Chapter Six: 'Essential' to the Convention System: Comparing Legal Services and the Media

Legal services, as has been shown, serve both private and public interests,[1515] which makes them sit somewhat uneasily with traditional approaches that see human rights primarily in terms of what they do for the rights holder (see Chapter Eight). In an attempt to find ways of better addressing this tension, this chapter examines how the Court has dealt with a similar situation where human rights are equally exercised not only in the interests of the rights holder,[1516] but in the interests of others: the media and journalists, whose activities further not only their own interests, but also the audience's right to freely receive information and the public interest in pluralism and democracy.

This chapter discusses (I.) how the Court's case law on the media deals with this comparable complex of interests, highlighting that the case law on the media is significantly more developed than that on legal services. Following this overview, the chapter assesses similarities and differences between legal services and the media (II.), with a view to identifying the potential and limitations of transferring (some of) the Court's case law on the media to the protection of legal services under the Convention.

I. A template for legal services? The Court's case law on the media

On the Court's view, the media, like legal services, are 'essential'[1517] for the Convention system. As for legal services, there is therefore an important public interest in ensuring that the media can fulfil the activities demanded of them to achieve the overarching goals of protection of human rights,

1515 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1516 Which has led to a burgeoning debate in moral theory on whether the protection of journalists can be properly classed as a question of human rights, which is discussed in Chapter Eight, 419ff.

1517 Compare *Bladet Tromsø and Stensaas v Norway [GC]* App no 21980/93 (ECtHR, 20 May 1999), para 59, which concerns the media, to the description of legal services in *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669, discussed in detail in Chapter Five, 240ff.

democracy and the rule of law. Moreover, the activities of the media, like those of lawyers, also further the rights of other Convention-rights holders, specifically, in the case of the media, the right to receive information. Finally, as with legal services, a quality requirement for the media is that these functions be fulfilled with a high degree of independence: While the public interest requires that these activities be performed, the State is (at least without a large number of additional safeguards) prohibited from simply stepping in and performing them itself, since they require independence from the State. This separates the media and legal services from other public services, such as eg healthcare, which, while equally essential to certain Convention rights such as Art. 2 ECHR, do not contain similar independence requirements prohibiting the State from directly undertaking the activity required by the human right.[1518]

Convention protection of the media thus exhibits a number of constraints similar to the Convention protection of legal services and consequently provides a fruitful source of comparison and contrast. The more developed case law on the media is a potential repository of techniques transferable to legal services, and could therefore in principle help shed light on the question of how best to analyse Convention protection of legal services. Following a general discussion of the role the Court has assigned to the media in the Convention system (1.), the current section goes into greater detail on the Court's case law securing the media's ability to fulfil these functions (2.).

1. The Court's view of the media's function in the Convention system

In the Court's view, when the media act, they act not only in their own private interests. Instead, they fulfil a key role without which the Convention system cannot work: to enable plurality and debate as preconditions of democracy, and, more widely, the further Convention goals of human rights and the rule of law.

On this basis, the Court sees the purpose of freedom of expression as essentially twofold: In the somewhat dated language of *Handyside v UK*

1518 Although note that in any case Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, CH Beck 2021), § 20, para 25 argue that the Convention does not impose an obligation on the State to maintain a functioning healthcare system.

[Plenary] (1976), '[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man'.[1519] Freedom of expression is therefore justified not only by reference to the interests of the person exercising it, but also as securing a public interest (in the sense of an interest which all members of the community have in common) in a democratic society, as well as, at times, other Convention principles such as that of the rule of law.[1520] Indeed, the Court has referred to 'the key importance of freedom of expression as one of the preconditions for a functioning democracy'.[1521] Based upon this analysis of the rationale underpinning Art. 10 ECHR, the Court has explicitly focused on contribution to public debate as a factor strengthening the applicant's position, noting that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'[1522] and that 'there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest'.[1523]

> A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions.[1524]

1519 *Handyside v UK [Plenary]* App no 5493/72 (ECtHR, 07 December 1976), para 49, see recently eg *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), para 177, where the Court referred to these 'general principles' as 'well established in the Court's case-law'.

1520 On this latter point and the role of eg court reporting in supporting the rule of law see, for example, *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995), para 34, as well as *Aquilina and others v Malta* App no 28040/08 (ECtHR, 14 June 2011), discussed in Chapter Four at 204.

1521 *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000), para 43; *Ringier Axel Springer Slovakia, as v Slovakia (no 4)* App no 26826/16 (ECtHR, 23 September 2021), para 26; *Khadija Ismayilova v Azerbaijan* App no 65286/13; 57270/14 (ECtHR, 10 January 2019), para 49, with further references.

1522 *Lingens v Austria [Plenary]* App no 9815/82 (ECtHR, 08 July 1986), para 42, see recently eg *Cheltsova v Russia* App no 44294/06 (ECtHR, 13 June 2017), para 95.

1523 Consistent case law since *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996), para 58, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 215.

1524 *Axel Springer AG v Germany [GC]* App no 39954/08 (ECtHR, 07 February 2012), para 91.

