of 'chilling effect', a term which abounds in both areas of law.[1654]

'Chilling effect', in the Court's view, is the risk that certain factors – which the Court guards against in its more specific jurisprudence, and which can range from threats by private actors to negative reactions on the part of the State – can render the exercise of an activity protected by human rights less attractive and thus reduce the level of exercise of that activity.[1655] Wherever the Court refers to 'chilling effect', it is therefore clear that it sees a certain level of the activity in question as desirable from the Convention point of view. The Court does not use this term in relation to any of the multitude of activities that, from a Convention view, are neutral, reflecting exclusively a personal choice on the part of the person exercising the right. Instead, the phrase 'chilling effect' so far appears only where there is a *public* interest in an activity taking place that renders factors which reduce activity level problematic from the Convention point of view.

This is perhaps the most significant argumentative similarity between the Court's case law on the media and on legal services: Both of these make

1652 cf n 1517.

1653 Of the 16 Grand Chamber judgments which rely on the concept, 11 concern either the media or legal services.

1654 For the media, see eg *Pedersen and Baadsgaard v Denmark [GC]* App no 49017/99 (ECtHR, 17 December 2004), para 93, which explicitly cites *Elçi and others v Turkey* (n 1517), discussed in detail in Chapter Five, 240ff, as well as n 1539; for legal services, see eg *Kyprianou v Cyprus [GC]* (n 1624), para 175, 181. The term appears to have first been used by the Court in *Goodwin v UK [GC]* (n 1529), para 39, a case regarding journalists' rights, where one commentator argues it may have been borrowed 'from the case law of the US Supreme Court relating to the First Amendment', Laurent Pech, *The Concept of Chilling Effect* (Open Society European Policy Institute 2021) 8.

1655 cf, as regards 'criminal defence work or human rights protection in Turkey', *Elçi and others v Turkey* (n 1517), para 714.

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extensive reference to 'chilling effect', reflecting the Court's position that these activities are desirable *in principle* and that therefore factors reducing the level of activity are inherently problematic. In this way, the focus on 'chilling effect' confirms what has been suggested in the first chapters of this piece: Like the media, legal services are, from the Convention point of view, a necessary, 'essential' condition that cannot, therefore, be fully reduced to the private interests of any individual.

Despite this underlying common consideration, the Court has been far clearer in the way it stresses the public-interest importance of the media than as regards legal services. The State's responsibility to ensure the functioning of media as a segment of society is clearly enunciated in the case law of the Grand Chamber, which explicitly names the State as the 'ultimate guarantor' in this regard.[1656] Such clarity on a State obligation to ensure this level of activity is notably absent for legal services; while even on the Court's case law legal services have a particular importance,[1657] rendering the idea of the State as an 'ultimate guarantor' ripe for transfer, no such transfer has so far taken place, and instead the Court struggles to address the public-interest dimension of legal services.

Against this backdrop, the present section analyses the similarities and differences in the Court's techniques when dealing with cases concerning the media and legal services and which thus concern human rights exercised in the interests of persons other than the rights holder. As has already been shown, the case law on the media is significantly clearer than that on legal services. Nonetheless, there are a number of tendencies where the Court's lines of reasoning converge.

(a) *Human rights in the interests of others*

The first of these is that the Court's case law on both the media and legal services is somewhat unusual from the Convention point of view in that it concerns not only rights, but, in the words of Art. 10 § 2, 'duties and responsibilities' that come with the exercise of these activities. Indeed, the Court, in both types of cases, frequently even makes reference to 'tasks'[1658]

1656 See *NIT SRL v Moldova [GC]* (n 1519), para 184, as well as 313.

1657 See Chapter Five, particularly at 225ff.

1658 For the media cf 323 and eg *von Hannover v Germany (No 2) [GC]* (n 1535), para 102; *Bozhkov v Bulgaria* (n 1560), para 43; for legal services see particularly

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that the applicants fulfil, a choice of language that clearly reflects the at least partially public nature of the activity they perform, or, to put it in the Court's words, the 'special position of journalists',[1659] which is itself eerily evocative of the 'special status of lawyers'.[1660]

For both legal services and the media, this use of human rights to further the interests of persons other than the rights holder marks a significant departure from traditional individualistic understandings of human rights, which ground human rights in what they do for the rights holder.[1661] Rather than the classic weighing of the private interests of the rights holder against countervailing public interests, the Court's systemic conception of freedom of expression means that, where the media are concerned, the 'interests to be weighed … are both public in nature'.[1662] Similarly to the cases on legal services, the balancing exercise is no longer just between private and public interests, but between several different public interests. This questions whether doctrines initially developed for balancing between private and public interests, such as proportionality analysis, can or should be applied in the same way,[1663] particularly since in some cases the Court seems to focus so strongly on the public interest that the rights of the individual journalist totally disappear in the balancing exercise.[1664] Indeed, the balancing

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Chapter Five, 225ff and eg *Morice v France [GC]* (n 1626), para 149; *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 55.

1659 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 165.

1660 *Nikula v Finland* (n 1624), para 45, discussed in detail in Chapter Five, 227ff.

1661 On these different conceptions of human rights see Chapter Eight.

1662 *Stoll v Switzerland [GC]* (n 1532), para 116; *Pentikäinen v Finland [GC]* (n 1532), para 94; *Erdtmann v Germany (dec)* (n 1532), para 21; *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 76. See also Oppitz (n 1546) 158, noting that effectively this means that democracy is on both sides of the scale, legitimising both freedom and restriction of freedom, replacing balancing with an internal conflict.

1663 See Chapter Eight, 436ff.

1664 cf eg *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 76, where the Court weighed 'the interests of the security service in maintaining order in Parliament and ensuring public safety' against 'the interests of the public in receiving information on an issue of general interest' without even referring to the journalist's own rights, or *Goodwin v UK [GC]* (n 1529), para 45, where the Court weighed a third party's interests against 'the interest of democratic society in securing a free press' and 'the vital public interest in the protection of the applicant journalist's source' without any reference to the position of the applicant themselves. This approach appears frequently in the Court's case law, cf also *Erdtmann v Germany (dec)* (n 1532), para 21, or *Bozhkov v Bulgaria* (n 1560), para 51.

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exercise performed in *Goodwin v UK* (1996) itself highlights the drastically different role that balancing can assume in these cases: In *Goodwin*, the public interest was weighed against a private one, but in reversed roles – the *public* 'interest of democratic society in securing a free press'[1665] was used to justify *exercise* of the human right, while the *private* interest of the third-party company in obtaining disclosure of the applicant's sources was invoked to justify restrictions on the applicant's rights.[1666] Whether such balancing of competing *public* interests is best done in the form of human rights litigation is open to debate, particularly in light of the fact that the Court continues to ostensibly balance the applicant's rights against the public interest.

In line with this emphasis on the public rather than the private, the Court has also clearly taken into account the wider 'constitutional dimension' of cases concerning both the media and legal services.[1667] It does this, in particular, by drawing on the general context beyond the individual case at hand when deciding on applications,[1668] as well as by drawing heavily on the abstract norms contained in soft-law documents. However, it is worth noting that the Court has generally recognised more clearly the constitutional dimension of cases involving the media, where it highlights the 'essential role' in practically all cases,[1669] than that of cases concerning legal services, where the cases in which it explicitly discusses the wider implications of legal services for the Convention system are comparatively rare and even then the Court's analysis is frequently far from clear.[1670]

1665 *Goodwin v UK [GC]* (n 1529), para 45.

1666 Ibid, para 45.

1667 Which is also reflected in the large number of third-party interventions in both groups of cases, see, for media freedoms, eg *Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 126, or *Khadija Ismayilova v Azerbaijan* (n 1521), para 72ff, and for legal services Chapter Five, n 1239, 1458.

1668 Which may also be seen as a reflection of its case law requiring the State to create a 'favourable environment for participation in public debate', cf eg *Huseynova v Azerbaijan* (n 1573), para 120. Note, for a legal-services case that discusses the wider context extensively, eg *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), especially para 214ff and the points following the Court's finding that 'the applicant's situation cannot be viewed in isolation'.

1669 Although this may also be due to the Court's more restrictive approach to the application requirements of its 'media' case law (discussed at 331ff), where contribution to a public debate will already be a criterion to even engage the separate 'media' regime.

1670 See, for a recent example of the difficulties in the Court's approach to legal services, *Mesić v Croatia* (n 1642), discussed in detail at 344ff below.

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Nonetheless, even for cases concerning lawyers, where the Court has the impression that the group as a whole is concerned – such as in the cases using the *Elçi and others v Turkey* (2003) dictum –,[1671] the Court will generally elevate the level of Convention protection.

This focus on context beyond the individual case at hand is significant because it underlines the finding above that the Court is not just concerned with the realisation of the Convention guarantees in an individual case, but with ensuring that a certain minimum level of the activity in question takes place. The Court argues in individual cases based on the impact on other people exercising a similar activity, since '[a]llowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned'.[1672] This is particularly clear in the more recent case law regarding countries with a deteriorating human rights record.[1673] Here, the Court will go beyond the facts of the present case to include the general situation in a given country in its reasoning. For example, in *Khadija Ismayilova v Azerbaijan* (2019), the Court '[took] note of the reports on the general situation in Azerbaijan concerning the freedom of expression and safety of journalists' and

> consider[ed] that such an environment may produce a grave chilling effect on freedom of expression, including on the 'public watchdog' role of journalists and other media actors and on open and vigorous public debate, all of which are essential in a democratic society.[1674]

1671 Discussed in Chapter Five, 240ff.

1672 *MAC TV sro v Slovakia* (n 1530), para 44. See also eg *Kozan v Turkey* App no 16695/19 (ECtHR, 01 March 2022), para 68, where the Court focused on an 'effet dissuasif, non seulement sur le magistrat concerné lui-même, mais aussi sur la profession dans son ensemble'.

1673 cf eg, as regards Turkey, *Ali Gürbüz v Turkey* App no 52497/08 (ECtHR, 12 March 2019), para 77, where the Court noted 'that the criminal proceedings repeatedly brought against the owners, publishers and editors-in-chief of newspapers and magazines, like the applicant, on the sole grounds that they had published statements [made by organisations prohibited under Turkish law] may also have the effect of partly censuring media professionals and limiting their ability publicly to express an opinion which has its place in a public debate', or, as regards the Russian Federation, the critical reference in *Novaya Gazeta and others v Russia* (n 1533), para 61.

1674 *Khadija Ismayilova v Azerbaijan* (n 1521), para 161 – note the reference to Recommendation CM/Rec(2016)4 and the description 'by the Commissioner for Human Rights of the Council of Europe, the third-party interveners and the applicant herself'.

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Similarly, the Court has generally been particularly vigilant where the context of a case indicates that it may have a particular 'chilling effect',[1675] while it has granted States a wider margin of appreciation where eg '[t]he applicant's conviction amounted only to a formal finding of the offence committed by him and as such could hardly, if at all, have any "chilling effect" on persons taking part in protests … or on the work of journalists at large'.[1676] This case law is strikingly similar to that concerning the condition of legal services, where the Court has equally drawn on context beyond the case at hand to modify the legal standards it applies.[1677]

Given that the cases concerned often relate to broader, abstract problems, it is unsurprising that the Court tries to react by referring to abstract norms,[1678] which, for both media and legal services, are typically soft-law provisions.[1679] Case law here is plentiful, and reflects the plethora of existing soft-law documents.[1680] However, as regards the media, since the

1675 *Huseynova v Azerbaijan* (n 1573), para 115.

1676 *Pentikäinen v Finland [GC]* (n 1532), para 113. See also eg *Erdtmann v Germany (dec)* (n 1532), para 26, explicitly ruling out a chilling effect ('the Court is satisfied that this penalty would not discourage the press from investigating a certain topic or expressing an opinion on topics of public debate') – both cases show, once again, that the Court will be less concerned where it thinks that there is no likely impact on the activity level regarding media.

1677 Discussed in detail in Chapter Five, 240ff in the section on the *Elçi* dictum, with particular reference, once again, to the problematic situation in Azerbaijan.

1678 Conversely, use of comparative law is far more pronounced in relation to the media (cf *NIT SRL v Moldova [GC]* (n 1519), para 110ff) than as regards the legal services sector, where the Court generally pays no attention to the large differences in approach within Europe.

1679 With, of course, all the associated problems which this brings. For an introduction, see eg Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (15th edn, Dalloz 2020), para 405ff; Vladislav Leonidovič Tolstyx, *Kurs Meždunarodnogo Prava* (Prospekt 2019) 157ff; Andreas von Arnauld, *Völkerrecht* (4th edn, C. F. Müller 2019), para 278ff. As Grabenwarter and Pabel (n 1518), § 5, para 12, note, the non-binding nature of these instruments is not reflected in the role they occupy in the Court's case law. Soft law on legal services is discussed in Chapter One, 34ff.

1680 As regards use of soft law by the Court in relation to the media, see, among many others, eg the Grand Chamber judgments in *NIT SRL v Moldova [GC]* (n 1519), para 97ff, *Pentikäinen v Finland [GC]* (n 1532), para 55ff, or *Goodwin v UK [GC]* (n 1529), para 39. Notably, this use of soft law is not confined to the Grand Chamber, with other formations citing soft law, cf eg the almost 20 pages cited in *Manole and others v Moldova* (n 1547), para 51ff. As regards the use of soft law in cases related to legal services, see, in particular, the *Elçi and others v Turkey* (n 1517) line of cases (discussed in detail in Chapter Five, 240ff), as well as cases such as eg *Cazan v Romania* (n 1616), particularly at para 42.

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passing of Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, the Court has concentrated most of its citations on that document as the most recent authoritative statement. Typically, it has not only listed it in the section on relevant legal materials but explicitly cited the Recommendation in the course of its reasoning.[1681] This case law would tend to show a gradual 'hardening' of that soft-law document,[1682] as the Court has drawn on it significantly in its interpretation of the (legally binding) European Convention on Human Rights.

(b) *Rights to provide and receive*

While use of soft law is thus a unifying feature of the case law on the media and on legal services, there are also significant differences between the techniques employed by the Court in both areas. This concerns, in particular, the way the Court uses the complex of rights to provide and to receive. While the Court highlights that other human-rights holders have a right to *receive* the information communicated by the media, it does not appear that this second set of rights has had any significant impact on the case law. There do not appear to be cases of potential recipients of media communication bringing individual applications based on their right to receive information. This stands in stark contrast to legal services; as shown in Chapter Two,[1683] the Court will often rely *exclusively* on the rights of the recipient of legal services, particularly when it comes to issues concerning the internal relationship between recipient and provider of legal services,

1681 *Huseynova v Azerbaijan* (n 1573), para 72; *Mazepa and others v Russia* (n 1563), para 73; *Khadija Ismayilova v Azerbaijan* (n 1521), para 69, 161; *Ali Gürbüz v Turkey* (n 1672), paras 46, 64, 66–67; *Szurovecz v Hungary* (n 1559), para 15; *Man and others v Romania (dec)* (n 1586), para 131. Depending on the outcome of that process, this is one potential future for the project of a 'European Convention on the Profession of Lawyer', discussed in Chapter One at 47.

1682 As in *Ali Gürbüz v Turkey* (n 1672), para 67, where the Court explicitly 'subscribe[d] to the affirmation set out in the aforementioned Committee of Ministers Recommendation to the effect that the frivolous, vexatious or malicious use of the law and legal process can become a means of pressure and harassment, especially in the context of multiple law suits', or *Man and others v Romania (dec)* (n 1586), para 131, where the Court drew on the Recommendation to better define the 'broad scope of protection' that 'journalists should enjoy'.

1683 cf Chapter Two, 95ff, 119ff.

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although it seems difficult to find a clear rationale for when the Court will use which set of rights.

This finding is noteworthy because it shows that, despite highlighting for both groups of cases that there is an interest protected by human rights both in providing and in receiving reporting on matters of public interest and legal services, the Court uses this dyad of human rights differently. While legal services are framed more clearly in terms of rights on the parts of both provider and recipient, the Court is inconsistent in the way it uses this complex. Conversely, as regards the media, there is a mismatch between the Court's rhetoric and its practice: Although the Court does highlight that there is a right to receive information by means of the media, case law directly concerning this right is noticeable by absence, with the Court's case law dominated almost entirely by media organisations complaining that their ability to *provide* such coverage is being interfered with. This means that the inconsistencies of the Court's case law as regards legal services, where it is not clear according to which standards the Court will choose whether to use rights to receive, rights to provide, or both, are not repeated for the media. However, it also means that an argument framed in the language of human rights is not reflected in actual enforceable human rights claims. At present, despite ostensible emphasis on a right to receive information on matters of public interest, there is no equivalent in the Court's case law to the 'internal' provider-recipient relationship identified for legal services in Chapter Two in relation to the media. Instead, the Court uses the recipients' rights only incidentally when assessing the provider's claims – which, in fact, is a parallel to an argument used in the cases brought by providers of legal services.[1684]

The most probable explanation for why the Court does not use rights to receive to a significant degree in its case law on the media may be a desire to prevent *actio popularis* claims. Unlike legal services in the Court's case law, where the number of potential claimants is inherently limited by the Court's focus on a 'relationship … based on mutual trust

1684 cf *Nikula v Finland* (n 1624), para 49, discussed in Chapter Three at 159ff, the Court noting 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'.

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and understanding',[1685] the lack of a special relationship between media provider and recipient means that the group of persons who could bring a claim arguing that their right to *receive* information has been violated is hard to define ahead of time. Using the rights of recipients in media cases would therefore create tension with the Convention's firm stance against *actio popularis* claims, expressed, for example, in the requirement of victim status in Art. 34 ECHR, since it would not be clear how the Court should differentiate between those who can claim a right to receive and those who cannot. The end result is that, while the Court highlights it in its statements, a right to receive has not played a significant role in the Court's case law on the media. Simultaneously, this also raises the question whether focusing only on rights is really appropriate here,[1686] since the Court uses these rights in name only but then refuses to further subjectivise the public interest in a functioning media sector.

Moreover, the inconsistencies identified above are indicative of a broader problem: Unlike the 'media' cases, which the Court sees as a separate group of cases treated by reference to common standards and citing other media cases, the Court, by and large, seems to be far less aware that there even *is* a category of 'legal services' cases. Instead of resolving cases concerning legal services according to standards applied to other cases concerning legal services, the Court will frequently mix and match the case law it uses, drawing on cases from a variety of fields rather than focusing on legal services. This is in keeping with a broader difference between the Court's case law on media and on legal services: The Court, by and large, struggles far more to analyse the latter in a coherent and convincing manner that reflects all the aspects involved.

(c) *The Court's difficulties with legal services:* Mesić v Croatia *as a model case*

A model case is the recent First Section judgment in *Mesić v Croatia* (2022), which demonstrates all of the difficulties and inconsistencies in the

1685 See Chapter Two, 70ff. It is worth noting that the Court has not yet had occasion to deal with legal services provided outside of such personalised relationships, which, with the advent of legal tech, are likely to become more widespread in at least some areas of law.

1686 On this point see Chapter Seven.

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Court's current approach to legal services. The facts of the case[1687] can be summarised as follows: A lawyer in France, Ivan Jurašinović, filed a criminal complaint on behalf of a client alleging that a group including the then-President of Croatia, Stjepan 'Stipe' Mesić, had been implicated in an attempt on the client's life.[1688] Asked about this serious allegation by the media, Mesić made derogatory statements about the lawyer's mental health,[1689] which led Jurašinović to successfully sue for defamation in the Croatian courts.[1690] Mesić then applied to the Strasbourg Court, arguing that the civil judgment ordering him to pay damages had violated his right to freedom of expression.[1691]

The case, therefore, involved essentially two elements: Jurašinović's reputation and the protection of lawyers' professional activities on behalf of clients, leading to a combination of different private (Jurašinović's own private interests in his reputation; the client's interest in his being able to represent him effectively) and public (the interest in lawyers being able to provide effective representation as a precondition of the rule of law) interests in play. Instead of acknowledging this complex situation, the Court focused only on Jurašinović's interests: It 'accept[ed] that the interference pursued a legitimate aim, as it was intended to protect the reputation or rights of others – namely the reputation of Mr Jurašinović'.[1692] In essence, the Court therefore identified as a legitimate aim only Jurašinović's private interest, rather than eg creating a link to 'maintaining the authority and impartiality of the judiciary' by means of protection of legal services.[1693]

1687 To the extent relevant here – the case also concerned an Article 6 § 1 'reasonable time' claim (*Mesić v Croatia* (n 1642), para 116ff), which, however, is not specific to legal services and thus not discussed below.

1688 Ibid, para 6.

1689 Ibid, para 11, 'Why this advocate who lodged the criminal complaint says that I am [H.P'.s] political patron is probably known only to him, but I would suggest to him that he visit Vrapče [a psychiatric hospital] when he comes to Zagreb because people [such as him] can receive effective treatment there. It is a great opportunity; it won't cost him a lot and our physicians are known for their efficiency'.

1690 Ibid, paras 14, 23, ultimately resulting in the enforcement of a claim of some EUR 17,000 against Mesić.

1691 Ibid, para 27.

1692 Ibid (n 1642), para 78.

1693 cf the argument advanced in Chapter Nine at 474, which runs, in essence, that, since the Court has interpreted 'authority of the judiciary' under Art. 10 § 2 as 'includ[ing], in particular, the notion … that the public at large have respect for and confidence in the courts' capacity to fulfil [their] function' (*The Sunday Times (No 1) v UK [Plenary]* App no 6538/74 (ECtHR, 26 April 1979), para 55) and that

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The Court then went on to balance only between 'freedom of expression, as protected by Article 10, and on the other [hand] the right to respect for private life enshrined in Article 8', making reference to the media case of *Axel Springer AG v Germany [GC]* (2012)[1694] and completely ignoring the fact that legal services were at issue in the present case, and that even Jurašinović himself had explicitly 'submitted that he had an interest in intervening in the present case both in his professional capacity as an advocate, and in his private capacity as the victim of the applicant's statement'.[1695] Without clarifying which weight was to be attached to these, the Court went on to state, after a list of criteria developed for the press,[1696] that

> [i]n cases such as the present one, domestic courts may also be required to take into account certain additional criteria: in this case, for example, the applicant's status as a politician and as a high-ranking State official, and on the other hand, Mr Jurašinović's status as an advocate, may be of importance for the outcome of the balancing exercise.[1697]

Having found that 'the domestic courts did not apply the criteria laid down in the Court's case law for balancing freedom of expression with the right to reputation', the Court 'f[ound] that it must carry out the required balancing exercise itself'.[1698] Despite noting that Jurašinović 'had lodged the criminal complaint in his professional capacity – namely as an advocate acting on behalf of his client'[1699] and including a separate sub-heading entitled 'The applicant's status as a high-ranking State official and Mr Jurašinović's status

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'for the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation' (*Kyprianou v Cyprus [GC]* (n 1624), para 175), one could easily class protection of legal services as part of protection of the authority of the judiciary.

1694 *Axel Springer AG v Germany [GC]* (n 1524). *Mesić v Croatia* (n 1642) is in general noteworthy for once again applying a colourful mix of cases on the media and on legal services to resolve a case that does not concern the media.

1695 *Mesić v Croatia* (n 1642), para 64. The public dimension was also highlighted by the French National Bar Council and the Paris Bar Association, who, in their third-party interventions, focused only on 'the need to protect the freedom of expression of advocates', ibid, para 74.

1696 Ibid, para 85, with reference to *Axel Springer AG v Germany [GC]* (n 1524) and *Couderc and Hachette Filipacchi Associés v France [GC]* (n 1627).

1697 *Mesić v Croatia* (n 1642), para 86.

1698 Ibid, para 93. This is in itself noteworthy, since in other cases the Court has already focused on the mere absence of a balancing exercise. See eg the Court's statements in *Reznik v Russia* App no 4977/05 (ECtHR, 04 April 2013), para 43, discussed in Chapter Four, 211ff.

1699 *Mesić v Croatia* (n 1642), para 94.

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as an advocate',[1700] the Court did not clarify exactly what the relationship between the latter's human rights and legal services was. Instead, the Court simply skipped to the following general considerations:

> The Court has in a number of cases emphasised that lawyers play a vital role in the administration of justice and that the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the Convention …
>
> It is further mindful of the occurrence of harassment, threats and attacks against lawyers in many Council of Europe member States. …
>
> … it considers that high-ranking State officials attacking the reputation of lawyers and making them objects of derision with a view to isolating them and damaging their credibility – as the applicant did in the present case – is often as effective as a threat in preventing lawyers from exercising their professional duties. Such statements could, as noted by the interveners …, have serious consequences for the rights of the accused and the right of access to a court, which are essential components of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.[1701]

Instead of explicitly clarifying that the State is under both obligations derived from individuals' private interests and under undirected duties based on public interests,[1702] the Court instead opted for this series of largely free-floating remarks, which bear only a tenuous relationship to the legitimate aim the Court had identified earlier, the protection of Jurašinović's reputation.[1703] Rather than attaching these arguments to Jurašinović's activity as providing legal services, or to the rights of his client in receiving them, or to an undirected duty on the State as a guarantor for legal services, the Court did not choose any clear normative point of reference for arguments that, clearly, were central to its reasoning.

To encompass the full range of possible inconsistencies, the Court then turned to the 'consequences of the statement and the severity of the sanction',[1704] where it held that

1700 Ibid, para 103.
1701 Ibid, paras 107–109. Note the departure from Jurašinović's own rights, which the Court had previously identified as the legitimate aim the State measures had been pursuing.
1702 For this analysis see Chapter Seven (introducing these concepts) and Chapter Nine (applying them to legal services).
1703 *Mesić v Croatia* (n 1642), para 93.
1704 Ibid, para 111.

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> [m]oreover, as established above …, the applicant's statement was not only injurious to Mr Jurašinović's reputation but was also capable of having a 'chilling', dissuasive effect on his exercise of his professional duties as an advocate. Therefore, the award of damages in the present case was, despite its size, an appropriate sanction to neutralise that chilling effect and proportionate to the legitimate aim of protecting the reputation of Mr Jurašinović.[1705]

Given the Court's analysis up to this point, this reasoning is a non-sequitur. The fact that the applicant's statement was capable of having a chilling effect on the exercise of Jurašinović's professional duties as an advocate was relevant not to the legitimate aim of protecting the reputation of Mr Jurašinović, but instead to the aim of securing the ability of lawyers to fulfil their functions, in line with the interests – Mr Jurašinović's and his client's private interests as well as the public interest in lawyers' activities – identified above. In this regard, *Mesić v Croatia* shows clearly the difficulties with the Court's current analysis of legal-services cases: The Court's exclusive use of directed duties[1706] based on human rights, a tool traditionally premised on the private interests of the rights holder, struggles to adequately conceptualise situations where the interests of other persons and the public interest are involved.[1707] Conversely, as regards the media, the Court's case law is significantly more developed, largely due to the explicit naming of a public interest in the media fulfilling their functions and a corresponding undirected duty on the State.[1708]

To complete this picture, the Court in *Mesić* closed by noting that

> [h]aving regard to all the foregoing considerations, the Court concludes that the interference with the applicant's freedom of expression was 'necessary in a democratic society' for the protection of Mr Jurašinović's reputation and to avoid a 'chilling effect' on professional duties carried out by advocates,[1709]

totally ignoring that only six pages earlier it had accepted 'that the interference pursued a legitimate aim, as it was intended to protect the reputation or rights of others – namely the reputation of Mr Jurašinović',[1710] which was equally the only point it referred to above when 'balancing freedom of expression with the right to reputation'.[1711] '"Chilling effect" on the pro-

1705 Ibid, para 113.
1706 Discussing directed and undirected duties see Chapter Seven, 358ff.
1707 Discussing this in greater detail Chapter Seven and Chapter Eight.
1708 See 310ff.
1709 *Mesić v Croatia* (n 1642), para 114.
1710 Ibid, para 78.
1711 Ibid, para 93.

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fessional duties carried out by advocates'[1712] – advocates plural, ie going beyond Mr Jurašinović himself – appears out of nowhere *after* the Court's reasoning, in the conclusion. This shows that the Court, while arguably aware that there is something special about these cases which goes beyond the applicant's private interests, does not know quite how to deal with these points.

Mesić therefore shows that the Court, for legal-services cases, still struggles significantly with the complex of private and public interests identified above. In this regard, the Court's media case law is far more advanced. There, the Court consistently highlights the multifaceted role of human rights exercise in media cases – serving not only the rights holder's own interests, but also the interests of others and the public interest in debate on matters of public interest –,[1713] and reinforces the media's position due to its role in securing other interests and a corresponding obligation on the State to guarantee this activity. For legal services, rather than highlighting this complex human rights situation, the Court typically flees into vague language and general considerations,[1714] avoiding a clearer normative foundation of additional protection for legal services as securing human rights and part of a State obligation to secure the rule of law – where it even notices this public-interest dimension at all, as there are also cases[1715] where the Court has seen *only* the public interest in the media and overlooked that in legal services.

While this point and the other differences identified above are true inconsistencies, some of the discrepancies between cases involving the media and involving legal services arise from characteristics inherent to the cases brought before the Court. One such difference is the prevalence, in media cases, of multipolar relationships involving multiple competing[1716] human rights. An almost classic constellation of cases involves balancing the media's rights against third-party rights such as the right to respect

1712 Ibid, para 114.
1713 See 310ff.
1714 See Chapter Five, 225ff.
1715 cf eg *Aquilina and others v Malta* (n 1520), para 43ff; *Semik-Orzech v Poland* App no 39900/06 (ECtHR, 15 November 2011), para 41ff, discussed in greater detail in Chapter Four at 204ff. See also Chapter Nine, 456ff.
1716 In this regard, these cases differ from the 'rights to provide/rights to receive' dynamic discussed above because rights to provide/receive legal services or information on matters of public interest are not in competition with each other, but mutually reinforcing.

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for private and family life under Art. 8 ECHR.[1717] While there are also legal-services cases where this is an issue, particularly as regards freedom of expression for lawyers versus the personality rights of other participants to the proceedings,[1718] these cases are rarer because there are significant doubts as to whether persons acting in the exercise of a State function can properly be seen as exercising human rights.[1719] As such, it is generally more common for legal-services cases to involve balancing against public interests, such as in effective criminal prosecution.[1720]

Finally, in addition to the similarities and differences discussed above, it is also worth noting that the case law on the media and on legal services share some of the same blind spots. This relates particularly clearly to the economic dimension of those activities.[1721] For both legal services and the media, the Court has not yet addressed threats caused by economic factors negatively affecting the activity level in the area concerned, such as the provision of such services being so unattractive economically that the activity ceases.[1722] This oversight may be because, on the Court's present analysis, this point is difficult to capture: The economic conditions of a given market are difficult to analyse from the perspective of the private interests of any individual participant on that market because the very nature of the market economy requires competition in which there will invariably be winners and losers. In this regard, an analysis of the kind proposed in Chapter

1717 To pick a single emblematic case: *von Hannover v Germany (No 2) [GC]* (n 1535) and the multitude of references therein.

1718 cf *Nikula v Finland* (n 1624) and *Morice v France [GC]* (n 1626) as well as Chapter Three, 154ff, and, recently, *Mesić v Croatia* (n 1642) itself.

1719 Discussing this point Chapter Eight, particularly at 426ff.

1720 cf eg *M v the Netherlands* App no 2156/10 (ECtHR, 25 July 2017). This focus is also partly due to the very litigation-focused role that the Court accords to lawyers.

1721 Notably, what little awareness the Court has shown, particularly in the *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) line of cases (discussed in Chapter Five at 231ff), has been focused primarily on a perceived tension between legal services' commercial and public-interest dimensions. To the extent ascertainable, this point does not seem to have arisen in media cases.

1722 As regards, for example, criminal defence in England see eg Catherine Baksi, 'Criminal defence: dead in a decade?' (2022) <https://www.lawgazette.co.uk/commentary-and-opinion/criminal-defence-dead-in-a-decade/5111081.article> accessed 08 August 2024, the underlying Christopher Bellamy, *Independent Review of Criminal Legal Aid* (2021), particularly para 1.33ff and, now, The Law Society, 'Westminster update: Law Society wins criminal legal aid judicial review' (2024) <https://www.lawsociety.org.uk/topics/blogs/law-society-wins-criminal-legal-aid-judicial-review> accessed 08 August 2024.

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Seven may hold the key to providing guidance on State obligations without creating overly strong positions on the part of any identifiable individual.

3. The Court's case law on the media: A source of inspiration for the case law on legal services?

Having examined the similarities and differences between the Court's case law on legal services and its case law on the media, the question arises to what extent the case law on legal services could be usefully informed by that on the media. The background to assessing the potential of such a transplant is the parallel nature of the problem as identified above: that of a certain – independent – social activity that the Court has identified not only as reflecting the rights holder's own interests, but as 'essential'[1723] to the Convention system because it furthers a variety of public and private interests.

While the problem, at this level of abstraction, is very similar, the Court, on the whole, has been far more aware of the wider, public-interest importance of the media than of that of legal services. References to the key role of the media abound and, crucially, have a distinct impact on the Court's case law. Conversely, while the Court has at times found kind words regarding legal services, its case law does little to secure that this segment of society, proclaimed as part of 'the very heart of the Convention system',[1724] can actually fulfil its functions in the Convention system. In this respect, the case law on the media is far clearer and more explicit than that on legal services.

To a certain extent, this could be a side-effect of the stricter approach to the application of the regime concerning the media than of that regarding legal services.[1725] While the Court focuses on 'lawyers'[1726] or 'the legal profession'[1727] globally, without visibily noticing the significant difference as regards the level of human rights defence involved,[1728] its case law on the media is explicitly limited to those situations where the media are actually

1723 cf n 1517.
1724 *Elçi and others v Turkey* (n 1517), para 669, discussed in detail in Chapter Five, 240ff.
1725 cf 330ff.
1726 cf the *Nikula* dictum, discussed in detail in Chapter Five, 227ff.
1727 cf the *Elçi* dictum, discussed in detail in Chapter Five, 240ff.
1728 On this see Chapter One, 36ff.

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performing a function of value to a public interest under the Convention: political speech or debate on matters of public interest.[1729] The Court's 'media' case law explicitly applies not wherever anyone publishes material, but only where the relevant actors are making a contribution within the ambit of the role that is significant to the Convention. This focus on role-based protection, technically manifested through an additional requirement at the level of scope which determines whether the enhanced protection of the Convention applies, allows the Court to custom-tailor its case law to protect only those activities which, from the Convention point of view, are actually key, filtering out other activities that may outwardly look similar but do not further any Convention interest.

This lack of a similar differentiation within the groups of 'lawyers' or 'the legal profession' may go some way towards explaining why the case law on the media is so much better developed: Introducing an additional requirement linked to human rights defence when determining the scope of the Court's enhanced protection case law allows the Court to limit its statements to those areas where the activity being fulfilled actually pulls towards the relevant Convention public interest. This, in turn, allows the Court to more clearly elevate protection for those activities, since it does not have to pay attention to the impact its case law will have for activities that, actually, do not reflect such a broader Convention goal. Simultaneously, such an explicit focus on whether the applicant is acting in a role that furthers a public interest under the Convention also permits for clearer discussion of how such roles should be understood, which is currently inhibited by the Court's largely tacit approach.[1730]

The approach currently taken by the Court, of ostensibly applying additional protection to all 'members of the legal profession' regardless of their link to human rights defence, is therefore problematic; as the Court itself seems to sense when it comes to the level of restriction, it *does* make a difference for Convention purposes whether the lawyer in question is acting

1729 *NIT SRL v Moldova [GC]* (n 1519), para 215; *Axel Springer AG v Germany [GC]* (n 1524), para 91; as well as 312ff.

1730 See, for example, the amount of analysis that was necessary to establish, in Chapter Three, that the Court essentially sees lawyers' representative role as limited to litigation (see now also *Mesić v Croatia* (n 1642), para 107ff, arguing exclusively by reference to Art. 6 and the 'full implementation of the fundamental right to a fair trial') – whether lawyers' human rights defence role is really limited this way is surely a debate that needs to be had, but which is currently obstructed by the Court's lack of transparency in its approach.

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as a human rights defender or not. However, due to its prior unequivocal wording regarding a different regime for the entire group, the Court, if it wants to reflect the differentiation between human rights defence and other types of legal work, is then forced into case law that, outwardly, looks inconsistent. This problem does not arise for the media, where the Court in the first place only applies its additional protective case law if a human rights defence function is being fulfilled, allowing it to develop a more coherent and robust system for those human-rights holders that fulfil 'essential' Convention functions.

If there are therefore good arguments to be made that the Court could learn from its own case law regarding the media to bring greater clarity to its case law on legal services, this also extends to the clarity with which the Court has enunciated the State's obligation to maintain the functioning of this sector. The State, in the Court's jurisprudence, is nothing less than the 'ultimate guarantor' of a functioning media sector. This is because without such a media sector, States cannot reach the goals – democracy, human rights, rule of law – to which they have subscribed, with binding legal force, in ratifying the Convention. This case law could be easily transferred to the legal services sector, at least for those segments which truly concern human rights defence: Without legal services in the defence of human rights, the Convention goals cannot be reached, which explains why the Court has taken the strong step of referring to 'the very heart of the Convention system'.[1731]

Nonetheless, the Court has so far shied away from naming the State as responsible for ensuring a functioning legal services sector. While for a functioning media sector, the State is classed as an 'ultimate guarantor' with corresponding obligations to ensure a favourable environment,[1732] no such finding has been made as regards the State's responsibility to ensure the existence of legal services. Indeed, even though eg the *Elçi* dictum identifies a similar problem to the difficulties that defects in the media sector pose to the Convention system, and the Court, in subsequent case law, has called for increased scrutiny by the State judiciary in these cases,[1733] the Court

1731 cf the *Elçi* dictum, discussed in detail in Chapter Five, 240ff.

1732 See 315ff.

1733 cf Chapter Five, 255, citing *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 214; *Kolesnichenko v Russia* App no 19856/04 (ECtHR, 09 April 2009), para 31; *Yuditskaya and others v Russia* App no 5678/08 (ECtHR, 12 February 2015), para 27; *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020), para 125.

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has not highlighted that the State is equally the 'ultimate guarantor' of the existence of legal services. Perhaps the Court thought that this much was already clear from its reference to 'the very heart of the Convention system'; but finding explicitly that the States have undertaken a guarantee for this 'heart' would bring greater clarity by making the foundations of the State judiciary's obligations of scrutiny clearer and linking this to a wider legal obligation on the State to ensure that legal services exist, which could then be clearly put into relation with applicants' rights.

Nevertheless, the Court has so far avoided clarifying exactly what the responsibility of the State is in this area. It is submitted that just as the State is the 'ultimate guarantor' of a functioning media sector, it is also the 'ultimate guarantor' of the existence of legal services. Explicitly finding such an obligation, and a corresponding obligation to regulate to promote a favourable environment for this area of human activity – as the Court has done for the media – would significantly clarify the interpretation of the Convention.

The aforementioned focus on a certain role which is to be 'guaranteed' also goes some way towards addressing a related ambiguity in the Court's case law: whether it focuses on function or on status.[1734] As discussed above, much of the Court's language sounds as though it attaches to a specific status, when in reality, for Convention purposes, it is the *function* of providing legal services in the defence of human rights that is decisive. For the media, the Court has never fallen into this trap: Since the media typically do not have a certain 'status', there was no risk of the Court confusing status and function – for the media, the Court has always been aware that from the Convention point of view, what counts is what is done rather than the formal status of the person doing it. Once again, the Court's case law on the media reaches similar results as that on legal services, but is much clearer in doing so – as such, it seems like a fruitful source of inspiration for the case law on legal services.

Drawing on the case law on the media would thus be a useful starting point, since for the media the Court seems clear on the fact that the Convention contains a legal obligation which is not fully directed to individuals. The theoretical implications of this position, as well as possible analyses that can contribute to greater clarity, will be discussed in the following chapters (Chapter Seven to Chapter Ten), which attempt to study the root of the problems underlying the Court's case law.

1734 Discussed in Chapter One, 60ff.

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III. Conclusion: Comparing legal services and the media

Structurally, there is thus a certain similarity between legal services and the media: In both cases, human rights further not only the private interests of the rights holder, but also the rights of others and public interests. For the media, the Court has not only developed a number of lines of case law that are similar to those concerning legal services, but has established a complex web of obligations on the State that aim to secure the media's ability to fulfil their Convention functions. Notably, the Court has explicitly imposed a duty on the State as the 'ultimate guarantor' of pluralism, which leads to obligations to create a favourable environment for public debate and to protect media activities. Despite certain doctrinal similarities, the approach the Court has taken as regards the media is generally clearer, since it engages more directly with the complex of interests identified above. This stands in stark contrast to the legal-services cases, where the Court's reasoning does not seem to clearly engage with the weight to be given to these interests and the way they should be reflected normatively. Although the case law on the media thus provides a number of useful starting points to clarify the Court's reasoning on legal services, the underlying conceptual problem remains largely unaddressed – that of focusing primarily on rights, a conceptual tool traditionally understood as reflecting the private interests of the rights holder. The following chapters address this problem and attempt to provide a more convincing alternative approach.

