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.

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.

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).

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.

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.

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.

(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.

(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.

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.

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.

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.

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.

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]

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.

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'.

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.

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.

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.

(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.

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.

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.