Where the former function of contributing to a public debate is being fulfilled, the Court 'will examine in scrupulous detail'[1525] while, where there is no such contribution, no additional protection will be granted.[1526] There is therefore, to quote the relevant heading in *NIT SRL v Moldova [GC]* (2022), a separate Convention regime for 'journalistic reporting on political issues and other matters of public concern'.[1527] The Court has summarised this elsewhere as 'the privileged position accorded by the Court in its case law to political speech and debate on questions of public interest'.[1528]

For this latter limb, debate on matters of public interest, the media are particularly important. There is an 'interest of democratic society in securing a free press',[1529] which 'will weigh heavily in the balance in determining … whether the restriction was proportionate to the legitimate aim pursued'.[1530] This passage highlights clearly that the Court grounds the protection it grants to the media not on eg the relevant journalist's private interests, but on the contribution which freedom of expression makes to public debate, ie the extent to which exercise of the human right advances the interests of persons other than the rights holder.[1531] Subsequently, this idea that the human right is being exercised not (exclusively) in a private interest, but in a public one, has been phrased even more clearly: In later cases, the Court, at the beginning of its proportionality analysis, has held

1525 *Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland* App no 34124/06 (ECtHR, 21 June 2012), para 56.

1526 cf eg *NIT SRL v Moldova [GC]* (n 1519), para 216, where the Court rejected elevated protection while noting that '[t]he Court is therefore not persuaded by the applicant company's submission that by conducting news reporting in the way it did in its news bulletins that were monitored, NIT had contributed to political pluralism in the media in any meaningful way'.

1527 Ibid, para 178.

1528 *Magyar Helsinki Bizottság v Hungary [GC]* App no 18030/11 (ECtHR, 08 November 2016), para 163. Note that the protection applied will be the same for both categories as 'there is no warrant in [the Court's] case-law for distinguishing … between political discussion and discussion on other matters of public concern', cf *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992), para 64.

1529 Consistent case law since *Goodwin v UK [GC]* App no 17488/90 (ECtHR, 27 March 1996), para 45, see recently eg *Sedletska v Ukraine* App no 42634/18 (ECtHR, 01 April 2021), para 62. For the conceptual problems this causes for theories of human rights based on the interests of the rights holder see Chapter Eight, 419ff.

1530 *Goodwin v UK [GC]* (n 1529), para 40, see recently eg *MAC TV sro v Slovakia* App no 13466/12 (ECtHR, 28 November 2017), para 39.

1531 This point is discussed from a conceptual perspective in Chapter Eight.

that the 'interests to be weighed … are both public in nature'.[1532] Indeed, the Court itself has used the systemic term 'function', focusing heavily on 'the essential *function* the media fulfil in a democratic society'.[1533] This is all the more noteworthy since there have also been conflicts between the European Court of Human Rights and domestic courts proceeding on more individualistic[1534] theories of human rights that focused on the right as advancing the private interests of the rights holder.[1535]

Given this public interest in the media being able to perform their role, the State is responsible for making sure that they can. Presumably, this responsibility is a legal obligation, since the State, in the Court's diction, is the 'ultimate guarantor of pluralism',[1536] which extends to ensuring pluralism in the media. The State is thus under a public-interest obligation

1532 *Stoll v Switzerland [GC]* App no 69698/01 (ECtHR, 10 December 2007), para 116; *Pentikäinen v Finland [GC]* App no 11882/10 (ECtHR, 20 October 2015), para 94; *Erdtmann v Germany (dec)* App no 56328/10 (ECtHR, 05 January 2016), para 21; *Selmani and others v the former Yugoslav Republic of Macedonia* App no 67259/14 (ECtHR, 09 February 2017), para 76.

1533 *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 72 (emphasis added). The quote appears with minor variations (particularly concerning the terms 'media' and 'press') since *Bladet Tromsø and Stensaas v Norway [GC]* (n 1517), para 59 and has recently been cited eg in *Novaya Gazeta and others v Russia* App no 11971/10; 48557/10 (ECtHR, 14 December 2021), para 57. For a summary in French, see eg *Görmüş and others v Turkey* App no 49085/07 (ECtHR, 19 January 2016), para 40 ('la presse joue un rôle essential dans une société démocratique').

1534 On this term see Chapter Eight, 399ff.

1535 cf the *Von Hannover* saga (*Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004); *von Hannover v Germany (No 2) [GC]* App no 40660/08; 60641/08 (ECtHR, 07 February 2012), in which the European Court of Human Rights applied a systemic understanding of freedom of expression to reduce the level of protection afforded to Art. 10 rights where the debate in question was classed as not concerning a legitimate matter of public concern. For a discussion, see eg Antje von Ungern-Sternberg, 'Autonome und funktionale Grundrechtskonzeptionen – Unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' in Nele Matz-Lück and Mathias Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem* (Springer 2012). Discussing these different approaches in detail see Chapter Eight.

1536 cf *Informationsverein Lentia and others v Austria* App no 13914/88 and others (ECtHR, 24 November 1993), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 184. Note that this is not limited to *media* pluralism, but relates generally to pluralism in society since '[t]he harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion', cf *Berkman v Russia* App no 46712/15 (ECtHR, 01 December 2020), para 45. See, for an overview of the Court's general case law on the State's role as guarantor

to ensure the proper functioning of this segment of society,[1537] which comports a number of further obligations which will be summarised below. Particularly, this relates to securing a certain minimum level of activity. In light of the Convention interest in debate on matters of public concern, 'the most careful scrutiny on the part of the Court is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern,'[1538] or, to put it in other words, are capable of having a 'chilling effect' on freedom of expression.[1539] This is so because there is a public interest under the Convention in this activity being exercised, and being exercised freely.