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Chapter Seven: Convention Obligations Beyond Rights: An Introduction to Undirected Duties

As has been shown in the foregoing chapters, both legal services and the media are complex phenomena under the Convention because they engage a number of different private and public interests.[1735] Generally speaking, the Court has been far more convincing in its protection of private interests than in its protection of public ones. In what follows, it will be argued that this is because the Court focuses only on rights, rather than taking the perspective of duties, since rights – unlike duties – are usually seen as necessarily conceptually linked to private interests.[1736]

This shift of perspective to emphasise the State's *duties* may be somewhat surprising for research on a human *rights* treaty. It is premised on the idea that the duties imposed on States by the Convention go beyond the duties that correspond to the rights of individual rights holders. The following chapters argue that the Court, by taking only the perspective of rights, at present deals only with a part of the obligations the Convention imposes on States. It currently concentrates only on the *directed* duties that correspond to individual Convention rights, and ignores the fact that the Convention can also impose *undirected* duties on the State. Because human rights are traditionally understood as grounded in individualistic concerns (as will be discussed in Chapter Eight), this leaves the Court struggling to address public interests – for these, undirected duties on the State would be a more suitable tool.

This chapter lays the foundations for the following chapters by introducing the two categories of directed and undirected duties or obligations (the terms 'duty' and 'obligation' will be used synonymously).[1737] It is well-established that obligations can be either directed, that is *owed to an identifiable individual*, or not owed in this way; however, the study of human rights treaties, to date, focuses exclusively on the former category and largely

1735 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1736 See Chapter Eight, 399ff.

1737 As Daniel Munoz, 'Obligations to Oneself' in Edward Zalta and others (eds), *Stanford Encyclopedia of Philosophy* (2022) 6 notes, '"duties" are just "obligations" with fewer syllables'.

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ignores obligations which do not create corresponding claim-rights for individuals.

The chapter begins with a brief explanation of the concepts of directed and undirected duties (I.), drawing primarily on English-language literature as there appears to be little contemporary debate on these points in the other languages surveyed for this study.[1738] It then (II.) highlights that both types of duties exist both in domestic constitutional law and in public international law. The main part of the chapter shows that the Convention can also be read as creating a number of undirected duties (III.). After establishing the possibility of undirected duties under the Convention, this part gives examples from the Court's case law and attempts to explain why these undirected duties have not yet received greater attention.

I. A typology of duties: Rights-based, non-rights-based, directed and undirected

Duties, understood here in the classic sense of reasons that are both categorical and pre-emptive in force,[1739] can be classified according to various

1738 As is discussed at n 1756ff, this may well be because the point is considered so uncontroversial as to not be worth stating, given that these systems were historically more premised on systems of 'objective law' rather than subjective rights, as discussed in Xavier Bioy, *Droits fondamentaux et libertés publiques* (6th edn, LGDJ 2020) 30ff. The only substantial discussion of the idea of undirected duties in German in recent times appears to be Hubert Schnüriger, *Eine Statustheorie moralischer Rechte* (Brill 2014) 60ff, who discusses the English-language debate portrayed below. Mentioning a similar idea as a mere aside see eg, from the French-language discourse, Samantha Besson, 'Structure et nature des droits de l'homme' in Maya Hertig Randall and Michel Hottelier (eds), *Introduction aux droits de l'homme* (2014) 31; for a historical contextualisation from the German-language literature see eg Marietta Auer, 'Subjektive Rechte bei Pufendorf und Kant: Eine Analyse im Lichte der Rechtskritik Hohfelds' (2008) 208 Archiv für die civilistische Praxis 584, 609, as well as – critically discussing the later English-language literature – Jan-Christoph Marschelke, *Jeremy Bentham - Philosophie und Recht* (Logos 2009) 173, and recently Moritz Blöchlinger, *Normative Legitimität von Recht, Moral und Menschenrechten im Lichte der positivistischen Trennungsthese* (Duncker & Humblot 2022) 222ff.

1739 cf the discussion in Massimo Renzo and Leslie Green, 'Legal Obligation and Authority' in Edward Zalta and others (eds), *Stanford Encyclopedia of Philosophy* (2022) 7.

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criteria.[1740] For present purposes, the most important are 'two distinctions: (i) the distinction between rights-based duties and other duties, and (ii) the distinction between directed duties, which are owed to others, and non-directed duties'.[1741]

I. Duties based on rights and duties based on other concerns

The first of these distinctions highlights that there are different grounds for duties, only one of which are rights. Rights are one possible ground of duties, but '[r]ights are not the only source of duties'.[1742] Instead, 'duties can be based on considerations other than someone's rights'.[1743] This is not trivial, since, as Waldron notes, 'basing duties on rights is quite a different matter from basing them on general utility'.[1744] Unlike rights, which are traditionally seen as protecting *individual* interests,[1745] duties can thus be grounded on, in principle, any consideration classed as relevant. Like rights, duties can protect interests,[1746] but unlike rights, these do not

1740 See eg the list contained in Hugh Breakey, 'Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities' (2014) 63 Political Studies 1198, 1201.

1741 Japa Pallikkathayil, 'Revisiting the Interest Theory of Rights: Discussion of The Morality of Freedom' (2016) 14 Jerusalem Review of Legal Studies 147, 154.

1742 Amir Paz-Fuchs, 'Rights, Duties and Conditioning Welfare' (2008) 21 Canadian Journal of Law & Jurisprudence 175, 175; Aleardo Zanghellini, 'Raz on Rights: Human Rights, Fundamental Rights, and Balancing' (2017) 30 Ratio Juris 25, 26. Indeed, one classic position is even that 'the notion of duty is conceptually prior to that of a right', John Tasioulas, 'On the Nature of Human Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (de Gruyter 2011) 29, who also highlights that 'duties without corresponding rights' are possible. See, for a historical overview of this debate in German, eg Auer (n 1738) 588ff.

1743 Joseph Raz, 'On the Nature of Rights' (1984) 93 Mind 194, 213; Joseph Raz, 'The Nature of Rights' in Joseph Raz (ed), *The Morality of Freedom* (Clarendon 1988) 186. Perhaps particularly clearly Raz, 'Right-Based Moralities' (ibid) 202: 'the government has a duty to achieve all these goals or at least to try to do so. But its duty is not grounded in my interest alone. It is based on my interest and on the interests of everyone else, together with the fact that governments are special institutions whose proper functions and (normative) powers are limited'.

1744 Jeremy Waldron, 'Rights in Conflict', *Theories of Rights* (OUP 1989) 128.

1745 This point is expanded on in Chapter Eight, 399ff.

1746 Joseph Raz, 'Free Expression and Personal Identification' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 153: 'Duties protect interests inasmuch as their observance promotes the

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necessarily have to be *private* interests. Duties based on human rights will be elaborated on in greater detail in Chapter Eight, which discusses various theories of human rights and highlights their generally individualistic focus.

2. Directed and undirected duties

The second distinction highlights that duties may be directed, that is *owed to an identifiable individual*, or they may not, existing, for example, in the interests of the public.[1747]

> Directed duties are duties that an agent owes to some party – a party who would be wronged if the duty were violated. They therefore comprise a three-place relation between the agent (or *subject*), the required action (or *content*) and the party (or *object*) who stands to be wronged. … [Non-directed duties] comprise only a two-place relation between subject and content.[1748]

'[I]f one is owed a duty then one is *wronged* by its violation. By contrast, violation of an undirected duty is wrong but does not wrong anyone in particular'.[1749]

The key point here is that directed duties are not the only possible form of duty (although they are the only one included in WN Hohfeld's seminal

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interests or their violation damages them. Rights protect interests inasmuch as they are the justifying reasons for duties which protect the interests'.

1747 The separation between directed and undirected duties is well-established. See eg Gopal Sreenivasan, 'Duties and Their Direction' (2010) 120 Ethics 465, 467; Rowan Cruft, 'Introduction' (2013) 123 Ethics 195, 195; Ariel Zylberman, 'The Very Thought of (Wronging) You' (2014) 42 Philosophical Topics 153, 154; David Frydrych, 'The Theories of Rights Debate' (2018) 9 Jurisprudence 566, 578; Joseph Bowen, 'Addressing the Addressive Theory of Rights' (2021) 39 Journal of Applied Philosophy 183, 183. Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019) 11 notes a 'standard usage in calling duties owed to a party "directed duties"'. See similarly, although not using this terminology, Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 International Affairs 427, 434.

1748 Simon Căbulea May, 'Directed Duties' (2015) 10 Philosophy Compass 523, 523 (emphasis in original). See also Simon Căbulea May, 'Address, Interests, and Directed Duties' (2022) 39 Journal of Applied Philosophy 194, 194.

1749 Cruft, 'Introduction' (n 1747) 195; Rowan Cruft, 'Why is it Disrespectful to Violate Rights?' (2013) 113 Proceedings of the Aristotelian Society 201, 201. See similarly Zylberman (n 1747) 154.

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account of 'fundamental legal conceptions',[1750] which has generated much subsequent confusion).[1751] As d'Almeida highlights,

> There are indeed duties – eg the duty that emerges from a promise made to someone – that seem, intuitively, to be relational; the action that is the content of the duty is owed to a specific individual, who holds the correlative claim-right. More recently, such duties have come to be called 'directed' duties … But it seems that we also properly use the term 'duty' to refer to what we are required to do regardless of whether we owe it to anyone; and it is plausible to think that the term 'duty', understood in this sense, is also aptly used to pick out legal positions. … Unlike directed duties, then, undirected duties do not correlate with claim-rights (or any other sort of entitlement) on anyone else. They are not relational positions. They are therefore not covered by Hohfeld's scheme; if we can have undirected as well as directed legal duties, Hohfeld's claim to comprehensiveness is unwarranted.[1752]

The correlation between right and duty thus only works one way: While every claim-right corresponds to a (directed) duty,[1753] '[not] every duty necessarily correlates with a claim-right'.[1754] Duties can arise without claim-rights. As a result, because the 'claim that every obligation defines some

1750 Developed in Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16 and Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710.

1751 As Sreenivasan (n 1747) 467 notes, '[o]n the whole, scholars have been content to follow Hohfeld in ignoring [undirected duties] altogether'.

1752 Luís Duarte d'Almeida, 'Fundamental Legal Concepts: The Hohfeldian Framework' (2016) 11 Philosophy Compass 554, 560 (citations omitted). He also notes later 'the fact that Hohfeld and his followers failed to differentiate between having a duty and having a *directed* duty to φ', ibid 562 (emphasis in original). See similarly, criticising 'Hohfeld [for] ignoring it altogether', Sreenivasan (n 1747) 467. Indeed, this may explain the greater awareness of undirected duties in Continental legal systems (Kenneth Campbell, 'Legal Rights' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2021) 16), which have their own theorists and are less strongly influence by Hohfeld.

1753 Joseph Bowen, 'Addressing the Addressive Theory of Rights' (2022) 39 Journal of Applied Philosophy 183, 183. Cruft coins the term 'Hohfeldian claim-rights and their flip-side, directed duties', Cruft, *Human Rights, Ownership, and the Individual* (n 1747) 11. In this sense, 'directed duties are at the heart of rights', Cruft, 'Why is it Disrespectful to Violate Rights?' (n 1749) 201. The same author also discusses the relationship between directed duties and rights in greater detail in Cruft, *Human Rights, Ownership, and the Individual* (n 1747) 80ff.

1754 d'Almeida (n 1752) 560, as well as Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 The Journal of Value Inquiry 243, 244. From the German literature see eg the passing remark in Auer (n 1738) 609.

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right … is unsustainable … it surely matters whether reasoning about ethical requirements starts with rights or with obligations'.[1755]

II. Undirected duties in the law

In fact, the idea that duties can exist without corresponding rights is so well-established in many legal systems that it is typically not even discussed,[1756] since many legal systems took this – rather than the idea of subjective rights – as their historical point of departure.[1757] For example, the French, Russian and German legal systems, as well as systems inspired by these, separate fundamentally between the categories of *droit subjectif/sub"ektivnoe pravo/subjektives Recht* (rights for individuals corresponding to duties on someone else) and *droit objectif/ob"ektivnoe pravo/objektives Recht*, which denotes undirected duties (duties not corresponding to rights for individuals).[1758]

1755 Onora O'Neill, *Towards Justice and Virtue* (CUP 1996) 129.

1756 To the extent ascertainable, there does not appear to be any contemporary controversy on undirected duties in the literature in French, German or Russian. Highlighting the tendency to focus exclusively on the 'rights' side of human rights and ignore the perspective of the duties generated see, from the French-language literature, Besson (n 1738) 24.

1757 The controversy in these systems concerned the question of *directed* duties and was largely conducted in the 19th century, cf Paul Tiedemann, *Philosophische Grundlagen der Menschenrechte* (Springer 2023) 7 as well as the sources in n 1758.

1758 For French law see eg Jean-Louis Bergel, *Théorie générale du droit* (Dalloz 2003) 2ff, 30ff; Jean-Luc Aubert, *Introduction au droit* (7th edn, Armand Colin 1998) 2; Rémy Cabrillac, *Introduction générale au droit* (10th edn, Dalloz 2013) 2ff; Pascale Deumier, *Introduction générale au droit* (6th edn, LGDJ 2021) 59; for Russian law see the classic depiction in Fëdor Fëdorovič Kokoškin, *Russkoe gosudarstvennoe pravo v svjazi s osnovnymi načalami obščego gosudarstvennogo prava* (1909) 22ff, as well as more recently eg Andrej Andreevič Myznikov, 'Pravovye kategorii «Sub"ektivnoe pravo» i «Zakonnye interesy» v sovremennoj teorii gosudarstva i prava' (2006) 3 Teorija i istorija gosudarstva i prava 30 with further references; for German law see eg Reinhold Zippelius, *Juristische Methodenlehre* (11th edn, CH Beck 2012) 5, and, in much greater detail, Klaus Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' in Klaus Stern (ed), *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1988) 477ff. Note that where the Court uses the term 'objective' in relation to the Convention obligations this does not mean non-relational, but only non-reciprocal, cf *Ireland v UK [Plenary]* App no 5310/71 (ECtHR, 18 January 1978), para 239; *Mamatkulov and Askarov v Turkey [GC]* App no 46827/99; 46951/99 (ECtHR, 04 February 2005), para 100.

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1. Undirected duties in constitutional law

Moreover, modern constitutions typically impose a broad range of public-interest-based undirected duties[1759] on the *pouvoir constitué*. Perhaps the most obvious example are provisions regarding the organisation of the State. These are *duties* on the State; however, they do not appear to be *directed* towards any one individual. *Directed* duties, conversely, are typically dealt with in sections that focus on the fundamental rights of individuals.

To illustrate the difference between undirected and directed duties, German constitutional law's treatment of the judiciary may be a useful example. In German constitutional law, the idea that the constitution gives rise to both undirected and directed duties is firmly established.[1760] The German Basic Law deals with the judiciary primarily in two places: a chapter regulating the State's undirected duties, and a provision regulating the State's directed duties. Chapter IX of the Basic Law, entitled 'The Judiciary', imposes obligations on the State as regards, for example, court organisation. These are duties on the State that are (largely)[1761] not directed towards any individual. Chapter I ('Basic Rights'), conversely, guarantees an individual right to 'have recourse to the courts' against administrative action;[1762] this corresponds to a duty on the State that is *owed to every rights holder* and is thus directed.

Of course, in reality matters are far more complex. Arguably, some of the duties imposed on the State under Chapter IX are actually *directed*, while the obligations derived from the Basic Rights chapter probably also comport some *undirected* duties. Nonetheless, there is a distinction between two separate types of legal obligations: obligations *owed to identifiable individuals*, and obligations that exist in the public interest. Rights for individuals always require that there be an obligation owed to the individual; however, this is not the only obligation the State is under.

1759 From the literature on constitutional theory see eg Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 131ff.

1760 eg Stern (n 1758) 473ff discussing this distinction in relation to fundamental rights.

1761 The separation is not quite clean; a number of the provisions in the section are now seen as (primarily or also) imposing duties directed towards individuals on the State.

1762 Art. 19 § 4 (1) Basic Law.

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2. Undirected duties in public international law

Moreover, public international law is eminently familiar with duties that are not owed to individuals. Indeed, up until relatively recently, public international law was understood as consisting *only* of such obligations. This was because individuals were understood as not satisfying public international law's conditions for rights-holdership, making them incapable of having rights under public international law.[1763] Instead, individuals, on these classic understandings, were 'mediated' through their States. For example, in the law of diplomatic protection, until relatively recently the understanding was that individuals were merely the objects of a violation of the rights of States, rather than being subjects of law themselves.[1764]

III. Undirected duties in Convention law

It is submitted that, in a similar vein, the Convention is not limited to directed duties corresponding to rights, but can also easily accommodate undirected duties on States. This section highlights that this is entirely compatible with the Convention's wording (1.), provides a (non-exhaustive) overview of examples (2.) and then discusses possible reasons why the idea of undirected duties under the Convention has not attracted attention so far (3.).

1. The Convention imposes undirected duties on States

The Convention's wording is entirely compatible with the idea that it imposes duties on States even where there are no corresponding rights for individuals. In fact, while nowadays debate mainly focuses on *rights* – to the point that the official title of 'Convention for the Protection of Human Rights and Fundamental Freedoms' has been replaced, in common

1763 For an introduction, see eg Andreas von Arnauld, *Völkerrecht* (4th edn, C. F. Müller 2019), para 66ff; Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (15th edn, Dalloz 2020), para 194ff; Vladislav Leonidovič Tolstyx, *Kurs Meždunarodnogo Prava* (Prospekt 2019) 49. In-depth analysis in Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016).

1764 cf ICJ, *LaGrand (Germany v USA)* (27 June 2001, ICJ Rep. 2001, 466).

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parlance, by the name 'European Convention on Human Rights'[1765] – the Convention text itself, in several key places, takes the different perspective of States' *duties*.[1766]

This begins with the first article of the Convention: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The provision clearly imposes a duty on States; however, whether that duty is *directed* to individuals is arguably not resolved by the wording. A beneficiary of a duty is not necessarily a rights holder, as the widespread debate on third-party beneficiaries shows.[1767] Ironically, this focus on the State's *duty*, rather than any individual's *right*, was even underlined by the title added in Protocol 11 at a time when subjective enforcement moved from an option to a mandatory feature of the Convention system: The title to the provision now reads 'obligation to respect human rights' – no mention is made of this being an obligation *to* anyone. Indeed, this is arguably one of the main functions of Art. 13: Were it only for Art. 1, a State could hypothetically comply with its obligations without granting anything at all to the individual, for example by means of a purely objective system in which State bodies charge themselves with tackling all violations of the Convention rights. In line with this, the only enforcement mechanism that has always been mandatory under the Convention, the inter-State application under Art. 33 ECHR, does not require a violation of a right, but only an 'alleged breach of the provisions of the Convention', ie a violation of a duty.[1768]

The focus on duties as opposed to rights is also reflected in the Court's mission in Art. 19 ECHR, 'Establishment of the Court'. Here, the Court's purpose is given as '[t]o ensure the observance of the engagements undertaken by the High Contracting Parties'.[1769] This focuses on the *duties* under-

1765 cf eg the Court's own website, https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=, accessed 08 August 2024.

1766 This is entirely consistent with the state of general public international law at the time of the Convention's drafting as discussed above, text to n 1763. Indeed, the Convention and the inception of human rights law are among the main international law developments that triggered the shift towards a view of public international law that recognises individuals at least to some extent.

1767 See eg Frances Myrna Kamm, *Intricate Ethics* (OUP 2007) 239; May, 'Directed Duties' (n 1748) 524; May, 'Address, Interests, and Directed Duties' (n 1748) 196ff; Zylberman (n 1747) 154.

1768 Discussing the differences between Art. 33 and Art. 34 see also 381ff.

1769 See, by contrast, Art. 30 of the African Charter on Human and Peoples' Rights, which notes that '[a]n African Commission on Human and Peoples' Rights …

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taken by the States; once again, it does not mention any corresponding claim-rights. In line with Art. 33 and the initially optional nature of the individual application mechanism, in principle Art. 19 ECHR on its own is also compatible with exclusively undirected duties: The Court could also 'ensure the observance of the engagements undertaken by the High Contracting Parties' without there being any claim-rights for individuals. Continuing this focus on States' obligations, rather than individuals' rights, the Convention also declares the individual's position irrelevant in certain circumstances when the enforcement of Convention duties so requires.[1770]

Moreover, even though Arts 2 – 14 are universally interpreted as granting rights to individuals, they do not necessarily show this from their wording. Some of these provisions are worded as *rights* ('everyone has the right'; 'everyone is entitled'). However, others are phrased in terms of a *duty* ('no one shall be').

On an open reading, then, the Convention seems quite clearly to be able to accommodate the possibility that directed duties grounded on rights are not the only obligations imposed on States. This is equally reflected in the Court's case law. The Court has highlighted that it does not see itself as tasked only with giving effect to the rights of the individual applicant in a given case. Instead, many of its statements can be read as understanding the Convention as imposing broader duties on States. The Convention, in the Court's case law, is 'a constitutional instrument of European public order'[1771] 'designed to maintain and promote the ideals and values of a democratic society governed by the rule of law'.[1772] In a notable focus on

shall be established … to promote human and peoples' rights and ensure their protection in Africa', or Art. 41 § 1 of the American Convention on Human Rights, which reads that '[t]he main function of the Commission shall be to promote respect for and defense of human rights'.

1770 For example in Arts 37 § 1, 39 § 1, regarding striking out and friendly settlements, where the Court can totally disregard the subjective wishes of the individual to focus on its mission of ensuring 'respect for human rights'.

1771 *Loizidou v Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), para 75, recently cited eg in *Ecodefence and others v Russia* App no 9988/13 and others (ECtHR, 14 June 2022), para 139, the belated judgment on the Russian Federation's Foreign Agents Act. One example of this 'constitutional' function, *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), has already been discussed in Chapter Five, 248ff. For an extensive discussion of the term 'European public order' see, now, Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (CUP 2021).

1772 *Merabishvili v Georgia [GC]* App no 72508/13 (ECtHR, 28 November 2017), para 307.

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the States' duties, the Court highlighted as early as *Ireland v UK [Plenary]* (1978) that

> [t]he Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[1773]

As a result,

> [a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.[1774]

This seems to indicate that the Court understands the Convention as imposing duties on the Convention States that go beyond the directed duties that correspond to individual Convention rights.

2. Examples of undirected duties from the Court's case law

In fact, one possible reading of Art. 1 of the Convention is that it imposes an undirected duty on the State to ensure that it can satisfy the directed duties corresponding to Convention rights in each individual case. Perhaps this is what the Court means when it highlights that 'by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention"' and refers to this as a 'general duty' over and beyond the 'positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention'.[1775] Indeed, that would sit rather well with the fact that this 'general duty' jurisprudence has been developed in the Court's case law on systemic problems:[1776] Those cases concern less a violation of a duty *to*

1773 *Ireland v UK [Plenary]* (n 1758), para 154; *Ecodefence and others v Russia* (n 1771), para 68. Note, once again, the more general reference to 'rules' and 'engagements' rather than necessarily 'rights'.

1774 *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003), para 26; *Paposhvili v Belgium [GC]* App no 41738/10 (ECtHR, 13 December 2016), para 130.

1775 *Strezovski and others v North Macedonia* App no 14460/16 and others (ECtHR, 27 February 2020), para 61.

1776 *Broniowski v Poland [GC]* App no 31443/96 (ECtHR, 22 June 2004), para 143. Highlighting the public-interest nature of the systemic problems cases see eg

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the individual applicant, but rather a violation of the duty requiring the State to maintain its ability to satisfy the directed duties corresponding to individual claims.[1777]

(a) *The State's duty to maintain a Convention-compliant judiciary*

Perhaps the most obvious example of an undirected duty from the main text of the Convention concerns the obligation to maintain a judiciary compliant with the Convention standards.

The Convention contains a number of rights for individuals which, in certain situations, require a judiciary conforming to certain characteristics. These rights put the State under correlative directed duties for the situations they apply to. However, these correlative directed duties do not exhaust the State's obligations as regards the judiciary. Instead, the State, is under an undirected duty to maintain its ability to fulfil the Convention rights which comprises maintaining a judiciary that *can* discharge the directed duties corresponding to individual claim-rights.

These two obligations – the directed duties that correspond to the Convention rights of each individual rights holder and the State's undirected duty to maintain its ability to fulfil these claims – are conceptually distinct. This is clear from the fact that it is possible to violate one of these obligations without violating the other.[1778] For example, it is entirely possible for the State to have satisfied its undirected duty to maintain a judiciary *capable* of satisfying the Convention rights without necessarily having satisfied the directed duty to satisfy them in the individual case at issue. This is in fact the typical situation where there are no systemic problems: In those cases, the State has discharged its undirected duties to generally maintain a Convention-compliant judiciary, but it is still possible that it has not complied with its directed duties. The directed duty covers only a part of

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Emmanuel Decaux, 'L'intérêt général, « peau de chagrin » du droit international des droits de l'homme ?' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015) 126.

1777 Note that in *Broniowski v Poland [GC]* (n 1776), the relevant section from para 134 onwards is entitled 'Compliance with Article 1 of Protocol No. 1', thus clearly taking the perspective of a duty.

1778 See, from the different context of Art. 8, *Nepomnyaschchiy and others v Russia* App no 39954/09; 3465/17 (ECtHR, 30 May 2023), para 78, where the Court explicitly 'consider[ed] that the existing legal framework is capable – at least in theory – of protecting the applicants from homophobic hate speech.'

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the content of the undirected duty on the State; the *right* is narrower than the State's *duty*.

This is particularly clear from the fact that the Convention *rights* which impose duties on the State regarding a judicial system do so only in specific situations. Only where 'the determination of … civil rights and obligations or of a criminal charge' is at stake does Art. 6 § 1 impose a directed duty on the State to provide 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[1779] '[T]he State's positive obligation under Article 2 of the Convention requires that, where a life-threatening injury or a death occurs, an effective independent judicial system is set up to provide appropriate redress'.[1780] '[I]t is part of the States' duties under Article 1 of Protocol No. 1 at least to set up a minimum legislative framework including a proper forum allowing persons who find themselves in a position such as the applicant's to assert their rights effectively and have them enforced,'[1781] which means 'that the States are under an obligation to provide judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any cases concerning property

1779 Indeed, the wording of 'independent and impartial tribunals established by law' is arguably more reminiscent of the kinds of norms which in domestic constitutions have their place in the chapter relating to the judiciary as one of the three branches of government. cf eg Chapter IX German Basic Law, Title 8 French Constitution of 1958.

1780 *Igor Shevchenko v Ukraine* App no 22737/04 (ECtHR, 12 January 2012), para 56. The wording here already shows the difficulties of an approach focused only on rights – presumably, the Court does not actually mean that, once a life-threatening injury or death occurs, the State must then set up an 'effective independent judicial system'. Instead, it seems more likely that the State is *generally* under an undirected duty to maintain such a system. For similar judgments, see eg *Calvelli and Ciglio v Italy [GC]* App no 32967/96 (ECtHR, 17 January 2002), para 49, noting further that 'Article 2 … enjoins the State … to take appropriate steps to safeguard the lives of those within its jurisdiction', ibid, para 48. For much the same reasoning on the basis of Art. 8 see *Botoyan v Armenia* App no 5766/17 (ECtHR, 08 February 2022), para 94.

1781 *Kotov v Russia [GC]* App no 54522/00 (ECtHR, 03 April 2012), para 117; *Theo National Construct SRL. v Moldova* App no 72783/11 (ECtHR, 11 October 2022), para 69. For the parallel case law in German constitutional law holding that 'effective legal protection securing property [is] an important element of the constitutional right itself' see eg Alexy (n 1759) 318.

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matters'.[1782] Moreover, under certain circumstances Art. 13 ECHR may also require a remedy before a judicial authority.[1783]

These provisions, then, impose – in certain situations – a directed duty on the State that correlates to a Convention right. However, in order to be able to fulfil these various rights, the State has to – constantly – maintain a judiciary conforming to the requisite minimum standards. This is a separate obligation on the State. The State cannot satisfy the rights claims unless it complies with this obligation; however, that does not automatically mean that the obligation to maintain a judiciary is itself directed to any individual. Instead, the Convention imposes a *duty* on the State, but gives individuals a *right* only if other, further criteria are satisfied, for example the situational criteria discussed above.

In the Court's practice, this second, undirected duty, is not typically clearly separated from claims of violation of individual rights.[1784] Nonetheless, an undirected duty to maintain a Convention-compliant judiciary seems to be supported by the Convention text. Art. 6 § 1 requires the State to 'establi[sh] by law' 'independent and impartial tribunals'. This requires the State to maintain such a system regardless of whether or not there actually are disputes concerning 'the determination of civil rights and obligations or of a criminal charge' because such a tribunal must already have been established by law *prior* to such a dispute arising. Moreover, that this obligation cannot be limited to a directed duty corresponding to a right seems clear from the fact that the Convention also highlights that complying with this duty can require the State to *restrict* human rights. Art. 10 § 2 ECHR highlights that 'maintaining the authority and impartiality of the judiciary' is a legitimate aim for Convention purposes. The Convention therefore clearly envisions that, in the course of fulfilling its obligation to maintain a Convention-compliant judiciary, the State may have to restrict human rights. That indicates that this obligation on the State is not identical to the subjective rights of individuals.

1782 *Strezovski and others v North Macedonia* (n 1775), para 61.

1783 eg *Ramirez Sanchez v France [GC]* App no 59450/00 (ECtHR, 04 July 2006), para 165.

1784 See similarly Heike Krieger, 'Funktionen von Grund- und Menschenrechten' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 135, noting that the ECtHR has not to date recognised cases of obligations without a corresponding individual right.

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Moreover, in recent case law it is the second, undirected duty that has come to the fore. This is particularly the case as regards the Polish rule-of-law crisis. Here, the Court focuses *mainly* on the violation of the undirected duty to maintain a Convention-compliant judiciary; the violation of a directed duty to the applicant is just a symptom of that violation. At the time of writing, certain formations of the Polish judiciary are in breach of the Convention, particularly Art. 6 § 1, because they have not been 'established by law',[1785] which compromises their independence and impartiality.[1786] This is *also* a violation of the rights of individual Convention-rights holders, but the main problem is that Poland is violating its undirected duty under the Convention to maintain a judiciary conforming to the Convention standard. The Convention violation is not only a violation of the rights of the individuals bringing cases before these 'courts', but a violation of the Polish State's undirected duty to maintain its ability to secure the Convention rights.

Tellingly, even the older case law on judicial organisation typically switched away from 'rights' to concentrate on the State's 'duties'.[1787] More recently, the Grand Chamber has even devised a label for this undirected duty: It now speaks of 'institutional requirements' under Art. 6 § 1,[1788] picking up a term that first appeared in a Chamber judgment in 2016[1789] and

1785 eg *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021), para 281, and *Juszczyszyn v Poland* App no 35599/20 06 October 2022), para 210, for the Disciplinary Chamber of the Supreme Court; *Advance Pharma sp z oo v Poland* App no 1469/20 (ECtHR, 03 February 2022), para 350, for the Civil Chamber of the Supreme Court; *Dolińska-Ficek and Ozimek v Poland* App no 49868/19; 57511/19 (ECtHR, 08 November 2021), para 354, for the Chamber of Extraordinary Review and Public Affairs of the Supreme Court; *Xero Flor w Polsce sp z oo v Poland* App no 4907/18 (ECtHR, 07 May 2021), para 290, for certain formations of the Constitutional Court.

1786 *Reczkowicz v Poland* (n 1785), para 284; *Juszczyszyn v Poland* (n 1785), para 215; *Advance Pharma sp z oo v Poland* (n 1785), para 353; *Dolińska-Ficek and Ozimek v Poland* (n 1785), para 357.

1787 As the Court put it in *Dobbertin v France* App no 13089/87 (ECtHR, 25 February 1993), para 44; *Keaney v Ireland* App no 72060/17 (ECtHR, 30 April 2020), para 109, '[t]he States have the duty to organise their judicial systems in such a way that their courts can meet each of the requirements of Article 6 § 1 of the Convention, including the obligation to hear cases within a reasonable time'.

1788 *Guðmundur Andri Ástráðsson v Iceland [GC]* App no 26374/18 01 December 2020), para 218, 233ff. German lawyers may notice a certain similarity to the idea of 'institutional guarantees' (author's translation, *Einrichtungsgarantien*), see eg Ute Mager, *Einrichtungsgarantien* (Mohr Siebeck 2003).

1789 *Letinčić v Croatia* App no 7183/11 (ECtHR, 03 May 2016), para 55.

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is fast becoming a standard category.[1790] While there is also a violation of the rights of the applicant in these cases, the main issue is a violation of the undirected duty on States to maintain their ability to secure the Convention rights. Alluding to this second obligation, the Grand Chamber has now – without making any reference to individuals – 'emphasise[d] that the Convention system cannot function properly without independent judges. The Contracting Parties' task of ensuring judicial independence is thus of crucial importance'.[1791] It is submitted that this is not just a 'task' in the sense of a policy goal, but also a legal obligation on the States. The Convention imposes a duty on the States to ensure judicial independence; under what circumstances this duty can also give rise to rights for individuals is a different, subsequent question.

In recent literature, moreover, there is some awareness of this shift in the Court's approach. As one comment highlights, the Court

> move[s] away from the right of the individual to an independent and impartial judge and look[s] at judicial independence in a more structural way, permeating the domestic judiciary in its entirety. While it is certainly too soon to say that *Grzęda* has created an enforceable general duty on states under the Convention to guarantee the independence of the judiciary on an abstract, structural level, and a subjective right for judges to their independence, it may be an indication that the Court is willing to move more in that direction.[1792]

Indeed, the same authors argue at a later point that '[t]aken together [Arts 1, 13 and 35] can be understood as containing an obligation for all Contracting Parties to guarantee a structurally independent judiciary',[1793] and that the 'Grand Chamber's understanding [in *Grzęda*] of the principle of judicial independence moved away from its traditional individual right for the parties to a judicial dispute and more towards a general duty for the state

1790 All subsequent uses date from 2021 and 2022: *Xhoxhaj v Albania* App no 15227/19 (ECtHR, 09 February 2021), para 290; *Xero Flor w Polsce sp z oo v Poland* (n 1785), para 247; *Reczkowicz v Poland* (n 1785), para 220; *Dolińska-Ficek and Ozimek v Poland* (n 1785), para 276; *Advance Pharma sp z oo v Poland* (n 1785), para 298; *Grzęda v Poland [GC]* App no 43572/18 (ECtHR, 15 March 2022), para 308; *Besnik Cani v Albania* App no 37474/20 (ECtHR, 04 October 2022), para 87; *Juszczyszyn v Poland* (n 1785), para 277, 334.

1791 *Grzęda v Poland [GC]* (n 1790), para 323.

1792 Mathieu Leloup and David Kosař, 'Sometimes Even Easy Rule of Law Cases Make Bad Law' (2022) 18 European Constitutional Law Review 753, 768. Note that the authors mix several different points here, since enforceability and rights-holdership are not the same question as whether there is such a general duty on states.

1793 Ibid 769.

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to safeguard the independence of the judiciary as a whole'.[1794] Moreover, other commentators have highlighted that '[t]he objective aspect of judicial independence requires that all Council of Europe … member States be constitutionally and legal organised in accordance with the separation of powers doctrine, and thus that the judiciary represents a power separate from the other branches of government'.[1795]

Finally, this idea that in addition to directed duties to satisfy individual rights there are also undirected duties on the Polish State becomes particularly clear if one looks not at ECHR law, but at the European Court of Justice's approach to the Polish cases. In EU law, the changes to the Polish judicial system are treated as a problem relating not only to the Charter of Fundamental Rights, but also to Art. 19 § 1 (2) Treaty on European Union.[1796] This provision requires the Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' without itself clarifying whether there is a *right* on the part of individual human beings to demand this.[1797] Instead, this obligation is classed as an undirected duty on the State: Art. 19 TEU is contained not in a section granting individual rights, but in 'Provisions on the Institutions'.[1798]

As the foregoing shows, then, directed duties corresponding to rights for individuals are only a part of the obligations which the Convention

1794 Ibid 779.

1795 Rafael Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 European Constitutional Law Review 591, 606.

1796 cf eg Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*; Case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*; Case C-791/19 *European Commission v Republic of Poland*; Case C-487/19 *W.Ż.*; Case C-204/21 *Commission v Poland*.

1797 There is some debate on this point, particularly on the relationship between Art. 47 § 2 CFR and Art. 19 TEU, as noted eg by Michał Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 395, 404. Interestingly, the (equally authentic) different language versions of the Charter differ in how they call the right under Art. 47 § 2 CFR: The English version uses 'right … to a fair trial', the French uses 'droit … à accéder à un tribunal impartial', while the German version uses 'Recht auf … ein unparteiisches Gericht'. Arguably, the latter version is linguistically far more focused on the State's duty: A more literal translation would be that this is a 'right to an independent court'.

1798 For the development of EU law see eg Bustos Gisbert (n 1795) 596ff, highlighting that in EU law the 'subjective aspect of judicial independence (as a citizen's right)' came considerably later due to the initially incomplete protection of human rights in EU law.

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imposes on States regarding the judiciary. In addition to those directed duties allowing individuals, in certain situations, to require that the State act a certain way, States are also under an undirected duty to maintain their ability to fulfil these directed duties, which requires them to maintain a Convention-compliant judiciary.

(b) *The State's duty to maintain a democratic form of government*

Another example of an undirected duty under the Convention is the duty on States to maintain a democratic form of government, which the Court equally sees as an obligation on States to maintain their ability to fulfil the Convention rights. This undirected duty then underlies a number of more specific directed duties, that is, rights, but can also, in other situations, justify restrictions of rights.

In fact, in this area the undirected duty on the State is far more obvious than directed duties in the sense of rights. This is because Art. 3 Protocol 1, one of the provisions most clearly related to the undirected duty to maintain a democratic form of government, is comparatively unusual in the Convention text in that it explicitly states the undirected duty, rather than stating any subsequent rights. In this sense its wording more closely resembles provisions of State organisational law.[1799] Art. 3 Protocol 1 reads: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. No mention is made of any individuals that this duty is owed *to*, and indeed even the title 'Right to free elections' was added only in 1998.[1800] Here, the undirected duty is clear because the wording of the provision takes the per-

1799 cf also Jens Meyer-Ladewig and Martin Nettesheim, 'Zusatzprotokoll zur EMRK Artikel 3 Recht auf freie Wahlen' in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention* (4th edn, Nomos 2017), para 2, who note that Art. 3 Protocol 1 deals with 'fundamental questions of state organisational law' (author's translation, '*staatsorganisationsrechtliche Grundfragen*'). In a similar vein Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, CH Beck 2021), § 23, para 122, highlight that Art. 3 Protocol 1 is not limited to a 'subjective right'. There does not appear to be similar awareness outside of the German-speaking legal sphere.

1800 Art. 2 § 4 (a) Protocol 11. Prior to this, the Convention did not have article headings.

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spective of the obligation on the State rather than any individual right. In fact, there was even serious disagreement over whether the provision also creates a *directed* duty in the form of a subjective right.[1801] While the Court later established that Art. 3 Protocol 1 also gave rise to rights, to this day the Court still makes statements that focus on the undirected duty to maintain a democratic form of government, as when it highlights that '[d]emocracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it'.[1802] While this language can be interpreted as reflecting a legal obligation, it makes no mention of a corresponding right.

Moreover, the Convention also explicitly assigns certain competencies to the legislative, as is clear from the way the Court has interpreted the idea of 'law' in various contexts. For example, the requirement of tribunals 'established by law' in Art. 6 § 1, as interpreted by the Court, is designed 'to ensure that the judicial organisation in a democratic society … is regulated by law emanating from Parliament'.[1803] There is thus a legal obligation on the State to maintain an elected assembly with a certain minimum amount of competencies; however, it is not clear that there is a corresponding subjective right on the part of any individual. Instead, it seems more promising to think of this duty to maintain a democratic form of government as an undirected duty. Not complying with such a duty is a violation of the Convention, but not by itself a violation of a Convention *right*, though of course it is unlikely that a State that violates its undirected duties will manage to avoid violating Convention rights further down the line. The undirected duty and the rights of individuals are nonetheless best kept separate. Similarly to the undirected duty to maintain a Convention-compliant judiciary, the undirected duty on States to maintain a democratic form of government can also interact with the rights of individuals both to enhance

1801 *Mathieu-Mohin and Clerfayt v Belgium [Plenary]* App no 9267/81 (ECtHR, 02 March 1987), para 47ff. Notably, the Commission initially spoke of an 'institutional' right, cf the discussion of this evolving term in ibid, para 51. For an overview of Art. 3 Protocol 1's drafting history see eg Agustín Ruiz Robledo, 'The Construction of the Right to Free Elections by the European Court of Human Rights' (2018) 7 Cambridge International Law Journal 225, who notes that 'the drafters of the Protocol were thinking of obligations of states rather than the rights of citizens; there was also no intention to formally enact the right to vote' (ibid 229).

