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.

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.

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

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).

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).

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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.

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.

> 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.

> 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

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

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.

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 *Jemeļjanovs 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.

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.

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.

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

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.

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 –

(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.'

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.

> 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.

(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.

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).

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.

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.

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.

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.

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.

> 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.

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.

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'.

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.

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.

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.

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.'

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.

– 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

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.

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.

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.

> 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.

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'.

> 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)

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.

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;

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).

> 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'.

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.

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.

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'.

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.

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.

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.

> 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

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.

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

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.

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.

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

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'.

> 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.

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'.

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.

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.

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).

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).

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.'

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.

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),

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

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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.

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.

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.

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.

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.

> 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.

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).

(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.

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.

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.

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.

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 *Jemeljanovs 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).

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

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'.

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.

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.

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.