The basic structure of Convention media freedoms, particularly the Court's analysis of freedom of expression in terms of what it does for public interests and the rights of persons other than the rights holder, therefore shows significant parallels to the situation of legal services.[1540] The following section provides an overview of the rough outlines of the Court's case law,[1541] laying the foundation for a comparison between the Court's case law on media and on legal services both in terms of black-letter law and of the argumentative techniques used.

2. Case law securing the media's ability to fulfil their Convention functions

In the Court's view, independent media are a conditio sine qua non, part of a 'precondition',[1542] of the Convention system because without them, public

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of pluralism, eg Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia 2016) 94ff.

1537 Framing this in the language of undirected duties see Chapter Seven at 375.

1538 *NIT SRL v Moldova [GC]* (n 1519), para 178.

1539 cf eg ibid, para 228. The significance of this focus on 'chilling effect', which indicates the Court's desire to secure a minimum activity level, is discussed below at 335ff.

1540 Although with the notable difference that there does not appear to be a parallel 'acting in individual cases' dimension to the media case law, due, essentially, to the lack of a link to identifiable rights holders for the mass-media fulfilling their role in political discourse. The problem is discussed in greater detail below at 341ff.

1541 Given the great expanse of the Court's case law on the media, the following section concentrates primarily on judgments by the Grand Chamber as well as select Chamber judgments.

1542 *Özgür Gündem v Turkey* (n 1521), para 43; *Ringier Axel Springer Slovakia, as v Slovakia (no 4)* (n 1521), para 26.

debate is impossible. They therefore require specific protection, which leads to a separate Convention regime where debate on matters of public interest is concerned,[1543] as well as for the actors that facilitate such debate. For these, the Court itself has explicitly highlighted 'the enhanced protection afforded to press freedom under Article 10 of the Convention'.[1544]

(a) *The State as the 'ultimate guarantor of pluralism'*

Drawing on the State's role as the 'ultimate guarantor'[1545] of pluralism, the Court has found that the State has potentially wide-ranging Convention obligations to ensure the functioning of public debate and, more specifically, of the media as facilitators thereof. 'In such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism'.[1546] This is because '[the Court] takes as its starting point the fundamental truism: there can be no democracy without pluralism'.[1547] Since '[a] situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media … undermines the fundamental role of freedom of expression in a democratic society',[1548] the State must proactively introduce market regulation preventing this outcome. Since '[g]enuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice', '[g]iven

1543 On this limitation see also 311ff.

1544 *NIT SRL v Moldova [GC]* (n 1519), para 215.

1545 cf n 1536.

1546 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* App no 38433/09 (ECtHR, 07 June 2012), para 134, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 186, 192. For an attempt at unpicking what the Court means with the open term 'pluralism' see Florian Oppitz, *Theorien der Meinungsfreiheit: Eine vergleichende Untersuchung richterlicher Grundrechtsdogmatik* (Nomos 2018) 111ff.

1547 *Manole and others v Moldova* App no 13936/02 (ECtHR, 17 September 2009), para 95; see also *NIT SRL v Moldova [GC]* (n 1519), para 185. Indeed, as a comparative aside, Art. 11 § 2 of the European Union's Charter of Fundamental Rights explicitly provides that '[t]he freedom and pluralism of the media shall be respected', in language that seems closer to the type of undirected duty discussed in Chapter Seven at 375.

1548 *Manole and others v Moldova* (n 1547), para 98, with reference to *VgT Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001).

the importance of what is at stake under Article 10, the State must be the ultimate guarantor of pluralism'.[1549]

The State is therefore obliged to regulate to secure the functioning of the media sector with a view to ensuring the specific goal of pluralism, although it retains the wide margin of appreciation that regulation addressing potentially conflicting policy goals brings with it: 'The Contracting States should therefore in principle enjoy a wide discretion in their choice of the means to be deployed in order to ensure pluralism in the media'.[1550] As long as States are fulfilling their 'guarantor' role, they appear to generally be able to rely on a wider margin of appreciation, since what is important from the Court's point of view is the result, not how States achieve it.[1551] Nonetheless, the Court has at times set out rather detailed regulatory objectives. For example, in *Manole and others v Moldova* (2009), it held that:

> The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment.[1552]

It then noted that

> [i]n this connection, the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe … provide guidance as to the approach which should be taken to interpreting Article 10 in this field,[1553]

drawing on the soft-law documents that made up 20 pages of the 73-page judgment[1554] to indicate to the Moldovan Government how to comply with its obligations under the much more abstract Art. 10 ECHR, thereby 'hardening' these soft-law standards into directly binding obligations.

1549 *Manole and others v Moldova* (n 1547), para 99.
1550 *NIT SRL v Moldova [GC]* (n 1519), para 193.
1551 cf eg ibid, para 194 and the focus on whether 'the relevant national legal norms and their application in the concrete circumstances of a given case seen as a whole produced effects that were compatible with the Article 10 guarantees and were attended by effective safeguards against arbitrariness and abuse'.
1552 *Manole and others v Moldova* (n 1547), para 100.
1553 Ibid, para 102.
1554 Ibid, para 51ff.