1802 *Gorzelik and others v Poland [GC]* App no 44158/98 (ECtHR, 17 February 2004), para 89, as well as the discussion in Dzehtsiarou (n 1771) 58ff.

1803 *Coëme and others v Belgium* App no 32492/96 and others (ECtHR, 22 June 2000), para 98; *Guðmundur Andri Ástráðsson v Iceland [GC]* (n 1788), para 214.

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them (where the Court sees them as furthering democracy)[1804] and to limit them (where they are in conflict with democracy).[1805] Taking exclusively the perspective of individual rights thus misses important features of the State's obligations.

(c) *The State's duty to maintain a functioning executive*

Similarly, the Convention also imposes an undirected duty on States to maintain a functioning executive. The positions guaranteed by a number of Convention rights can only be fulfilled if the State is able to enforce the law; this, in turn, implies a duty on the State to ensure that it maintains its ability to do so. To take an example from the Court's case law, 'execution of a judgment given by any court must … be regarded as an integral part of the "trial" for the purposes of Article 6'[1806] and '[t]he State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice'.[1807]

This second obligation is arguably best understood as an undirected duty. On its own, not maintaining such a system is a violation of a Convention obligation, but not (yet) of any identifiable individual's right. A right in the sense of a directed duty is violated only once someone attempts to enforce a judgment and cannot.

1804 cf eg the case law protecting political participation, Dzehtsiarou (n 1771) 53 with further references.

1805 Setting out case law on 'actions of the applicants [which] could potentially undermine democracy' ibid 53. See eg *Ždanoka v Latvia [GC]* App no 58278/00 (ECtHR, 16 March 2006), para 122, where the Court highlighted as legitimate the aim 'to protect the integrity of the democratic process by excluding from participation in the work of a democratic legislature those individuals who had taken an active and leading role in a party which was directly linked to the attempted violent overthrow of the newly-established democratic regime'.

1806 *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997), para 40; *Stoyanov and Tabakov v Bulgaria (No 2)* App no 64387/14 (ECtHR, 07 December 2021), para 47.

1807 *Fuklev v Ukraine* App no 71186/01 (ECtHR, 07 June 2005), para 84; *Ciocodeică v Romania* App no 27413/09 (ECtHR, 16 January 2018), para 84.

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(d) *The State's 'obligation to protect the rule of law and prevent arbitrariness'*

In another example of an undirected duty under the Convention, the Grand Chamber in its 2012 judgment *Kotov v Russia* explicitly held that the State is subject to an 'obligation to protect the rule of law and prevent arbitrariness'.[1808] In fact, 'the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention'.[1809] 'One of the fundamental components of European public order is the principle of the rule of law.'[1810] This requires the State 'at least to set up a minimum legislative framework including a proper forum allowing persons … to assert their rights effectively and have them enforced'.[1811]

Once again, this duty is best understood as an undirected duty on the State that requires it to maintain its ability to fulfil the directed duties contained in the Convention rights. Conversely, it does not appear that Convention rights cover the full scope of the State's obligation; a right on the part of individuals to require the State 'to protect the rule of law and prevent arbitrariness' seems difficult to justify because there does not seem to be an interest on the part of each and every individual that is sufficiently strong to justify such a right. Instead, such rights exist only as regards situations where the individual's interests are more closely concerned; nonetheless, the State remains under an undirected obligation to secure the preconditions to fulfil these Convention rights.

(e) *The State's duty as 'the ultimate guarantor of pluralism'*

Moreover, another example of an undirected duty under the Convention is the Court's holding that the State is 'ultimate guarantor of pluralism'.[1812]

1808 *Kotov v Russia [GC]* (n 1781), para 117; *Theo National Construct SRL. v Moldova* (n 1781), para 69.

1809 *Iatridis v Greece* App no 31107/96 (ECtHR, 25 March 1999), para 58; *Valverde Digon v Spain* App no 22386/19 (ECtHR, 26 January 2023), para 54.

1810 *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 21 June 2016), para 145; *Aliyev v Azerbaijan* (n 1771), para 225.

1811 *Kotov v Russia [GC]* (n 1781), para 117; *Theo National Construct SRL. v Moldova* (n 1781), para 69.

1812 cf *Informationsverein Lentia and others v Austria* App no 13914/88 and others (ECtHR, 24 November 1993), para 38; *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), para 184, discussed in Chapter Six, 313ff. See also, on this 'objective dimension' in both ECHR and German constitutional law, Rainer

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The Court has not said that this obligation is owed to anyone; instead, it has used language that seems consistent with the idea that this is an undirected duty not immediately owed to anyone, as when the Court emphasises the 'interest of democratic society in securing a free press'[1813] and highlights the 'public's'[1814] right to receive information, as well as 'the key importance of freedom of expression as one of the preconditions for a functioning democracy'.[1815] In its further case law, it has gone into greater detail on this undirected duty, emphasising 'a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism',[1816] that 'the positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear'[1817] and that '[t]he [national] courts must … take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general'.[1818]

Once again, these are undirected duties imposed on the State to ensure that it can satisfy the directed duties contained in Convention rights. The undirected duty then interacts with these directed duties in different ways, sometimes reinforcing Convention rights and sometimes limiting them. As regards reinforcement of subjective rights, for example, 'the positive obligations under Article 10 of the Convention require States to … establi[sh] an effective system of protection of journalists'.[1819] Conversely, the State's

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Grote and Nicola Wenzel, 'Die Meinungsfreiheit' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 17ff.

1813 Consistent case law since *Goodwin v UK [GC]* App no 17488/90 (ECtHR, 27 March 1996), para 45, see recently eg *Sedletska v Ukraine* App no 42634/18 (ECtHR, 01 April 2021), para 62.

1814 Constant jurisprudence since *Informationsverein Lentia and others v Austria* (n 1812), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 1812), para 184.

1815 eg *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000), para 43; *Ringier Axel Springer Slovakia, as v Slovakia (no 4)* App no 26826/16 (ECtHR, 23 September 2021), para 26.

1816 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* App no 38433/09 (ECtHR, 07 June 2012), para 134, see recently eg *NIT SRL v Moldova [GC]* (n 1812), para 186, 192.

1817 *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECtHR, 29 January 2015), para 68, as well as the further cases cited above on 317.

1818 *Bozhkov v Bulgaria* App no 3316/04 (ECtHR, 19 April 2011), para 51.

1819 *Khadija Ismayilova v Azerbaijan* App no 65286/13; 57270/14 (ECtHR, 10 January 2019), para 158.

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public-interest obligations can also allow it to restrict individual rights: The Court has 'accepted that the ability of a country's licensing system to contribute to the quality and balance of programmes constitutes a sufficient legitimate aim for an interference', and 'also accepted that interferences seeking to preserve the impartiality of broadcasting on matters of public interest' and 'measures intended to ensure the audience's right to a balanced and unbiased coverage of matters of public interest in news programmes' all pursue legitimate aims.[1820] Similarly, where the Court has interacted with the position of the individual, it has even gone as far as highlighting that they have certain 'tasks', for example as a 'purveyor of information and public watchdog'[1821] or as imparting information and ideas on areas of public interest.[1822]

(f) *The State's duty to maintain separation of powers*

Finally, there also appears to be an undirected duty under the Convention requiring the State to maintain some level of separation of powers. While the Court has ostensibly denied that the Convention 'requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction',[1823] it has highlighted elsewhere 'the fundamental principles of the rule of law and the separation of powers'.[1824] Despite the Court's attempts to deny that it is regulating the allocation of powers, this is effectively the case when it 'emphasises that the notion of the separation between the political organs of government and the judiciary, as well as [the] importance of safeguarding the independence of judiciary, have assumed growing importance in its case law'.[1825] If '[o]nly an institution … [with] independence of the executive … merits the designation

1820 *NIT SRL v Moldova [GC]* (n 1812), para 174.
1821 *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985), para 58, see recently eg *NIT SRL v Moldova [GC]* (n 1812), para 129.
1822 *Lingens v Austria [Plenary]* App no 9815/82 (ECtHR, 08 July 1986), para 41.
1823 *Kleyn and others v the Netherlands [GC]* App no 39343/98 and others (ECtHR, 06 May 2003), para 193; *Ramos Nunes de Carvalho e Sá v Portugal [GC]* App no 55391/13 and others (ECtHR, 06 November 2018), para 144.
1824 *Guðmundur Andri Ástráðsson v Iceland [GC]* (n 1788), para 233; *Juszczyszyn v Poland* (n 1785), para 277.
1825 *Svilengaćanin and others v Serbia* App no 50104/10 and others (ECtHR, 12 January 2021), para 64.

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"tribunal" within the meaning of Article 6, para 1',[1826] this imposes a duty on the State to maintain some level of separation of powers.

Once again, these obligations are easier to explain as undirected duties. Granting a subjective right to each individual to allow them to require that the State be organised in this way seems difficult because the interest of each individual is probably not strong enough to justify such wide-reaching consequences. Conversely, classing this as part of the States' obligations to ensure that they can continue to fulfil the Convention rights seems relatively straightforward, since without separation of powers presumably a State would quickly lose its ability to eg provide independent and impartial tribunals or effective remedies.

(g) *The State's duty to take climate action*

Moreover, the April 2024 Grand Chamber judgment in *Verein KlimaSeniorinnen Schweiz and others v Switzerland*, seen by many as a major step in the development of the Convention, can be read as a particularly clear case of the Court using undirected duties. In the admissibility section, the Court found that neither the individual applicants[1827] nor the association they had founded could claim that their rights were violated,[1828] but that the case was nonetheless admissible because

> the standing of an association to act on behalf of the members or other affected individuals within the jurisdiction concerned will not be subject to a separate requirement of showing that those on whose behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context.[1829]

It held that the complaints 'fall within the scope of Article 8'[1830] without having identified any rights.

The Court then proceeded to the merits, 'assess[ed] the respondent State's compliance with its duty to put in place, and effectively apply in

1826 *Beaumartin v France* App no 15287/89 (ECtHR, 24 November 1994), para 38; *Eminağaoğlu v Turkey* App no 76521/12 (ECtHR, 09 March 2021), para 90.
1827 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* App no 53600/20 (ECtHR, 09 April 2024), para 535.
1828 Ibid, para 523, 525.
1829 Ibid, para 502.
1830 Ibid, para 525.

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practice, the relevant mitigation measures'[1831] and found a violation of the Convention. 'Rights' are conspicuous by absence in its analysis of the merits: Instead, the Court assessed the State's compliance with its 'obligations' and 'duties', and found a violation. It did not, however, find that anyone's rights had been violated. This fits well with the idea that the Convention can generate undirected duties: The Convention can also impose obligations on States without a corresponding right.

(h) *Undirected duties as reflecting public interests*

While the foregoing overview is not intended to be exhaustive – presumably, there are other duties which the Convention imposes on States without necessarily granting a corresponding subjective right –, even this brief list of undirected duties under the Convention reveals a key point: the duties' grounding. Undirected duties are justified not by reference to any one individual, but by reference to a *public* interest.[1832] *KlimaSeniorinnen* itself shows this particularly well. The Court, at various points in the 260-page judgment, stressed that the climate crisis affects individual interests held in common by all members of the community.[1833] The Court noted 'lack of State action, or insufficient action, to combat climate change [entails] a situation with general effect':[1834] 'Everyone is concerned by the actual and future risks, in varying ways and to varying degrees, and may claim to have a legitimate personal interest in seeing those risks disappear';[1835] 'everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change.'[1836] Procedurally, the Court even highlighted that 'the grant of standing to the applicant association before the Court is in the interests

1831 Ibid, para 555.
1832 On this term see Chapter One at 66. Highlighting that the Court justifies pluralism as being in the public interest see also Decaux (n 1776) 124.
1833 On this term see Chapter One at 66.
1834 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* (n 1827), para 485.
1835 Ibid, para 485.
1836 Ibid, para 483.

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of the proper administration of justice'.[1837] The undirected duties imposed on States were therefore grounded by reference to public interests.[1838]

This is significant because it is a key difference to *rights*. Rights as traditionally understood – particularly human rights – are seen as grounded in *individual* interests.[1839] Conversely, *undirected duties* are not conceptually limited in this way. They can easily be justified by reference to those interests which all members of the community have in common. This is, moreover, apparent in the structure of the Convention, as discussed in Chapter Eight.[1840] Some elements of these undirected duties appear explicitly in the 'legitimate aims' section, such as 'maintaining the authority and impartiality of the judiciary' in Art. 10 § 2 as a reflection of the undirected duty, based on the public interest, to maintain a Convention-compliant judiciary; that these undirected duties are not based on private interests can thus also explain why they are strong enough to justify restrictions on Convention rights, since the private interest taken in isolation of every individual in eg democracy is probably not strong enough to justify severe restrictions on rights.

3. Possible reasons for the lack of attention to undirected duties

As the foregoing has shown, the Convention imposes undirected duties on States to maintain their ability to fulfil the directed duties that correspond to Convention rights. Why, then, have these undirected duties, to date, not been addressed more explicitly?

This section discusses a number of possible explanations. The main reason is presumably linked to the individual application mechanism's focus on directed duties, which have thus also formed the main focus of Convention scholarship. The section then highlights that the Convention drafters may have simply assumed that these duties would not be violated, that domestic human rights law may not have provided a sufficient template for the Court's jurisprudence and, finally, that States are traditionally hesit-

1837 Ibid, para 523 (emphasis added).

1838 See the description by George Letsas, 'Did the Court in KlimaSeniorinnen create an actio popularis?' (2024) <https://www.ejiltalk.org/did-the-court-in-klimaseniorinnen-create-an-actio-popularis/> accessed 08 August 2024, who goes on to make a different proposal based on the rights of future generations.

1839 On this see Chapter Eight, 399ff.

1840 Chapter Eight, 406ff.

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ant to see public international law as partially determining their internal constitutional structure.

(a) *The individual application mechanism's focus on directed duties*

The most significant factor explaining why the Court has not, to date, paid significant attention to undirected duties may well be linked to the dominance, in practice, of only one of the two enforcement mechanisms laid down in the Convention.

Art. 33, entitled 'Inter-State cases', provides that '[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'. This provision can capture undirected duties comparatively easily, since these equally focus on a *breach* of the Convention rather than necessarily a violation of any rights of individuals. Art. 33 focuses on the State's *duty*, rather than on anyone's *right*, as reflected in the idea of an 'objective' mechanism enunciated by the Court in eg *Ireland v UK*.[1841] However, in practice Art. 33 cases are extremely rare, with only around 30 inter-State applications lodged to date in the entire history of the Convention. In the Court's contemporary practice,[1842] these cases are thus few and far between.

Conversely, Art. 34, which is entitled 'Individual applications', is now mandatory[1843] and makes up the bulk of the Court's work, is worded in a far narrower way. Individuals cannot complain of 'any alleged breach' like States can. Instead, they need to 'clai[m] to be the victim of a violation by

1841 cf *Ireland v UK [Plenary]* (n 1758), para 239; *Mamatkulov and Askarov v Turkey [GC]* (n 1758), para 100. Note that the Court understands 'objective' as meaning 'non-reciprocal', unlike the usage of that term in domestic law discussed at n 1758.

1842 For a contribution highlighting the key role of the inter-State application in the original Convention see eg Dean Spielmann and John Darcy, 'The European Court of Human Rights as a Guarantor of a Peaceful Public Order in Europe' (2014) 3 Cyprus Human Rights Law Review 106, 107. Discussing the role of the inter-State application as the 'default' means of enforcement and comparing it to the individual application mechanism see in detail Isabella Risini, *The Inter-State Application under the European Convention on Human Rights* (Brill 2018).

1843 Prior to Art. 1 Protocol 11 the right for individuals to apply to the Court was still an optional part of the Convention machinery. cf Art. 25 § 1 (1) of the original Convention text, which allowed petitions only 'provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petition'.

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one of the High Contracting Parties of *the rights* set forth in the Convention or the Protocols thereto'.[1844] This mechanism is far more clearly geared at *directed* duties such as rights – although, notably, it does not seem to prohibit the Court from assessing undirected duties, at least if one takes Art. 19's description of the Court's function as 'to ensure the observance of the engagements undertaken by the High Contracting Parties' seriously. Nonetheless, the fact that individual applications, which have a close conceptual link to directed duties, make up essentially all of the Court's work may go a long way towards explaining why the Court has not to date discussed undirected duties extensively. In essence, the Court may be letting its vision of substantive Convention law be influenced by the procedural mechanism through which cases come before it.

The fact that the Court has, by and large, not interacted explicitly with undirected duties may thus flow from procedural peculiarities of Convention law and the dominance of Art. 34 over Art. 33.[1845] Once again, the Polish cases provide a useful comparison: If the question is framed not as 'has Poland violated the applicant's right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' (the question under Art. 34) but as 'has Poland breached its obligation to maintain independent and impartial tribunals established by law' (the question under hypothetical Art. 33 proceedings), the fact that what is at issue is an *undirected* duty becomes far clearer. If the Art. 33 mechanism enjoyed greater popularity, similarly to EU law where the European Commission can require compliance with the provisions of the Treaties without having to show that any individual's rights have been violated, this would presumably have prompted greater attention to the undirected duties the Convention generates. But, as Onora O'Neill has put it in the philosophical context: '[O]nce rights rather than obligations are treated as the basic deontic category, … those [obligations] which lack corresponding rights altogether are quite simply hidden from view'.[1846]

As a result, one possible explanation for the lack of awareness regarding undirected duties may be that in practice Art. 34, which requires the applic-

1844 Emphasis added. Even the pilot judgment procedure, which can be framed as dealing with individual applications arising out of situations where the State has violated its undirected duties, requires violation of an individual's rights.

1845 Highlighting the different approach to the public interest under Art. 33 see, from the French-language literature, Decaux (n 1776) 127.

1846 O'Neill, *Towards Justice and Virtue* (n 1755) 140.

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ant to be the victim of a violation of a right,[1847] almost totally dominates the case law. However, the fact that the individual application mechanism makes directed duties more visible than undirected ones does not mean that the Convention cannot create undirected duties.[1848] First, it is worth emphasising that the substantive scope of obligations and their procedural enforcement are separate questions; in fact, mechanisms of procedural enforcement that are less developed than substantive obligations are a typical hallmark of international law. Second, the Convention contains an enforcement mechanism that easily accommodates undirected duties: the inter-State application under Art. 33. That this provision is not used particularly frequently is a practical consideration, but does not affect the Convention's ability to generate undirected duties. Moreover, while the individual application mechanism under Art. 34 requires that the applicant show 'victim status', this is mainly intended to exclude *actio popularis* claims and require the applicant to show that they are '"directly affected" by the measure complained of'.[1849] As the Court's case law particularly on public-service broadcasters shows,[1850] this requirement of being 'directly affected' can also be satisfied by a particularly close link to the undirected duty in question. It does not necessarily confine the Court to assessing only directed duties, as the many cases in which the Court takes the broader context into account show.[1851] Both the Court's case law and the Convention text contemplate a role for the Court that is not exclusively limited to assessing the situation of the applicant, particularly given Art. 19's broad definition of the Court's function and the fact that the Convention, even within the individual application mechanism, contains situations where it will depart from the individual applicant's position.[1852] Violation of an undirected duty can thus be argued both as part of an individual application and under the inter-State mechanism, as well as, of course, in political debate, as is typical of public international law. The focus on the individual application mechanism may thus explain why undirected duties have not

1847 For the Court's varying approaches to the concept of 'human rights' see Chapter Eight, 406ff, 415ff.

1848 See also 362ff.

1849 *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 04 December 2015), para 164. See now, however, *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* (n 1827), para 460ff.

1850 Chapter Ten, 491ff.

1851 See particularly the cases listed at 364, as well as Chapter Ten, 491ff.

1852 See n 1770 with reference to Arts 37 § 1, 39 § 1.

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received more attention, but does not exclude them as a category of Convention law.

(b) *Convention scholarship's focus on rights and directed duties*

In a repetition of the tendency in the Court's case law, Convention scholarship also typically focuses on rights and directed duties to the exclusion of undirected duties.[1853] Textbooks regularly highlight the Convention's purpose as essentially securing a number of particularly important private interests against the more powerful State.[1854] Discussion of the possibility of obligations on States which do not necessarily create identical corresponding individual rights is effectively non-existent,[1855] and even the literature on positive obligations focuses on positive obligations *owed to individuals*.[1856]

This focus on rights and directed duties may stem from the fact that the Convention's capacity to create rights under international law for individuals against States is more novel and therefore attention-grabbing.

1853 O'Neill, *Towards Justice and Virtue* (n 1755) 128 highlights that rights are also the predominant concept in contemporary ethics.

1854 See similarly Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (6th edn, Sweet & Maxwell 2019) 3–017; Lichun Tian, *Objektive Grundrechtsfunktionen im Vergleich* (Duncker & Humblot 2012) 41, 61, 221; Volker Röben, 'Grundrechtsberechtigte und -verpflichtete, Grundrechtsgeltung' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 9. For human rights law more generally see Maya Hertig Randall, 'Typologie des Droits de l'Homme' in Maya Hertig Randall and Michel Hottelier (eds), *Introduction aux Droits de l'Homme* (Schulthess 2014) 41; Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 30ff; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) 29.

1855 Krieger (n 1784), para 10, notes a similar absence of debate, as does Tian (n 1854) 36. A further potential reason for Convention scholarship's lack of discussion of undirected duties may be that the separation into rules of law (undirected duties) and rights is not typically explicitly discussed in English-speaking legal systems, cf Campbell (n 1752) 16ff.

1856 eg Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia 2016) 11. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 17 explicitly highlights in her recent work on positive obligations that 'human rights law works from rights as a point of departure towards obligations'.

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In the general literature on public international law,[1857] the Convention, along with other human rights treaties, has been most highlighted for its subjectively assigned positions since these have the potential to make the individual a subject of international law, in a significant contrast to classicist views of public international law. As one textbook puts it,

> [f]rom the perspective of individuals, the most important outcome of the internationalization of human rights is the fact that human persons now enjoy individual rights under international law and have therefore become partial subjects of this branch of law. Thus the traditional theory according to which international law by definition is limited to the legal status of states and international organizations has finally been overcome.[1858]

By comparison to this paradigm shift, the idea that the Convention *also* commits States to certain obligations regardless of the position of individuals is not new: This effect of international treaties is far less original and thus less noticeable than the idea that a treaty can directly grant rights to individuals. From the point of view of classic public international law, there would have been nothing ground-breakingly new (and thus likely to attract attention) in a treaty by which the States guaranteed to each other that they would organise certain questions of domestic organisational law in a specific way. Presumably, a formulation such as '[t]he High Contracting Parties shall establish by law independent and impartial tribunals', while overlapping in content, would have attracted less scholarly attention than the radical idea of according rights *directly to individuals* by means of a treaty between States, and creating an international court to adjudicate them to boot.

(c) *The Convention's assumption that undirected duties will not be violated*

Moreover, while there is support for the idea of undirected duties in the Convention text,[1859] there would have been ways of phrasing the Convention that would have made them even clearer. For example, the alternative hypothetical phrasing proposed above, that '[t]he High Contracting Parties shall establish by law independent and impartial tribunals', would arguably have made more explicit the same legal obligation that Art. 6 § 1 ('everyone

1857 eg von Arnauld (n 1763), para 66ff; Dupuy and Kerbrat (n 1763), para 194ff; Tolstyx (n 1763) 49.
1858 Kälin and Künzli (n 1854) 13.
1859 Above 363ff.

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is entitled to a fair and public hearing … by an independent and impartial tribunal established by law') implies: the undirected duty to maintain a Convention-compliant judiciary.

One possible explanation for why such obligations that the States maintain their ability to satisfy the Convention rights were not more explicitly included in the Convention may have been that it was assumed that these undirected duties would not be violated anyway, and that the brunt of the Court and Commission's case-load would thus be failure to comply with obligations towards individuals under the Convention. The twelve original High Contracting Parties were largely countries with, by the standards of their time, relatively well-established and well-functioning democratic, rule-of-law based systems. Moreover, Art. 4 of the Council of Europe Statute made being 'able and willing to fulfil the provisions of Article 3', which highlights that

> [e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I,

a condition for membership in the Council of Europe. The underlying assumption may thus have been that all States would comply with their undirected duties to maintain their ability to satisfy the Convention rights, particularly since Art. 1 explicitly repeated their duty to 'secure to everyone within their jurisdiction' these rights and freedoms. It may thus have been taken for granted that all High Contracting Parties would maintain their ability to comply with the Convention rights.[1860]

Moreover, this explanation sits well with the Convention's initial focus on negative obligations.[1861] For negative obligations, it is not clear whether there are any separate undirected duties on the States requiring them to maintain their ability to fulfil *negative* obligations, since these only require that the State do nothing, an avenue always available. The preponderance of such negative obligations in the original Convention text supports the idea

1860 Conversely, that also explains why the case law applying a systemic conception of human rights appears mainly from the 1990s onwards: The States that had joined more recently had greater difficulty complying with their undirected duty to maintain their ability to fulfil the Convention rights, but the Court, instead of focusing on this root-cause violation, focused on the symptoms, the subsequent violations of individual rights.

1861 For a very brief introduction to the development of the Court's case law see eg Lavrysen (n 1856) 2.

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that perhaps it was assumed that it was not necessary to regulate undirected duties aimed at ensuring that the State could satisfy the Convention rights.

(d) *Insufficient inspiration from domestic human rights law*

The fourth possible reason why undirected duties have not figured prominently in the Court's case law is because in domestic law – which is usually a key source of inspiration for the Court's doctrines – undirected duties are typically (with some exceptions) not discussed in the context of human rights norms. This is because most modern constitutions dedicate separate provisions to undirected duties. For example, instead of a human right in the style of Art. 6 § 1 guaranteeing certain organisational arrangements for the courts, both the French and German constitutions contain chapters on the organisation of the judiciary as one of the three branches of government.[1862] Debate on undirected duties thus focuses on those norms, rather than on the extent to which such undirected duties are contained in domestic human rights law. As a result, in eg German law,[1863] the idea that undirected duties can also derive from provisions that take the perspective of *rights* was long overshadowed by the more obvious idea that provisions worded as rights create directed duties and provisions worded as eg organisational law create undirected ones.[1864] Following various debates under the Weimar constitution that can now be seen as precursors to this

1862 cf eg Title 8 French Constitution of 1958; Chapter IX German Basic Law, although note that for the latter for example Stern (n 1758) 184ff highlights the close connection between empowering organisational norms and human rights and eg Michael Dolderer, *Objektive Grundrechtsgehalte* (Duncker & Humblot 2000) 240 maintains that it is possible to discern a tendency in the Basic Law to underpin even organisational norms with fundamental rights, leading to a kind of 'fundamental-rights-based procedural and organisational law' (author's translation, 'grundrechtliche[s] Verfahrens- und Organisationsrecht').

1863 To the extent ascertainable there does not appear to be a similar discussion in other legal systems. Noting the idea of undirected duties deriving from human rights as originating in Germany see eg Louis Favoreu, *Droit des libertés fondamentales* (8th edn, Dalloz 2021) 54 and Bioy (n 1738) 43.

1864 Klaus Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' in Klaus Stern and Florian Becker (eds), *Grundrechte-Kommentar* (3rd edn, Wolters Kluwer 2019), para 55, who refers to undirected duties derived from fundamental rights as a 'legal discovery' (author's translation, *juristische Entdeckung*). For a historical contextualisation see Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' (n 1758) 508ff.

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realisation,[1865] it took until the 1950s for this idea of undirected duties derived from human-rights provisions – known in German as the 'objective function' of fundamental rights – to gain prominence,[1866] with several more decades of debate as to the full impact of this discovery.[1867]

It is thus no coincidence that in German law, the area where undirected duties flowing from human rights norms have been developed most extensively is in relation to a prerequisite of democracy for which there are *no* explicit organisational provisions at the constitutional level: freedom of broadcasting. The media are so important as to frequently be called the 'fourth estate';[1868] but unlike the other three 'estates', the German Basic Law does not (ostensibly) impose any duties on the State as regards media regulation. As a result, debate on the extent of the State's obligations focused on the extent to which the human rights norm regulating freedom of broadcasting imposes undirected duties on the State. However, while there is a rich literature specifically in relation to freedom of broadcasting, in other areas the debate is far less developed because – where there are explicit undirected duties committing the State to democracy[1869] or the rule of law[1870] – the extent to which such duties also derive from provisions focusing on human rights has less practical significance.

While the Court happily adopted similar doctrines as regards broadcasting,[1871] outside of this area it had comparatively little from the domestic level to draw on. This is not without a certain irony; given that undirected duties, at the Convention level, do *not* have separate norms regulating them, since the Convention does not contain explicit provisions regulating

1865 Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' (n 1864), para 57; for an in-depth study of eg 'institutional guarantees' (author's translation, *Einrichtungsgarantien*) see Mager (n 1788).

1866 See seminally Bundesverfassungsgericht BVerfGE 6, 55 (71ff) – *Ehegattenbesteuerung*; BVerfGE 7, 198 (205ff) – *Lüth*. For an older historical contextualisation see Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' (n 1758) 491ff.

1867 See eg Bundesverfassungsgericht BVerfGE 39, 1 (42ff) – *Schwangerschaftsabbruch I*; BVerfGE 49, 89 (116ff) – *Kalkar I*, as well as, discussing the development of the case law, Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' (n 1864), para 68ff. For an overview of the current state of the law see eg Matthias Herdegen, 'GG Art. 1 Abs. 3' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (2022), para 17 ff.

1868 Or, in the United States of America, the 'fourth branch'.

1869 Art. 20 § 1 Basic Law.

1870 Art. 20 § 3 Basic Law.

1871 For a comparison of German and ECHR law see Grote and Wenzel (n 1812), para 16ff.

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the organisation of public power, the extent to which such undirected duties can be derived from provisions regulating Convention rights is even more important than at the domestic level. Public international law does not have a category of State organisational law in the way domestic constitutions do; as a result, the question of which organisational requirements can be derived from human rights treaties is even more pressing and leads to these taking on functions that domestic constitutional rights, complemented by explicit provisions regulating the organisation of the State, do not necessarily have to fulfil to the same extent.

(e) *Public international law is not traditionally understood as regulating domestic organisational law*

A final reason why the Court has not been more explicit about the undirected duties the Convention imposes is because many of these are particularly sensitive politically and might trigger allegations of the Court overstepping its mandate: A number of the undirected duties contained in the Court's case law (eg concerning the judiciary, democracy, the executive or the rule of law) are the kind of question that, domestically, is typically regulated at the constitutional level. In this sense, the undirected duties contained in the Convention contain a hard core of constitutional organisational norms, giving the Convention a 'constitutional' significance that goes far beyond regulating protection of individual rights, the area traditionally debated under the label of 'constitutionalising'[1872] the Convention. Once again, the recent case law on judicial organisation in Poland provides a clear example: The Polish Constitutional Court assessed largely the same issues as the ECtHR, but in relation to the Polish Constitution's provisions on the organisation of the judiciary and the rule of law.[1873]

One of the reasons why undirected duties have not been referred to more explicitly may therefore be the controversial nature of the idea that the European Convention on Human Rights contains rudiments of its own constitutional organisational law and thus has an impact on questions of domestic constitutional law.[1874] This is exacerbated by the fact that the

1872 cf n 1877.

1873 See the summary in *Xero Flor w Polsce sp z oo v Poland* (n 1785), para 30ff.

1874 See generally regarding the more assertive stance of EU law on 'harmonising' domestic legal orders Janneke Gerards, 'Uniformity and the European Court of

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Convention, from a domestic perspective, stands at a sub-constitutional level in all States except Austria and the Netherlands.[1875] In keeping with the comparative lack of analysis of the extent to which human-rights norms can generate undirected duties, even where there has been debate on the Convention as a 'constitutional'[1876] document, that has focused almost entirely on the Convention rights as norms regulating the relationship between defined individuals and the State,[1877] rather than on their ability to impose undirected duties based on the public interest on the State.

Nonetheless, while the fact that European human rights law has not usually been understood as regulating domestic organisational law may explain the lack of attention paid to undirected duties, it does not mean that a clearer assessment of such duties would overstep the Court's mandate, given that these duties flow from the same legal provisions that give rise to the subjective Convention rights. These undirected duties, just like directed ones, derive from commitments the States have undertaken under the Convention and form preconditions for States to satisfy individuals' rights. Moreover, as discussed above, the Convention text, with the comprehensive obligation under Art. 1, the broad role envisioned for the Court in Art. 19 and the explicit permission to depart from the applicant's individual situation in Arts 37 § 1, 39 § 1 clearly contemplates a role for the Court that goes beyond the rights of individual applicants.[1878] While it is true that the most detailed normative content in the Convention is in relation to human rights and directed duties, diagnosing the Convention as a 'partial constitution in the field of human rights'[1879] in the sense of *only* subjectively assigned positions to the exclusion of constitutional elements dealing with

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Human Rights' in Koen Lemmens, Stephan Parmentier and Louise Reyntjens (eds), *Human Rights with a Human Touch: Liber amicorum Paul Lemmens* (Intersentia 2019).

1875 For an overview of the status of the Convention in various jurisdictions see eg Grabenwarter and Pabel (n 1799) § 3.

1876 For recent criticism of the term see eg Dzehtsiarou (n 1771) 96ff.

1877 From the copious literature see eg Steven Greer and Luzius Wildhaber, 'Revisiting the Debate About 'Constitutionalising' the European Court of Human Rights' (2012) 12 Human Rights Law Review 655, 666ff, as well as the summary in Laurence R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125, 138ff.

1878 See, in greater detail, 362ff.

1879 Christoph Grabenwarter, 'The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights' in Armin von Bogdandy and Pàl Sonnevend (eds), *Constitutional Crisis in the*

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the organisation of the State seems incorrect. In fact, the Convention (and with it the Court's mandate) is not limited in this way; it also contains norms, albeit at a relatively high level of abstraction, regarding those organisational arrangements which have a significant impact on human rights. In this sense, the Convention has far more elements of a constitution than is typically assumed, and as the cases on the Polish rule-of-law crisis show, these elements may become increasingly prominent in the future.

IV. Conclusion: Undirected duties under the Convention

As has been shown, the Convention creates a number of duties on States. Only some of these, the more limited class of directed duties, correspond to *rights*. However, since the Court and Convention scholarship near-exclusively take a 'rights' perspective, they assess only a part of the duties that the Convention imposes on States. This is problematic because duties are a broader category than rights. The perspective chosen is therefore not irrelevant. As Onora O'Neill explains,

> [i]f the preference for theories of rights over theories of obligations were only a matter of choice among idioms, there would be little reason to prefer theories of obligation. … [T]heories of rights and of obligations are not extensionally equivalent. While it is true that there cannot be rights without correlative obligations, there can well be obligations without correlative rights.[1880]

None of this is to say that emphasising the Convention's role as creating *rights* for individuals is problematic. Rights have an important advantage over duties: They can easily justify the imposition of previously unknown duties as situations change.[1881] However, *only* focusing on rights (and directed duties) is a limitation. Such a perspective leaves all other undirected duties out of the picture because there are no corresponding rights.

The following two chapters show the difference between an approach that uses only rights and one that combines rights and undirected duties. Chapter Eight highlights that taking only the perspective of *rights* is problematic because human rights, as traditionally understood, reflect the

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European Constitutional Area: Theory, Law and Politics in Hungary and Romania (Hart 2015) 259. See similarly Röben (n 1854), para 11.

1880 Onora O'Neill, 'Rights to Compensation' (1987) 5 Social Philosophy & Policy 72, 83.

1881 Noting the 'dynamic aspect of rights, their ability to create new duties' Raz, 'On the Nature of Rights' (n 1743) 200.

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interests of the individual rights holder and are thus ill-suited to capture wider public interests. Chapter Nine explains how *duties* can be grounded both on private and on public interests and shows how a view of the State's duties that also includes *undirected* duties can more convincingly resolve these cases without affecting outcomes. In essence, the claim that will be made is that the Court resolves cases involving the public interest by means of the wrong tool: It modifies its understanding of human rights, which it usually understands as focused on the position of the individual rights holder, to include public interests, which leads to tension with its case law in other areas. Instead, it should be protecting *public* interests via undirected duties on the State.

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Chapter Eight: Individualistic and Systemic Conceptions of Human Rights

The previous chapter discussed different types of duties, noting in particular the distinction between duties which are owed to others (directed duties) and undirected duties not owed to specific individuals[1882] and giving a number of examples of the latter undirected duties in Convention law. This chapter returns to the perspective of rights and highlights the problems that flow from the fact that the Court, at present, focuses near-exclusively on rights and corresponding directed duties. While such directed duties grounded on human rights are well-suited to capture private interests,[1883] in line with human rights and the directed[1884] duties they ground being typically understood as justified[1885] by reference to the position of the rights holder, interpreting these duties as protecting interests other than those of the rights holder leads to problematic inconsistencies within the Court's case law. Where activities, such as legal services or journalism, significantly affect *public* interests, a combination of directed duties based on private interests and undirected duties based on public ones is more appropriate, as will be argued in Chapter Nine. This is because the Convention and most of the Court's case law are based on an understanding of human rights that will be labelled as 'individualistic' for present purposes and assumes that the Convention rights are justified only by what they do for the individual; interpreting human rights in a 'systemic' way, by reference to what they do to advance interests that are not those of the rights holder and which would be better protected by undirected duties, thus sits uneasily with much of Convention law.

1882 cf eg Japa Pallikkathayil, 'Revisiting the Interest Theory of Rights: Discussion of The Morality of Freedom' (2016) 14 Jerusalem Review of Legal Studies 147, 154.

1883 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1884 In recent times 'philosophers have claimed that the Theories of Rights debate is, or ought to be recast as being, about how best to explain a "directed" duty's direction', David Frydrych, 'The Theories of Rights Debate' (2018) 9 Jurisprudence 566, 577 with further references, as well as the further references below in n 1940.

1885 On the interchangeable nature of the terms 'justifying', 'founding', 'basing', 'deriving' or 'grounding' see Samantha Besson, 'Justifications' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2022) 25.

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The present chapter shows that using exclusively directed duties is problematic because combining legal doctrines developed on individualistic understandings of human rights with systemic readings leads to inconsistencies. In a first section (I.), the chapter explains the predominantly individualistic justifications of human rights that mark the debate on moral human rights and examines to what extent these are reflected in Convention law. A second section (II.) does the same for systemic justifications of human rights, once again beginning with the debate on moral human rights before turning to black-letter Convention law. Finally, a third section (III.) shows that combining systemic justifications of Convention rights with doctrines – such as regarding the scope of the Convention rights and on proportionality – which are premised on an individualistic view leads to inconsistencies within the Court's case law.

Due to inconsistent terminology across the literature, a definitional note is in order. For present purposes, a conception of human rights will be termed

> 'individualistic' if 'any given right is justified by what it does for its holder, considered independently of whether it serves or disserves people other than its holder'.[1886]

This definition builds on terminology that already exists in the literature. By contrast, a conception of human rights will be called

> 'systemic' if it justifies rights (also) by whether the right serves or disserves people other than its holder.

These descriptions have been developed in the philosophy of moral human rights, not as regards the legal human rights of the Convention. This is in keeping with a significant lack of theoretical analysis of the Convention.[1887]

1886 Rowan Cruft, 'Human Rights as Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 130. Cruft, here, is describing Joseph Raz's influential theory of rights, which will be dealt with in greater detail below at 402ff. Defining 'individualistic conception[s] of human rights – as based on the good of the right holder' see also Rowan Cruft, 'Journalism and Press Freedom as Human Rights' (2022) 39 Journal of Applied Philosophy 359, 361.

1887 Noting this eg Alain Zysset, *The ECHR and Human Rights Theory* (Routledge 2017) 20, Bosko Tripkovic and Alain Zysset, 'Uncovering the Nature of ECHR Rights: An Analytical and Methodological Framework' (2024) 24 Human Rights Law Review 1, 4, and Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (CUP 2021) 112ff.