(b) *The obligation to create 'a favourable environment for participation in public debate'*

In addition to this case law on 'a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism',[1555] 'the positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear'.[1556] The Court's reference to the State as the 'ultimate guarantor' thus brings with it concrete obligations on the State to ensure that the exchange of different ideas and opinions can and does actually take place. This is based, inter alia, on the Court's assumption that the media market is subject to market failure without State intervention:

> To ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.[1557]

(c) *The independence of the media*

Given the media's role as facilitators of such public debate, they must be able to act independently. This equally manifests in a number of strands of the Court's case law: In light of the requirement of independence, journalists have the right to determine themselves how best to perform

1555 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 134, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 186, 192.

1556 *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECtHR, 29 January 2015), para 68. The quote goes back to *Dink v Turkey* App no 2668/07 and others (ECtHR, 14 September 2010), para 137 ('un environnement favorable à la participation aux débats publics de toutes les personnes concernées'), and has recently been cited in eg *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), para 9.

1557 *Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 130; *NIT SRL v Moldova [GC]* (n 1519), para 185.

their functions,[1558] and it is not for State bodies,[1559] nor indeed for the Court,[1560] to determine how journalists should best fulfil their tasks. This freedom is essentially a corollary of journalists' independence from the State: If journalists are to be truly independent, all State interference with how they go about their activities must, in principle, be avoided. As a result and to avoid interference in particular by the courts, their 'journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation'.[1561] In a similar vein, authorities that regulate the media need to be independent.[1562]

(d) *The obligation to protect the media against State and non-State attacks*

Moreover, the importance of journalists and of their independence to the Convention system means that the State is under an enhanced obligation to protect them, both against State and against non-State actors.[1563] The Court has explicitly mentioned 'safeguards to be afforded to the press [which] are of particular importance',[1564] and has also focused on a number of additional protective features for individual journalists, which cannot be justified purely by reference to their individual interests, but are typically justified by reference to the importance of the functions which journalists

1558 From the rich case law see only eg the Grand Chamber judgments in *NIT SRL v Moldova [GC]* (n 1519), para 183, 193; *von Hannover v Germany (No 2) [GC]* (n 1535), para 102, and *Jersild v Denmark [GC]* App no 15890/89 (ECtHR, 23 September 1994), para 31.

1559 cf eg *Szurovecz v Hungary* App no 15428/16 (ECtHR, 08 October 2019), para 74.

1560 cf eg *Bozhkov v Bulgaria* App no 3316/04 (ECtHR, 19 April 2011), para 48, 'it is not for the Court to substitute its own views for those of the press as to the appropriate timing of publication of a news story'.

1561 *Prager and Oberschlick v Austria* (n 1520), para 38; *Bladet Tromsø and Stensaas v Norway [GC]* (n 1517), para 59; see recently eg *Samoylova v Russia* App no 49108/11 (ECtHR, 14 December 2021), para 77.

1562 *NIT SRL v Moldova [GC]* (n 1519), para 205.

1563 cf eg *Pentikäinen v Finland [GC]* (n 1532), para 89; *Gongadze v Ukraine* App no 34056/02 (ECtHR, 08 November 2005), para 168; *Najafli v Azerbaijan* App no 2594/07 (ECtHR, 02 October 2012), para 66ff; *Khadija Ismayilova v Azerbaijan* (n 1521), para 164; *Mazepa and others v Russia* App no 15086/07 (ECtHR, 17 July 2018), para 45.

1564 Constant case law, cf *Jersild v Denmark [GC]* (n 1558), para 31, see recently eg *Mammadov and Abbasov v Azerbaijan* App no 1172/12 (ECtHR, 08 July 2021), para 61.

exercise, that is, ultimately, to protect the activities which they engage in. As such, where the applicant exercises the functions of a 'public watchdog',[1565] they will be particularly protected.

As regards threats from the State, this protective obligation manifests, inter alia, in additional restrictions on the State's ability to conduct search and seizure operations at journalists' offices.[1566] Moreover, the Court has noted that 'public measures preventing journalists from doing their work may raise issues under Article 10'.[1567] Since 'it cannot be disputed that the physical ill-treatment by State agents of journalists while the latter are performing their professional duties seriously hampers their exercise of the right to receive and impart information',[1568] the State will have to take particular care where it takes measures that may adversely affect journalists' activities in this way.[1569] However, the Court has been keen to stress that media activity does not give a general right to break the law, particularly the criminal law.[1570]

As regards threats from private actors, the Court has noted that

> the key importance of freedom of expression as one of the preconditions for a functioning democracy is such that the genuine, effective exercise of this freedom is not dependent merely on the State's duty not to interfere, but may call for positive measures of protection, even in the sphere of relations between individuals.[1571]

As such, the Court has developed a distinct line of case law 'concerning respondent States' obligations to investigate criminal offences against journalists',[1572] in which it is 'of the utmost importance to investigate whether the threat was connected to the applicant's professional activity and by whom it had been made'.[1573] The Court has therefore derived from Article 10 of the

1565 cf eg *Bozhkov v Bulgaria* (n 1560), para 42 or, from the French-language case law, eg *Görmüş and others v Turkey* (n 1533), para 72.
1566 cf eg *Ernst and others v Belgium* App no 33400/96 (ECtHR, 15 July 2003).
1567 *Najafli v Azerbaijan* (n 1563), para 68.
1568 Ibid, para 68.
1569 cf eg *Butkevich v Russia* App no 5865/07 (ECtHR, 13 February 2018), para 130.
1570 *Stoll v Switzerland [GC]* (n 1532), para 102; *Pentikäinen v Finland [GC]* (n 1532), para 91.
1571 *Khadija Ismayilova v Azerbaijan* (n 1521), para 158 with further references.
1572 Ibid, para 119.
1573 Ibid, para 120 – note that in this regard, the judgment in *Khadija Ismayilova* corrects the criticism made by Judges Nussberger and Vehabović in their Joint Partly Dissenting Opinion in *Huseynova v Azerbaijan* App no 10653/10 (ECtHR, 13 April 2017) 28.

Convention a 'positive obligation' to 'establi[sh] an effective system for the protection of journalists',[1574] and has, in relevant cases, highlighted that the victim's status 'as a journalist' put him 'at particular risk of falling victim to an unlawful attack',[1575] that 'the authorities, primarily prosecutors, ought to have been aware of the vulnerable position in which a journalist who covered politically sensitive topics placed himself/herself *vis-à-vis* those in power at the material time',[1576] or that a failure to protect a critical journalist against an attack by an ultranationalist group not only violated the substantive obligations contained in Art. 2, but also Art. 10.[1577]

(e) *Protecting the public's right to receive information*

The reasoning for this elevated protection is that in fulfilling their functions of enabling public debate, the media are acting not only to realise their own human rights, but also those of the recipients of the information, since Art. 10 § 1 ECHR explicitly also guarantees 'freedom … to receive and impart information'.[1578] While the Court has at times phrased public debate merely as an 'interest of democratic society',[1579] over time it has drawn more concrete links to specific human rights norms and has highlighted that the public, which itself consists of human-rights holders, has a right to receive information.[1580] The activity in question, the provision of information and opinions on matters of public interest, is therefore protected both by human rights to provide these services and human rights to receive them. At times, the Court even appears to give precedence to the latter rights despite the fact that the 'public' is not directly involved in the case at Strasbourg,[1581] as in *Selmani and others v Former Yugoslav Republic of Macedonia* (2017), where the Court noted that '[t]hose were important

1574 *Khadija Ismayilova v Azerbaijan* (n 1521), para 158.
1575 *Kılıç v Turkey* App no 22492/93 (ECtHR, 28 March 2000), para 66; see similarly *Dink v Turkey* (n 1556), para 135.
1576 *Gongadze v Ukraine* (n 1563), para 168.
1577 *Dink v Turkey* (n 1556), para 138.
1578 cf eg the long line of cases recently summarised by the Grand Chamber in *NIT SRL v Moldova [GC]* (n 1519), para 184.
1579 cf n 1529 and *Goodwin v UK [GC]* (n 1529), para 45.
1580 Constant jurisprudence since *Informationsverein Lentia and others v Austria* (n 1536), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 184.
1581 Although of course the State is charged with pursuing the public's interests.

elements in the exercise of the applicants' journalistic functions, which the public should not have been deprived of in the circumstances of the present case'.[1582] In keeping with this departure from merely the applicant's own rights as a standard of review,[1583] the Court has explicitly held that '[t]he [national] courts must therefore take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general'.[1584]

(f) *Elevated protection only for 'responsible journalism'*

This additional protection is not attached to a particular status, but is engaged as long as the applicant performs the functions of a journalist,[1585] which is particularly clear from cases such as *Man and others v Romania (dec)*.[1586] There, the Court did not provide elevated protection to the applicant journalists where there was no link to journalists' function of contributing to public debate since the applicants 'were accused of a crime which essentially consisted of refraining from imparting information of public interest in exchange for personal gain'.[1587] In line with this functional approach, the additional protective regime identified above will also only apply where media actors act in accordance with established professional standards. Where applicants do not fulfil these minimum standards described as 'responsible journalism',[1588] they also do not benefit from additional protection. A model example is *Haldimann and others v Switzerland* (2015), where the Court dealt extensively with whether the way the report in question had been made 'was capable of contributing to the public

1582 *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 84.
1583 Which suggests that the analysis proposed in Chapter Nine for legal services might also be fruitfully applied to the media.
1584 *Bozhkov v Bulgaria* (n 1560), para 51.
1585 cf eg *Butkevich v Russia* (n 1569), para 131.
1586 *Man and others v Romania (dec)* App no 39273/07 (ECtHR, 19 November 2019).
1587 Ibid, para 130, where the Court also noted at para 131 that 'because of the nature of the criminal acts under investigation, the current case differs essentially from cases where journalists' right to impart information had been breached'.
1588 *Flux and Samson v Moldova* App no 28700/03 (ECtHR, 23 October 2007), para 26, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 180.

debate on [the] issue'[1589] and made a detailed assessment of the applicant journalists' conduct.[1590] In that regard, the Court highlighted

> that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism.[1591]

Where these minimum standards of professional behaviour are not met, no additional protection will apply.