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The Court itself is vocally sceptical of theory,[1888] which is problematic because it shifts the underlying questions from the explicit to the implicit level – it is impossible to apply human rights *without* a vision of what justifies them and what they should do.[1889] '[T]he justifications of rights at least co-shape the expectations about their appropriate substance and about the appropriate holders, who should enjoy legal rights and who not',[1890] meaning that ignoring these questions is not an option. Unfortunately, this under-theorisation of the Convention is in line with the widely-noted general under-theorisation of legal, as opposed to moral, human rights.[1891] There is a broad[1892] and long-standing[1893] consensus that there is an insufficient link between the theory of moral human rights and the debate on legal human rights, which is partly due to many authors not clarifying which of the two they are discussing.[1894]

1888 See famously, in the context of 'horizontal effect', the Court's statement in *VgT Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001), para 46 that it 'does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*'.

1889 Particularly since Art. 31 § 1 VCLT requires that a treaty shall be interpreted 'in the light of its object and purpose', meaning that the answer has a direct doctrinal impact. The Court itself, when discussing Art. 31 § 1 VCLT, has typically merely highlighted 'the object and purpose of the Convention as an instrument for the protection of individual human beings' (*Loizidou v Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), para 72; similarly *ND and NT v Spain [GC]* App no 8675/15; 8697/15 (ECtHR, 13 February 2020), para 172) or 'an instrument for the protection of human rights' (*Magyar Helsinki Bizottság v Hungary [GC]* App no 18030/11 (ECtHR, 08 November 2016), para 121; *Slovenia v Croatia [GC]* App no 54155/16 (ECtHR, 18 November 2020), para 60). That, however, begs the question.

1890 Anne Peters, 'The Importance of Having Rights' (2021) 81 Heidelberg Journal of International Law 7, 10.

1891 Besson (n 1885) 23ff.

1892 For further references see eg Samantha Besson, 'Human Rights: Ethical, Political…or Legal? First Steps in a Legal Theory of Human Rights' in Donald Earl Childress (ed), *The Role of Ethics in International Law* (CUP 2011) 213; Allen Buchanan, *The Heart of Human Rights* (OUP 2013) 50; Eric Posner, 'Human Welfare, Not Human Rights' (2008) 108 Columbia Law Review 1758, 1767.

1893 See eg Saladin Meckled-García and Basak Çali, 'Lost in Translation: The Human Rights Ideal and International Human Rights Law' in Saladin Meckled-García and Basak Çali (eds), *The Legalization of Human Rights* (Taylor & Francis 2005) 10, 10; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 5.

1894 On this criticism see eg Buchanan, *The Heart of Human Rights* (n 1892) 12, 81. Noting that 'the majority of human rights theorists […] justify human rights […]

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Given this lack of theoretical analysis specifically of the Convention rights, 'the obvious place to turn to for justification then is [general] human rights philosophy or theory'.[1895] The idea that human rights philosophy can usefully inform human rights law is so widespread in both anglophone and other discourses[1896] as to have been referred to as the 'orthodox' position.[1897] Nonetheless, given that this 'Mirroring View'[1898] has recently come under criticism, a brief digression seems appropriate to explain why the debate on moral human rights can nonetheless inform a study of the law of the European Convention.

The debate on moral human rights is useful because the positive legal human rights contained in the Convention are both conceptually and textually linked to moral human rights.[1899] Conceptually, this is because '[t]he law institutes human right-holders as such and makes universal moral rights human rights, either by recognizing them as legal rights or

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without clarifying why justifications are needed in the first place or what exactly they are justifying' Besson, 'Justifications' (n 1885) 24.

1895 Besson, 'Justifications' (n 1885) 24.

1896 For an overview of the 'mirroring view' from the German-language literature see recently eg Moritz Blöchlinger, *Normative Legitimität von Recht, Moral und Menschenrechten im Lichte der positivistischen Trennungsthese* (Duncker & Humblot 2022) 31ff.

1897 Andreas Follesdal, 'Theories of Human Rights' in Reidar Maliks and Johan Karlsson Schaffer (eds), *Moral and Political Conceptions of Human Rights* (CUP 2017) 78; Jesse Tomalty, 'Justifying International Legal Human Rights' (2016) 30 Ethics & International Affairs 483, 483; Mark D. Retter, 'The Road Not Taken: On MacIntyre's Human Rights Skepticism' (2018) 63 The American Journal of Jurisprudence 189, 195 with further references. For further formulations see eg Besson, 'Human Rights: Ethical, Political…or Legal? First Steps in a Legal Theory of Human Rights' (n 1892) 211 n 1; Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 Transnational Legal Theory 31, 34.

1898 Introducing this (critical) term Buchanan, *The Heart of Human Rights* (n 1892) 14ff, who notes at 17 that '[t]he Mirroring View holds that to justify an international legal human right typically involves defending the claim that a corresponding moral human right exists'. See also Allen Buchanan, 'Why International Legal Human Rights?' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 245 as well as, from the German-language literature, Theodor Schilling, *Internationaler Menschenrechtsschutz* (4th edn, Mohr Siebeck 2022) 4. Noting the predominance of the Mirroring View in the work of many influential contemporary philosophers Rowan Cruft, 'Human Rights Law Without Natural Moral Rights' (2015) 29 Ethics & International Affairs 223, 223.

1899 See similarly from the German-language literature Paul Tiedemann, *Philosophische Grundlagen der Menschenrechte* (Springer 2023) 13ff.

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by creating them in recognition of certain fundamental universal moral interests'.[1900] Even legal human rights are '[f]or better or for worse … seen as formulating valid moral claims'[1901] because 'grounding legal human rights in prelegal moral rights does an especially good job of reflecting the importance we want to give legal human rights'.[1902] Textually, the Convention, through its links to the Universal Declaration of Human Rights, refers back to moral justifications;[1903]

> in denying the relevance of [moral human rights] to the justification of [international legal human rights], [criticism of the Mirroring View] sits awkwardly with the preambular language of core ILHR documents, which strongly suggests that the rights contained therein are intended to give legal expression and force to the rights held by all humans simply in virtue of being human.[1904]

For the present question, reference to the philosophy of moral human rights is all the more possible because, in what follows, no normative claim will be made that the Court *should* follow one of these theories. Instead, theories developed in the philosophy of moral human rights will be used in a weaker sense as descriptive tools to highlight the potential reasons for inconsistencies in the Court's case law.

However, even if the debate on moral human rights is more advanced than that on legal human rights, it equally suffers from (albeit less pronounced) problems.[1905] Even for moral human rights authors have noted the problematic tendency to 'write about human rights [but] leave entirely unspecified what our particular aim and approach is'.[1906] Moreover, nor is there a universally accepted theory for moral human rights – '[t]here

1900 Besson, 'Justifications' (n 1885) 29. For a similar argument as regards domestic constitutional rights see Robert Alexy, 'The Existence of Human Rights', *Law's Ideal Dimension* (OUP 2021) 145.

1901 Onora O'Neill, 'Response to John Tasioulas' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 71.

1902 Cruft, 'Human Rights Law Without Natural Moral Rights' (n 1898) 229.

1903 Developing this argument in greater detail and for international human rights law generally see eg Besson, 'Justifications' (n 1885) 24; Tomalty (n 1897) 487.

1904 Tomalty (n 1897) 487; Buchanan argues against this point in *The Heart of Human Rights* (n 1892) at 73.

1905 As Besson, 'Justifications' (n 1885) 25 puts it: 'if it is true that the justifications of human rights and their role are indeterminate and contested, it should be a consolation to realize that so is the rest of human rights theory'.

1906 James Griffin, 'Human Rights: Questions of Aim and Approach' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 15.

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is nothing approaching a consensus'.[1907] Instead, '[a]lthough rights are the distinctive normative concept of modern times, philosophers' analyses of the concept are a jumble'.[1908] In fact, questions have even been raised whether a single theory is desirable or indeed possible. Perhaps '[t]here is no "one-size-fits-all" theory of human rights, either of their moral foundations or of their scope'.[1909]

As a result of this plurality, it can in principle be permissible to adduce several different justifications for legal human rights.[1910] However, in the context of the European Convention on Human Rights, the present study posits that the Court's case law should aim to be consistent across different cases. Therefore, multiple theories are unproblematic only if they do not contradict each other. While it is possible for the Court to apply different justifications in different areas, it should not combine these unless they are compatible with each other.

The following sections set out two major theoretical approaches to moral and legal human rights, individualistic (I.) and systemic (II.) understandings. It then highlights (III.) that the criterion of compatibility between the two is not met because the former understanding excludes considerations that the latter would include. Note that the debate on 'political' conceptions of human rights,[1911] which focus on the role that human rights play between

1907 Scott FitzGibbon, 'The Ethical Bases of Human Rights' (2019) 19 Journal of Law in Society 19, 19.

1908 Leif Wenar, 'Rights and What We Owe to Each Other' (2013) 10 Journal of Moral Philosophy 375, 378.

1909 Letsas (n 1892) 25.

1910 For an introduction to the debate over monist and pluralist accounts of the justification of human rights see eg Besson, 'Justifications' (n 1885) 32ff. As Alexy notes, 'the assumption that there must exist precisely one standard general ground for individual rights which has to be embraced … obscures the insight that there may exist a bundle of quite different reasons behind any individual right, and that different rights may rest on quite different reasons' (Robert Alexy, 'Individual Rights and Collective Goods' in Carlos Nino (ed), *Rights* (NYU Press 1992) 164). See also Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 120 on 'foundational pluralism'. Noting that this is also true for 'international legal human rights' Buchanan, *The Heart of Human Rights* (n 1892) 50.

1911 For an introduction see eg Gerhard Ernst and Jan-Christoph Heilinger, 'Introduction' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) VIIff. For to the extent ascertainable the first discussion of a political conception specifically in the context of the Convention see Tripkovic and Zysset (n 1887).

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States, will not be addressed; these conceptions not only 'mi[ss] the intranational purpose of human rights',[1912] but generally also offer no guidance on how to interpret human rights in individual cases because they simply presuppose a moral theory of rights.[1913] Moreover, the text below largely cites materials written in the English language because in recent years this has been the main language of debate;[1914] however, as the literature in French, German and Russian shows and in line with human rights' claim to universalism, the ideas discussed in the following sections are not peculiar to anglophone discourse.[1915]

I. Individualistic conceptions of human rights

The classic justification for human rights is individualistic: Human rights are justified by what they do for their holder, regardless of whether this serves or disserves anyone else. 'An assumption shared by almost all [the] diverse conceptions [of human rights] is that human rights … are held by the right-holder for their own sake, rather than for the sake of others beyond the right-holder'.[1916] The present section highlights the predominance of individualistic conceptions in moral human rights theory (1.). It then argues that this type of individualistic conception sits well with both the Convention text and the Court's case law and is thus arguably the premise underlying the legal human rights of the Convention in most areas (2.).

1912 Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 Ethics 711, 726.

1913 David Miller, 'Joseph Raz on Human Rights: A Critical Appraisal' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 235.

1914 Bridging the linguistic gap between English and German see eg the contributions in Johannes Haaf and others (eds), *Die Grundlagen der Menschenrechte* (Nomos 2023), as well as the recent overview in Blöchlinger (n 1896).

1915 For an introduction in German see eg Tiedemann (n 1899); in French see eg Samantha Besson, 'Structure et nature des droits de l'homme' in Maya Hertig Randall and Michel Hottelier (eds), *Introduction aux droits de l'homme* (2014); in Russian see eg the first two chapters of Aleksandr Antonovič Kovalev, *Meždunarodnaja zaščita prav čeloveka: Učebnoe posobie* (Statut 2013).

1916 Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019) 118.

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1. Individualistic conceptions in moral human rights theory

Most moral human rights theory is individualistic in the sense explained above, ie human rights are justified by what they do for their holder. 'Individual moral rights, of which human moral rights are a sub-species, are not only rights *of* individuals, they are also grounded in some normatively salient characteristic of the individual right-holder'.[1917] 'Human rights share with rights of all kinds a commitment to the importance of certain individual interests'.[1918] Indeed, 'individualistic justification [is] one of the hallmarks – maybe even the one hallmark – of human rights'.[1919] 'Only the interests of the right-holder, and not anyone else's interests, need to be invoked as part of the positive case for the right's existence'.[1920] This 'individual-centred'[1921] approach is so common that authors typically do not even make it explicit – where they do, it is frequently referred to as the 'orthodox'[1922] or 'traditionalist'[1923] view. 'The idea of human rights … is rooted in a sort of ethical or normative individualism which views the human individual as the most important entity that exists in the world'.[1924] As a result, 'there must be something about the right-holder that is of suffi-

1917 John Tasioulas, 'On the Nature of Human Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (de Gruyter 2011) 29 (emphasis in original).

1918 Jeremy Waldron, 'Rights and Human Rights', *The Cambridge Companion to the Philosophy of Law* (CUP 2020) 156.

1919 Cruft, 'Human Rights as Rights' (n 1886) 129, and similarly at 136.

1920 John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 61.

1921 Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251, 253 referring in passing to 'the individual-centred concerns which generate human rights'.

1922 Tasioulas, 'On the Nature of Human Rights' (n 1917) 20, 26ff; Tasioulas, 'On the Foundations of Human Rights' (n 1920) 45; Follesdal (n 1897) 80ff; FitzGibbon (n 1907) 29; Andrea Sangiovanni, *Humanity Without Dignity* (HUP 2017) 177. Note that in many of these contributions 'orthodox' is used as a label to contrast against 'political' theories as described at text to n 1911.

1923 Alon Harel, 'Revisionist Theories of Rights: An Unwelcome Defense' (1998) 11 Canadian Journal of Law and Jurisprudence 227, 227: 'Traditionalists are committed to the view that [a] right is grounded in individualistic reasons alone and hold that this position has important implications for the scope of the right'.

1924 Waldron, 'Rights and Human Rights' (n 1918) 157. Note that a similar idea underpins the definition of 'public interests' chosen for this study and discussed in Chapter One, 65ff, particularly the rejection of so-called 'unitary conceptions'.

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cient moral importance to ground the duties and it is because this is so that the duties are owed to him or her'.[1925] What exactly this 'something' is is disputed,[1926] with various authors citing aspects as diverse as eg dignity,[1927] independence,[1928] needs,[1929] capabilities,[1930] autonomy,[1931] vulnerability[1932] and, of course, combinations of the foregoing,[1933] but human rights, on these views, are always individualistically justified.[1934] Of course, this does

1925 Buchanan, *The Heart of Human Rights* (n 1892) 58.

1926 Note that this is also true on non-consequentialist theories of human rights (for an introduction see eg William J. Talbott, 'Consequentialism and Human Rights' (2013) 8 Philosophy Compass 1030), which are also, perhaps even more (Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 350ff), focused on the individual. Highlighting that '[w]e should reject as false the choice between a status-based or dignitarian account of human rights and an interest-based account' Tasioulas, 'On the Foundations of Human Rights' (n 1920) 56 (since the question is ultimately definitional, as explained eg in James Sherman, 'A New Instrumental Theory of Rights' (2010) 13 Ethical Theory and Moral Practice 215, 218; Leif Wenar, 'The Value of Rights' in Joseph Keim Campbell, Michael O'Rourke and David Shier (eds), *Law and Social Justice* (Bradford 2005) 201).

1927 Tasioulas, 'On the Foundations of Human Rights' (n 1920) 55. For a discussion of dignity regarding legal human rights see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655. Note that 'dignity' is a particularly popular topos in the German-language literature, partly for reasons related to the prominence this concept enjoys in German constitutional law, but even beyond a strictly legal setting, see eg Tiedemann (n 1899) 73ff. Highlighting its significance from the Russian literature eg Andrej Jurov, 'Vvedenie v koncepciju prav čeloveka' in Vadim Karastelev (ed), *Kurs «Prava čeloveka»: učebnoe posobie* (Moskovskaya Xel'sinkskaya Gruppa 2012) 10 with further references.

1928 Ariel Zylberman, 'The Very Thought of (Wronging) You' (2014) 42 Philosophical Topics 153, 161.

1929 David Miller, 'Grounding Human Rights' (2012) 15 Critical Review of International Social and Political Philosophy 407.

1930 Amartya Sen, 'Human Rights and Capabilities' (2005) 6 Journal of Human Development 151.

1931 James Griffin, *On Human Rights* (OUP 2008) 32ff.

1932 Martha Fineman, 'The Vulnerable Subject' (2008) 20 Yale Journal of Law and Feminism 1.

1933 Waldron, 'Rights and Human Rights' (n 1918) 161. For a broader overview see eg FitzGibbon (n 1907), and the eight possible justifications discussed by Alexy, 'The Existence of Human Rights' (n 1910) 147.

1934 Cruft, 'Human Rights as Rights' (n 1886) 130. See, for similar links between human rights and private interests, eg Griffin, 'Human Rights: Questions of Aim and Approach' (n 1906) 10; Waldron, 'Rights and Human Rights' (n 1918) 153; Tasioulas,

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not mean that a positive impact on others cannot be a pleasant side-effect of human rights. It simply means that the justification of this right does not depend on whether it has this effect. For human rights as classically understood, '[i]ndividualistic justification is central'.[1935] Moreover, this individualistic conception is not limited to the anglophone sphere, but instead is also shared in the general literature on human rights in French,[1936] German[1937] and Russian.[1938]

(a) *Interest theories of rights as individualistic conceptions*

In fact, this focus on the individual is frequently seen not just as one of the hallmarks of *human* rights, but of *all* legal rights,[1939] in the sense that it

'On the Foundations of Human Rights' (n 1920) 50; Robert Mullins, 'Rights, Roles and Interests' (2019) 16 Journal of Ethics and Social Philosophy 98.

1935 Rowan Cruft, 'Why is it Disrespectful to Violate Rights?' (2013) 113 Proceedings of the Aristotelian Society 201, 206. Note that this also holds good for procedural approaches to human rights such as the one proposed by Forst (n 1912).

1936 See eg Besson, 'Structure et nature des droits de l'homme' (n 1915) 23ff, highlighting the individualistic focus of international human rights at 25; Emmanuel Decaux, 'L'intérêt général, « peau de chagrin » du droit international des droits de l'homme ?' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015) 125; Louis Favoreu, *Droit des libertés fondamentales* (8th edn, Dalloz 2021) 16.

1937 See eg the discussion of the development in Franziska Martinsen, 'Theoretische Grundlagen der Menschenrechte zwischen Ideengeschichte und Zukunft' in Johannes Haaf and others (eds), *Die Grundlagen der Menschenrechte* (Nomos 2023), in Markus Wolf, 'Allgemeines Selbstbewusstsein: Eine hegelianische Alternative zu "orthodoxen" und "politischen" Konzeptionen der Menschenrechte' in Johannes Haaf and others (eds), *Die Grundlagen der Menschenrechte* (Nomos 2023) 70ff as well as the discussion in Tiedemann (n 1899), particularly chapters 2–6. Discussing the contemporary English-language debate in German see particularly Hubert Schnüriger, *Eine Statustheorie moralischer Rechte* (Brill 2014).

1938 See eg the introduction in Jurov (n 1927) 14ff, Kovalev (n 1915), particularly chapters 1 & 2, or Mark Gibni, 'Formirovanie i razvitie koncepcii prav i svobod čeloveka' in Sergej Aleksandrovič Balašenko and Ekaterina Aleksandrovna Dejkalo (eds), *Prava čeloveka: Učebnoe posobie* (Junipak 2015) 14ff.

1939 Waldron, 'Rights and Human Rights' (n 1918) 156: 'Human rights share with rights of all kinds a commitment to the importance of certain individual interests'. Note, however, that Rowan Cruft, 'Human Rights as Individualistically Justified: A Defence' in Thom Brooks (ed), *Current Controversies in Political Philosophy* (Routledge 2015) argues that this 'account of *rights in general* is better taken as a theory of the narrower category [of] *human rights*' (emphasis in original).

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is the feature that explains the 'directedness' of the corresponding duty.[1940] This is the case if one follows an 'interest theory' of rights,[1941] since 'the basic idea underlying the Interest Theory is that every right protects some aspect of a person's welfare'.[1942] Such theories exist in a number of legal systems[1943] and are widely accepted in contemporary legal theory,[1944] including the theory of human rights.[1945] They propose that 'the essential feature of rules which confer rights is that they have as a specific aim the protection

1940 In this sense see eg Hillel Steiner, 'Directed Duties and Inalienable Rights' (2013) 123 Ethics 230, 232; Zylberman (n 1928) 156ff; Pallikkathayil (n 1882) 153ff; Allen Buchanan and Gopal Sreenivasan, 'Book Review: Cruft, Rowan. Human Rights, Ownership, and the Individual ' (2021) Ethics 383, 384; Simon Căbulea May, 'Address, Interests, and Directed Duties' (2022) 39 Journal of Applied Philosophy 194, 195.

1941 It is also true if one follows a 'will theory' (for an overview including the theory's problems see eg Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy & Public Affairs 223, 238), because even these theories remain focused on the rights-holder (and their ability to form a will), cf Frydrych (n 1884) 578. However, these theories will not be discussed in greater detail for present purposes since they are unsuitable for the Convention (they can explain neither unwaivable Convention rights nor the extension of scope *ratione personae* even to individuals who cannot form a will). See generally the criticism in eg Matthew H. Kramer, 'Rights Without Trimmings', *A Debate Over Rights* (OUP 2000) 69.

1942 Kramer (n 1941) 62.

1943 See eg for a French-language perspective Decaux (n 1938) 125 and, discussing inter alia the German debate, Jean-Louis Bergel, *Théorie générale du droit* (Dalloz 2003) 38ff. Moreover, the debate in German law dates to the 19th century, see for example the interest theory expounded by Rudolf von Jhering; comparing this debate to later debates in English, including many of the authors cited above, see Gerhard Wagner, 'Rudolph von Jherings Theorie des subjektiven Rechts und der berechtigenden Reflexwirkungen' (1993) Archiv für die civilistische Praxis 319, 321, as well as more recently Schnüriger (n 1937). For an overview in the context of German fundamental rights law see Klaus Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' in Klaus Stern (ed), *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1988) 524ff.

1944 Wenar, 'The Nature of Rights' (n 1941) 240 with further references.

1945 cf Wenar, 'The Value of Rights' (n 1926) 201 with further references in n 43; Waldron, 'Rights and Human Rights' (n 1918) 152; Griffin, 'Human Rights: Questions of Aim and Approach' (n 1906) 10; George Letsas, 'Rescuing Proportionality' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 328; Miller, 'Joseph Raz on Human Rights: A Critical Appraisal' (n 1913) 232; Besson, 'Justifications' (n 1885) 26; Eva Erman, 'The "Right to Have Rights" to the Rescue' in Mark Goodale (ed), *Human Rights at the Crossroads* (OUP 2014) 74.

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or advancement of individual interests or goods'.[1946] In fact, these theories are arguably more convincing as theories of human rights than they are as theories of rights in general.[1947]

A – perhaps the most[1948] – classic account of such an interest theory in English[1949] is the one by Joseph Raz,[1950] which is widely acknowledged as a 'classic exposition'[1951] and used as a basis by many subsequent authors.[1952] Raz gives the following '*Definition:* "X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.[1953] Since the first limb of Raz' test is mainly intended to exclude as

1946 Neil MacCormick, 'Rights in Legislation' in Peter Hacker and Joseph Raz (eds), *Law, Morality, and Society - Essays in Honour of HLA Hart* (OUP 1977) 192.

1947 cf eg Cruft, *Human Rights, Ownership, and the Individual* (n 1916) 19. To provide just one example: Raz' statement that '[r]ights are never justified just because they serve the public interest' (Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Journal 27, 39) is much more defensible as regards *human* rights than as regards rights generally, since the limitation that the right must serve the rights holder's interest can easily be introduced as a definitional criterion for *human* rights, while it is not clear what would stop the legislature granting claim-rights in the Hohfeldian sense even where these do not serve the rights holder.

1948 '[M]ost influential' Griffin, 'Human Rights: Questions of Aim and Approach' (n 1906) 4; 'most widely-cited' Leif Wenar, 'Rights' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2021) 19; NE Simmonds, 'Rights at the Cutting Edge' in Matthew H. Kramer (ed), *A Debate Over Rights* (OUP 2000) 204.

1949 cf n 1943. Highlighting Raz' significance from a Russian perspective see Max Aleksandrovič Belyaev, 'Pamjati Džozefa Raza (1939–2022)' (2022) 12 Teoretičeskaja i prikladnaja jurisprudencija 75.

1950 To the extent ascertainable, the arguments made in what follows also hold good for other versions of the interest theory. Raz' description has been chosen because it is particularly widespread.

1951 Tasioulas, 'On the Foundations of Human Rights' (n 1920) 50.

1952 Jeremy Waldron, 'Rights in Conflict', *Theories of Rights* (OUP 1989) 128; Waldron, 'Rights and Human Rights' (n 1918) 152; Frances Myrna Kamm, *Intricate Ethics* (OUP 2007) 244; Besson, 'Human Rights: Ethical, Political…or Legal? First Steps in a Legal Theory of Human Rights' (n 1892) 231; Anne Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5 Transnational Environmental Law 1, 18ff; Zysset (n 1887) 21; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 102. Drawing on this definition in the French-language discourse see Besson, 'Structure et nature des droits de l'homme' (n 1915) 25.

1953 This is the definition provided in Joseph Raz, 'The Nature of Rights' in Joseph Raz (ed), *The Morality of Freedom* (Clarendon 1988) 166. Raz repeats the same definition with minor variations throughout his work.

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rights holders non-human animals,[1954] the main point for present purposes is that '[a] person has a right if and only if an interest of his is a sufficient ground for holding another to be subject to a duty'.[1955] A 'person's interest [is] understood to mean that which is good for him, ie that which makes his life intrinsically a better life, better not for others or for a cause but in itself as a human life'.[1956] Rights, therefore, are 'intermediate conclusions between statements of the right-holder's interests and another's duty'.[1957]

According to this theory, rights are firmly individualistic. As Waldron puts it, these 'interests are individualised concerns'.[1958] Indeed, Raz even refers to the 'truism' that 'the objects of rights – that is, what one has a right to – … will be of value to the rights-holder themselves'[1959] because '[r]ights are always to what is in the interest of the right-holder'.[1960]

(b) *The role of public interests in individualistic conceptions*

In individualistic conceptions of human rights, public interests are typically seen as categorically different from private interests.[1961] According to these 'traditionalist' accounts, 'collective concerns cannot be intrinsic reasons, ie, they cannot be the reasons by virtue of which the demand is classified as a claim of *right*'.[1962] Instead, '[u]nder the traditionalist view, valuable human

1954 Obviously, this is controversial, see eg Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (n 1952). For an introduction to the general debate on criteria for rights-holdership see Kenneth Campbell, 'Legal Rights' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2021) 9ff.

1955 Joseph Raz, 'Legal Rights' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 266.

1956 Raz, 'Rights and Individual Well-Being' (n 1955) 46.

1957 Raz, 'Legal Rights' (n 1955) 259.

1958 Waldron, 'Rights and Human Rights' (n 1918) 153.

1959 Raz, 'Human Rights in the Emerging World Order' (n 1897) 35.

1960 Raz, 'Rights and Individual Well-Being' (n 1955) 46.

1961 From the French literature see eg Favoreu (n 1938) 149ff, Xavier Bioy, *Droits fondamentaux et libertés publiques* (6th edn, LGDJ 2020) 238ff as well as Decaux (n 1938), particularly at 124, and, from the German literature, eg Josef Isensee, 'Gemeinwohl im Verfassungsstaat' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland: Band IV: Aufgaben des Staates* (3rd edn, CF Müller 2015), para 37ff, and Klaus Stern, 'Band III/2: Allgemeine Lehren der Grundrechte', *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1994) 343ff.

1962 Harel (n 1923) 233 (emphasis in original).

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concerns can be divided into two kinds: individual and public. The former can give rise to rights while the latter cannot'.[1963] This, of course, leaves open the possibility that such public concerns can give rise to undirected duties; it merely denies that public concerns can generate the type of directed duties typical of human rights.

Instead, where public and private interests interact, public interests are typically understood as factors that are to be weighed *against* individual concerns (since protection of individual concerns is independent of whether they further public interests); the whole point of human rights, in these conceptions, is to eliminate certain options that would otherwise be pursued for the common good. As Dworkin puts it, 'the role of … rights in the political process … supposes, in our political community, an antagonism between appeals to rights and appeals to the general welfare'.[1964] 'Rights are normally understood as restrictions upon taking the most effective means to realizing desired or desirable ends'.[1965] This is the reason why it is 'widely held that there is an inherent tension between human rights and public interest'.[1966] Although Raz himself goes on to criticise it,[1967] he acutely summarises this view as 'many have seized on the primacy of individual rights as one sign that the special role of rights, their special function or significance in moral and political thought, is that they represent the individual's perspective or interest against the general or public good'.[1968]

2. Individualistic conceptions of Convention rights

On the whole, such individualistic conceptions of human rights can explain many features of the Convention and the Court's case law,[1969] which has

1963 Ibid 236.

1964 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 434.

1965 cf eg Samuel Freeman, 'Problems with Some Consequentialist Arguments for Basic Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 109.

1966 Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 99.

1967 As will be shown below at 419ff, Raz' later writing seems to abandon the individualistic conception underlying his classic formula.

1968 Raz, 'Rights and Individual Well-Being' (n 1955) 44.

1969 See similarly Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (6th edn, Sweet & Maxwell 2019) 3–017; Lichun Tian, *Objektive Grundrechtsfunktionen im Vergleich* (Duncker & Humblot 2012) 41, 61, 221; Volker

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referred to the Convention as 'designed to protect individuals' human rights'.[1970] If individualistic conceptions are predominant in the debate on moral human rights, these perspectives also arguably underpin a number of key doctrines in relation to the legal human rights of the Convention. In fact, there is even much in the Court's language to suggest that it embraces some form of an interest theory of rights, since it often speaks in terms of 'interests'.[1971]

The Convention's drafting history is unhelpful, since '[g]enerally, negotiators tended to assert their own conceptions of human rights rather than tackle those espoused by their colleagues. Accordingly discourse on the nature of human rights tended to be more a series of isolated utterances than a dialogue'.[1972] However, the final text of the Convention contains a number of elements that fit best with an individualistic conception of human rights.

This is the case, for example, as regards the clear separation in the Convention between the State on the one hand and the individual on the other. This is easy to explain for an individualistic conception of human rights, since those individualistic conceptions separate clearly between private interests and public ones. According to an individualistic conception of human rights, only individual interests can give rise to human rights because only human beings are classed as absolutely, intrinsically valuable. The State, conversely, is valuable only derivatively, by means of what it does for these human beings, and thus has no *individual* interests of its own. As a result, the State cannot have human rights – it does not have the type of individual interests which human rights protect, because the State is not

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Röben, 'Grundrechtsberechtigte und -verpflichtete, Grundrechtsgeltung' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 9. Noting generally for legal human rights that the 'liberal philosophical tradition is much closer to the paradigm of human rights law' Pavlos Eleftheriadis, 'Human Rights as Legal Rights' (2010) 1 Transnational Legal Theory 371, 386.

1970 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* App no 53600/20 (ECtHR, 09 April 2024), para 501.

1971 See similarly Zysset (n 1887) 21; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 100; George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 718; Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 16.

1972 Danny Nicol, 'Original Intent and the European Convention on Human Rights' (2005) Public Law 152, 158.

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valuable independently of its contribution to human well-being.[1973] The interests which the State pursues, the public interest, cannot give rise to human rights on classic individualistic conceptions.

For the Convention, this conceptual separation between the State and the individual becomes clear literally from the first article, since Art. 1 ECHR distinguishes between the High Contracting Parties, who are obliged to 'secure' the Convention rights, and 'everyone' (else), who are entitled to human rights. This substantive provision finds its procedural equivalent in Art. 34 ECHR, under which only a 'person, non-governmental organisation or group of individuals' can bring an application against one of the States. The Court explained this position – that the State does not hold the type of interests protected by the Convention – in the recent judgment in *OOO Memo v Russia* (2022), where it held that 'civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of "the protection of the reputation … of others" under Article 10 § 2'.[1974] In line with the individualistic premise that the State's lack of individual interests means that it cannot hold human rights, the Court noted the State's derivative value and highlighted that 'bodies of the executive vested with State powers are essentially different from [private] legal entities … [because] they exist to serve the public'.[1975] As a result,

> by virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differ from both the right to reputation of natural persons and the reputational interests of legal entities, private or public, that compete in the marketplace.[1976]

1973 McCrudden (n 1927) 679 refers to this as 'the limited-state claim': 'the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa'. For perspectives from French-, German- and Russian-language literature see Chapter One, 65ff.

1974 *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), para 47. Simultaneously, 'this does not exclude that individual members of a public body, who could be "easily identifiable" in view of the limited number of its members and the nature of the allegations made against them … may be entitled to bring defamation proceedings in their own individual name' (ibid) because they *are* human-rights holders.

1975 Ibid (n 1974), para 44. Moreover, in ibid, para 39 the Court linked reputation to human dignity, as it has done in a number of cases since at least *UJ v Hungary* App no 23954/10 (ECtHR, 19 July 2011), para 22.

1976 *OOO Memo v Russia* (n 1974), para 47. See also *Mária Somogyi v Hungary* App no 15076/17 (ECtHR, 16 May 2024), para 36.

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Moreover, the typical individualistic separation between private interests and public interests is also textually recognised in Arts 8 – 11. These articles each contain a first paragraph that lists certain individual interests (respect for private and family life, freedom of thought, conscience and religion, expression, assembly and association) that are generally protected. A second paragraph then sets out the criteria under which, exceptionally and in the name of one of the public interests exhaustively[1977] listed as legitimate aims,[1978] these interests can be interfered with. Because individuals are prima facie free to do whatever they like (paragraph 1) and the State can only interfere with their interests under certain additional conditions (paragraph 2), these provisions create a rule-exception relationship between the enjoyment of Convention rights and State interference: Any interference with the scope of a right will be unlawful *unless* it can exceptionally be justified.[1979] This opposition between individual and public interests is in keeping with classic tenets of individualistic understandings of human rights.[1980]

If that shows the textual basis for the separation between private interests and public interests, the Court has also received this into its case law from an early date. As the Plenary Court seminally put it in *Soering v UK* (1989) for Art. 3,[1981] 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental

1977 *OOO Memo v Russia* (n 1974), para 37, *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), para 182, and eg Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, CH Beck 2021), § 18, para 12.

1978 Highlighting that 'public interest is the umbrella term for different interests which are invoked in limitation clauses' Simone Peter, *Public Interest and Common Good in International Law* (Helbing Lichtenhahn 2012) 39; noting that a frequent justification for these limitations is 'because of the need to balance the interest of the community against the interests of the individual' eg Bernadette Rainey and others, *Jacobs, White & Ovey: the European Convention on Human Rights* (7th edn, OUP 2017) 340. For a discussion from the French literature see Decaux (n 1938) 124, highlighting legitimate aims as a reflection of the *intérêt général*.

1979 Anne Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (2021) 19 International Journal of Constitutional Law 1135, 1139.

1980 See similarly Leanne Cochrane and John Morison, 'Public Interest' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2017), para 22.

1981 And therefore, ironically enough, in relation to a norm that precisely does *not* ostensibly permit balancing.

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rights'.[1982] The Court, therefore, generally seems to take the view that the Convention conceptualises private interests and public interests as opposed to each other, as is evident from this text block which has now migrated across the Court's case law to form a staple of analysis under Art. 1 Protocol 1,[1983] which explicitly makes reference to 'the public interest'.

Finally, this type of individualistic conception as an appropriate basis for the interpretation of the Convention is also reflected in the way the Court has emphasised the key importance of the individualistic concept of human dignity.[1984] As the Grand Chamber noted in *I v UK [GC]* (2002), 'the very essence of the Convention is respect for human dignity and human freedom',[1985] and as a result 'the notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees'.[1986] 'Any interference with human dignity strikes at the very essence of the Convention'.[1987] As has been shown above, in the debate on moral human rights, these values are typically adduced by individualistic justifications of human rights.

II. Systemic conceptions of human rights

While individualistic conceptions of human rights, under which human rights are justified by what they do for their holder *regardless* of whether

1982 *Soering v UK* App no 14038/88 (ECtHR (Plenary), 07 July 1989), para 89; *Maria Azzopardi v Malta* App no 22008/20 (ECtHR, 09 June 2022), para 52. Similar dicta appear as early as *Sporrong and Lönnroth v Sweden* App no 7151/75; 7152/75 (ECtHR (Plenary), 23 September 1982), para 69.

1983 *Brumărescu v Romania* App no 28342/95 (ECtHR, 28 October 1999), para 78; *Carmelina Micallef v Malta* App no 23264/18 (ECtHR, 28 October 2021), para 40. Highlighting the need for 'a balance between the demands of the public interest involved and the applicant's fundamental property rights' eg *Kotov v Russia [GC]* App no 54522/00 (ECtHR, 03 April 2012), para 110.

1984 See similarly Schilling (n 1898) 23.

1985 *I v UK* App no 25680/94 (ECtHR, 11 July 2002), para 70; *Ražnatović v Montenegro* App no 14742/18 (ECtHR, 02 September 2021), para 37. For a recent study of the role of 'dignity' in the Court's case law see Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1.

1986 *Jehovah's Witnesses of Moscow and others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 135.

1987 *Bouyid v Belgium [GC]* App no 23380/09 (ECtHR, 28 September 2015), para 101; *Skorupa v Poland* App no 44153/15 (ECtHR, 16 June 2022), para 257.

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this serves or disserves anyone else, are thus generally the most widespread both as regards moral human rights and as regards the Convention, they are not the only possible interpretation of human rights. Instead, there are also approaches that permit justifying human rights by reference to the contribution they make to the interests of persons *other than* the rights holder.[1988]

This section discusses these systemic conceptions of human rights and the frequent objections brought forward against them. It begins with an overview of the debate on moral human rights (1.) and continues by comparing this debate to the Court's case law (2.), before finally discussing the problem of human rights justified by reference to specific roles (3.).

1. Systemic conceptions in moral human rights theory

As regards moral human rights, there are only comparatively few theorists who try to justify all or many human rights by reference to what they (also) do for persons other than the rights holder and try to argue that 'rights can be used to defend and promote societal interests'.[1989] This may be because many classic human rights intuitively seem more obviously to further the interests of the rights holder than a wider public interest. Not being killed or tortured instinctively seems to do more for the person who is saved from this unpleasant treatment than for a general interest in these activities not taking place.

Perhaps the most prominent attempt to *generally* justify human rights by their contribution to interests other than those of the rights holder is by John Stuart Mill.[1990] Mill famously saw the value of rights in enabling 'experiments of living' so that 'the worth of different modes of life should be proved practically, when any one thinks fit to try them' as a 'chief ingredient of individual and social progress'.[1991] Nonetheless, this attempt to conceive of human rights generally as justified by reference to public interests has re-

1988 These theories are thus already committed to the consequentialist analysis proposed by eg interest theories (cf n 1926), but differ from individualistic consequentialist approaches in that they also consider the consequences for others than the rights holder.

1989 See the description given by Harel (n 1923) 233.

1990 John Stuart Mill, *On Liberty* (4th edn, Longmans, Green, Reader & Dyer 1869), as well as the discussion in eg Talbott (n 1926) 1033.

1991 Mill (n 1990) 104–5.

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mained comparatively niche. Instead, overarching conceptions of all human rights are typically not justified by reference to promoting the interests of anyone other than the rights holder. Presumably, this is because it is not clear why, if the focus is on promoting societal interests, one still needs the separate category of 'human rights' in the sense of positions assigned to individuals. If the goal is to further a public interest, individual human rights seem more likely to be a hindrance than a help.[1992]

Instead, it is far more common to adduce a contribution to public interests as an additional justification only for certain human rights, rather than for human rights generally. Systemic arguments have been made to justify human rights such as eg freedom of religion (which 'serve[s] communal peace'),[1993] economic freedom (which 'contributes greatly to the existence of an open market')[1994] or equality rights (as furthering efficient resource allocation in markets).[1995] In fact, public-interest justifications can be adduced for a number of human rights; for example, the right to education contained in Art. 2 Protocol 1 presumably has a positive impact on a State's gross domestic product.

Most prominently, however, such justifications have been developed for the right to freedom of expression.[1996] As Wenar explains,

> [t]here are, in the broadest terms, two views of the value of the right to free speech. On the first view, speech rights are good in themselves. To respect a person's speech rights is simply to respect the inherent dignity and worth of that person as a rational and autonomous being. On the second view, speech rights are means to ends. We ascribe speech rights because doing so will help us to achieve desirable states of affairs like democratic stability, market efficiency and greater enlightenment.[1997]

1992 Hence eg utilitarianism's traditional scepticism of human rights.

1993 Raz, 'Liberty and Rights' (n 1953) 251.

1994 Joseph Chan, 'Raz on Liberal Rights and Common Goods' (1995) 15 Oxford Journal of Legal Studies 15, 18. For the complex situation in EU law see eg Francesco de Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law' (2014) 15 German Law Journal 383.