Moreover, where violations of professional standards are alleged, that can in principle also justify revocation of licenses required under domestic law if there are such licensing requirements. This is frequently the case, for example, in relation to television or radio stations, due to historical technical limitations. Nonetheless, removal of such a license is classed as the most severe possible sanction for a failure to meet professional standards, and is therefore only to be used restrictively,[1592] once again marking the Court's tendency to particularly protect media activities.

(g) *Pluralism as a justification for restricting rights*

While all of the aforementioned shows additional *protection* of Convention rights in order to secure the media's ability to fulfil their functions, the Court has also allowed the State to rely on its responsibility to secure functioning public debate to justify *restrictions* on the rights of applicants acting in a regulated market. For example, in *NIT SRL v Moldova [GC]*, the Grand Chamber noted that it had already 'accepted that the ability of a country's licensing system to contribute to the quality and balance of programmes constitutes a sufficient legitimate aim for an interference', and 'also accepted that interferences seeking to preserve the impartiality

1589 *Haldimann and others v Switzerland* App no 21830/09 (ECtHR, 24 February 2015), para 57.

1590 Ibid, para 61ff. See similarly *Bozhkov v Bulgaria* (n 1560), para 51, where the Court, after an extensive analysis, noted that '[h]aving regard to the above factors, the overall context of the case and the important public interest involved, the Court is satisfied that the applicant acted as a responsible journalist'.

1591 *Haldimann and others v Switzerland* (n 1589), para 61. Constant case law since *Bladet Tromsø and Stensaas v Norway [GC]* (n 1517), para 65, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 180.

1592 *NIT SRL v Moldova [GC]* (n 1519), paras 218, 222.

of broadcasting on matters of public interest' and 'measures intended to ensure the audience's right to a balanced and unbiased coverage of matters of public interest in news programmes' all pursue legitimate aims.[1593]

Moreover, the Court has paid particular attention to the passage in Art. 10 § 2 that '[t]he exercise of these freedoms … carries with it duties and responsibilities'. While that is easily reconcilable both with the wording and with the non-absolute nature of Art. 10, the Court has gone one step further and held that the media have 'tasks', which sits somewhat uneasily with the traditional idea that the State has tasks and individuals have rights since human rights protect the position of the rights holder.[1594] Such 'tasks' include, specifically, those of 'purveyor of information and public watchdog'[1595] and of imparting information and ideas on areas of public interest.[1596]

(h) *Expanding case law to other actors fulfilling similar functions to journalists*

Finally, the strong focus on function reflected in the case law displayed above also influences the scope of the Court's case law: By now, and in light of the decrease in technical barriers which has widened the spectrum of those able to contribute to public debate beyond traditional press outlets,[1597] the Court has extended much of its case law developed regarding journalists to other actors fulfilling similar functions, such as non-governmental organisations and bloggers.[1598]

1593 Ibid, para 174.
1594 See the discussion in Chapter Eight.
1595 *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985), para 58, see recently eg *NIT SRL v Moldova [GC]* (n 1519), para 129. See, for a particularly clear example, *Bozhkov v Bulgaria* (n 1560), para 43, where the Court held that '[t]here can be no doubt that this was a question of considerable public interest … and that the publication of information about it formed an integral part of the task of the media in a democratic society'.
1596 *Lingens v Austria [Plenary]* (n 1522), para 41.
1597 cf, in this vein, the Joint Concurring Opinion of Judges Sajó and Vučinić in *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECtHR, 25 June 2013).
1598 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 159, 168.

II. The Court's case law on the media and on legal services: Similar problems, different analyses

As readers of Chapter Two to Chapter Five will no doubt already have noted, a number of the lines of case law regarding the media resemble those regarding legal services. This is despite the fact that, as a general rule, the Court's case law on the media is more developed and exhibits greater clarity, particularly as regards the wider public interest with which, for legal services, the Court tends to struggle more.

Building on the overview of the case law on the media, this section compares and contrasts the Court's case law on the media and on legal services, highlighting which areas the Court deals with in a similar way and where there are differences. This enquiry proceeds in three parts. A first part (1.) deals with similarities in the actual black-letter law of the Convention, comparing the features of the protective regimes applied to the media and to legal services. A second part (2.) deals with the Court's reasoning, comparing, in particular, the arguments which the Court attaches weight to in deciding the cases brought before it. Finally, a third part (3.) draws together the aforementioned developments to assess to what extent the Court's case law on the media can be fruitfully drawn on to resolve (some of) the problems identified in the Court's case law on legal services.