1995 Antje von Ungern-Sternberg, 'Autonome und funktionale Grundrechtskonzeptionen – Unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' in Nele Matz-Lück and Mathias Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem* (Springer 2012) 70.

1996 See seminally Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 Philosophy & Public Affairs 204.

1997 Wenar, 'The Value of Rights' (n 1926) 179.

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Since the latter 'approach to rights will aim to bring about a particular distribution (end state, pattern) of interests, and will ascribe whatever rights are necessary to achieve this distribution',[1998] it requires a vision of that final result. For freedom of expression, this end state is frequently posited as a society in which political debate is possible, and consequently the rights that are necessary to achieve this result are ascribed – rights particularly protecting political expression. Wenar, for example, highlights that '[a] right permitting false political speech … has important stabilizing influences in a democratic system', while a right to false commercial speech could presumably not be justified on this basis (since it adversely affects the public interest in a functioning economy).[1999] As Raz notes,

> [i]n the Common Law freedom of expression is regularly defended, where it is defended, on grounds of the public interest, that is on the interests of third parties. The right-holder's interest itself, conceived independently of its contribution to the public interest, is deemed insufficient to justify holding others to be subject to the extensive duties and disabilities commonly derived from the right of free speech.[2000]

Typically, this is taken to mean that these 'different views concerning the scope of the right to free speech necessarily affect the scope of *protection* of speech'.[2001]

However, the problem with justifying human rights by reference to what they do for public interests is that this seems to weaken the protection these rights provide.[2002] This is because on these understandings it is not clear what should happen when human rights do not contribute to optimising public interests.[2003] For such situations, systemic conceptions of human

1998 Ibid 193.

1999 Ibid 197.

2000 Raz, 'The Nature of Rights' (n 1953) 179, as well as the discussion in Raz, 'Free Expression and Personal Identification' (n 1955). Of course, the second sentence of this quotation effectively gives up Raz' own definition of rights, as will be discussed below at text to n 2044ff.

2001 Harel (n 1923) 227, highlighting this assumption in the general debate and challenging this view.

2002 See Cruft, 'Human Rights as Rights' (n 1886) 133 noting 'the common concern that non-individualistic theories of human rights are inadequate', as well as Onora O'Neill, 'Ethical Reasoning and Ideological Pluralism' (1988) 98 Ethics 705, 710 noting that '[d]espite J. S. Mill's optimism about the close fit between utilitarian foundations and liberal conclusions, utilitarian reasoning is widely thought unable to explain why rights should be taken as overriding'.

2003 Indeed, on individualistic conceptions one of the main functions of human rights is to protect the position of the individual precisely in those situations when their

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rights seem inclined to reduce the weight of the right because it does not contribute to the public interest, rather than only when it causes harms. To quote Raz, 'if rights do not represent the special force of the interest of the right-holder then they cease to capture the idea of a protective shield against the claim of the well-being of others'.[2004] As Chan notes, in this kind of approach,

> the protection of a liberal right would not be offered to those individuals whose enjoyment of the right does not contribute to the common good. There is nothing in the approach to guarantee that no individual should be excluded from enjoying a liberal right even if that enjoyment does not contribute to the liberal culture. … In this regard the more popular view of rights, the individualist, right-holder's interest view, has an advantage. For this view stresses that even if protecting those people mentioned above [uneducated outcasts, communists or fascists] does no general good to the society, their interests should still be protected by rights, unless their enjoyment of rights cause much harm to others. Fundamental moral rights do not depend on their positive externalities.[2005]

In the words of Pallikkathayil,

> [o]ne might worry that by treating rights as mere tools, and by extension treating the status of right-holding as a mere tool, [utilitarianism] cannot do justice to the significance of rights. And one might have a similar worry about [systemic conceptions of human rights] insofar as [they] too sometimes treat rights as instruments for promoting others' interests.[2006]

The reason for this 'worry' is that ultimately such a systemic approach 'leave[s] no political concept to express the important idea that the fundamental interests of an individual should be protected even if *not* protecting them would rather enhance the good or interest of society'.[2007] Moreover, given that these views can interpret the scope of the right in terms of public interests, it is not clear that they will be able to perform the (relatively clearer) balancing exercise typical of individualistic conceptions; instead, they may simply interpret scope in a narrow way without the relative clarity of tests that provide more detailed steps.[2008]

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rights do *not* contribute to optimising public interests, since in other situations the individual's interests are unlikely, practically speaking, to be at risk.

2004 Raz, 'Liberty and Rights' (n 1953) 250.

2005 Chan (n 1994) 29.

2006 Pallikkathayil (n 1882) 157.

2007 Chan (n 1994) 30.

2008 On the problems such public-interest conceptions cause for human rights *law* see below III.

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Finally, it is not clear that such conceptions can support the 'limited-state' claim above,[2009] that is the idea that the State differs categorically from individuals in that it is not absolutely, but only derivatively valuable (and therefore cannot hold human rights). This is because such conceptions ultimately also make the individual derivatively valuable, since their protection is justified by reference to what the exercise of their rights does to further a public interest. Since the position of the individual is not recognised independently of the public interest, it seems dubious whether the separation between an intrinsically valuable individual and the only derivatively valuable State can be upheld. Indeed, it is only for individualistic views that 'a necessary condition for any individual's capacity to have rights, leaving aside artificial agents such as corporations, is that their existence and well-being have intrinsic and non-derivative value'.[2010] If human rights are grounded not (only) in the idea that human beings are 'sources of ultimate moral concern', the 'intrinsic or non-instrumental value' of their 'existence and welfare',[2011] it becomes difficult to justify why the State should be excluded from holding human rights. Both the value of human rights and of the State then derive from furthering the public interest because the individual is 'ultimately treated as a resource for promoting the good'.[2012] This is in contrast to individualistic conceptions, which typically highlight that 'individuals should be treated as ends and not simply as means to an end'.[2013]

2. Systemic conceptions of Convention rights

In line with the strong support for individualistic conceptions identified above and the difficulty that approaches that focus on public interests have in recognising human rights, there is comparatively little support for systemic conceptions in the Convention. The closest textual link seems to be Art. 10 § 2's wording, which notes that the exercise of freedom of expression 'carries with it duties and responsibilities', thus presenting a slightly different perspective than private interests. However, this phrase can also

2009 McCrudden (n 1927) 679 and n 1973.
2010 Tasioulas, 'On the Foundations of Human Rights' (n 1920) 55.
2011 Ibid 55.
2012 Kamm, *Intricate Ethics* (n 1952) 248.
2013 McCrudden (n 1927) 659.

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be understood in line with an individualistic conception to highlight that freedom of expression is more likely than other human rights to conflict with public interests or with the interests of other rights holders. In keeping with this limited textual support, systemic conceptions of human rights do not appear to have played a significant role in the Court's case law outside the two areas discussed in the present study, the media and legal services, despite the fact that such justifications would also be possible for other rights contained in the Convention.[2014]

Nonetheless, for the media and legal services, the Court's case law frequently adduces systemic conceptions. This is in line with the Court's emphasis that these two areas are 'essential' for the Convention system to function[2015] – the Court thus clearly wants to limit States' leeway in these areas due to the strong link between public interests and the media and legal services, and in the absence of alternative doctrinal tools[2016] controls States' obligations by means of rights.

The Court's case law on the media has been discussed in greater detail in Chapter Six. For present purposes, it suffices to recall that, in language strikingly reminiscent of Mill,[2017] the Court, since the foundational *Handyside* judgment, sees freedom of expression as serving not only the (private) interest in 'the development of every man', but also the public interest as 'one of the essential foundations of [a democratic society]' and 'one of the basic conditions for its progress'.[2018] On this basis, the Court has interpreted the right to freedom of expression as (also) securing 'pluralism'.[2019] That this is not a private interest of the individual rights holder is

2014 See n 1993 to 1995 and accompanying text. For the example of systemic conceptions applied to protect freedom of parliamentary speech see below n 2083 and accompanying text.

2015 Compare *Bladet Tromsø and Stensaas v Norway [GC]* App no 21980/93 (ECtHR, 20 May 1999), para 59, which concerns the media, to the description of legal services in *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669, discussed in detail in Chapter Five, 240ff.

2016 For an alternative approach recognising undirected duties see Chapter Nine.

2017 See n 1991 and accompanying text.

2018 *Handyside v UK [Plenary]* App no 5493/72 (ECtHR, 07 December 1976), para 49, see recently eg *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), para 177, where the Court referred to these 'general principles' as 'well established in the Court's case-law'.

2019 cf *Informationsverein Lentia and others v Austria* App no 13914/88 and others (ECtHR, 24 November 1993), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 2018), para 184. See, in greater detail, Chapter Six, 314ff.

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clear from the Court's explicit holding in *Goodwin* that there is an 'interest *of democratic society* in securing a free press',[2020] which 'will weigh heavily in the balance in determining … whether the restriction was proportionate to the legitimate aim pursued'.[2021] The Court, therefore, follows a systemic conception of freedom of expression in the media cases,[2022] interpreting the rights of the individual rights holder in terms of what they contribute to the public interest in pluralism. This focus on a public interest is also reflected in the fact that the Court, in essence, enquires into whether the applicant's reporting fulfilled a legitimate aim for Convention purposes when it highlights the particular protection accorded to 'reporting facts capable of contributing to a debate in a democratic society'.[2023]

As regards legal services, the Court also clearly interprets the rights of lawyers in terms of the extent to which they advance public interests or the interests of the client. Examples abound in Chapters Two, Three and Five. To revisit just one case: The *Niemietz* judgment on professional secrecy for lawyers and Art. 8 shows the Court's systemic conception of the lawyer's rights well. Here, the Court argued that 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention'.[2024] What the Court did not highlight explicitly is that these 'rights guaranteed by Article 6 of the Convention' were not those of the applicant, but those of potential clients. It thus focused not on positions protecting the private interests of the applicant lawyer, but on public interests and the interests of third parties. Moreover, in the professional secrecy case law, the Court never enquires into whether the parties actually *wanted* the information concerned to be secret, but applies blanket protection under Art. 8 to any information. While easily explainable from the point of view of a public interest in the general protection of

2020 Emphasis added. Consistent case law since *Goodwin v UK [GC]* App no 17488/90 (ECtHR, 27 March 1996), para 45, see recently eg *Sedletska v Ukraine* App no 42634/18 (ECtHR, 01 April 2021), para 62.

2021 *Goodwin v UK [GC]* (n 2020), para 40, see recently eg *MAC TV sro v Slovakia* App no 13466/12 (ECtHR, 28 November 2017), para 39.

2022 cf eg the summary in Arjen van Rijn, 'Freedom of Expression (Art. 10)' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 765ff.

2023 *Axel Springer AG v Germany [GC]* App no 39954/08 (ECtHR, 07 February 2012), para 91. This point will be discussed in greater detail below at 426ff.

2024 *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 37; for further citations see Chapter Two, n 432.

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professional secrecy, this is difficult to reconcile with merely the protection of the applicant's private interests in an individualistic sense.

This systemic approach is also clear from the Court's strong emphasis on the applicant's *role*. The Court consistently highlights that lawyers in a given case were acting as defence attorneys and thus contributing to a public interest in a functioning justice system.[2025] This justification for their rights does not derive solely from their own interests and is thus not an individualistic one. Moreover, departure from an individualistic conception of the Convention is also visible from the fact that the Court interprets this role as not only granting rights, but as also imposing some sort of vague duties. The 'special role of lawyers, as independent professionals, in the administration of justice entails a number of duties'.[2026] For example, as the Court held in *Nikula v Finland* (2002), it is 'legitimate to expect [lawyers] to contribute to the proper administration of justice'.[2027] Moreover, the Court has elsewhere highlighted that lawyers have certain 'tasks'.[2028] The imposition of such obligations flowing from a human rights document is difficult to reconcile with an individualistic conception of the Convention rights; clearly, they cannot flow from the private interests of the rights holder because they bring with them considerable burdens. It can be explained more easily by a systemic conception of human rights: On this, human rights can be interpreted in terms of what they contribute to others' interests, which makes these theories more suitable for explaining additional obligations derived from human rights documents.

3. Role-bearer rights as an example of the shortcomings of individualistic conceptions?

Though the Court presumably did not pay specific attention to it, the emphasis on the 'special role of lawyers' reflects the terminology of a recent

2025 See Chapter Five, 225ff, and eg 464 below.
2026 *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 46.
2027 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45, discussed in detail in Chapter Five, 227ff.
2028 cf eg *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 149; *Beuze v Belgium [GC]* App no 71409/10 (ECtHR, 09 November 2018), para 128; *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), paras 52, 55.

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debate in the English-language[2029] literature on moral human rights. In recent times, there has been some discussion noting that so-called role-bearer rights – rights that relate to a specific *role* exercised by the rights holder – represent a challenge for classic individualistic conceptions of rights.[2030] This is because such rights, in practice, are often much stronger than the rights holder's own interest in the activity appears to be – if the rights holder even has such an interest at all. This discrepancy between the common usage of the language of rights and the interest theory is typically interpreted to mean one of two things: Either the individualistic focus of the classic interest theory is incorrect;[2031] or these cases are best resolved not only by means of rights, but with the help of other concepts (such as duties, as has been suggested in Chapter Seven and will be developed in greater detail in Chapter Nine).[2032]

As regards legal human rights, there does not, as yet, appear to be a debate on this point, nor has there been a discussion anywhere specifically concerning lawyers.[2033] The following section sets out the state of debate on moral human rights, which typically takes journalists[2034] as an example, before highlighting that the problem is, if anything, even more complicated for lawyers, where there are explicit rules concerning the relationship between the interests of the lawyer and their subordination to the interests of the client.

2029 To the extent ascertainable there is no parallel debate in French, German or Russian.

2030 Mullins (n 1934); Pallikkathayil (n 1882); Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886).

2031 See the alternative definitions of 'rights' discussed in eg Wenar, 'Rights' (n 1948) 17ff.

2032 See eg Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886) 359; Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 Oxford Journal of Legal Studies 257, 266; as well as the discussion in Wenar, 'The Nature of Rights' (n 1941) 244. Ironically enough, Raz himself seems to have countenanced this possibility when he notes that the arguments for protecting freedom of expression as a matter of individual rights are public-good arguments and the case for a subjective right is essentially that this is more *efficient*, see Raz, 'Free Expression and Personal Identification' (n 1955) 168.

2033 However, Raz himself notes at one stage that 'the rights of priests, doctors and lawyers to preserve the confidentiality of their professional contacts are likewise justified ultimately by their value to members of the community at large', Raz, 'The Nature of Rights' (n 1953) 179, but then uses journalists as his main example.

2034 Mullins (n 1934) 100ff; Pallikkathayil (n 1882); Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886).

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(a) *Moral human rights debate on journalists as role-bearers*

Notably, Raz himself was significantly critical of what he described as '[t]he Individualistic Fallacy [, which] leads to the false belief that all rights – or more modestly, all important rights – are justified by concern for the rightholder and his interests'.[2035] However – quite aside from the fact that, if this is a fallacy, it nonetheless appears to be a fallacy the Convention is based on –,[2036] Raz' own formula arguably did much to contribute to this position.

To recall Raz' original framing of the interest theory, '"X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.[2037] The problem in applying this formula to journalists is that the interests *of the journalist* are usually not seen as sufficient for grounding the very strong protection that the media typically enjoys.[2038] In fact, Raz realised this problem with his definition.[2039] He explains it as

> the weight of the right does not match the right-holder's interest which it serves, because in all of [these cases] the right is justified by the fact that by serving the interest of the right-holder it serves the interest of some others, and their interest contributes to determining the weight due to the right.[2040]

2035 Raz, 'Rights and Politics' (n 1947) 27.

2036 See above at 406ff.

2037 Above n 1953.

2038 As Raz himself notes, '[t]he rights of journalists (however qualified) to protect their sources are normally justified by the interest of journalists in being able to collect information. But that interest is deemed to be worth protecting because it serves the public. That is, the journalist's interest is valued because of its usefulness to members of the public at large', Raz, 'The Nature of Rights' (n 1953) 179.

2039 Raz describes it as 'a puzzle about rights which, even if not deep, is revealing of the motives for many of the common views held about them. On the one hand, typically rights are to what is, or is thought to be, of value to the right-holder. On the other hand, quite commonly the value of a right, the weight it is to be given, or the stringency with which it is to be observed do not correspond to its value to the right-holder', Raz, 'Rights and Individual Well-Being' (n 1955) 45. Gopal Sreenivasan, 'Public Goods, Individual Rights and Third-Party Benefits' in Mark McBridge (ed), *New Essays on the Nature of Rights* (Bloomsbury 2017) 132 highlights that this is 'an additional test [Raz] introduces in subsequent work'.

2040 Raz, 'Rights and Individual Well-Being' (n 1955) 50. See similarly Raz, 'Liberty and Rights' (n 1953) 248 and at 261 where he notes that 'the interest of the right-holder in itself, in the case of many of the rights which were used as examples above, is insufficient to justify that degree of protection'.

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According to this test, 'other people's interests count for the justification of the right only when they are harmoniously interwoven with those of the right-holder, ie only when benefiting him is a way of benefiting them, and where by benefiting them the right-holder's interest is served',[2041] that is 'as long as the third-party interests are served *precisely by serving* the individual's own interest'.[2042]

The problem with Raz' explanation is that it is incompatible with his own theory, which, as shown above,[2043] generally explains the Convention rights rather well. As a number of authors have noted, 'while Raz presents this as a way to interpret his theory it is actually an admission of defeat',[2044] at least if one accepts the premise that 'the vesting of an individual with a given claim-right … should reflect nothing apart from the *intrinsic* standing of the individual who is to possess it'.[2045] '[I]f the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is not sufficient to give rise to the duty of noninterference with his speech'.[2046] 'This argument in fact denies the right-holder's interest view of rights'[2047] because '[t]he rights holder's

2041 Raz, 'Rights and Individual Well-Being' (n 1955) 51.

2042 Sreenivasan, 'Public Goods, Individual Rights and Third-Party Benefits' (n 2039) 133, who also questions whether this is true in Raz' examples, since the interests of the third party and of the individual differ.

2043 406ff.

2044 Cruft, 'Human Rights as Rights' (n 1886) 131; similarly Cruft, 'Why is it Disrespectful to Violate Rights?' (n 1935) 207ff; Rowan Cruft, 'Introduction' (2013) 123 Ethics 195, 197. The inconsistency with Raz' definition is also highlighted in Wenar, 'The Nature of Rights' (n 1941) 242; Sreenivasan, 'A Hybrid Theory of Claim-Rights' (n 2032) 265ff; Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202, 206; Wenar, 'Rights' (n 1948) 18; Freeman (n 1965) 117; Buchanan, *The Heart of Human Rights* (n 1892) 59; Simon Căbulea May, 'Directed Duties' (2015) 10 Philosophy Compass 523, 530; Janis David Schaab, 'Why It Is Disrespectful to Violate Rights: Contractualism and the Kind-Desire Theory' (2017) 175 Philosophical Studies 97, 100; Cruft, *Human Rights, Ownership, and the Individual* (n 1916) 30ff.

2045 Sreenivasan, 'A Hybrid Theory of Claim-Rights' (n 2032) 266, who notes that 'at a minimum, this requirement is a *desideratum* for a theory of claim-rights, one that derives from the aim of preserving the connection between the language of rights and liberal individualism'.

2046 Kamm, *Intricate Ethics* (n 1952) 245.

2047 Chan (n 1994) 26 – noting, in particular, that '[n]owhere does Raz state the reason as explicitly as I do here'. Cruft, *Human Rights, Ownership, and the Individual* (n 1916) 18 gives a vivid example of why Raz' 'interpretation' is problematic: 'For example, we would find ourselves saying that my employer's duty to pay my salary is a duty which is owed not only *to me* but also *to my local shopkeepers*. Because I spend my salary in their shops, they have an interest at stake in my being paid,

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interest is dependent on the interests of others whom the role benefits, and therefore not an individually sufficient reason for any duty'.[2048]

> Roles like 'journalist' are often said to have a non-individualistic justification. Many of the role-based duties associated with journalism are grounded not by the interests of the journalist, but by the way in which journalists serve the interests of others. It appears to follow that any rights associated with the role of journalist must also be justified by consideration of the general interest, and that therefore the interests of the individual are not sufficient to ground any duties.[2049]

As a result, some authors highlight that '[j]ournalists' communicative rights are therefore not simply instances of the more general right to communicate held by everyone',[2050] and indeed it is not self-evident that they are human rights at all,[2051] since to class them as such 'deviates from the view that human rights are held universally by everyone'.[2052] Journalists, in these cases, have their rights not *qua* human, but *qua* journalist.[2053] Simply put, the fact that their protection is not premised on their own interests 'makes it very difficult to explain the ordinary thought that *free speech rights are the rights of speakers*'.[2054]

To date, the relatively recent debate on role-bearer rights has not yielded final results, though it can certainly be credited with identifying a problem. There are a number of alternative theories of rights,[2055] each with their own advantages and drawbacks, none of which has yet managed to achieve anywhere near the acceptance of interest theories of rights. In addition, there are also a number of authors who have considered the possibility that these cases should therefore not be resolved via rights, but instead

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> and on [Raz'] interpretation it is unclear how we could stop that interest inheriting the duty-grounding importance of my own interest in my salary: the shopkeeper's interest is served by the way the duty serves my own interest. But surely my employer's legal duty to pay my salary is not itself owed to local shopkeepers as well as to me'. (emphasis in original)

2048 Mullins (n 1934) 100.
2049 Ibid 104.
2050 Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886) 359.
2051 Discussing this objection ibid 369.
2052 Ibid 369.
2053 For this separation see eg Mullins (n 1934) 105.
2054 Wenar, 'Rights and What We Owe to Each Other' (n 1908) 394 (emphasis in original).
2055 Noting 'ever more sophisticated versions' Campbell (n 1954) 7.

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via duties in the public interest.[2056] For the moment, the debate on moral human rights and role-bearers thus seems unresolved.

(b) *Lawyers as a particularly complicated case of role-bearer rights*

The compatibility of journalists' strong protection with standard theories of rights is therefore far from self-evident. However, the role of lawyer arguably not only mirrors many of these problems. Due to a number of specificities of the position of lawyers, the question how and whether their rights can be classed as human rights may be even more complicated than it is for journalists.

The problem is that if one takes Raz' classic definition of rights,[2057] according human rights to lawyers as regards their professional activities would require us to say that an aspect of the lawyer's well-being (their interest) is sufficient reason to create duties on the State. The difficulty with this line of reasoning is that it is quite clearly not the one embraced by the Court. Instead, the Court argues consistently by means of the systemic value of the lawyer's human rights as furthering the interests of others – it argues primarily by reference to the well-being (the interests) of the client (see Chapters Two and Three). By contrast, the well-being of the lawyer (discussed in Chapter Four) enjoys at best limited protection, since it is mainly a (commercial) interest in the exercise of a profession and the Court largely does not engage with this profession's public-interest dimension in those cases. Notably, while in *Elçi and others v Turkey* (2003) the Court mentioned 'the freedom of lawyers to practise their profession without undue hindrance',[2058] this is not a right explicitly contained in the Convention, nor was the quote subsequently reprised.

If, in line with individualistic understandings of human rights, one focuses on what a right does *for the rights holder*, lawyers' rights allow them to exercise their profession – but that is not a right explicitly protected by the Convention, and even the limited protection of professional life that

2056 See n 2032.
2057 See 420.
2058 *Elçi and others v Turkey* (n 2015), para 669, discussed in detail in Chapter Five, 240ff.

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exists under Art. 8 ECHR[2059] is considerably weaker than the stand-alone rights to exercise one's profession contained in many other human-rights documents.[2060] In fact, even if one focuses instead on eg the right to freedom of expression, a lawyer's *own* private interests when speaking in court are arguably of a commercial nature (exercising their profession) – and in the Court's usual jurisprudence commercial speech is *less*, not *more*, protected.[2061] Lawyers' own interests therefore do not seem to justify the comparatively strong protection that they are accorded.

Moreover, matters are even more complicated because there are separate rules concerning the 'interests' of lawyers. While one can assume that the Convention can recognise that lawyers have a private interest in their general exercise of legal services, assuming that lawyers have *any* private interests where they are acting for a client in an individual case is far more problematic. This is because *when acting as a lawyer* lawyers are not supposed to have private interests at all (otherwise the risk of a conflict of interests looms large), but instead to act exclusively in the interests of the client,[2062] as the Court has highlighted in many cases, for example when it emphasises the lawyer's 'duty to defend *their clients*' interests zealously',[2063] their role as 'intermediaries',[2064] not as a party, as 'independent',[2065] or that '[a]n advocate representing a client is speaking on behalf of that client and

2059 cf eg *Denisov v Ukraine [GC]* App no 76639/11 (ECtHR, 25 September 2018). Note that as regards judges and prosecutors, the Court openly argues by reference to their independence, cf eg *Kartal v Turkey* App no 54699/14 (ECtHR, 26 March 2024), para 76, and *Stoianoglo v Moldova* App no 19371/22 (ECtHR, 24 October 2023), para 38.

2060 Such as for example the German Basic Law under Art. 12.

2061 As Harel (n 1923) 230 notes, '[t]he right to free speech is justified on the ground that it is conducive to autonomy, or the market place of ideas, but not on the grounds that it is conducive to the financial interests of the rightholder'. On the Court's constant jurisprudence that commercial speech will be less protected see eg *Sekmadienis Ltd v Lithuania* App no 69317/14 (ECtHR, 30 January 2018), para 73.

2062 For a particularly clear statement from soft law see eg Principle 2.7 of the CCBE Code of Conduct, noting that 'a lawyer … must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession'.

2063 *Nikula v Finland* (n 2027), para 54; *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 51 (emphasis added).

2064 *Nikula v Finland* (n 2027), para 45, discussed in detail in Chapter Five, 227ff.

2065 cf eg *Morice v France [GC]* (n 2028), para 135, as well as the discussion in Chapter Two at 145 and in Chapter Five.

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for the purpose of effectively defending the client's – not his or her own – interests'.[2066]

There is an argument to be made that, at least on an interest theory of rights, this prevents the application of human rights to lawyers acting in individual cases,[2067] and that their activities should be protected either only via the client's human rights or via undirected duties on the State.

Moreover, there is a further key difference to the debate surrounding journalists. The entire debate regarding role-bearer rights for journalists is premised on justifying the additional rights that come from the role, ie the elevation of the individual journalist's protection.[2068] For lawyers, things are far more complex. As shown in Chapters Four and Five, there are also wide areas where the role of lawyer triggers additional *restrictions* on human rights.

Taken together, these points highlight that there are significant tensions between standard doctrines of human rights and the protection of lawyers. The traditional interest theory cannot easily justify applying human rights to lawyers, since the interests protected are those of their clients and the general public interest in the rule of law. Conversely, systemic theories are not easy to reconcile with a number of standard doctrines of the Court's case law, as will be shown in the following section.

III. Mixing individualistic and systemic conceptions leads to inconsistent case law

As has been shown, there are significant differences of opinion in a number of areas of moral human rights theory. The Court, presumably as a result of its tendency not to interact directly with theoretical questions, has not addressed these, but has simply applied a mix-and-match approach that combines different conceptions of human rights. This is problematic because these understandings are not necessarily compatible: While individualistic conceptions justify human rights *only* by what they do for the rights holder, systemic ones permit interpreting these rights *also* according to what they

2066 *Rogalski v Poland* App no 5420/16 (ECtHR, 23 March 2023), Joint Dissenting Opinion of Judges Wojtyczek and Poláčková, para 3 (this is not part of their dissent, but a summary of the Court's case law).

2067 For further development of this point see below 433.

2068 This is because of the assumption that 'the indirect effects of strong speech rights are mostly appealing', Wenar, 'The Value of Rights' (n 1926) 194.

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do for the interests of other rights holders or for the public interest. The two conceptions thus differ significantly and can lead to different outcomes on cases.

Within the law of the Convention, the clash of these conceptions is particularly obvious as regards the scope of the Convention rights *ratione personae* (1.) and *ratione materiae* (2.), as regards proportionality analysis (3.) and as regards procedural questions regarding burden of proof (4.). Common to all of these areas is that the Court has developed most of its general, overarching doctrines on the basis of an individualistic conception of human rights. As will be shown in the remainder of this chapter, doctrines premised on this conception are at least in tension with the type of systemic conception the Court advocates for the media and for lawyers, and perhaps even incompatible; the next chapter (Chapter Nine) argues that the public interest in these areas would be better reflected by means of an undirected duty on the State.

1. Tensions regarding scope *ratione personae*

The first noticeable difference between individualistic and systemic conceptions is as regards the scope of the Convention rights *ratione personae*. For an individualistic conception, scope *ratione personae* is a relatively uninteresting point:[2069] In most cases, where individuals apply, the only question is whether, in terms of the applicant's person, it is possible in general that they hold private interests of the type protected by the Convention. For a systemic conception, which can also include public interests in the justifications of human rights, this question is significantly blurred: Should scope *ratione personae* be determined by reference to private interests or by reference to the public interest, or perhaps by reference to both simultaneously?

(a) *Is a private interest always required?*

The first question on which individualistic and systemic conceptions can differ is whether the scope of the Convention rights is engaged if there is no *private* interest involved, as where the State acts to fulfil public interests. For

2069 See eg ECtHR, *Practical Guide on Admissibility Criteria* (2022), paras 217–41.

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the vast majority of situations where the State is active, there is no debate on this because human rights norms seem immediately inappropriate for application to State activities – they are, if anything, geared as rights *against* the State, not as rights *for* the State. It therefore seems difficult to imagine State activities that even resemble the positions protected by human rights such as that to life, freedom from torture and slavery, or liberty and security.[2070] However, the situation is less obvious where State bodies perform activities that strongly resemble those performed by private (non-State) actors, particularly as regards communicative activities by the State. According to an individualistic conception of the Convention rights, their scope *ratione personae* should not be engaged, since the State is valuable only derivatively and thus cannot hold the kinds of private interests protected by human rights. A systemic conception is not committed to this position: Instead, it can focus on the fact that according human rights protection to bodies organised as part of the State can, in certain circumstances, further the private interests of others, or indeed public interests.

A classic question in this field is whether independent public service broadcasters organised as part of the State should be able to rely on the human right to freedom of expression. On an individualistic understanding, the simple answer would be that this does not fall within the scope of the Convention rights. The State, unlike human beings, is not intrinsically valuable. Since it is valuable only derivatively, it cannot hold human rights. A systemic conception, by contrast, can argue that as long as the public service broadcaster is sufficiently independent, their activities can further public debate on political matters just as much as private broadcasters can, and that they can therefore promote a public interest. This is the line of reasoning that the Court, in its case law permitting public service broadcasters to rely on the Convention, has followed,[2071] though recent judgments are beginning to show greater critical awareness of the difficulty

2070 Note that matters are already different as regards certain elements of the right to a fair trial, where there are some legal systems, such as German constitutional law, which allow even State bodies to invoke requirements such as impartiality, see eg Bundesverfassungsgericht BVerfGE 6, 45.

2071 The Court makes essentially systemic arguments in its line of cases recognising their standing under Art. 34, cf Chapter Six at 334. Highlighting that 'there was little difference between Radio France and the companies operating "private" radio stations' eg *Kotov v Russia [GC]* (n 1983), para 94, where the Court also emphasises the similarity in analysis of the concepts 'governmental organisation' and 'public authority' (ibid, para 95).

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in reconciling this position with individualistic conceptions of the Convention.[2072]

(b) *Is a private interest always sufficient?*

If the foregoing has concerned the question of whether a private interest is *necessary* to engage the scope *ratione personae* of the Convention rights, individualistic and systemic conceptions of human rights can also diverge on whether such a private interest is, on its own, *sufficient*.

If one applies a systemic conception, it is entirely possible to require that the rights holder be not only the type of person that can hold private interests, but also the kind of person whose protection furthers the *public* interest. In fact, as regards the media and legal services, the Court frequently tests twice for scope *ratione personae*: once as regards *ratione personae* for private interests, and once to assess whether the applicant is the type of actor for whom a special protective regime based on the public interest applies. Where the actors engaged are obviously non-State, the Court is typically quick to affirm scope *ratione personae* in the sense of an individualistic conception. Nonetheless, at a later stage in its reasoning, it then frequently applies a second *ratione personae* test when it assesses whether the applicants are part of the group that it sees as serving public interests.

For example, this second test of scope *ratione personae* is essentially what the Court is performing when it assesses whether the applicant was acting as a lawyer for Convention purposes[2073] and focuses on the applicant's

2072 See the Joint Partly Dissenting Opinion of Judges Paczolay, Wojtyczek and Poláčková in *Croatian Radio-Television v Croatia* App no 52132/19 and others (ECtHR, 02 March 2023), who hold the explicit view that protecting the autonomy of public broadcasting services is not a question of human rights because '[]the status of Convention right-holder stems from the nature of an entity as a grouping of individuals and derives ultimately from human nature and human dignity' and thus 'denotes separation from the State'. As a result, on the Court's current case law, '[t]he Convention … becomes an instrument protecting, without distinction, fundamentally different legal positions: rights and freedoms anchored in human dignity, principles of State organisation, empowerments granted to State bodies, relations between various State bodies, and so forth. As a result, fundamental human rights stemming from human dignity are diluted in a legal cocktail which becomes indigestible'.

2073 See eg *Morice v France [GC]* (n 2028), para 146, as well as the case law cited on 225.

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'special status'[2074] as a lawyer as a prerequisite for the application of certain strands of its case law. This is a test for the scope *ratione personae* of the role-bearer rights the Court applies to lawyers. Perhaps even more explicitly, the Court has performed such a second-level *ratione personae* analysis as regards the media. In *Magyar Helsinki Bizottság v Hungary [GC]* (2016), the Court explicitly differentiated between 'everyone' and 'the press': 'While Article 10 guarantees freedom of expression to "everyone", it has been the Court's practice to recognise the essential role played by the press in a democratic society … and the special position of journalists in this context'.[2075] In these cases, the Court tests for scope *ratione personae* twice: once in the classic liberal sense of being part of 'everyone', ie being able to hold private interests, and once in a second, public-interest based *ratione personae* analysis, where the Court tests whether the applicant satisfies the personal requirements of being part of the press/of being a journalist, which engage a separate regime within the Convention.

In addition to the Court not making sufficiently clear that it is in essence testing a second time for scope *ratione personae*, this approach shows well the tensions between individualistic and systemic conceptions of human rights. For individualistic conceptions, there is only one personal status relevant for human rights, that of being of ultimate, intrinsic value and thus being able to hold private, that is non-derivative, interests.[2076] By contrast, the double testing the Court performs under its systemic conception in these cases effectively introduces different classes of human-rights holders into the Convention at the level of personal scope, which sits uneasily with the Convention text's consistent use of the more neutral terms of 'everyone' and 'no one'. Instead, were one to codify the Court's case law, the relevant provisions would have to read not 'everyone has the right to', but 'journalists' or 'lawyers' 'have the right to',[2077] which raises the question

2074 *Nikula v Finland* (n 2027), para 45, discussed in detail in Chapter Five, 227ff.

2075 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1889), para 165.

2076 This is the reason why Cruft notes that 'there are notable costs to this expansive approach [of classing journalists' role-defining rights as human rights]: it deviates from the view that human rights are held universally by everyone; it also muddles the distinction between human rights and role-based rights', Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886) 369. Raz actually hints at a similar point himself in Raz, 'The Nature of Rights' (n 1953) 170 when he notes the difficulty in deriving freedom of political speech from the general right to freedom of expression.

2077 cf in this relation Judge Walsh's statement in his Dissenting Opinion in *Goodwin v UK* that 'the Court … has decided in effect that under the Convention a journalist

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of whether these issues can properly be understood as ones of *human*, as opposed to journalists' or lawyers', rights. Given that the Convention's rules on scope purport to be universal, treating this question as one of human rights is not self-evident. Moreover, as Chapter Nine will show, it is not the only way of protecting the activity in question.

(c) *Can the categories of scope* ratione personae *and* ratione materiae *be maintained on a systemic understanding?*

More fundamentally, it is not clear whether the separation between scope *ratione personae* and scope *ratione materiae* – which is well-established in the Court's case law[2078] – can usefully be maintained by systemic understandings of human rights. This is because that separation itself already appears to be premised on an individualistic understanding of human rights. On such an individualistic understanding, scope *ratione personae* assesses whether the applicant can, generally speaking, hold the type of private interests the Convention protects – which means essentially determining that they are a human being, non-governmental organisation or qualifying group of individuals. Scope *ratione materiae* then assesses whether their activity falls within the ambit of one of the Convention rights.[2079] Scope *ratione personae* assesses whether they qualify as a rights holder; scope *ratione materiae* assesses whether their activity is protected by the Convention. The first of these tests relates to a status, the second to an activity.

This separation works far better on an individualistic understanding than on a systemic one, at least for those situations where the applicant is not obviously a non-State individual. Since systemic understandings take as (one) criterion for assigning Convention rights whether the public interest is being furthered, they introduce an activity-based criterion into both of

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is by virtue of his profession to be afforded a privilege not available to other persons', *Goodwin v UK [GC]* (n 2020), Separate Dissenting Opinion of Judge Walsh, para 1.

2078 For *ratione personae* see eg *Ireland v UK [Plenary]* App no 5310/71 (ECtHR, 18 January 1978), para 238; *Mamasakhlisi and others v Georgia and Russia* App no 29999/04; 41424/04 (ECtHR, 07 March 2023), para 291; for *ratione materiae* see eg *De Wilde, Ooms and Versyp ('Vagrancy') v Belgium (Merits) [Plenary]* App no 2832/66 and others (ECtHR, 18 June 1971), para 47; *LB v Hungary [GC]* App no 36345/16 (ECtHR, 09 March 2023), para 60ff.

2079 ECtHR, *Practical Guide on Admissibility Criteria* (n 2069), para 278ff.

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the tests, which questions the separation between the two. Where a public interest is furthered, a systemic conception can accord rights without necessarily being committed to following the strict delimitation of rights holdership *ratione personae*. On a systemic conception, the question, for example, of whether Convention rights can be assigned to public service broadcasters thus hinges on the extent to which they are independent enough that their activities may further media pluralism. Questions of abstract ability to hold human rights in the sense of an analysis scope *ratione personae* do not arise because the main question is broadcasters' activities, not their status. Perhaps unsurprisingly, in its case law applying the Convention rights to public service broadcasters, the Court thus does not operate in the substantive categories of scope *ratione materiae* and scope *ratione personae*. Instead, it fudges this question by performing its assessment only under the all-encompassing procedural category of 'locus standi' under Art. 34.[2080]

2. Tensions regarding scope *ratione materiae*

Moreover, a similar problem regarding the necessity and sufficiency of private interests appears as regards scope *ratione materiae*. To enjoy the protection of the Convention, does an activity have to serve a private interest? And, if it does, is that always enough to engage the protection of the Convention rights?

(a) *Is a private interest always required?*

The first of these questions concerns whether the scope of the Convention rights is engaged for activities that *only* serve a public interest, but not a private one.

Individualistic conceptions of human rights would tend not to see these activities as the exercise of human rights (but instead to resolve them via other concepts). Since there is no *private* interest in the activity, it does not

2080 *Croatian Radio-Television v Croatia* (n 2072), para 79; *Radio France and others v France (dec)* App no 53984/00 (ECtHR, 23 September 2003), para 26ff. On the problematic mixing of procedural and substantive questions see similarly Chapter Seven, 381ff.

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fall within the scope *ratione materiae* of human rights norms. For example, German constitutional law, which is typically seen as essentially premised on an individualistic understanding of human rights,[2081] does not apply freedom of expression to speech in parliament or in other State bodies.[2082] This is because protecting such speech is not derived from the individual Member of Parliament's intrinsic value as a human being or their private interests, but from the *public* interest in MPs being able to speak as part of the political process. Members of Parliament speak not qua human, but qua elected representative, ie qua office-holder (role-bearer). Their rights in parliament are not supposed to further their private interests – that would be corruption –, but the public interest.

Moreover, the structure of human rights analysis (broadly similar in German and ECHR law) as developed on the basis of an individualistic understanding also seems inappropriate to resolve these cases: Nobody has a prima facie right to speak freely in parliament which can only be restricted according to the standards applied to human rights (legitimate aim, necessity, proportionality). Instead, such speech is by its very nature subject to further regulation, for example as regards speaking time limits, in order for parliament to function. The matter thus concerns not the external relationship between the State and a non-State actor, for which such tools are well-suited, but the internal organisation of the State. The German courts therefore resolve these questions by reference to organisational provisions concerning the role of the parliament and the rights of its members, not by reference to human rights.