1. Media and legal services: Doctrinal similarities

In the Court's case law, both the media and legal services involve the exercise of Convention rights not exclusively in the interests of the rights holder, but also in the interests of others and in the public interest. The exercise of human rights by lawyers and by the media is thus protected inter alia for its systemic value.[1599] These rights serve not (only) to fulfil the autonomously determined goals of those exercising them, but equally to further a certain pre-defined public goal. As a result, both legal services and the media have a certain fiduciary nature: Rights are exercised in the interest and on behalf of other rights holders. In the case of the media, this is the part which the Court refers to as the public's right to receive information on matters of public interest. In the case of legal services, it

1599 See Chapter Eight.

is, to date, typically the rights of an identifiable client or clients.[1600] In both cases, the activity in question is protected by the complex of rights both to provide a service and rights to receive it.[1601] This dual function of the rights at stake, to simultaneously further the interests of the rights holder and other public or third-party interests, gives rise to a complex net of considerations that can conflict as well as complement each other. Given that, seen at this level of abstraction, media and legal services share a number of significant features, it is unsurprising that the case law on both types of human rights defender displays some similar traits – which in turn make the divergences in the Court's case law all the more noticeable.

(a) *Structural differences between the case law on media and on legal services*

It is worth noting at the outset that despite the aforementioned similarities, there are also key structural differences between the situation of the media and that of legal services. As will be seen below, the resemblances between the case law on the media and on legal services are, by and large, concentrated on what has been termed the 'external' dimension of legal services in Chapter Three; conversely, there does not appear to be an equivalent for the media to the elevated protection provided for what was termed the 'internal' dimension of legal services (discussed in Chapter Two). This presumably flows from a factual difference in the way the cases arise: The activities of the media, unlike legal services, are not typically individualised and provided on the basis of a 'relationship', but instead, as the term 'mass' media makes clear, are provided without any particular connection between provider and recipient. As a result, the Court's case law protecting

1600 Although note that there is, of course, an argument to be made that the Court's case law on media focusing on 'the public's right' could equally be applied to the right to receive legal services.

1601 For German law, Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 331 notes as many as four possible roots for subjective rights related to broadcasting: '(1) individual rights to broadcast, (2) individual rights to acquire information and form opinions, (3) rights of those working in broadcasting, and (4) rights of social groups to express their views through broadcasting media'.

a special relationship between provider and recipient[1602] exists only for legal services, but not for the media.[1603]

Moreover, there are also areas where there is no parallel case law because the problem only arises for one of the two fields of law. This is, for example, the case concerning Art. 34 protection of lawyers,[1604] since the media cannot be involved as representatives in the right of individual application. To a lesser extent, this also concerns the Court's case law on administrative arrangements.[1605] Since licensing requirements for the media are far less common than for lawyers, there is little case law echoing the Court's jurisprudence on 'self-regulation' and on 'the role of Bar associations', although notably, where regulation does come into play, the Court, for the media, seems to have contented itself with 'independent', rather than 'self-regulating',[1606] arrangements. For much the same reasons, there does not appear to be case law echoing the protection of access to the profession of lawyer,[1607] since the media professions, which have no direct link to the exercise of public power or a State-conferred monopoly, are not usually subject to specific State-controlled access requirements in the same way that legal professions often are.

(b) *Special legal regimes for both the media and legal services*

Turning to the concrete similarities of the Court's case law on the media and on legal services, a first point that is common to both in principle, though not necessarily in its details, is that the Court applies a separate regime of Convention law for those engaging in these activities. Where cases involve the media or legal services, the Court will apply the Convention in a different way to reflect its vision of the importance of these activities for the Convention system as a whole.

1602 See Chapter Two.

1603 Which, presumably, is also the reason why the Court resolves 'media' cases almost entirely via freedom to provide rather than freedom to receive – in the absence of individualised recipients, human rights analysis struggles in these cases, cf below 341ff.

1604 See Chapter Three, 190ff.

1605 For legal services see Chapter Five, 260ff.

1606 cf Chapter Five, 305 and *NIT SRL v Moldova [GC]* (n 1519), para 222.

1607 See Chapter Four, 201ff, although note that that case law is largely unspecific to lawyers.

i. *Protection against the State*

At its most basic, this relates to specific case law on the protection of both the media and lawyers against State interference. As critically diagnosed by Judge Walsh in his Dissenting Opinion in *Goodwin v UK* (1996), 'the Court … has decided in effect that under the Convention a journalist is by virtue of his profession to be afforded a privilege not available to other persons'.[1608] This is evident from cases such as *Magyar Helsinki Bizottság v Hungary [GC]* (2016), where the Court explicitly separated between 'everyone' and 'the press': 'While Article 10 guarantees freedom of expression to "everyone", it has been the Court's practice to recognise the essential role played by the press in a democratic society … and the special position of journalists in this context'.[1609] While the Court has not been as clear regarding legal services, the case law analysed in the previous chapters shows that, similarly to the media, the Convention applies in a different way where legal services are being provided, which the Court in some areas, for example in *Čeferin v Slovenia* (2018), has also explicitly referred to as 'increased protection'.[1610]

Within this special regime, the first common denominator to both fields of law is case law designed to make it more difficult for the State to interfere. Both the media[1611] and lawyers[1612] benefit from specific protection against State action, which manifests as the State having very limited scope to restrict activities performed in the ambit of the functions of the media or legal services. In this regard, the case law on search and seizure (and the related 'chilling effect') is particularly noteworthy, since the Court's case law frequently refers to cases concerning lawyers in cases brought by journalists and vice versa.[1613] For the media, this additional protection manifests as increased protection against threats from State and non-State actors,[1614]

1608 *Goodwin v UK [GC]* (n 1529), Separate Dissenting Opinion of Judge Walsh, para 1, although Walsh was arguably advocating a functional approach, which the Court has since adopted, cf cases such as *Youth Initiative for Human Rights v Serbia* (n 1597).