A systemic conception, by contrast, is not committed to protecting only private interests and can thus easily treat these cases as ones of human rights, drastically broadening the ambit of human rights norms. For example, the European Court of Human Rights, despite highlighting that the reason for protecting parliamentary speech is *not* the speaker's own interest, nonetheless applies Art. 10. The Court reasons that '[t]here can be no

2081 Klaus Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' in Klaus Stern and Florian Becker (eds), *Grundrechte-Kommentar* (3rd edn, Wolters Kluwer 2019), para 1.

2082 Rainer Grote and Nicola Wenzel, 'Die Meinungsfreiheit' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 55.

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doubt that speech in Parliament enjoys an elevated level of protection'[2083] because 'freedom of parliamentary debate is of fundamental importance in a democratic society'.[2084] That this protection is not primarily based on the human-rights holders' own interests is particularly clear from the Court's judgment in *Lombardo and others v Malta* (2007), where the Court

> recall[ed] that while freedom of expression is important for everybody, it is especially so for elected representatives of the people. They represent the electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with their freedom of expression call for the closest scrutiny on the part of the Court.[2085]

Here, the Court openly uses the systemic value of parliamentary expression as a justification for applying the human right to freedom of expression under Art. 10, which sits uncomfortably with more classic individualistic conceptions of human rights that refer back to the right-holder. It is true that 'there can be no doubt that speech in Parliament [should enjoy] an elevated level of protection'; however, there can be significant doubt whether this is a question of the human right to freedom of expression of members of parliament.[2086]

The same problem, whether human rights can be applied even where there is no private interest, arises for lawyers acting on behalf of clients because it is not clear that lawyers have any private interests in these situations. Aside from the conceptual difficulties mentioned above,[2087] in many cases before the Court, lawyers themselves have emphasised that they are not acting in their private interest, but in that of the client. For example, in *Mesić v Croatia* (2022), the lawyer consistently emphasised[2088] that he was only relaying the ideas and information provided by his client.[2089]

2083 *Karácsony and others v Hungary [GC]* App no 42461/13; 44357/13 (ECtHR, 17 May 2016), para 138. Indeed, the point is frequently no longer debated, *Ikotity and others v Hungary* App no 50012/17 (ECtHR, 05 October 2023), para 29.

2084 *Karácsony and others v Hungary [GC]* (n 2083), para 139.

2085 *Lombardo and others v Malta* App no 7333/06 (ECtHR, 24 April 2007), para 53.

2086 For an alternative explanation of these cases based on a combination of undirected and directed duties see Chapter Nine.

2087 423ff.

2088 *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022), paras 6, 7, 9, 64ff, discussed in Chapter Six, 344ff.

2089 The same is true for the section in which the Court focused on 'The applicant's status as a high-ranking State official and Mr Jurašinović's status as an advocate', ibid, para 103ff. Neither of these positions derives from the intrinsic value of the individual; instead, they are both essentially public functions.

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For an individualistic understanding, there are thus significant obstacles to applying the Convention rights to lawyers acting on behalf of clients. By contrast, on a systemic conception, the application of the Convention rights to lawyers' professional activities is far easier to explain: While lawyers may not be acting in their own *private* interests where they represent clients, they are, on the Court's case law, clearly furthering both the interests of the client and a public interest, as reflected both in the Court's reference to legal services as a 'public service'[2090] and in lawyers' semi-public status as 'officers of the court'.[2091] A systemic conception can thus easily class these cases as within the scope of the Convention rights *ratione materiae*.

However, that this is in tension with the rest of the Court's case law becomes clear if, for example, one compares the situations of judges and lawyers. The Court appears to apply individualistic conceptions to the former and systemic conceptions to the latter.

On the Court's case law, judges fall within the scope of the Convention rights *ratione personae* because they are human beings; however, to the extent ascertainable,[2092] the Court treats their professional activities as not falling within the scope of the Convention rights *ratione materiae* because these activities do not reflect any private interest on the part of the judge.[2093] Aside from the fact that Art. 6 ECHR requires precisely that the judge have *no* private interest in the outcome of the case,[2094] this application of an individualistic conception of human rights seems convincing inter alia because of the general freedom from justificatory requirements that human rights bring: The State, acting through judges and prosecutors, *should* have to justify why it acts, unless one wants to give it the kind of general freedom to act that non-State individuals enjoy, which seems

2090 *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987), para 46 (b).

2091 See Chapter Two, 122ff, as well as the discussion in Chapter Five, 225ff.

2092 However, for a recent case applying freedom of expression to a prosecutor see *Brisc v Romania* App no 26238/10 (ECtHR, 11 December 2018), complete with a scathing Dissenting Opinion by Judge Kūris, joined by Judge Yudkivska.

2093 Notably, cases concerning unfair dismissal of judges argue by reference to the impact of the dismissal on the judge's private life, rather than by reference to any protected interest in exercising the functions of judge. See eg *Denisov v Ukraine [GC]* (n 2059), particularly at para 115ff.

2094 Note *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), para 118, where the Court highlighted that the 'subjective' limb of the 'impartiality' test requires that there be no 'personal conviction or interest of a given judge in a particular case'. For an introduction to the philosophical literature on such public roles see eg Waheed Hussain, 'The Common Good' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2018) 11.

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incompatible with the Convention's structure aimed at limiting State activities to pursuing the public interest.

On the other hand, the Court does apply the Convention rights to lawyers acting in the course of their professional activities, without explaining why their situation as regards judicial proceedings is different from that of judges. While the Court has highlighted that lawyers 'cannot be considered to be [organs] of the State',[2095] it has also classed them as 'intermediaries between the public and the courts'.[2096] This seems to be some kind of half-way position, meaning that it is not obvious why for individualistic conceptions lawyers will be sufficiently 'non-State' to apply human rights without qualms. Unless one wants to grant a drastically stronger right to exercise one's profession than the Convention to date recognises, lawyers' comparatively strong position cannot be justified by reference to their own private interests, but only because of a *public* interest in the rule of law and the administration of justice. For an individualistic conception, this means that treating the rights of lawyers in litigation as human rights is at least problematic. They speak not qua human, but qua lawyer.

(b) *Is a private interest always sufficient?*

Furthermore, individualistic and systemic conceptions also differ on whether a private interest will always be sufficient for scope *ratione materiae*. Instead, systemic conceptions can restrict the scope of human rights so as not to apply to activities that do not further the relevant public interest.

In this vein, if freedom of expression is interpreted to secure public debate, lowering[2097] or excluding protection for expression that is not seen as furthering such a debate is entirely consistent.[2098] Moreover, if freedom of expression is applied to lawyers, but interpreted in line with a systemic conception as protecting their functions *and* if these functions are seen as

2095 *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007), para 99, discussed in detail in Chapter Two, 124ff.

2096 *Nikula v Finland* (n 2027), para 45, discussed in detail in Chapter Five, 227ff.

2097 cf eg the *von Hannover v Germany (No 2) [GC]* App no 40660/08; 60641/08 (ECtHR, 07 February 2012) saga.

2098 To the extent that the Court is very hesitant to entirely exclude statements from the protection of Art. 10 at the level of scope *ratione materiae* this shows a combination of systemic and individualistic approaches, cf eg Matthias Cornils, 'EMRK Art. 10 Freiheit der Meinungsäußerung' in Hubertus Gersdorf and Boris Paal (eds), *BeckOK Informations- und Medienrecht* (CH Beck 2021), para 5.

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essentially limited to litigation, it is easy to understand why their freedom of expression will be less protected than that of other individuals as regards statements made outside the courtroom.

An individualistic conception, by contrast, can of course permit restrictions where there is a conflict between the private interest protected by freedom of expression and a public interest. However, it cannot simply reduce the level of protection because of a lack of contribution to the public interest. Instead, the private interest of the rights holder in freedom of expression is protected per se, regardless of what it does for any other person. The 'privileged position accorded by the Court in its case law to political speech and debate on questions of public interest'[2099] is thus harder to justify on an individualistic conception than on a systemic one.

3. The Court's proportionality analysis as essentially premised on an individualistic conception

If questions of scope of the Convention rights therefore already show tensions between individualistic and systemic conceptions,[2100] perhaps the most significant tension between these conceptions of the Convention rights regards their ability to justify the Court's proportionality analysis.[2101]

2099 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1889), para 163, discussed in Chapter Six at 310ff.

2100 No discussion of the general criticisms of proportionality as a standard in human rights law is offered here because in any case proportionality analysis is an established doctrine in the Court's case law. For an introduction to the extensive debate on proportionality-based and 'trumping' conceptions of human rights see eg Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468, 475 and Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) Modern Law Review 671, 673ff.

2101 Interestingly, this does not appear to be a point that features in the debate on conceptions of moral human rights. That may be because that discourse is generally largely detached from legal practice, and consequently does not pay much attention to how to resolve concrete cases. Noting that '[p]roportionality has attracted even less philosophical attention [than human rights], though it has received extensive doctrinal treatment by European constitutional theorists and lawyers … [because] it is … too lawyerly a concept to attract philosophical interest' Letsas, 'Rescuing Proportionality' (n 1945) 318.

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This is because proportionality analysis in human rights law[2102] seems to be largely premised on an individualistic conception that separates between private and public interests and then weighs these against one another.[2103] Proportionality analysis as used by the Court is a protective mechanism for private interests in the sense of narrowing the field of permissible interference with the individual's legal position; it is not to date used as a cure-all for resolving all types of conflicts between varying public interests.

Moreover, the separation between private and public interests is not only reflected in all three limbs of the Court's proportionality test, but also underpins the very existence of that test – the idea that the State can only interfere with human rights where this is proportionate. The fact that the State must justify its actions, whereas the human-rights holder is under no such justificatory requirement, is a reflection of the distinction between the intrinsically valuable human being and the only derivatively valuable State. The State has no value in itself and thus has to justify its actions; the individual *is* valuable in themselves and does not need to justify themselves. This conceptual distinction is reflected legally in the lopsided structure of the proportionality test in human rights law as applied only to the interference,[2104] not to the exercise of the human right. The exercise of the right does not need to be justified.

Given this close link to individualistic understandings, it is not clear whether proportionality analysis can be applied in the same way where both sides of the scale are interpreted in light of public interests. The test as

2102 On other uses see eg Anne Peters, 'Proportionality as a Global Constitutional Principle' in Anthony F. Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017).

2103 See in this sense eg Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 The Cambridge Law Journal 174, particularly at 179; Peters, 'Proportionality as a Global Constitutional Principle' (n 2102) 254; Çalı (n 1921) 253; Tsakyrakis (n 2100) 468; Madhav Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 International Journal of Constitutional Law 298, 298; Pavel Ondřejek, 'The Theoretical Basis of the Relationship between Fundamental Rights and Public Interests' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021) 69. From the French-language literature, see eg Bioy (n 1961) 234, from the German-language literature see eg Schilling (n 1898) 51ff.

2104 Peters calls this 'crucial feature of the suitability and necessity tests' 'their *asymmetrical* quality' (emphasis in original) and notes that '[t]he test does not work the other way round', Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1140. Referring to 'a priori preference of fundamental rights … to the public interest' eg Ondřejek (n 2103) 70.

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applied by the European Court of Human Rights is at least not designed, and possibly unsuitable, for weighing public interests on the 'rights' side against other public interests on the 'interference' one.[2105] The asymmetrical nature of the test, as well as the idea of bipolar weighing between the applicant's interests and the public interest, seem difficult to reconcile with a systemic conception of human rights.

Moreover, there are also more specific difficulties at each of the three stages of the test. At its simplest,[2106] 'the principle of proportionality consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrow sense'.[2107] For the Convention, these are framed as the requirements of a legitimate aim and of necessity in a democratic society, which comprises the second and third principles. For all three limbs of the test, problems arise when the 'rights' side is interpreted in light of public interests in the way systemic understandings propose.

(a) *Suitability*

Under the 'suitability' limb of the proportionality test as understood by the Court, any measure interfering with Convention rights must be suitable to further one of the legitimate aims set out in the Convention, eg in the second paragraphs of Arts 8 – 11.

For an individualistic conception of human rights, the purpose of this requirement is clear. Although in the Court's practice the interpretation of these aims is broad,[2108] the limitation of possible justifications for interference with private interests contained in the 'legitimate aim' limb has the important function of elevating protection for private interests by clarifying that interference with human rights is only possible for reasons carrying

2105 Noting explicitly that the 'interests to be weighed … are both public in nature' see, from the media case law, eg *Stoll v Switzerland [GC]* App no 69698/01 (ECtHR, 10 December 2007), para 116 (discussed in Chapter Six at 337).

2106 There are variations in how conscientiously the Court applies proportionality analysis, although it consistently pays at least lip-service to it.

2107 Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16 Ratio Juris 131, 135. This section draws on Alexy's account of proportionality as 'representative of legal scholars' efforts to theorize proportionality', Yun-chien Chang and Xin Dai, 'The Limited Usefulness of the Proportionality Principle' (2021) 19 International Journal of Constitutional Law 1110, 1110.

2108 Rivers (n 2103) 195. Indeed, cases where there is no legitimate aim are often dealt with via Art. 18, Grabenwarter and Pabel (n 1977), § 18, paras 13, 28.

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a certain minimum weight[2109] and is thus subject to stricter requirements than State action that does not interfere with human rights. 'The arguments and the evidence for overriding the right have to be stronger than the arguments and evidence just to outweigh any trivial interest'.[2110] In the context of constitutional rights, this has been phrased as '[c]onstitutional rights always trump any consideration except for considerations which [also] enjoy constitutional status'.[2111] In that sense, the 'legitimate aim' limb acts as a kind of rough filter limiting the aims 'able to compete with the right on the balancing stage'.[2112] This privileges the exercise of human rights. The lopsided nature of the Court's test is justified because it is only the State which is limited to pursuing aims classed as 'legitimate'; individuals have the freedom to act for whichever aim they choose, indeed to define their own aims, though they must, of course, stay within the limits of their human rights. Protecting the human rights of individuals, on an individualistic conception, is not derivative of the aims the individuals pursue; human beings are protected simply because they are intrinsically valuable, valuable per se.

For a systemic conception, however, this asymmetry is far harder to justify. Where both the interference *and* the human right itself are justified by reference to public interests, it seems difficult to explain why the test of 'legitimate aim' should only be applied to one of them, but not the other. This is all the more so since Arts 8 – 11 § 2 contain an admittedly broad, but nonetheless closed list of public interests classed as 'legitimate'. Why, when weighing between several different *public* interests, should the Court restrict the number of considerations to be adduced against one of them by means of the lists in Arts 8 – 11 § 2? Doing so essentially amounts to 'upgrading' one of many public interests by restricting the number of considerations that may be offered as reasons for limiting its fulfilment, thus partially removing it from the political fray by granting an additional

2109 'Only sufficiently important public objectives are permitted to limit the enjoyment of rights', Rivers (n 2103) 179, which constitutes 'a very crude balancing exercise between rights and public interests at the highest level of generality', ibid 196.

2110 Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1140.

2111 Matthias Klatt and Moritz Meister, 'Proportionality - a Benefit to Human Rights? Remarks on the I-CON Controversy' (2012) 10 International Journal of Constitutional Law 687, 690. At 704 this understanding is transferred to the ECHR, where '[t]he state is thus not free to identify the legitimate aim freely'.

2112 Ibid 691.

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protection that is not easy to justify. This kind of 'elevat[ion] above the ordinary goods'[2113] created by the reduced number of permissible justifications for interferences seems at odds with the generally open structure of weighing between different public interests, where usually *any* relevant consideration can be adduced.[2114]

Instead, if one does follow a systemic conception of the Convention rights, it seems more consistent to abandon the lopsided structure of the proportionality test and require that the exercise of the human right *also* be justified as pursuing a legitimate aim, ie as truly being in a public interest.[2115] This means applying the suitability test both to the interference *and* to the right. In fact, a close analysis of the Court's case law in those cases where it follows a systemic conception shows that this may be what it is doing, even if it avoids the terms 'suitability' to further a 'legitimate aim' in its assessment of the applicant's activities. Nonetheless, in essence the Court applies the requirement of 'suitability to further a legitimate aim' not only to the interference, but also to the rights holders side.

For example, in the case law on the media, the Court has scrutinised whether the exercise of freedom of expression is 'capable of contributing to a debate in a democratic society'[2116] and thus pursues the purpose of 'journalistic reporting on political issues and other matters of public concern'[2117] as a criterion for the level of protection it will grant. Where the applicants do not pursue such a legitimate aim, their level of protection will be reduced.[2118] For lawyers, the Court has also assessed whether they were acting as lawyers,[2119] whether their activities served the defence of

2113 Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1139.

2114 Note that focusing instead on undirected duties permits for such more open weighing, given that it removes the priority for specific public interests that happen to resemble positions protected by rights.

2115 This question is similar to the one discussed in relation to scope *ratione materiae*, see 435ff.

2116 *Axel Springer AG v Germany [GC]* (n 2023), para 91, discussed in Chapter Six at 311.

2117 cf eg *NIT SRL v Moldova [GC]* (n 2018), para 178, discussed in Chapter Six at 312ff.

2118 See eg *Man and others v Romania (dec)* App no 39273/07 (ECtHR, 19 November 2019), discussed in Chapter Six at 321.

2119 cf the cases listed in Chapter Five at 225.

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their clients,[2120] and has even gone as far as recently criticising a domestic court for not establishing whether the applicant's activities pursued this purpose.[2121] This is at the very least similar to the 'legitimate aim' test applied under the first limb of the proportionality test, but is an additional justificatory requirement applied not to the interference, but to the exercise of the right.

Requiring, in this way, that not only the restriction on the right, but *the exercise of the right itself* serve a legitimate aim marks a significant departure from proportionality analysis as traditionally understood in both human rights law and the Court's case law. In particular, it departs from the classic vision that only the State is under a justificatory burden and instead introduces an additional restrictive criterion imposing justificatory requirements on the human-rights holder, who must now explain why their activity is worth protecting.

The problem with this systemic approach is that, even leaving aside the question of whether justificatory requirements should be applied to human-rights holders, it is clearly not the approach embraced by the Convention. The Convention text contains standards only for testing whether the interference furthers a legitimate aim, but not for testing whether the rights holder's activities further such an aim, in line with the premise identified above that the Convention is generally based on an individualistic understanding of human rights. Arts 8 – 11 § 2 contain lists of legitimate aims for *restricting* Convention rights, but the Convention does not contain any indication as to the 'legitimate aims' that may justify the *exercise* of Convention rights – presumably because the exercise of Convention rights is not in need of justification.

(b) *Necessity*

The second limb of the proportionality test in the Court's case law, 'necessity', seems equally difficult to apply if both the human right and the

2120 cf eg *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019), para 65, as well as more generally regarding lawyers' statements outside the courtroom Chapter Three, I70ff.

2121 *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018), para 62, where the Court criticised that 'none of the [domestic] courts explored the relation of the impugned statements to the facts of the case'.

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interference are justified by reference to public interests.[2122] Necessity is typically understood in human rights law to mean that of several equally effective means of furthering the legitimate aim, the interference chosen must be the one that causes the least detriment to the human right. This is easy to explain on an individualistic grounding of human rights: While individual interests may in certain cases have to yield to public ones, that can certainly not be justified if, in reality, there was a way of satisfying the public interest that would have been less burdensome to the rights holder. '[C]ollective goals may restrict individual rights, but only if it is absolutely necessary for the promotion of the collective goal'.[2123]

If one applies a systemic conception, however, it is not clear how to apply the test of necessity. The fact that such conceptions interpret both the human right *and* the interference by reference to a public interest is in tension with the rule-exception relationship that the Court's test of necessity assumes, which ultimately flows from the individualistic assumption that the exercise of human rights is inherently valuable and does not need justification, while State interference can be justified only derivatively. As a result, on a systemic conception, it is not clear why only the interference, as opposed to the exercise of the human right, should be assessed as to its 'necessity'. Instead, one could just as well insist that the *exercise* of the human right has to be necessary to further a legitimate public-interest aim.

On a close reading of the Court's case law, the Court actually does this, applying the necessity criterion to the applicant's exercise of Convention rights and abandoning the traditional asymmetrical character of the necessity test. For example, in *Nikula*, it highlighted that 'it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument'.[2124] From this quote, it is immediately apparent that 'the relevance and usefulness of a defence argument', ie whether certain statements were *necessary* to protect the client's position, is in principle a criterion. It may be subject to a reduced standard of review, but whether a statement was necessary to further the legitimate aim of the client's defence is a criterion for the level of human rights protection accorded.

2122 Noting the general difficulty of applying necessity as a criterion where there are more than two principles in play Alexy, 'Constitutional Rights, Balancing and Rationality' (n 2107) 136.

2123 Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 101.

2124 *Nikula v Finland* (n 2027), para 54.

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In essence, this adds 'necessity' as a further criterion to the applicant's exercise of their freedom of expression, a criterion not contained in Art. 10 § 1. That this point is anything but trivial is immediately apparent from the Court's case law on lawyers' freedom of expression outside the courtroom: Where the Court has focused on the fact that judicial remedies were still available to the applicant,[2125] this essentially amounts to a finding that statements outside judicial proceedings were not *necessary*. In the Court's view, judicial remedies would have been an equally suitable but milder means of pursuing the legitimate aim of the client's defence, although the Court does not typically establish explicitly that this is the case and, in particular, does not examine the 'equally suitable' limb.[2126]

(c) *Balancing*

Finally, it is not clear how to perform a balancing exercise according to a systemic conception of human rights. This is not only because balancing, in the Court's case law, 'starts with the presumption that rights enjoy priority over public interests',[2127] which is difficult to reconcile with rights *interpreted in light of* public interests.[2128] It is also because interpreting both sides of the scale in terms of public interests fudges what is being balanced and how.

Balancing in the context of proportionality in human rights law is an operation that consists of three steps.[2129]

> The first stage involves establishing the degree of non-satisfaction of or detriment to the first principle. This is followed by a second stage in which the

2125 cf eg *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998) as well as the other cases discussed in Chapter Three, 170ff.

2126 As has been highlighted above, such 'equal suitability' could, for example, be lacking in situations where there are systemic problems in a State's justice system which make judicial proceedings an ineffective means of defence.

2127 Başak Çalı, 'Balancing Test: European Court of Human Rights (ECtHR)', *Max Planck Encyclopedia of International Procedural Law* (2018) 15.

2128 See also, for media freedoms, Florian Oppitz, *Theorien der Meinungsfreiheit: Eine vergleichende Untersuchung richterlicher Grundrechtsdogmatik* (Nomos 2018) 158, noting that if both the right and the interference are justified by reference to democracy, there is no longer a clear benchmark against which the interference can be measured.

2129 Robert Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 Ratio Juris 433, 436ff.

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> importance of satisfying the competing principle is established. Finally, in the third stage it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.[2130]

'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[2131] Severe interferences with one principle will therefore only be permissible to attain a high degree of realisation of the other.[2132]

Balancing in human rights law is thus premised on two points of reference which are then weighed against each other.[2133] The 'test requires a balancing of the benefits gained by the public and the harm caused to the constitutional right through the use of the means selected by law to obtain the proper purpose'.[2134] On an individualistic conception of human rights, these two points of reference are the private interests of the rights holder on the one hand and the public interest in the legitimate aim on the other.[2135]

While this, despite the constant criticism levelled at proportionality and particularly at balancing,[2136] is relatively clear, a systemic conception of human rights significantly blurs this exercise. On such a conception, the 'human rights' side, rather than reflecting only private interests and being weighed against public interests, itself already includes references to public interests. Since the importance of the private interest and the importance of the public one are not necessarily the same, this makes the point of reference for the purposes of balancing between the human right and the interference unclear. Which is decisive – the severity of the interference with the rights holder's private interest or with the public interest adduced to justify their rights?

This problem is visible, for example, if one conceptualises freedom of expression, in line with a systemic understanding of human rights, as justified by both the private interests of the human-rights holder and public interests in certain types of speech. The private interest and the public one

2130 Ibid 436ff.
2131 Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 102.
2132 Questions regarding epistemic discretion (cf ibid 414ff) are explicitly excluded from the present assessment.
2133 See also the account in ibid 401ff.
2134 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 340.
2135 Focusing on weighing of private versus public interests eg Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' (n 2081), para 159.
2136 See n 2100.

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on the 'rights' side will not necessarily pull in the same direction. It may be very important to an individual to express themselves on a point that makes no contribution to a public interest, for example where there is no contribution to public debate. Conversely, there are also forms of expression that may be very important to the public interest, but in which the individual has little or no private interest – as, for example, when lawyers speak in defence of another human-rights holder.[2137] In these cases, which of the interests is decisive to determining 'the degree of non-satisfaction of or detriment' – the human-rights holder's interest in performing the activity, that of other human-rights holders in the activity being performed, or a broader public interest such as eg the rule of law? If a defence attorney is lightly admonished not to pursue a line of questioning which, in fact, is the client's most promising defence, is the interference to be weighed by reference to the lawyer's rights (at best light severity), the client's rights (very severe)[2138] or the public interest in fair judicial proceedings (perhaps also very severe?)?

These problems are anything but academic. As has been shown, the Court will often rhetorically emphasise the importance to the client's position when determining the protection of the rights of lawyers.[2139] However, in other constellations it then limits which considerations it will include in its analysis. For example, in situations where a State is alleged to have violated its obligation under Art. 34 not to hinder individual applications to the Court, the Court does not allow the client to rely on their right to apply to Strasbourg unhindered at all if their lawyer has complained to the Court in their own name.[2140] In cases raised under the substantive Convention rights, by contrast, the Court does not decline scope, but instead simply reaches the same outcome regardless of whether the client or lawyer complain.[2141] This is problematic because, if the applicant's rights are

2137 See 423ff. Indeed, Raz has also noted this for freedom of political expression, since 'most people participate in public expression rarely if at all' and 'many other interests most people have are much more valuable to them than their interest in [freedom of public expression]', Raz, 'Free Expression and Personal Identification' (n 1955) 147.

2138 Leaving aside the fact that Art. 6 ECHR as traditionally understood is not open to proportionality balancing.

2139 cf eg the *Nikula* (n 2027) dictum, discussed in detail in Chapter Five, 227ff.

2140 See Chapter Three, 194, and eg *Hilal Mammadov v Azerbaijan* App no 81553/12 (ECtHR, 04 February 2016), para 119.

2141 cf eg *Tuğluk and others v Turkey (dec)* App no 30687/05 (ECtHR, 04 September 2018), discussed in Chapter Three, 180ff.

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to continue to have significance as a point of reference, one cannot simply refrain from a balancing exercise just because an assessment has been or will be conducted by reference to *someone else's* human rights. While it is understandable that the Court may be trying to avoid dealing with similar issues twice, this does mark a significant inconsistency in which positions it will interpret into the 'rights' side for the purposes of the balancing exercise.

While an individualistic understanding thus provides comparatively clear standards, the balancing exercise required by the Court's proportionality analysis becomes significantly more difficult to apply where the 'rights' position is interpreted as reflecting public interests under a systemic reading of human rights. On such an interpretation, weighing is no longer structured as an exercise between two points, but between all sorts of aspects, thus becoming multidimensional without clear standards. Here, there is a significant risk that the applicant's rights will be reduced without the relatively clear standards which proportionality balancing typically provides in the Court's case law. While individualistic conceptions do not suffer from these problems – they can distinguish clearly between private interests as the first principle and public interests as the second –, systemic conceptions find it far more difficult to perform a rational balancing exercise because it is clear neither what exactly is balanced nor how the relative weights are determined.

4. Procedural implications

Finally, the procedural law of the Convention also appears premised on an individualistic conception of human rights. As Peters puts it,

> [w]here the enjoyment of a right is the default rule and starting point of the legal assessment of a conflictual situation, the burden of explanation, justification, and proof shifts to the government. … [E]njoyment of the right is the fallback position. It is not the attainment of the public interest goal but the interference with the right which demands explanation, justification, and proof.[2142]

This is an analysis which equally underpins the Convention: In principle, it is enough for the applicant to establish interference with the scope of a human right because these are protected per se; once this is done, it

2142 Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1139ff.

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is for the State to attempt to justify the interference.[2143] This position can be easily explained by reference to the separation that individualistic conceptions of human rights make between intrinsically valuable individuals and the derivatively valuable State: only the latter is subject to justificatory burdens, while the human-rights holder never needs to justify why they are exercising their human rights (though there may be situations where their rights can be limited).

Systemic conceptions, conversely, cannot explain this point as easily because they do not necessarily comport a rule-exception relationship as between several different public interests. The justificatory burden is thus less clearly assigned. This point is not merely theoretical; as shown in the preceding parts of this section, the Court does, particularly in the case law on media freedoms, require that applicants justify themselves.

IV. Why does the Court draw on systemic conceptions?

A systemic conception of the Convention rights, ie one that does not limit the justifications for these rights to the protection of the rights holder, thus leads to significant tension with the Convention text and most of the Court's case law, which usually seem to understand the Convention rights as justified primarily by reference to the position of the rights holder. So why has the Court nonetheless embraced systemic conceptions of human rights in some areas?

There are two main possible (and perhaps complementary) explanations for this. The first (1.) is that the Court, focusing on incremental development of its case law, has not noticed that systemic conceptions sit uneasily with doctrines that are premised on an individualistic conception of human rights. The second (2.) is that the Court is trying to broaden the scope of the Convention and expand the public-interest obligations imposed on States; given that at present it lacks the category of undirected duties, it does so by altering its interpretation of rights.

2143 Jens Meyer-Ladewig and Björn Ebert, 'EMRK Artikel 38 Prüfung der Rechtssache' in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention* (4th edn, Nomos 2017), para 19. This point is even more convincing if, in line with eg Forst (n 1912) 712, one sees human rights as having 'a common ground in one basic moral right, the *right to justification*' (emphasis in original).

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1. Systemic conceptions as a coincidental by-product of case law evolution

The first potential explanation for the Court's use of systemic conceptions is perhaps slightly underwhelming in its simplicity: The Court has just failed to notice that these conceptions are not obviously compatible with the rest of its case law. In fact, this seems rather plausible. The Court does not engage with theoretical questions such as these, and as this chapter has shown, the issue is difficult to unpick even for lawyers not bogged down in the busy day-to-day workings of one of Europe's highest courts.[2144] While there does now seem to be some awareness of the issue, that is mainly limited to comparatively recent dissenting opinions challenging established case law.[2145] In the rest of its case law, the Court shows no visible awareness of the difficulties of combining individualistic and systemic conceptions. Indeed, *Handyside* itself simply listed both private and public interests as justifying freedom of expression[2146] without highlighting that these propose different standards for determining the outcomes of cases.[2147]

This explanation – that the development of systemic conceptions of the Convention rights is largely historical coincidence – moreover holds particularly well for the case law on lawyers. From the case law assessed for the present study, it appears that up until the late 1990s, the Court dealt with cases involving legal services exclusively from the perspective of the rights of the client, which is unproblematic on an individualistic conception of human rights that sees those rights as protecting interests of the rights holder. The protection granted to the applicant client under Art. 6[2148] or Art. 8[2149] in such cases can easily be explained by reference

2144 Particularly since this shift appears to have taken place around the time when Protocol 11 triggered a significant increase in the Court's workload, see below.

2145 See eg *Brisc v Romania* (n 2092) with a Dissenting Opinion by Judge Kūris, joined by Judge Yudkivska; *Croatian Radio-Television v Croatia* (n 2072) with a Joint Partly Dissenting Opinion by Judges Paczolay, Wojtyczek and Poláčková.

2146 'Freedom of expression constitutes one of the essential foundations [of a democratic society], one of the basic conditions for its progress and for the development of every man', *Handyside v UK [Plenary]* (n 2018), para 49.

2147 Note also that the debate on the nature of moral human rights and, in particular, on role-bearer rights is considerably younger, beginning, in essence, from the late 1970s and 1990s onwards respectively.

2148 eg *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980); *Campbell and Fell v UK* App no 7819/77; 7878/77 (ECtHR, 28 June 1984).

2149 *Schönenberger and Durmaz v Switzerland* App no 11368/85 (ECtHR, 20 June 1988).

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to the applicant's own interests. Simultaneously, the early cases in which lawyers applied to the Court all involved situations which can be easily classed as relating to the lawyer's own private interests.[2150] Again, this can be explained without any problems on an individualistic reading of the Convention rights.

By comparison, the problematic systemic conception discussed above – the interpretation of the *lawyer's* rights to protect the *client's* interests – appears to have arisen only from the late 1990s, ie relatively recently. The first case in which a lawyer invoked the protection of the Convention rights for their representative activities appears to be *Schöpfer v Switzerland* (1998),[2151] which (as discussed in Chapter Three[2152]) involved a lawyer who was fined for giving an incendiary press conference instead of pursuing further judicial remedies. The Court's discussion of the question of the scope of the Convention rights is short enough to be easily reproduced in full: 'The penalty in issue incontestably amounted to "interference" with the applicant's exercise of his freedom of expression'.[2153] Nowhere did the Court or the Parties discuss that, in fact, the applicant lawyer had not been acting in his own private interests, but in that of his client, and that applying the Convention rights here thus constituted a significant shift away from the Court's traditional individualistic understanding that the Convention rights protect the position of the rights holder.[2154]

Moreover, even when the Court later began applying the Convention rights to representative activities by lawyers in judicial proceedings, there was no discussion of this shift away from individualistic understandings of the Convention rights. Instead, in *Nikula v Finland* (2002), which seems to be the first of these cases chronologically, the Court simply noted that '[t]he participants in the proceedings agreed that the applicant's conviction amounted to an interference with the exercise of her right to freedom of

2150 *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983); *H v Belgium* (n 2090); *Schönenberger and Durmaz v Switzerland* (n 2149); *Ezelin v France* App no 11800/85 (ECtHR, 26 April 1991); *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994).

2151 *Schöpfer v Switzerland* (n 2125).

2152 171ff.

2153 *Schöpfer v Switzerland* (n 2125), para 24.

2154 One possible explanatory factor is that the Court, even on its new systemic conception, did not find a violation of the Convention. This would presumably also have been the result of an individualistic conception, which would likely have held that the scope of the Convention rights was not engaged.

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expression. The Court sees no reason to conclude otherwise'.[2155] There was no further discussion of the point in subsequent cases, although of late there does appear to be some increasing awareness that applying the Convention rights to protect *public* interests can be problematic,[2156] as evidenced, for example, by the judgment in *OOO Memo v Russia* (2022) denying a human right to reputation to State bodies.[2157]

2. Systemic conceptions as an attempt to expand the State's duties

A different or complementary explanation is that the Court is trying to expand the public-interest obligations imposed on States. This explanation is closely linked to the fact the Court at present appears only to recognise directed duties corresponding to rights.[2158] As a result of this limitation, when the Court tries to expand the State's *duties*, it has to interpret *rights* more broadly.

Perhaps a particularly obvious example are the cases where the Court uses human rights to deal with matters that Judges Paczolay, Wojtyczek and Poláčková, in their recent joint partly dissenting opinion in *Croatian Radio-Television v Croatia* (2023),[2159] described not as 'rights and freedoms anchored in human dignity', but as 'principles of State organisation, empowerments granted to State bodies [or] relations between various State bodies'.[2160] Given that the Court has not, to date, developed doctrines regarding the undirected duties imposed on States by the Convention, it

2155 *Nikula v Finland* (n 2027), para 30. *Nikula* also appears to be in tension with the more recent case law in *OOO Memo v Russia* (n 1974), given that in *Nikula* the Court accepted that the 'interference in any case pursued the legitimate aim of protecting the reputation and rights' of a prosecutor acting in that function (*Nikula v Finland* (n 2027), para 38).

2156 See n 2145.

2157 *OOO Memo v Russia* (n 1974).

2158 On this see Chapter Seven.

2159 *Croatian Radio-Television v Croatia* (n 2072).

2160 Ibid 40. See also the Joint Dissenting Opinion of Judges Wojtyczek and Poláčková in *Rogalski v Poland* (n 2066), para 3, where they highlight that '[t]he protection which Article 10 extends to advocates acting on behalf of their clients exists first and foremost to serve the interests of those clients. Advocates' freedom of speech is therefore limited in that they are bound by the interests of their clients and by the instructions those clients give. An advocate representing a client is speaking on behalf of that client and for the purpose of effectively defending the client's – not his or her own – interests'.

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appears committed to framing questions such as the rights of public-service broadcasters or of members of parliament in terms of 'human rights' if it does not want to reject such applications as inadmissible.

In this regard, systemic understandings may be an attempt by the Court to find a way of discussing the public interests (or rights of other individuals) which States must protect under the Convention. A systemic conception allows the Court to keep discussing rights, but broaden the ambit of its assessment and examine factors other than the position of the applicant, particularly the position of other individuals (such as where it uses combinations of rights to provide and receive certain services)[2161] or the general public interest in a certain activity. An individualistic understanding cannot do this; such a conception would need to complement rights with a doctrine of undirected duties.

One example of this public-interest focus is the way the Court uses systemic conceptions to move away from the applicant's situation in isolation and put it in a broader context. A model case is *Aliyev v Azerbaijan* (2018). Here, the Court explicitly highlighted that 'the applicant's situation cannot be viewed in isolation'.[2162] Instead, it focused on 'the totality of the … circumstances … and the general situation concerning human-rights activists in the country'.[2163]

A similar desire to move away from the position of individual rights holders is, moreover, evident for legal services in overarching terms such as 'the central role of the legal profession'.[2164] These groups do not appear to be holders of Convention rights, meaning that it is unclear – if the Court's approach remains focused on rights – how this case law is best assessed and to what extent it is binding on States. Substantially the same problem appears for the Court's case law highlighting that 'professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently' and that 'self-regulation of the legal profession [is] paramount'.[2165] Whether one

2161 cf for legal services Chapter Nine, 460ff; for the media, see Chapter Six, 341ff.

2162 *Aliyev v Azerbaijan* (n 1977), para 214.

2163 Ibid, para 215.

2164 *Elçi and others v Turkey* (n 2015), para 669, discussed in detail in Chapter Five, 240ff.

2165 *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 78; *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), para 60; *Namazov v Azerbaijan* (n 2026), para 46; *Bagirov v Azerbaijan* (n 2063), para 78.

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applies an individualistic or a systemic conception, such case law is difficult to explain from the perspective of rights.

The Court's desire to escape the limited framing of an individualistic conception of human rights is understandable given that the broader factors mentioned above ultimately have a significant impact on the enjoyment of human rights. However, it is less clear that the problem here is really the *individualistic* conception of human rights. Instead, the problem causing the Court's limited perspective in these cases is that it does not, as yet, have a doctrine of undirected duties, which forces it to focus on rights and the corresponding directed duties. The problem with this is that human rights, given their close conceptual link to private interests, are not necessarily well-suited to protect *public* interests. Instead, such public interests are best protected via undirected duties, as will be shown – returning to the example of legal services – in the following chapter.

V. Conclusion: Individualistic and systemic conceptions of human rights

As shown in this chapter, the key difficulty underlying the Court's case law as regards activities that touch on both private and public interests is that the Court mixes different, potentially incompatible, conceptions of human rights. Most of moral human rights theory, as well as Convention law, is premised on an *individualistic* conception of human rights that sees human rights as justified by what they do for the rights holder, regardless of whether this serves or disserves people other than the holder. In certain areas, however, the Court instead follows a systemic conception of human rights, where rights are justified (also) by whether they serve or disserve people other than the holder, which is far less supported in both moral human rights theory and in Convention law. The problem with this is that mixing doctrines based on an individualistic conception with a systemic one leads to inconsistencies in the Court's case law, since most of the Court's case law has been developed by an individualistic reading of the Convention rights. The reason for this shift may be that the Court is looking for a tool to better reflect duties on States that are grounded in public, rather than private, interests. The next chapter shows that this aim could be achieved by means of a combination of rights and undirected duties. The study's final chapter shows why this is preferable.

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

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

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

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

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

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

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

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

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

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

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

II. Undirected duties and individual rights: Disconnect

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

1. Only private interests involved

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

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

2173 See Chapter One, 54ff.

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(a) *No link to legal activities whatsoever*

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

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

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

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

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

(c) *Attacks on lawyers by private individuals*

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

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

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

(d) *'Exceptional circumstances' cases*

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

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

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2. Only public interests involved

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

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

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

2192 See Chapter Five, 257ff.

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

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

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

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

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

III. Undirected duties and individual rights: Harmony

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

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

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

2197 cf Chapter Five, 286ff.

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

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

2200 Chapter Two.

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

(a) *Freedom to communicate confidentially*

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

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

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

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

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

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

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

2205 See Chapter Two, 96ff.

2206 cf Chapter Two, n 353 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

(b) *An autonomously determined relationship*

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

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

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

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

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

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

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

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

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

2. Elevated protection for lawyers' external activities

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

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

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

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

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

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

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

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

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

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

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

2225 cf eg ibid, para 181.

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

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

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

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

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

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

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

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

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

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

3. Protection against disbarment

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

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

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

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

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

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

2234 cf eg ibid, para 41.

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

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

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

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

4. Watchdog cases

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

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

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

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

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

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

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

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

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

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

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

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

IV. Undirected duties and individual rights: Conflict

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

1. Lawyers' freedom of expression outside the courtroom

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

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

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

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

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

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

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

2. State regulation of legal services

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

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

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

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

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

2253 See Chapter Five, 260ff.

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

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

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

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

2257 See Chapter Five, particularly at 261ff.

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

2259 Chapter Five, 267ff.

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

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

2262 See Chapter Five, 275ff.

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

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

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

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

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

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

3. Protecting legal services against third parties

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

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

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

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

2270 Ibid, paras 33ff, 76.

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

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4. Recognition of the conflict cases in the Convention?

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

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

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

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

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

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

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

2276 See Chapter Five, 227ff.

2277 See Chapter Five, 235ff.

2278 *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 46.

2279 *Nikula v Finland* (n 2196), para 45.

2280 *Schöpfer v Switzerland* (n 2196), para 29.

2281 *Casado Coca v Spain* (n 2263), para 55. Similar phrases appear in eg *Schöpfer v Switzerland* (n 2196), para 32; *Nikula v Finland* (n 2196), para 46; *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004), para 28; *Kincses v Hungary* (n 2195), para 38.

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

V. Conclusion: Combining rights and undirected duties

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

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Chapter Ten: What Do Undirected Duties Add?

As the preceding chapter has shown, it is *possible* to understand the Court's case law as the result of two different duties on the State, directed duties protecting private interests and an undirected duty protecting the public interest in legal services.[2282] A key point has been that this does not affect the *outcome* of the cases; as Harel notes regarding the debate on whether to adopt a systemic conception of freedom of expression or to combine an individualistic one with further duties, '[t]he difference … is not therefore in the overall protection granted to speech, but in the way the protection of speech is justified'.[2283] Instead, '[t]he primary difference … concerns … the division of labor between rights-based arguments and arguments which are not rights-based'.[2284] Why, then, is an analysis based on directed and undirected duties *preferable*?

This chapter sets out the advantages of recognising more clearly that, as regards legal services, States are under not one, but two obligations which can interact in different ways. In a first section (I.), the chapter highlights that this analysis can better explain certain features of the Court's case law which are surprising on an analysis based exclusively on rights, notably why the right invoked or the rights holder bringing the application make little difference, why the Court seems to test for scope twice in these cases and why it is so willing to depart from the circumstances of the case at hand. A second section (II.) then sets out that beyond its value in explaining the Court's case law as it stands, recognising explicitly that the State is also

2282 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

2283 Alon Harel, 'Revisionist Theories of Rights: An Unwelcome Defense' (1998) 11 Canadian Journal of Law and Jurisprudence 227, 233. Ironically enough, even Raz argues that 'rights alone cannot provide a complete account of morality' (Joseph Raz, 'Right-Based Moralities' in Joseph Raz (ed), *The Morality of Freedom* (Clarendon 1988) 193) and that 'if morality has a foundation it includes duties, goals, virtues, etc' (ibid 193), although, as has been shown in Chapter Eight (text to n 2038ff), he thinks that certain public interests can be interpreted into human rights.

2284 Harel (n 2283) 233. Noting that '[t]aking journalism and a free press as human rights is a way of marking their distinctive moral significance' while highlighting that 'there are other ways of doing this' Rowan Cruft, 'Journalism and Press Freedom as Human Rights' (2022) 39 Journal of Applied Philosophy 359, 359.

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under an undirected duty grounded in public interests would also allow the Court, with comparatively little effort, to remedy some of the problems which its case law currently presents.

I. Added explanatory value

If the Court's case law, as is presently the case,[2285] is seen as reflecting *only* directed duties on States that are grounded in individuals' rights, the Court's case law as regards situations involving public interests exhibits a number of surprising features. These can be better explained by recognising that the State is simultaneously both under a directed duty towards the applicant (grounded in private interests) *and* under an undirected duty to ensure legal services (grounded in public interests), and that these duties can interact in the ways discussed in Chapter Nine.

1. Explain why the right applied makes little difference

The first point that is difficult to explain on an analysis that uses only rights is that the Court, by and large, reaches identical results for similar factual situations *regardless of the Convention norm invoked*. On a view that focuses only on directed duties towards individual rights holders, this is unexpected: Given that different Convention norms protect different interests, it seems surprising that the provision under which an application is brought should make little or no difference to the outcome. Conversely, an analysis that includes undirected duties on the State can easily explain this otherwise curious feature of the case law: The Convention right is merely the key to open the gates to the Court, but the actual content of the State's legal obligations is determined less by directed duties based on the applicant's rights than by undirected duties. These latter duties are grounded not in any specific right because they do not derive only from private interests, but from the general public interest and are a manifestation of the State's obligation to maintain its ability to fulfil the Convention rights.

This explains the many cases of the Court vacillating between Convention provisions and often even shifting away from the norm under which an application is brought. Perhaps the clearest example is the essentially

2285 See Chapter Eight.

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identical case law on professional secrecy regardless of which Convention right (most frequently Arts 5 § 4, 6 under both civil and criminal limbs, 8 and 34) is invoked.[2286] Moreover, the Court even mixes the right invoked and the standard of review: As has been shown in the cases on 'harmony' above, the Court, on applications brought by lawyers under Art. 10, shifts its standard of review to Art. 6 without explaining what effect this has on the applicant's position,[2287] even though it has held elsewhere that the lawyer cannot rely on the client's Art. 6 rights.[2288] If one conceptualises the Convention as imposing on States only the directed duties corresponding to rights, this case law is surprising – surely shifting between different Convention rights should have an impact on the way cases are decided. However, if one includes undirected duties, it becomes easier to explain: The State's undirected duties do not derive from any single human right, but from the State's obligation to maintain its ability to fulfil the Convention rights, which explains why they do not change with the right invoked by the applicant.

2. Explain why the applicant's person makes little difference

In addition to explaining why the right invoked does not seem to make much of a difference to the Court's reasoning, an analysis that includes undirected duties can also explain why the Court cares so little *who* invokes the right. For example, in the case law on professional secrecy, the Court has generally reached the same results regardless of whether the client or the lawyer brings the application.[2289] Moreover, even in other areas there are cases where the Court has treated the lawyer's and the client's position as identical, either explicitly refusing to analyse one of these positions

2286 cf Chapter Two, text to n 353.

2287 cf *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 46, discussed Chapter Nine at 465.

2288 See Chapter Three at 181 discussing *Mattei v France (dec)* App no 40307/98 (ECtHR, 15 May 2001), particularly 15, as well as *Ignatius v Finland (dec)* App no 41410/02 (ECtHR, 17 January 2006) 6.

2289 eg *Petri Sallinen and others v Finland* App no 50882/99 (ECtHR, 27 September 2005), para 71; *Wieser and Bicos Beteiligungen GmbH v Austria* App no 74336/01 (ECtHR, 16 October 2007), para 67; *André and another v France* App no 18603/03 (ECtHR, 24 July 2008).

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at all[2290] or simply applying the same analysis to both without differentiation.[2291]

On an analysis that focuses only on directed duties grounded in rights, which on all theories protect at least also the private interests of the rights holder, one would once again expect more variation in the case law as the rights holder changes. Instead, the Court appears relatively uninterested in the applicant's position. For example, in the professional secrecy cases, it typically does not even enquire into whether the lawyer or the client actually *wanted* to keep the materials in question confidential,[2292] which would seem surprising if one were concerned with their private interests. Analysing these cases in terms of the State's undirected duty to generally ensure the confidentiality of legal communication can easily explain this relative lack of attention to the individual's position: Since the duty is grounded not in anyone's private interests, but in a public one, the position of the applicant is not central.[2293]

3. Explain why the Court tests for scope twice

Moreover, analysing cases on legal services as the result of directed duties based on private interests and an undirected duty grounded on public ones can also explain why the Court appears to test twice for scope. If one accepts that there are two different duties on States that may be involved, it is easy to understand that the requirements for these to apply may differ. This can explain, for example, the Court's case law requiring public interests in addition to private interests.[2294] The reason why the Court tests for scope *twice* in these cases is because, in fact, it is testing the applicability of both the directed and the undirected duty. While the former regards the question of whether a suitable rights holder is invoking something prima

2290 See Chapter Three, 194ff and eg *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, where the Court refused to examine the client's complaint because the lawyer had filed an application in their own right.

2291 *Tuğluk and others v Turkey (dec)* App no 30687/05 (ECtHR, 04 September 2018), para 36, discussed in Chapter Three, 180ff.

2292 *Laurent v France* App no 28798/13 (ECtHR, 24 May 2018), para 36.

2293 For examples of similar grounding of professional secrecy in 'public order' in domestic legal systems see Chapter Nine, text to n 2207.

2294 See Chapter Eight, 428ff, 435ff.

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facie covered by a right, the latter regards the question of whether the content of the State's undirected duty relates to someone in the applicant's position. This will only be the case where the applicant has certain characteristics, which, crucially, are *not* the same characteristics as those required for rights-holdership in general. This second test, which assesses whether the State's undirected duty to protect legal services is involved, is therefore not satisfied where the applicant was not acting as a lawyer, but not because this means that the applicant cannot hold *rights* – instead, the reason is that the State's *duty* to protect lawyers as part of the rule of law is not engaged where the victim of an interference was not acting as a lawyer, as has been discussed in the preceding chapter in the cases on 'disconnect'.[2295]

4. Explain why the Court sets out general measures

Moreover, recognising that these cases also involve an undirected duty on the State to ensure legal services can also explain why the Court is frequently so willing to issue general guidelines to States on how they should legislate[2296] and to rely on soft law. Since the undirected duty is not grounded in any individual's rights, it makes sense that the Court does not focus on the State's obligations to the individual, but on the State's obligations *tout court*. However, because the Convention does not provide further detail on the State's general obligations in the public interest as regards legal services, it is unsurprising that the Court instead resorts to other related texts in an attempt to clarify the State's undirected duties.

II. Remedying the problems in the current case law

While the foregoing has shown that recognising the interplay of rights and undirected duties is useful to *explain* certain features of the Court's case law, this section argues that it can also *remedy* certain aspects that are currently problematic. These problems largely derive from the main side-effect of the current rights-only perspective, which is its tendency to mix

2295 Chapter Nine, 455ff.

2296 cf eg *Dudchenko v Russia* App no 37717/05 (ECtHR, 07 November 2017) and the discussion in Chapter Two, 108ff, as regards covert surveillance, and *Lindstrand Partners Advokatbyra v Sweden* App no 18700/09 (ECtHR, 20 December 2016), para 95 and the discussion in Chapter Two, 112ff, as regards search and seizure.

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and match between private and public interests without clearly identifying and justifying what each of these require. This can lead both to shifting standards and to the obscuring of certain assumptions that are in need of justification. Separating more clearly into private interests protected by rights and public interests protected by undirected duties can resolve this issue and provide clearer standards for resolving cases before the Court.

1. Clarity regarding the point of reference

One major advantage of an analysis that treats directed duties based on private interests separately from undirected duties grounded in public interests is that it clarifies the point of reference for each duty. This is important because it can affect the outcomes of cases. As Waldron notes, '[a] duty grounded legally in the interests of an individual may have different parameters and interact differently with other normative considerations to a duty grounded in, say, wealth-maximisation or general utility'.[2297] If one separates between directed and undirected duties, the impact of a given State act or omission can be assessed separately as regards the effect on the individual and on legal services more generally. Conversely, an analysis that acknowledges only directed duties risks confusing the standards to be applied by switching back and forth between private and public interests.

(a) *Point of reference for the directed duty: The individual's interests*

On the analysis proposed here, for the directed duties derived from individuals' rights the impact on the applicant's private interests is the point of reference. This is in keeping with traditional approaches as discussed in Chapter Eight – the point of reference for determining the weight of the individual's rights is the effect on their dignity, autonomy, etc, thus returning to a more established vision of human rights as protecting the position of the rights holder.

2297 Jeremy Waldron, 'Rights and Human Rights', *The Cambridge Companion to the Philosophy of Law* (CUP 2020) 153.

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(b) *Point of reference for the undirected duty: The rule of law and the administration of justice*

For the State's undirected duty to ensure legal services, the point of reference is the State's obligation to maintain its ability to fulfil the Convention rights, since legal services are 'essential' and a 'necessary prerequisite for the effective enforcement of the provisions of the Convention'.[2298] The impact of a certain State act or omission on the public interest in the rule of law and the administration of justice is therefore the relevant benchmark because this is the interest that grounds the undirected duty.[2299] This seems relatively easy to reconcile with the Court's case law, given the constant link in the Court's jurisprudence between cases related to legal services and 'the rule of law'[2300] as well as 'the administration of justice'.[2301]

2. Greater clarity regarding the State's undirected duties

Moreover, in addition to clarifying the point of reference for both directed and undirected duties, recognising this latter category separately has the major advantage that it makes it possible to study the nature and contents of the State's undirected duty.

2298 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669, discussed at length in Chapter Five, 240ff.

2299 The rule of law is mentioned in the Convention Preamble, para 5, as well as in the Statute of the Council of Europe (Preamble, para 2, as well as Art. 3). In a similar way, the State's obligations as regards the media derive ultimately from the Convention requirement of a democratic society, cf Chapter Six, 310ff.

2300 *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020), para 137, 'it would be incompatible with the rule of law to leave without any particular safeguards at all the entirety of relations between clients and legal advisers' (discussed in Chapter One at 60); *Elçi and others v Turkey* (n 2298), para 669, '[t]he Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law' (discussed in Chapter Five at 240ff and in Chapter Nine at 469).

2301 'The special status of lawyers gives them a central position in the administration of justice', *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45 (discussed in Chapter Five at 227ff and in Chapter Nine at 474); 'independence of the legal profession … is crucial for the effective functioning of the fair administration of justice', *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007), para 135; for eg professional secrecy see *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 37 and the cases cited in Chapter Two at 111ff.

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(a) *Clarity regarding the legal bindingness of the State's undirected duties*

First, recognising that States are under an undirected duty to ensure legal services has the significant advantage of clarifying that this is a legal obligation under international law and not just an optional policy choice. A State in which the availability of legal services falls below a certain level therefore not only acts in a way that may be considered undesirable, but violates its international-law obligations under the Convention.

This is important, for example, in the cases discussed in Chapter Nine in the 'conflict' category.[2302] As has been shown, these include situations where protecting legal services requires restrictions on some individuals' rights to secure benefits to others. Here, recognising that the State is under an undirected duty to ensure legal services can provide a better justification for the restriction of individual rights because it clarifies that the State is not taking optional measures, but is obliged to act to fulfil a different, conflicting duty under Convention law.[2303]

Moreover, this distinction can have a particularly significant impact on those cases from the 'disconnect' category that engage only the State's undirected duty.[2304] On the Court's current rights-only perspective, it is difficult to explain what this case law is; presumably it consists simply of obiter dicta, since the Court does not at present recognise Convention obligations without corresponding rights. That would tend to suggest that the Court's statements in relation to 'independence'[2305] or 'self-regulation of the legal profession'[2306] are not binding on States, since there do not appear to be any obvious Convention rights capable of grounding corresponding directed duties. Conversely, accepting that the Convention can also impose *undirected* duties on States can explain that these are, in fact, legally binding obligations on the States, just not ones that are accompanied by

2302 Chapter Nine, 470ff. A further example not discussed there would be eg the cases on mandatory pro bono work (*Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983); *Graziani-Weiss v Austria* App no 31950/06 (ECtHR, 18 October 2011); discussed in Chapter Five at 267): Provisions of this type further restrict the rights of lawyers, but are designed to advance the rights of recipients, particularly by facilitating access to justice.

2303 As Joseph Raz, 'On the Nature of Rights' (1984) 93 Mind 194, 211 notes, 'rights can conflict with other rights or with other duties'.

2304 Chapter Nine, 459ff.

2305 *Siałkowska v Poland* (n 2301), para 135, discussed in Chapter Five at 257.

2306 *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 78, discussed in Chapter Five, 299ff.

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corresponding rights on the part of every individual. Not complying with these undirected duties, for example by failing to ensure an independent legal profession[2307] or sufficient access to legal services,[2308] is therefore a Convention violation, although not necessarily on its own already a violation of a Convention *right*.[2309] When the Court discusses the content of these 'undirected duties', it is fulfilling its task of 'ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto' (Art. 19 ECHR) by assessing whether the States have complied with their undirected duty to maintain their ability to fulfil the Convention rights.

Moreover, recognising that this undirected duty is legally binding on the State would allow the Court to more convincingly address systemic problems. This is because those problems arise not primarily from the violation of any directed duty to an individual, but from a violation of the State's undirected duty to maintain its ability to fulfil the Convention rights. Moreover, in these cases assessing only the directed duties corresponding to individual rights is unhelpful because the impact on each private interest is not necessarily the same as on the public interest. For example, an insufficient number of lawyers willing and able to exercise their functions is a problem in relation to the State's undirected duty to ensure legal services' availability.[2310] However, an insufficient number of lawyers does not mean that every individual rights holder will have had their rights violated, despite the fact that the State has breached the Convention. A State could conceivably, for example, remedy the situation of those individuals who complain to Strasbourg by prioritising their cases, but leave the underlying problem unaddressed. The perspective of rights is hence not well-suited to

2307 See eg the discussions in *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), para 60; *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 46; *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 78. These cases are also discussed in Chapter Five, 299ff.

2308 As is a frequent criticism of the effects of the UK Legal Aid, Sentencing and Punishment of Offenders Act 2012, cf eg https://www.lawgazette.co.uk/news/laspo-turns-10-legal-aid-deserts-expanding/5115622.article, accessed 08 August 2024.

2309 In practice, however, it seems difficult to imagine that this Convention violation will not near-automatically lead to violations of Convention rights.

2310 The situation of the English criminal bar shows that this is no hypothetical example. For a brief introduction see eg Sara Chessa, 'Access to justice: Criminal barristers on indefinite strike to defend legal aid' (2022) <https://www.ibanet.org/Access-to-justice-Criminal-barristers-on-indefinite-strike-to-defend-legal-aid> accessed 08 August 2024.

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deal with problems that concern the State's undirected duty to ensure it is able to fulfil the Convention rights.

Acknowledging that the Convention also imposes undirected duties on the States would therefore allow the Court to interact with systemic problems more clearly: Integrating a step into the Court's analysis in which it assesses the effect on legal services generally would allow the Court to more easily reflect on this wider dimension. An analysis that includes undirected duties on States can avoid the problematic tendency to see 'the applicant's situation … in isolation'[2311] and easily include 'the totality of the … circumstances … and the general situation concerning human-rights activists in the country'.[2312]

(b) *Clarity regarding the content of the State's undirected duties*

Furthermore, separately assessing the State's undirected duty to ensure legal services, which is grounded on the public interest, makes it possible to both identify and discuss which duties on States the Court sees these public interests as justifying.

i. *Separating between margin of appreciation and minimum requirements*

Acknowledging that the State is under an undirected duty to ensure legal services makes it possible to identify where the State retains a margin of appreciation and where the Convention imposes minimum requirements. While the former area is one of policy choice, the latter is one of the State's legal obligations.

For example, if one takes the perspective of undirected duties, the Court's case law makes it clear that States are required to maintain some kind of professional secrecy regime,[2313] but that professional secrecy may not be absolute in the sense of having no exceptions at all.[2314] This is

2311 *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), para 214.

2312 Ibid, para 215.

2313 cf eg *Kruglov and others v Russia* (n 2300), para 137, discussed in Chapter Two at 96ff.

2314 *Golovan v Ukraine* App no 41716/06 (ECtHR, 05 July 2012), para 65, discussed in Chapter Two at 100ff.

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therefore a mandatory part of the public-interest obligation to ensure legal services. Simultaneously, there are other parts which the Court treats as merely desirable, such as, for example, specialisation by lawyers.[2315] Finally, there are also areas where the Court leaves the entire choice to the States, such as 'determin[ing] who is authorised to practise law within their jurisdiction, and under what conditions'.[2316] Identifying these cases as part of an undirected duty on the State makes it possible to separate more clearly between those areas where States have a margin of appreciation and those where the States are bound by the Convention to act in a certain way.

ii. *Does the public interest justify reservation of legal services to a certain group?*

Recognising the State's undirected duty to ensure legal services also makes it possible to discuss whether all of the duties the Court imposes on States are really justified by corresponding public interests. For example, at present the Court seems to generally assume that the regulation of legal services will involve reserving[2317] the exercise of certain activities to a specific group of persons. This leads to some sort of unified 'legal profession'[2318] consisting of those who have the right to perform these activities. Since the Court does not at present operate with the category of undirected duties, it does not explain why the public interest justifies imposing these duties on States, which is problematic.

In fact, there may well be public interests that justify limiting the provision of legal services in this way, for example to ensure certain quality standards. However, the point is not self-evident, as is reflected in the various approaches taken to reservation of activities across the Council of Europe space. While some legal systems within the Convention operate strict reservation of activities,[2319] others are more deregulated,[2320] leading to more heterogenous legal services sectors. The Court's comparatively narrow view thus reflects some legal systems better than others, without

2315 See Chapter Two at 143ff.
2316 *Kruglov and others v Russia* (n 2300), para 137.
2317 To take the term used in Part 3 of the English Legal Services Act 2007.
2318 See eg the *Nikula* doctrine, discussed in detail in Chapter Five, 227ff.
2319 cf eg Germany, where in principle *all* legal services constitute restricted activities.
2320 cf eg Switzerland, where only a relatively limited list of legal services are monopolised to Bar members.

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the Court explicitly explaining why this model of regulation is preferable. The lack of explicit statements on 'suitability' leaves the Court open to the criticism of cultural blindness.[2321] This is all the more noteworthy since the Court's case law has stayed largely consistent throughout its history despite the fact that the addition of post-socialist States in the 1990s brought States with very different approaches to the regulation of legal services, and consequently greater variety in who provided such services and how, into the Convention.

Accepting the idea of an undirected duty to ensure legal services would, for these cases, provide an opportunity to clarify the Court's reasoning. Since such an undirected duty is based on public interests, the Court would have the opportunity (and be required) to explain why the public interest is better served by a system based on reservation of activities, rather than simply taking this position as implicit.

iii. *Does the public interest require protecting only certain legal services?*

Recognising a separate undirected duty on the State to ensure legal services also makes it possible to discuss more clearly whether the public interest grounding this duty applies equally to all legal services, or whether the level of protection can depend on the field of law or the activity performed.

(1) *Does the State's undirected duty require elevated protection of activities other than human rights defence?*

For example, separately assessing the State's undirected duty to ensure legal services makes it possible to discuss whether the public interest also requires the State to provide particularly strong protection even for legal services outside human rights defence. As discussed in Chapter One,[2322] not everything lawyers do is human rights defence; instead, only certain legal services can be classed as defending human rights.

At present, the Court's case law on this point is unclear. Its rhetoric speaks comprehensively of 'lawyers' or 'the legal profession', which on the

2321 See the allegation made in *Rogalski v Poland* App no 5420/16 (ECtHR, 23 March 2023), Joint Dissenting Opinion of Judges Wojtyczek and Poláčková, para 4.

2322 36ff.

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face of it would imply an undifferentiated protection that relates to *all* legal services. Nonetheless, the cases actually decided by the Court reveal a significant overrepresentation of cases where legal services are human rights defence, particularly in the criminal-law context. Moreover, the Court focuses on a role 'essential'[2323] to the Convention system. Arguably, not all legal services are equally 'essential' to the Convention system, and in recent cases the Court has sometimes focused on the relationship between legal services and human rights defence.[2324] Does the State, then, have a duty to protect all legal services, or only those that bear a relationship to defending human rights?

Here, the Court's current analysis is confusing because it does not explicitly engage with the State's undirected duty to ensure legal services and hence does not clarify what exactly the State must protect. If one recognises an undirected duty on the State to ensure legal services, however, it becomes possible to debate whether this undirected duty requires the State to protect *all* legal services or only or more strongly those that constitute human rights defence.

(2) *Does the State's undirected duty require elevated protection of activities other than litigation?*

Moreover, assessing the State's undirected duty to ensure legal services separately also makes it possible to discuss more clearly which activities the State has to protect. In particular, is the State obliged only to, or perhaps to more strongly, protect the activities of lawyers in litigation? At present, this seems to be the result of the Court's case law;[2325] however, the exclusion of additional protection for other activities has not, typically, been justified

2323 *Elçi and others v Turkey* (n 2298), para 669, discussed at length in Chapter Five, 240ff.

2324 See eg *Aliyev v Azerbaijan* (n 2311), para 208, where the Court highlighted 'that the applicant is a human-rights defender and, more specifically, a human-rights lawyer', in line with the entire case's focus on human rights defence.

2325 cf *Michaud v France* App no 12323/11 (ECtHR, 06 December 2012), para 118, where the Court held that 'lawyers are assigned a fundamental role in a democratic society, that of defending litigants', as well as eg the distinction between statements made in court and outside the courtroom, discussed in Chapter Three, 154ff. Note that the European Union also seems to be adopting this position, cf Art. 5n §§ 2, 5 Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1 as amended by Council Regulation (EU) 2022/1904 of 06 October 2022 [2022]

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by the Court, nor is it self-evident. Identifying whether the undirected duty on States requires them only to protect legal services in litigation or also out-of-court legal services would make it possible to discuss whether this distinction is justified from the Convention point of view.

This is because, while litigation is undoubtedly a classic legal service, it is increasingly seen as just one important area of legal support for individuals. The role of legal services has in many jurisdictions expanded significantly beyond the resolution of disputes that have already arisen and are or will be before a State authority, not least since contentious and non-contentious legal support often go hand in hand or transition into each other. Moreover, a vision of legal services that focuses essentially on litigation arguably assumes a fairly well-functioning justice system. As the Court's case law on systemic problems in the judiciary in a number of States shows,[2326] that assumption is no longer necessarily valid. Where there are serious deficiencies in the justice system, litigation may not always be the best, nor even sometimes a promising, means of human rights defence.[2327] The assumptions underlying the Court's case law are therefore open to question, but the lack of clarity on the extent of States' undirected duties makes it difficult to discuss whether the duty to ensure legal services should relate only or primarily to litigation.

(3) *Which case law is transferable?*

Moreover, clarifying that the State is simultaneously under directed and undirected duties in these cases can help to explain when lines of case law developed in relation to other professions can be transferred to the legal services sector.[2328] Here, such an analysis would make clear that the question is not whether the position of the applicant is similar or not, but

OJ L259/3, which prohibits the provision of non-contentious legal services to the government of Russia or legal persons established in Russia.

2326 For a very cursory introduction see eg Chapter Seven, 366ff.

2327 For a visible example, where a lawyer in a State for which the Court itself has identified serious rule-of-law problems instead chose to attract media attention, see eg *Bagirov v Azerbaijan* (n 2307). For an example of a human rights group combining legal defence and media activities – which would be problematic from the Court's point of view – see eg the Russian group OVD Info, https://ovd.info, accessed 08 August 2024.

2328 cf *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994), paras 53–54, discussed in Chapter Five, 231ff.

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whether there is a similar undirected duty in relation to the profession, as, for example, regarding the media.[2329]

(c) *Clarity regarding who may invoke the State's undirected duties*

In a further step, recognising undirected duties on the State to maintain its ability to satisfy the Convention rights also provides a basis for discussing whether, in some situations, someone should be able to *invoke* these duties, thus making them partially directed and opening the possibility of individual applications under Art. 34.[2330]

To avoid confusion: This idea that perhaps a part of the undirected duties on the State can be classed as invokable by others does not mean that these latter positions are *human* rights, as is quite obvious from the fact that not all humans have them. Instead, they are strictly limited to what is in the public interest, in line with the fact that they are not derived from the position of the rights holder, but from the extent to which they further compliance with the undirected duties on the State requiring it to maintain its ability to satisfy the Convention rights. Because they are not human rights, they are not conceptually tied to protecting the concerns of intrinsically valuable individuals, but can be based on public-interest considerations, mirroring the approach in other areas of law where rights are granted as a convenient means of ensuring compliance with obligations, such as environmental law granting rights to environmental associations or European Union law granting the four freedoms to individuals for the ulterior purpose of furthering market integration.[2331]

2329 See Chapter Six.

2330 Of course, in any case undirected duties could always be invoked via the inter-State mechanism under Art. 33, which contains no limitation to directed duties, as discussed in Chapter Seven, 362ff. Moreover, similarly to many other international law obligations with weak enforcement mechanisms, the State remains bound by undirected duties even in the absence of enforcement proceedings, meaning that they may play a role in softer fora such as political debate.

2331 cf Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 13, where the Court of Justice of the European Union justified granting rights to individuals inter alia because '[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States'.

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Initially, the idea that the Convention may create rights other than *human* rights may seem surprising. However, it arguably reflects what the Court is already doing. The idea of a right being assigned because its assignment is apt to further compliance by the State with its undirected duties can easily explain why public service broadcasters are able to bring cases before the Court notwithstanding the fact that they are organised as part of the State.[2332] If one sees the State as under an *undirected* duty to ensure media pluralism – which is perhaps what the Court means when it emphasises that the State is the 'ultimate guarantor of pluralism'[2333] –, which is grounded in a public interest, then one can, in principle, allow any actor who will further this public interest to bring cases to the Court. This may be the reason underlying the Court's willingness to hear individual applications brought by public service broadcasters: They may not be intrinsically valuable, as is required for human rights. But allowing them to criticise the State for not complying with its undirected duties furthers the public interest in media pluralism. Moreover, given that such cases can only be brought where the public service broadcaster is 'directly affected' themselves,[2334] such applications do not fall foul of Art. 34's 'victim status' prohibition on *actio popularis* claims.

A further example of such a right assigned to further compliance with the State's undirected duties can also be seen in the recent Grand Chamber judgment in *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (2024): Here, the Court explicitly justified granting standing to the applicant association because it was 'in the interests of the proper administration of justice'[2335] to enable the Court to assess whether the State had complied with its Convention obligations. The Court also repeated that 'it may be possible for an association to have standing before the Court despite the fact that it cannot itself claim to be the victim of a violation of the Convention';[2336] beyond the restriction to 'associations', this shows a certain latitude for the idea that the Convention can create rights that are not

2332 See Chapter Six at 334.

2333 cf eg *Informationsverein Lentia and others v Austria* App no 13914/88 and others (ECtHR, 24 November 1993), para 38, see recently eg *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), para 184.

2334 cf eg *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 04 December 2015), para 164.

2335 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* App no 53600/20 (ECtHR, 09 April 2024), para 523.

2336 Ibid, para 498.

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human rights because they are not individualistically justified, but instead are grounded in advancing public interests or the interests of others. This could easily justify rights granted to lawyers in their role as lawyers or, for example, to Bar associations.

However, because these are not in themselves human-rights claims,[2337] the right assigned in order to secure the State's undirected duty is far narrower than a human right, covering only those activities that are in the public interest. As a result, public service broadcasters can be granted a lesser role-bearer right to speak *only* on matters of public interest, just as lawyers can be granted a role-bearer right to act where this furthers the interests of clients, or members of parliament can be granted rights to speak in parliament where this furthers the public interest. However, such rights are not subject to the traditional prima facie preference that human rights are; moreover, the fact that these are not human rights in the sense of positions derived from the private interests of the rights holder means that the doctrines developed by the Court which are premised on the protection of individual interests presumably cannot apply without modification.

Similarly to the above cases, given that the State's obligation to ensure legal services is not a directed duty derived from human rights but an undirected duty under the Convention, the ability to invoke this duty can be assigned wherever it seems apt to further the public interest in legal services. Once again, that can easily explain why the Court grants rights to lawyers despite the fact that their private interests are not involved: Allowing lawyers to invoke the protection of the Convention where they act professionally can then be justified not in relation to the Convention's human rights provisions, but as derivative of the State's undirected duty to ensure legal services as part of the rule of law. Just like the media or, now, environmental NGOs,[2338] lawyers are valuable not intrinsically, but because of their systemic role. While that, on traditional understandings, precludes the application of *human* rights norms because lawyers have no relevant *private* interests, an undirected duty on the State based on the public interest is open to other justifications and can, in principle, allow invocation wherever this public interest is being furthered.

2337 See similarly debating whether journalists' free speech rights are human rights Cruft (n 2284) 369.

2338 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* (n 2335), para 489ff.

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Moreover, such an approach also provides the foundation for questioning the traditional position that Bar associations do not have standing before the Court.[2339] Recognising that the State is under an undirected duty to ensure legal services makes it possible to discuss whether furthering compliance with this duty could be a reason for allowing Bar associations to complain to the Court about violations, particularly since arguably much of the Grand Chamber's reasoning in *KlimaSeniorinnen*[2340] appears readily adaptable to Bar associations acting to defend the rule of law. As discussed above, Bar associations cannot hold human rights as traditionally understood because they do not hold ultimately valuable, private interests. However, if one recognises an undirected duty on the State to ensure legal services, there is no reason not to allow Bar associations to complain about violations of this duty in certain cases, given that allowing them to do so may further the public interest in legal services, or at least to invoke those elements of the undirected duty that concern the independence of lawyers' professional organisations.[2341] Transferring the justification from *KlimaSeniorinnen* (2024), 'the fact that complaints may concern acts or omissions in respect of various types of general measures, the consequences of which are not limited to certain identifiable individuals or groups but affect the population more widely', can be seen to create a 'need, in this context, for a special approach to victim status'.[2342]

3. More stringent use of proportionality analysis

Moreover, separating into directed duties based on private interests and undirected duties based on public ones can lead to clearer use of proportionality analysis. This relates both to determining those areas where the proportionality test is appropriate and to providing clearer criteria for balancing.

2339 Chapter Five, 294ff.
2340 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* (n 2335), para 489ff, particularly at 502.
2341 See Chapter Five, 286ff, as well as Chapter Nine, 459ff.
2342 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* (n 2335), para 479.

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(a) *Application of proportionality analysis*

The first advantage of separating between the State's directed and undirected duties as regards legal services relates to determining where proportionality analysis is appropriate. Proportionality analysis is only appropriate in those cases where there is a directed duty to an individual in play; where there is only an undirected duty in play, proportionality analysis is inappropriate. In the Court's case law, this is already reflected in the fact that the 'independent and impartial' tribunal requirement of Art. 6 § 1 is not typically understood as being subject to proportionality balancing; the question, here, is not one of weighing, but of whether the State has complied with the minima of its obligation to maintain a Convention-compliant judiciary.

(b) *Clearer criteria for balancing*

Moreover, separating into directed duties based on private interests and undirected duties based on public ones makes it possible to clarify the Court's balancing exercise. This is because it makes it possible to clarify both the weight of the legitimate interest pursued and the weight of the interference with each of these two interests separately, rather than mixing private and public interests into one duty, which risks leaving the standards applied unclear.

At present, the Court's use of a single obligation interpreted to protect both private and public interests makes the point of reference for its balancing unclear since it is not clear whether the severity of an interference is determined in relation to the private interests of the applicant or the public interest in legal services. Conversely, the analysis proposed above can treat these two points separately. It becomes possible to apply a two-stage balancing test.

One of these stages consists of balancing the private interests of the applicant against the public interest adduced as a legitimate aim to justify the interference. Here, in keeping with traditional proportionality balancing, the first step is to determine the severity of the interference with, for example, the applicant's private interest in their privacy (Art. 8) or freedom of expression (Art. 10). The second step is to determine the weight of the legitimate aim pursued. Finally, these two may not be disproportionate to one another.

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The other stage consists of balancing the interference against the public interest in ensuring legal services. The steps, here, are the same. This would require the Court to determine how severe the interference with the public interest in ensuring legal services is, how weighty the legitimate aim pursued is, and whether these two are disproportionate to each other. Unlike its current case law, this would require the Court to clearly determine the relationship between the measure in question and the public interest in ensuring legal services.

To take the example given in Chapter Eight,[2343] that of a light admonition of a defence attorney for pursuing a line of questioning which is the client's most promising defence: Here, at the balancing stage – scope and interference established –, one could first balance between the lawyer's private interest in not being admonished for his expression on the one hand and the public interest in maintaining the authority and impartiality of the judiciary on the other. The interference with the defence attorney's private interest would, given the relatively light nature of the sanction, presumably be classed as light. Simultaneously, depending on how disruptive the statement was, one might well class the public interest as medium, particularly given that at the abstract level maintaining the authority and impartiality of the judiciary is an interest that is comparatively important. Balancing between these two points might lead to the conclusion that the interference with the applicant lawyer's position on its own would not be disproportionate.

However, a second balancing test could then be applied as between ensuring legal services as a precondition of the rule of law and maintaining the authority and impartiality of the judiciary. Here, one could weigh the interference with legal services as comparatively high on the scale given the importance of defence rights to the rule of law. As a result, this could well outweigh the public interest in maintaining the authority and impartiality of the judiciary, depending, once again, on how disruptive the statement was. This two-stage test, however, has the significant advantage of clarifying that there are two different interests in play: the lawyer's private interest in not being admonished, and the public interest in lawyers being able to perform their activities, which are not the same position, legally speaking, particularly since they derive from different foundations.

Structuring the Court's balancing in this way has the advantage that it reduces the risk of shifting between the two standards, which is typical for

2343 See 445, text to n 2138.

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systemic conceptions of human rights. Instead, it would impose a relatively clear justificatory structure establishing under which circumstances the State may act to further or hinder the public interest in legal services.

III. Conclusion: The advantages of combining rights and undirected duties

Recognising that the Convention can create not only directed duties corresponding to individual rights, but also undirected duties on the States has a number of benefits.

The first group of such benefits is the ability of this idea of duties on the State that are not directed towards identifiable individuals to explain a number of unusual tendencies in the Court's case law. By recognising explicitly that these duties are not owed to the applicant, the idea of undirected duties can explain well why in these cases neither the Convention right applied nor the position of the rights holder make a significant difference to the outcomes of the cases, as well as explaining why the Court tests twice for scope (once for the directed and once for the undirected duty) and why it is so willing to set out general measures going beyond the case at hand.

The second group of benefits relates to remedying a number of problems in the Court's case law. Here, such an understanding can identify more clearly that the point of reference for the directed duty is the individual interests justifying it, whereas the undirected duty is justified on the basis of certain public interests – for legal services, the rule of law and the administration of justice. These provide the benchmarks against which interference should be assessed. Moreover, this analysis can also provide greater clarity on the State's undirected duties, making it possible to recognise its binding legal status and facilitating discussion of the precise contents which the public interest can justify, as well as who might be able to invoke them. Finally, such an approach is able to provide for more stringent use of proportionality analysis.

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Conclusions, Outlook and Directions for Further Research

Legal services such as legal advice and representation play an essential role in protecting and realising human rights and are also a necessary condition of the rule of law and the administration of justice: Without legal services, none of these goals can be fully realised. Despite this significance, from the perspective of human rights law, how best to ensure legal services exist presents something of a conundrum. Human rights as traditionally understood in moral and legal theory are justified by reference to what they do for the rights holder. That traditional position can easily explain rights to receive legal services on the part of clients, but struggles significantly to explain why issues concerning those who provide legal services should be a matter of lawyers' human rights: When lawyers act on behalf of clients, their role is not to further their own interests, but those of the client and the general public interest in legal services as a constituent element of the rule of law. This questions whether rights accorded to clients and lawyers are really the most convincing way of protecting legal services. More fundamentally, it questions the idea that the Convention for the Protection of Human Rights and Fundamental Freedoms (to use the European Convention on Human Rights' full name) should be read exclusively from the perspective of *rights*.

Conceptually, rights are closely linked to what in moral philosophy are termed 'directed duties': obligations on someone (here: the State) to do something (here: respect, protect and fulfil Convention rights, interpreted more specifically in each given case) *owed to* (directed towards) *a concrete rights holder*. As the flipside of the 'right', this latter element of 'directedness' is, for human rights, traditionally justified by reference to certain characteristics or interests of the rights holder (with a wide variety of different criteria in the details). Human rights, as traditionally understood, therefore protect the rights holder's private interests (the well-being of an identifiable individual). This makes it difficult to combine a rights-based analysis of the position of lawyers, who act primarily in the interests of others, with traditional understandings of human rights.

Protection of legal services, despite being a central task of any human rights instrument, is thus difficult to explain convincingly by means of

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rights and corresponding directed duties. The present study therefore proposes a broader reading of the duties the Convention imposes on States. In moral philosophy as in law, directed duties are not the only kind of obligation. Instead, there are also *undirected* duties: obligations on someone (here: the State) to do something (here: respect, protect and fulfil Convention rights) that are not owed to identifiable individuals. Unlike directed duties, these undirected duties do not necessarily correspond to rights on the part of someone else; as a result, they are not necessarily linked to private interests, but can easily reflect public interests ('those individual interests which all members of a community have in common'[2344]). In domestic constitutional law and in public international law, such duties are so commonplace they are hardly noticed, as, for example, regarding legal obligations concerning the way the State must be organised; however, in the context of the European Convention on Human Rights, such undirected duties have been largely neglected.

On the basis of this broader vision of the State's duties under the Convention, protection of legal services under the European Convention on Human Rights can be conceptualised as the result of two different obligations on the State: the directed duties flowing from the applicant's rights in each given case and an undirected duty on the State to ensure legal services. While the former are grounded in the applicant's private interests, the latter is not: Instead, it is grounded in the public interest in legal services as a prerequisite of human rights protection, the rule of law and the administration of justice.

These directed and undirected duties can interact in different ways. They can be in a state of disconnect, where only the applicant's private interests or only the public interest in legal services are involved. They can be in harmony, where both the applicant's private interests and the public interest in legal services militate for the same result. Finally, they can be in conflict: The applicant's private interests may be opposed to the public interest in legal services.

This idea of a directed and an undirected duty interacting with each other can explain the Court's case law without changing its results and is therefore a suitable substitute for the current approach based only on rights and corresponding directed duties. Instead of attempting to capture public interests in a conceptual tool designed for private ones, a more promising

2344 Virginia Held, *The Public Interest and Individual Interests* (Basic Books 1970) 99 and Chapter One, 65ff.

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approach is to continue to use rights, with their inherent link to the right holder's individual concerns, to protect private interests and instead protect public interests via undirected duties on the State. Use of an undirected duty to protect public interests thus has a number of advantages: Beyond adding explanatory value, it also clarifies that the State is under a legally binding obligation above and beyond the individual case to ensure that legal services exist.

The present study has focused on the protection of legal services under the European Convention on Human Rights and has taken this as a model case to discuss the idea of directed and undirected duties flowing from human rights instruments. However, its findings have implications for a number of other areas. As a general rule, almost all of the areas concerned are significantly under-researched, leaving many questions open.

Specifically as regards legal services, it is noteworthy how little research exists on the international law of legal services. With a few notable exceptions,[2345] the law of legal services is treated almost exclusively as a matter of domestic law, which belies the many areas identified above where international law imposes obligations on States. Indeed, it is particularly noteworthy that eg the relationship between different organisations claiming to represent lawyers at the regional and global levels has not received greater attention, given that many of these non-governmental actors interact closely with international organisations and appear to wield considerable influence.[2346]

Moreover, there is much to suggest that the findings of the study are not limited to legal services under the European Convention, but in principle transferable both to other areas of Convention law and to other human rights instruments, opening avenues for further research.

In terms of Convention law, perhaps the most obvious potential area to transfer the study's findings to is that of the media, the example typically cited in the debate on role-bearer rights in moral philosophy.[2347] However, the idea of justifying the exercise of rights by reference to what they do for others is arguably a common feature of all types of human rights defence, which means that the study's findings may have application even beyond legal services and the media. Moreover, the examples listed in Chapter Sev-

2345 David Collins, *The Public International Law of Trade in Legal Services* (CUP 2018) springs to mind, but, as the title indicates, is limited to international economic law.

2346 Chapter One, 39ff.

2347 See Chapter Eight, 419ff.

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en,[2348] where the Convention effectively binds States on certain questions of their organisational, sometimes even constitutional (as regards, for example, democracy, separation of powers or the rules on the judiciary) law, all merit further exploration. The idea of undirected duties on the State may be a fruitful further avenue of inquiry here, particularly since it remains to be seen how the Court will react to the ongoing Polish rule-of-law crisis, which shows particularly clearly the shortcomings of an approach centred only on rights. Given that the Court has recently introduced the idea of 'institutional requirements'[2349] under Art. 6 § 1, language more reminiscent of constitutional organisational law,[2350] there is much to suggest that questions surrounding the focus on rights merit further study,[2351] as the Court is forced to venture further into domestic constitutional law in an attempt to secure the Convention rights. Undirected duties related to State organisational law mean that the Convention may have 'constitutional' features in a far wider sense than previously understood, going beyond merely protecting individual rights to impose broader obligations in the public interest.

Finally, there does not, at present, appear to be anything in the analysis proposed here that is specific to the European Convention on Human Rights. Instead, the idea that international human rights treaties – despite their name – create not only directed duties corresponding to rights, but also undirected duties on States, in principle seems generalisable. Presumably, not only the European Convention creates an obligation on States to eg ensure legal services and a judiciary conforming to certain minimum standards, but similar obligations can also be derived from other human rights instruments both regional and global. This means that by ratifying such treaties, States undertake not only to respect, protect and fulfil the rights of individuals, but also make certain commitments of an organisational nature, such as maintaining separation of powers and an independent judiciary. In fact, a similar effect may also derive from domestic human rights instruments, where, in many jurisdictions, there is as yet

2348 Chapter Seven, 365ff.

2349 *Guðmundur Andri Ástráðsson v Iceland [GC]* App no 26374/18 01 December 2020), para 218, 233ff.

2350 See Chapter Seven, text to n 1788ff.

2351 Noting that things may be in flow see also Mathieu Leloup and David Kosař, 'Sometimes Even Easy Rule of Law Cases Make Bad Law' (2022) 18 European Constitutional Law Review 753, 768, discussed in Chapter Seven at n 1792.

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no debate on undirected duties flowing from human-rights provisions.[2352] Given the general disconnect between the literature in moral philosophy on undirected duties and legal human rights scholarship, this may equally be a promising avenue for further inquiry.

2352 See Chapter Seven, 387ff.

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Zusammenfassung in deutscher Sprache

Rechtsdienstleistungen wie Rechtsberatung und -vertretung weisen Wechselwirkungen mit einer Vielzahl privater und öffentlicher Interessen auf. Einerseits betreffen sie Privatinteressen von Anwalt- und Mandantschaft, andererseits besteht ein gewichtiges öffentliches Interesse an Rechtsdienstleistungen als Vorbedingung eines Rechtsstaates. Obwohl ohne Rechtsdienstleistungen die praktische Durchsetzung der Garantien der Europäischen Menschenrechtskonvention (EMRK) nicht möglich ist, erschwert dieses Geflecht öffentlicher und privater Interessen die Einstufung in die klassischen dogmatischen Figuren des Europäischen Gerichtshofs für Menschenrechte (EGMR). Die vorliegende Arbeit untersucht, wie der EGMR private und öffentliche Interessen in seiner Rechtsprechung zu Rechtsdienstleistungen schützt, und hinterfragt, ob der Gebrauch von Rechten Einzelner zum Schutz öffentlicher Interessen im Einklang mit der übrigen Rechtsprechung des EGMR steht oder ob es konsistentere Alternativen gibt.

Kapitel 1 beginnt nach einer einleitenden Schilderung des Grenzphänomens "Rechtsdienstleistung" mit einem Überblick über den völkerrechtlichen Regelungsbestand. Im Bereich sog. "soft laws", d.h. nicht rechtsverbindlicher Standards, werden insbesondere die Grundprinzipien betreffend die Rolle der Rechtsanwälte der Vereinten Nationen und die Empfehlung des Europarates R(2000)21 zur freien Ausübung des Anwaltsberufs vorgestellt. Rechtsdienstleistungen können überdies in den Anwendungsbereich von Standards zum Schutz von Menschenrechtsverteidigern und -verteidigerinnen fallen; die herrschende Meinung im Völkerrecht geht jedoch davon aus, dass dies nur für Rechtsdienstleistungen mit einem besonders engen Bezug zum Menschenrechtsschutz gilt. Zudem haben eine Reihe anwaltlicher Nichtregierungsorganisationen wie die International Bar Association oder die Union Internationale des Avocats "soft law" entwickelt. Rechtsverbindliche völkerrechtliche Normen zu Rechtsdienstleistungen finden sich dagegen meist in Randgebieten von Normenkomplexen, die im Schwerpunkt Anderes regeln, so beispielsweise im Recht der Welthandelsorganisation oder im humanitären Völkerrecht. Das Kapitel kommt in diesem Teil zum Ergebnis, dass die Regelungslage zu Rechtsdienstleistungen im Völkerrecht unklar ist, obwohl das Vorhandensein von Rechtsdienstleistungen erhebliche Auswirkungen auf eine Vielzahl im Völkerrecht gere-

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gelter Bereiche hat, insbesondere auf den internationalen Menschenrechtsschutz.

Aufbauend auf diesem Befund analysiert die Untersuchung kritisch, wie der EGMR die Bedeutung von Rechtsdienstleistungen für private und öffentliche Interessen in seiner Rechtsprechung reflektiert. Die Untersuchung folgt dabei zwei Forschungsfragen:

Welche Verpflichtungen zur Gewährleistung privater und öffentlicher Interessen an Rechtsdienstleistungen erlegt die Rechtsprechung des EGMR den Staaten auf?

Spiegelt die Rechtsprechung des EGMR die betroffenen privaten und öffentlichen Interessen umfassend und in Einklang mit der Rechtsprechung zu anderen Bereichen wider, oder gibt es andere Herangehensweisen, die sowohl umfassender als auch konsistenter sind?

Zur Beantwortung dieser Fragen sind im Rahmen der Untersuchung insgesamt 580 Fälle in französischer und englischer Sprache ausgewertet worden, von denen 463 im Text enthalten sind. 345 dieser Fälle beschäftigen sich speziell mit Rechtsdienstleistungen. Dieses Fallmaterial deckt den Zeitraum von Februar 1975 bis Juni 2024 ab und enthält Verfahren gegen alle 46 gegenwärtigen Mitgliedstaaten sowie gegen die Russische Föderation. Auf die Erörterung des methodischen Ansatzes des Forschungsvorhabens folgt die Definition zentraler Begriffe der Untersuchung, beispielsweise die der "Rechtsdienstleistung" sowie des "öffentlichen" und des "privaten" Interesses.

Kapitel 2 untersucht das erste zentrale Element der Rechtsprechung des EGMR zum Schutz von Rechtsdienstleistungen im Mandantschaftsinteresse, den besonderen Schutz des Innenverhältnisses zwischen Anwalt oder Anwältin einerseits und Mandant oder Mandantin andererseits. In seiner Rechtsprechung hebt der EGMR die besondere Bedeutung dieser Beziehung hervor und betont, dass diese durch gegenseitiges Vertrauen und Verständnis geprägt sein sollte. Um eine solche Vertrauensbeziehung zu ermöglichen, sind aus Sicht des EGMR insbesondere die Auswahl der rechtsdienstleistenden Person und die Kommunikation zwischen ihr und der Mandantschaft bedeutsam.

Hinsichtlich der Person von Anwalt oder Anwältin geht der EGMR davon aus, dass es für die Vertrauensbeziehung förderlich ist, wenn die Mandantschaft diese weitestgehend frei wählen darf. In der Rechtsprechung des EGMR betrifft dies vor allem den Bereich der strafprozessualen Garantie

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des Art. 6 Abs. 3 lit. c EMRK, wo er zwischen staatlichen Strafverfolgungsinteressen und dem Verteidigungsinteresse des oder der Beschuldigten abwägt und typischerweise letzterem den Vorzug gibt. Vertrauensfördernd kann sich eine solche Wahl jedoch nur dort auswirken, wo sie auf einer hinreichenden Informationsgrundlage erfolgt; die Auswahl eines Anwaltes aufgrund Unkenntnis erheblicher Tatsachen stellt daher keine "Wahl" eines Anwaltes dar, wie die Große Kammer in der Leitentscheidung *Dvorski ./. Kroatien* entschieden hat.[2353] Trotz dieser grundsätzlich auf Schutz der freien Entscheidung abzielenden Rechtsprechung geht der EGMR jedoch davon aus, dass ein pauschales Selbstvertretungsverbot für Anwälte und Anwältinnen im nationalen Strafprozessrecht nicht gegen die Konvention verstößt.[2354]

Zusätzlich zum besonderen Schutz der Wahl von Anwalt oder Anwältin schützt der EGMR auch die Kommunikation mit der Mandantschaft als Voraussetzung einer Vertrauensbeziehung. Das betrifft bereits die generelle Möglichkeit der Kommunikation. Hier stellt der EGMR die Regel auf, dass sämtliche Kommunikationsbeschränkungen einer Rechtfertigungspflicht unterliegen, die selbst in Fällen der Terrorismusbekämpfung streng gehandhabt wird. Über die bloße Möglichkeit der Kommunikation hinaus schützt der EGMR zudem die Vertraulichkeit dieser Kommunikation, indem er den Staat verpflichtet, das Geheimhaltungsinteresse sowohl der Mandantschafts- als auch der anwaltlichen Seite zu achten. Besonders häufige Fallgruppen betreffen dabei den Kontakt mit Inhaftierten, die Telekommunikationsüberwachung sowie Hausdurchsuchungen in Kanzleien. In allen Fällen verlangt der EGMR eine strenge verfahrensrechtliche Absicherung und fordert teils gesetzliche Regelungen, deren Inhalt er detailliert vorgibt. In jüngerer Zeit haben den EGMR darüber hinaus Fälle aus der Geldwäschebekämpfung beschäftigt, wo eine neuere gesetzgeberische Tendenz Rechtsdienstleistenden Pflichten zur Berichterstattung über ihre eigene Mandantschaft auferlegt, die vom EGMR gebilligt worden sind.

Sind die genannten Voraussetzungen erfüllt, geht der EGMR regelmäßig davon aus, dass die konkrete Ausgestaltung der Beziehung Sache der Parteien ist. Trotz der Verpflichtung der Staaten, insbesondere im Anwendungsbereich des Art. 6 Abs. 3 lit. c EMRK gewisse qualitative Mindeststandards

2353 *Dvorski ./. Kroatian [Große Kammer]* Az. 25703/11, Urt. v. 20.10.2015. Im Fall: bereits durch Angehörige mandatierter Anwalt, der durch die Ermittlungsbehörden an der Kontaktaufnahme gehindert wurde.

2354 *Correia de Matos ./. Portugal [Große Kammer]* Az. 56402/12, Urt. v. 04.04.2018.

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für Rechtsdienstleistungen zu sichern, nimmt der EGMR aufgrund der Unabhängigkeit der Anwaltschaft eine Verantwortung des Staates für anwaltliche Leistungen erst bei manifesten, staatlichen Stellen hinreichend bekannten Qualitätsproblemen an. Beispiele sind etwa Fälle völliger anwaltlicher Untätigkeit, mangelnden Einsatzes für das Mandantschaftsinteresse, andauernder Nichterreichbarkeit sowie gravierender Mängel in Vorbereitung, Qualifikation oder Unabhängigkeit auf anwaltlicher Seite.

Das Kapitel kommt zu dem Ergebnis, dass die Rechtsprechung des EGMR das Verhältnis zwischen Anwalt oder Anwältin und Mandant oder Mandantin deutlich stärker schützt als andere Beziehungen. Wenngleich dieser Schutz weder hinsichtlich Anwaltswahl noch hinsichtlich der Vertraulichkeit der Kommunikation absolut ist, so unterliegen staatliche Eingriffe doch regelmäßig hohen Hürden. Das Verständnis des EGMR, nach dem staatliche Eingriffe in das anwaltliche Innenverhältnis grundsätzlich zu vermeiden sind, führt darüber hinaus dazu, dass den Staat ohne weitere Anhaltspunkte regelmäßig keine Verantwortung für anwaltliche Schlechtleistungen trifft.

Kapitel 3 untersucht, wie der EGMR die Interessen der Mandanten und Mandantinnen schützt, indem er nach außen gerichtete anwaltliche Rechtsdienstleistungen (insbesondere Rechtsvertretung) schützt. Das Kapitel trennt zwischen Rechtsdienstleistungen auf der Ebene des nationalen Rechts und solchen im Rahmen von Individualbeschwerden, also bereits auf Ebene der EMRK selbst.

Den Schwerpunkt der Rechtsprechung zum Schutz von Tätigkeiten im nationalen Recht bildet dabei die Freiheit der Meinungsäußerung (Art. 10 EMRK) von Anwälten und Anwältinnen im Rahmen ihrer Vertretungstätigkeit, insbesondere bei Konflikten mit richterlichen, staatsanwaltlichen oder sachverständigen Prozessbeteiligten. Der EGMR nimmt für anwaltliche Äußerungen in gerichtlichen oder behördlichen Verfahren einen besonders starken Schutz der Rechte des Anwaltes oder der Anwältin an. Diesen begründet er vor allem unter Rückgriff auf die Rechte der Mandantschaft, geht aber gleichzeitig davon aus, dass sich Anwalt oder Anwältin nicht unmittelbar auf diese berufen können. Bei anwaltlichen Äußerungen mit Verfahrensbezug, die außerhalb des Verfahrens selbst erfolgen – beispielsweise Äußerungen gegenüber den Medien – zeigt sich dagegen die entgegengesetzte Tendenz: Hier lässt der EGMR unter Rückgriff auf die "besondere Stellung" von Anwalt oder Anwältin regelmäßig einschneidendere Beschränkungen als für andere Personen zu. Die Rechtsprechung des EGMR scheint insoweit auf der Annahme eines grundsätzlich effektiven gerichtli-

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chen Rechtsschutzsystems zu fußen, die jedoch nicht immer der Realität in allen Konventionsstaaten entspricht.

Neben diesen Fällen zur Meinungsäußerungsfreiheit haben insbesondere Fälle zum Recht auf Freiheit und Sicherheit (Art. 5 EMRK) sowie zu Recht auf Leben (Art. 2 EMRK) und Folterverbot (Art. 3 EMRK) den EGMR beschäftigt. Hier schützt der EGMR Anwälte und Anwältinnen im Rahmen ihrer Berufsausübung in besonderem Maße gegen Eingriffe von behördlicher Seite. Eine besondere Verpflichtung des Staates zum Schutz vor Angriffen durch private Dritte nimmt er dagegen trotz Forderungen in Sondervoten nicht an.

Im Hinblick auf den Schutz von Rechtsdienstleistungen im Zusammenhang mit der Individualbeschwerde hat sich darüber hinaus gesonderte Rechtsprechung zu Art. 34 Satz 2 EMRK entwickelt, nach dem sich "die Hohen Vertragsparteien verpflichten … die wirksame Ausübung [des Rechts auf Individualbeschwerde] nicht zu behindern". Diese Verpflichtung interpretiert der EGMR überaus streng und sieht beispielsweise bereits Versuche, Beschwerdeführende oder ihre Anwälte und Anwältinnen unter Umgehung des EGMR zu kontaktieren, als Konventionsverletzung an. Ähnlich wie in den Fällen zur anwaltlichen Meinungsäußerungsfreiheit bleibt jedoch auch hier der normative Anknüpfungspunkt letztlich unklar. In mehreren Fällen, in denen sowohl der Anwalt im Hinblick auf seine eigenen Rechte als auch der Beschwerdeführer unter Verweis auf Art. 34 Satz 2 EMRK den EGMR angerufen haben, sieht dieser unter Verletzung des Rechtsschutzinteresses des Mandanten regelmäßig von einer Prüfung von dessen Rechten ab.

Die Analyse zeigt, dass die Rechtsprechung zum Schutz der Interessen der Mandantschaft durch Schutz nach außen gerichteter Rechtsdienstleistungen der anwaltlichen Seite widersprüchliche Tendenzen aufweist. In einigen Bereichen werden Rechtsdienstleistungen klar stärker geschützt, beispielsweise im Hinblick auf anwaltliche Äußerungen vor Gericht oder den Schutz vor staatlichen Übergriffen. In anderen Konstellationen dagegen genießt anwaltliches Handeln entweder keinerlei zusätzlichen Schutz (beispielsweise gegenüber Angriffen von Privaten) oder wird sogar schwächer geschützt als vergleichbare Handlungen durch andere Personen (beispielsweise bei Äußerungen außerhalb von Verfahren).

Kapitel 4 wendet sich der Frage zu, wie der EGMR die Interessen von Anwälten und Anwältinnen an der Erbringung von Rechtsdienstleistungen schützt. Obgleich die EMRK keine allgemeine Freiheit der Berufsausübung enthält, sind einzelne Elemente anwaltlicher Tätigkeit durch extensive Aus-

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legung anderer Rechte, insbesondere des Rechtes auf Achtung des Privat- und Familienlebens (Art. 8 EMRK) und der Eigentumsgarantie (Art. 1 Erstes Zusatzprotokoll), geschützt. Besonders hervorzuheben ist insoweit der Schutz der Wahl und Ausübung des Anwaltsberufes. Dieser wird allerdings regelmäßig allein mit den Interessen des Anwalts oder der Anwältin, nicht mit einem öffentlichen Interesse am Schutz von Rechtsdienstleistungen begründet.

Stärkeren Eingang findet das öffentliche Interesse dagegen in Fällen, die zwischen Interessen des Anwalts oder der Anwältin und öffentlichem Interesse liegen und in denen sich jene, ohne an einem bestimmten Verfahren beteiligt zu sein, aufgrund ihrer allgemeinen Rechtskenntnisse kritisch zu Vorgängen von gesamtgesellschaftlichem Interesse äußern (in Anlehnung an die Rechtsprechung zu Journalisten als "Wachhund"-Fälle bezeichnet). Aufgrund ihrer besonderen Bedeutung für den politischen Diskurs schützt der EGMR solche Äußerungen regelmäßig in besonderem Maße; zugleich stellt er jedoch klar, dass dieser Schutz dem Schutz journalistischer Äußerungen nicht gleichwertig ist. Dadurch ergibt sich für die betroffenen Anwälte und Anwältinnen ein Spannungsverhältnis zur sonst vom EGMR befürworteten anwaltlichen Zurückhaltung, das die Vorhersehbarkeit der Rechtsprechung reduziert.

Das Kapitel kommt zu dem Ergebnis, dass der Schutz der anwaltlichen Interessen uneinheitliche Rechtsprechungslinien aufweist. Während das öffentliche Interesse an Rechtsdienstleistungen in einigen Fällen keinerlei Eingang in die Argumentation des EGMR findet, spielt es in anderen Fällen eine deutlich stärkere Rolle und führt zu einem gesteigerten Schutz der Interessen von Anwälten und Anwältinnen.

Kapitel 5 beschäftigt sich, nachdem die vorangegangenen Kapitel der Bedeutung von Rechtsdienstleistungen für die privaten Interessen auf Mandantschafts- und anwaltlicher Seite gewidmet waren, mit dem öffentlichen Interesse an Rechtsdienstleistungen, das sich insbesondere aus deren Bedeutung für Rechtsstaatlichkeit und den Schutz von Menschenrechten ergibt.

Zu diesem öffentlichen Interesse hat der EGMR vor allem zwei Rechtsprechungslinien entwickelt, wobei die eine den besonderen Status von Anwälten und Anwältinnen betont, die andere die Bedeutung des Berufsstandes der Anwaltschaft als "Herz des Konventionssystems" hervorhebt. In der Praxis dient erstere primär der Rechtfertigung von Eingriffen in die Rechte von Anwälten und Anwältinnen, insbesondere im Bereich der Meinungsäußerungsfreiheit, und wirkt damit grundrechtsverkürzend.

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Die zweite Formulierung wird dagegen durchgängig verwendet, um den Schutz der Beschwerdeführenden zu verstärken, und wird vom EGMR insbesondere dort eingesetzt, wo generelle Bedenken eines unzureichenden Schutzes von Rechtsdienstleistungen bestehen und die Situation der beschwerdeführenden Person dem EGMR repräsentativ für ein Systemversagen scheint. Insoweit spiegelt diese Formel die zentrale Bedeutung von Rechtsdienstleistungen als Vorbedingung der Konventionsziele wider. Passend zum Spannungsverhältnis zwischen diesen beiden Grundsatzaussagen schreibt der EGMR der "Anwaltschaft" als Ganzes eine Reihe unterschiedlicher Eigenschaften, insbesondere Unabhängigkeit, effektive Vertretung, eine besondere "Würde" sowie ein gewisses Maß an Selbstverwaltung, zu, ohne diese jedoch normativ klar zu verorten.

Aufbauend auf dieser besonderen Bedeutung von Rechtsdienstleistungen hat der EGMR einige Rechtsprechungslinien entwickelt, die sich mit der konkreten Sicherung des öffentlichen Interesses an Rechtsdienstleistungen beschäftigen. Hierzu gehören einerseits die Entscheidungen, die sich mit der Regulierung des Rechtsdienstleistungsmarktes beschäftigen, insbesondere im Hinblick auf bestimmte Voraussetzungen zu fachlicher und persönlicher Eignung von Rechtsdienstleistenden. Ausführlicher hat sich der EGMR dem Komplex des anwaltlichen Berufsrechts gewidmet. Zusätzlich zu Rechtsprechung zum anwaltlichen Disziplinarrecht beschäftigt er sich dabei auch mit der Stellung von Rechtsanwaltskammern, wo er grundsätzlich Unabhängigkeit fordert, diese jedoch gleichwohl als Teil des "Staates" einstuft und daher die Beschwerdefähigkeit unter Art. 34 Satz 1 EMRK ablehnt.

Die Analyse zeigt, dass die Rechtsprechung des EGMR nur einige, jedoch nicht alle Elemente des öffentlichen Interesses an Rechtsdienstleistungen schützt. Während er sich bewusst ist, dass Rechtsdienstleistungen eine besondere Bedeutung für das Konventionssystem haben, kann der EGMR diese Erkenntnis in den hergebrachten Kategorien seiner auf den Schutz von Rechten Einzelner ausgerichteten Rechtsprechung nur unzureichend fassen und bildet daher eine Reihe bedeutsamer Fragen in seiner Rechtsprechung nicht ab.

Kapitel 6 wendet sich daher der Rechtsprechung zu einem anderen Bereich zu, der ebenfalls sowohl private als auch öffentliche Interessen berührt und daher möglicherweise Anhaltspunkte zur Lösung der für Rechtsdienstleistungen identifizierten Probleme bieten kann: den Medien, die ebenso wie Rechtsdienstleistungen vom EGMR explizit als "essenzielle" Voraussetzungen des Konventionssystems eingestuft worden sind. Ähnlich

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wie bei der Tätigkeit von Anwälten und Anwältinnen, die nicht nur den Interessen der Mandantschaft oder dem Eigeninteresse an der Ausübung des anwaltlichen Berufes, sondern zugleich dem öffentlichen Interesse an Rechtsstaatlichkeit dient, dient das Handeln der Medien nicht nur deren eigenen Interessen, sondern auch dem Interesse Dritter an Information und dem öffentlichen Interesse an pluralem politischem Diskurs als Vorbedingung demokratischer Entscheidungsfindung. Aufgrund dieser ähnlichen Interessenlage vergleicht dieses Kapitel die Rechtsprechung zu Medien mit der zu Rechtsdienstleistungen mit dem Ziel, übertragbare Ansätze aus der Rechtsprechung zu Medien zu finden.

Die Rechtsprechung zu den Medien variiert dabei klar das Niveau des Menschenrechtsschutzes im Hinblick auf den Beitrag zu öffentlicher Meinungsbildung und zum politischen Prozess. Berichterstattung, die einen Beitrag zu Debatten von (legitimem) öffentlichen Interesse leistet, wird besonders stark geschützt, während der EGMR bei Fehlen eines solchen Beitrags das Schutzniveau absenkt. Ähnlich wie bei Rechtsdienstleistungen nimmt der EGMR eine als für die EMRK "essenziell" angesehene Funktion an; nur im Rahmen dieser Funktion besteht ein besonderer Schutz.

Anders als bei Rechtsdienstleistungen identifiziert der EGMR in der Rechtsprechung zu den Medien jedoch deutlich expliziter, dass es ein öffentliches Interesse an der Menschenrechtsausübung Privater gibt. Neben einer gesonderten Prüfung, ob die Berichterstattung einem öffentlichen Interesse dient, weist der EGMR im Bereich der Medien dem Staat auch explizit eine Garantenfunktion für das öffentliche Interesse an einer pluralen Medienlandschaft zu, die sich in einer Pflicht zu bestimmten regulatorischen Maßnahmen niederschlägt. Vergleichbar deutliche Stellungnahmen sucht man im Hinblick auf Rechtsdienstleistungen vergeblich. Das Kapitel schließt mit der Feststellung, dass eine Übertragung einiger der in der Rechtsprechung zu den Medien entwickelten Figuren zwar förderlich wäre, letztlich aber beide Bereiche das besondere Phänomen der Ausübung von Menschenrechten in einem öffentlichen Interesse nur unzureichend erfassen, weil der EGMR ohne klare Kriterien zwischen privaten und öffentlichen Interessen wechselt.

Kapitel 7 widmet sich sodann der Frage, ob die vom EGMR angenommenen Verpflichtungen des Staates gegenüber Einzelnen den einzigen Typus aus der EMRK ableitbarer Verpflichtungen darstellen. Neben den bekannten Verpflichtungen, denen subjektive Rechte gegenüber stehen, stellt das Kapitel die Möglichkeit von Verpflichtungen aus der EMRK dar, denen

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keine subjektiven Rechte gegenüberstehen. Diese müssen daher nicht zwingend durch private Interessen begründet werden.

Unter Rückgriff auf Erkenntnisse der Moralphilosophie betont das Kapitel die unterschiedlichen möglichen Gründe und Arten von Pflichten. Pflichten sind sowohl durch Rechte als auch durch andere Erwägungen begründbar; sie können entweder Rechte gewähren oder Verpflichtungen ohne korrespondierende Rechte begründen.[2355] Letztere Kategorie ist im nationalen Verfassungsrecht gerade aus dem Staatsorganisationsrecht bekannt, im Völkerrecht stellen Verpflichtungen, die keine Rechte für Individuen begründen, nach klassischen Verständnissen sogar die typische völkerrechtliche Verpflichtungsform dar.

Sodann zeigt das Kapitel auf, dass sich auch der EMRK Verpflichtungen entnehmen lassen, denen keine inhaltsgleichen Rechte gegenüberstehen. Die EMRK erlegt den Staaten insbesondere die Rechtspflicht auf, sicherzustellen, dass sie ihre Verpflichtungen gegenüber Individuen erfüllen können. Aus dieser Rechtspflicht erwachsen eine Reihe weiterer Verpflichtungen, die allerdings selbst nicht unmittelbar Rechte für Einzelne begründen. So sind die Staaten beispielsweise verpflichtet, eine unabhängige Judikative, eine demokratische Staatsform und eine funktionierende Exekutive zu gewährleisten. Diese Verpflichtungen, die im öffentlichen Interesse bestehen, gewähren nur unter bestimmten zusätzlichen Bedingungen (wie zum Beispiel hinsichtlich der Judikative des Entstehens einer Streitigkeit in Bezug auf zivilrechtliche Ansprüche und Verpflichtungen oder über eine strafrechtlichen Anklage, Art. 6 Abs. 1 Satz 1 EMRK) Rechte Einzelner, wenn deren private Interessen hinreichend betroffen sind.

Schließlich erörtert das Kapitel mögliche Gründe, warum die Idee von Verpflichtungen ohne korrespondierende Rechte in Rechtsprechung und Literatur zur EMRK bisher nicht stärker diskutiert wird. Besonders hervorzuheben ist hierbei die nahezu vollständige Dominanz der (die Behauptung einer Rechtsverletzung voraussetzenden) Individualbeschwerde in der Rechtsprechungspraxis des EGMR. Aufgrund des bahnbrechenden Charakters eines völkerrechtlichen Vertrages, der unmittelbar Rechte an Einzelne gewährt und diese insoweit jedenfalls zu partiellen Völkerrechtssubjek-

2355 Der Begriff der "objektiven" Verpflichtung wird hier bewusst vermieden, weil er in der Rechtsprechung des EGMR bereits verwendet wird, um hervorzuheben, dass die Konventionsverpflichtungen keine Gegenseitigkeit erfordern. Siehe *Irland ./. Vereinigtes Königreich [Plenum]* Az. 5310/71, Urt. v. 18.01.1978, Rn. 239; *Mamatkulov und Askarov ./. Türkei [Große Kammer]* Az. 46827/99; 46591/99, Urt. v. 04.02.2005, Rn. 100.

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ten macht, hat dies auch in der rechtswissenschaftlichen Forschung zu einer nahezu ausschließlichen Betrachtung der Verpflichtungen, zu denen es korrespondierende Rechte gibt, geführt. Darüber hinaus konzentriert sich auch die fachwissenschaftliche Debatte um den Verfassungscharakter der Konvention ausschließlich auf die Frage nach dem Schutz individueller Rechte; dass die Konvention darüber hinaus auch eine Reihe (staats-)organisationsrechtlicher Vorgaben enthält, denen keine subjektiven Rechte gegenüber stehen, ist dagegen bisher vernachlässigt worden. Dieser zweite "konstitutionelle" Aspekt mag jedoch in den kommenden Jahren an Bedeutung zunehmen; in seinen Fällen zur polnischen Rechtsstaatskrise prüft der EGMR unter Art. 6 Abs. 1 Satz 1 EMRK im Wesentlichen dieselben Fragen, die innerstaatlich am polnischen Staatsorganisationsrecht gemessen worden sind. Das Kapitel hebt daher hervor, dass die EMRK Staaten auch dort Verpflichtungen auferlegt, wo es keine inhaltsgleichen Rechte Einzelner gibt, und dass diese Verpflichtungen maßgeblich durch öffentliche Interessen begründet werden.

Kapitel 8 wendet sich der Frage zu, ob und inwieweit das bisherige ausschließlich rechtebasierte Verständnis des EGMR in sich kohärent ist. Unter Rückgriff auf die Moralphilosophie werden individualistische und systemische Menschenrechtsverständnisse gegenübergestellt, die in unterschiedlichem Maße die Berücksichtigung öffentlicher Interessen zulassen und unterschiedliche Kriterien für die Falllösung liefern.

Im ersten Teil führt das Kapitel aus, dass Menschenrechte in der Moralphilosophie üblicherweise individualistisch begründet werden, also dadurch, dass sie die Position des Rechteinhabers fördern oder widerspiegeln. Dieses Verständnis, das unter anderem mit einer Trennung zwischen den privaten Interessen Einzelner und dem öffentlichen Interesse einhergeht,[2356] liegt sowohl dem Konventionstext als auch dem Großteil der Rechtsprechung des EGMR zu Grunde.

Dagegen gibt es in einzelnen Teilbereichen, gerade hinsichtlich der Kommunikationsrechte, auch Menschenrechtsverständnisse, die den Wert dieser Menschenrechte jedenfalls auch im Hinblick auf die Förderung öffentlicher Interessen oder der Interessen Dritter begründen, d.h. durch ihre systemische Bedeutung. Diese sind in der Moralphilosophie weit weniger etabliert, begegnen in der Rechtsprechung des EGMR aber im Hinblick sowohl auf die Medienrechte als auch auf Rechtsdienstleistungen. In jüngerer Zeit ist insoweit in der angelsächsischen Moralphilosophie

2356 Zur Definition dieser Begriffe vgl. Kapitel Eins, 65ff.

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eine Grundsatzdebatte entstanden, ob sich die Rechte von Journalisten als Menschenrechte begründen lassen, obwohl sie nicht primär den Interessen des Rechteinhabers dienen. Dieses Problem nach der Anwendbarkeit von Menschenrechten stellt sich für Anwälte und Anwältinnen in verschärftem Maße, weil diese in ihrer Berufsausübung stets fremde Interessen, nämlich die der Mandantschaft, zu vertreten haben, und berufsrechtlich gehalten sind, diesen den Vorrang zu geben.

Schließlich stellt das Kapitel dar, dass die Kombination individualistischer und systemischer Menschenrechtsverständnisse in der Praxis des EGMR zu inkonsequenter Rechtsprechung führt. Das folgt daraus, dass der EGMR den Großteil seiner Rechtsprechung auf Basis eines individualistischen Verständnisses entwickelt hat, das andere Entscheidungskriterien liefert als ein systemisches Verständnis. Diese Unterschiede zeigen sich insbesondere im Hinblick auf persönlichen und sachlichen Schutzbereich der Konventionsrechte sowie bezüglich der Verhältnismäßigkeitsprüfung, die ebenfalls individualistisch geprägt auf einer Trennung zwischen Privatinteressen und öffentlichen Interessen aufbaut. Die Bestandsaufnahme zeigt, dass die Kombination dogmatischer Figuren, die auf einem individualistischen Menschenrechtsverständnis aufbauen, mit systemischen Menschenrechtsverständnissen die Entscheidungskriterien des EGMR verwischt und daher problematisch ist.

Kapitel 9 wendet die in den beiden vorangegangenen Kapiteln gewonnenen Ergebnisse sodann auf den Hauptgegenstand der Untersuchung, den Schutz von Rechtsdienstleistungen, an. Aufbauend auf der Erkenntnis, dass die EMRK sowohl Rechte als auch Verpflichtungen ohne Rechtsinhabende begründen kann, bietet dieses Kapitel einen alternativen Erklärungsansatz für die Rechtsprechung des EGMR. Diese wird als Interaktion zwischen Rechten Einzelner und einer staatlichen Verpflichtung, das Vorhandensein von Rechtsdienstleistungen sicherzustellen, begriffen. Zwischen diesen beiden Verpflichtungen sind drei Verhältnisse denkbar. Eine erste Gruppe betrifft die Fälle, in denen aus Sicht des EGMR entweder nur die Rechte und Privatinteressen Einzelner oder aber nur das öffentliche Interesse betroffen sind und Regelungen in einem Bereich ohne Auswirkungen auf den jeweils anderen bleiben. Eine zweite Gruppe betrifft Fälle, in denen die Rechte Einzelner und das öffentliche Interesse harmonieren; in diesen Fällen kann die staatliche Verpflichtung zum Schutz von Rechtsdienstleistungen erklären, warum der EGMR ein außerordentlich hohes Schutzniveau für die Rechte Einzelner gewährt, das allein durch deren private Interessen nicht begründet werden könnte. Die dritte Gruppe betrifft die Fälle, in

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denen die Rechte Einzelner mit der staatlichen Verpflichtung zum Schutz von Rechtsdienstleistungen konfligieren, wobei der EGMR letzterer den Vorrang gibt. Hier erklärt die Verpflichtung zum Schutz von Rechtsdienstleistungen, warum der Staat stärker in Konventionsrechte eingreifen darf, als er es sonst könnte. Das Kapitel kommt so zu dem Ergebnis, dass die vorgeschlagene Kombination aus Rechten Einzelner und einer staatlichen Verpflichtung, das Vorhandensein von Rechtsdienstleistungen sicherzustellen, in allen Fällen die gleichen Ergebnisse wie ein systemisches Menschenrechtsverständnis erreichen kann und damit eine taugliche Alternative zu dieser problematischen (vgl. Kapitel 8) Herangehensweise darstellt.

Kapitel 10 schließlich arbeitet die Vorteile einer getrennten Berücksichtigung der Rechte Einzelner und der staatlichen Verpflichtung zum Schutz von Rechtsdienstleistungen heraus. Ein Mehrwert entsteht zunächst in erklärender Hinsicht: Die Annahme einer staatlichen Verpflichtung zum Schutz von Rechtsdienstleistungen, die nicht inhaltsgleich mit Rechten Einzelner ist, kann eine Reihe von Auffälligkeiten der Rechtsprechung des EGMR erklären, beispielsweise warum die Person des oder der Beschwerdeführenden oder das angeführte Konventionsrecht wenig oder keinen Einfluss auf die Entscheidungen des EGMR haben. Zugleich kann die Annahme einer staatlichen Verpflichtung zum Schutz von Rechtsdienstleistungen eine Reihe bestehender Probleme in der Rechtsprechung des EGMR lösen. So lässt sich damit klarstellen, dass Bezugspunkt für die Rechte Einzelner deren Privatinteressen, Bezugspunkt für die Verpflichtung zum Schutz von Rechtsdienstleistungen jedoch das öffentliche Interesse an Rechtsstaatlichkeit ist. Auf dieser Grundlage lassen sich Inhalt und Umfang der staatlichen Verpflichtung zum Schutz von Rechtsdienstleistungen präziser diskutieren, etwa ob nur Menschenrechtsverteidiger und -verteidigerinnen geschützt sind oder ob nur Rechtsdienstleistungen vor Gericht geschützt sind oder sein sollten. Schließlich führt die Annahme einer solchen Verpflichtung auch zu einer klareren Verhältnismäßigkeitsprüfung, da deutlicher getrennt werden kann, welche Bereiche einer Abwägung zugänglich sind und wie diese zu erfolgen hat. Das Kapitel kommt daher zu dem Ergebnis, dass eine Trennung zwischen den Rechten Einzelner und der staatlichen Verpflichtung zum Schutz von Rechtsdienstleistungen, wie sie in Kapitel Neun beispielhaft vollzogen worden ist, gegenüber einem systemischen Menschenrechtsverständnis erhebliche Vorteile bietet.

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