1609 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 165.

1610 *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018), para 57. The case is discussed in greater detail in Chapter Three at 164ff.

1611 See 319ff.

1612 See Chapter Three, 183ff.

1613 See Chapter Four, 219ff, Chapter Two, 110ff.

1614 See 319ff.

where the Court will frequently focus on the relationship between threats and the applicant's professional activities as a journalist.[1615] However, for legal services, it appears to be limited to additional protection against the State, where cases such as *Cazan v Romania*[1616] and *François v France*[1617] show a clear emphasis on elevated protection.[1618] As regards physical attacks by non-State actors,[1619] the Court has not held that the State has any special protective obligations towards lawyers, despite minority arguments to the contrary.[1620] The Court's requirement that States 'establi[sh] an effective system for the protection of journalists'[1621] therefore does not have an equivalent for lawyers. The Court, to date, has not provided any indication as to the rationale for this differentiation, nor is it clear that threats from non-State actors are necessarily less dangerous to the role lawyers fulfil.

ii. *Independence*

While protection against threats is thus somewhat different, a further limb of protection that is common to both the media and legal services is that those performing the activity in question are, in principle, granted the right to decide independently how to do so, presumably in an attempt to avoid giving the State – and, therefore, potentially bad-faith actors – a right to control the activities of such human rights defenders. Journalists have the right to determine themselves how to go about their work, protected by an elevated threshold for State interference through the Court's jurisprudence granting the media the right to 'a degree of exaggeration'.[1622] Similarly, the Court is loath to allow State authorities to define how legal services should

1615 cf eg *Najafli v Azerbaijan* (n 1563), para 68; *Khadija Ismayilova v Azerbaijan* (n 1521), para 120.

1616 *Cazan v Romania* App no 30050/12 (ECtHR, 05 April 2016), discussed in Chapter Three at 183ff.

1617 *François v France* App no 26690/11 (ECtHR, 23 April 2015), discussed in Chapter Three at 189.

1618 See Chapter Three, 183ff.

1619 cf Chapter Three, 188ff.

1620 cf the Joint Partly Concurring and Partly Dissenting Opinion by Judges Lazarova Trajkovska and Pinto de Albuquerque in *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014), discussed in Chapter Three at 188.

1621 *Khadija Ismayilova v Azerbaijan* (n 1521), para 158, discussed at n 1574 and accompanying text.

1622 See 318.

be effectuated,[1623] and eg where lawyers act in court proceedings, they will be entitled to a particularly large degree of freedom of expression.[1624] To quote *Nikula*, 'it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument',[1625] which gives lawyers 'a certain latitude regarding arguments used in court'.[1626] While the caveat regarding 'supervision by the bench' might initially seem different to the situation as regards the media, it is arguably simply a more explicit version of the case law that applies to both groups – for the media, just as for legal services, the Court has been clear that freedom of expression still has limitations.[1627]

iii. *Differences regarding protection and restriction of rights?*

While the existence of the aforementioned special regimes is indeed a key similarity between the Court's case law on the media and the case law on legal services, there is one notable difference between the two: In contrast to the case law on the media, which consistently elevates Convention protection, the case law on legal services is less unequivocal. While freedom of expression for lawyers will be subject to particular protection as regards freedom of expression in court, lawyers, unlike the media, will also have their freedoms restricted on the basis of their role. This is particularly evident as regards freedom of expression out of court,[1628] where restrictions, justified by reference to the *Nikula v Finland* (2002) doctrine on the 'special status of lawyers',[1629] go beyond those applicable to other human-rights

1623 cf Chapter Two, 121ff, focusing on the 'autonomously determined relationship' between provider and recipient of legal services.

1624 See Chapter Three, 158ff, key cases being eg *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002) and *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005).

1625 *Nikula v Finland* (n 1624), para 54, discussed in Chapter Three at 159.

1626 *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 133, discussed in Chapter Three at 173ff.

1627 cf, for journalistic freedom, *Couderc and Hachette Filipacchi Associés v France [GC]* App no 40454/07 (ECtHR, 10 November 2015), para 144, and for 'a lawyer's freedom of expression in the courtroom' *Kyprianou v Cyprus [GC]* (n 1624), para 174, discussed in Chapter Three at 161ff.

1628 Discussed in Chapter Three at 171ff.

1629 cf eg *Morice v France [GC]* (n 1626), para 132ff. The *Nikula* doctrine is discussed in detail in Chapter Five, 227ff.

holders. This divergence between the special regimes applied to the media and to legal services was clearly enunciated in *Morice v France [GC]* (2015). There, the Grand Chamber explicitly rejected the suggestion made by the CCBE to align lawyers' freedom of expression with that of the media, noting that 'in view of the specific status of lawyers and their position in the administration of justice the Court takes the view, contrary to the argument of the CCBE …, that lawyers cannot be equated with journalists',[1630] focusing instead on lawyers' role as 'protagonists in the justice system'[1631] to determine that lawyers' freedom of expression outside of court would be more restricted than that of other persons. In this way, the special regime regarding legal services consisting of both enhanced protection and additional restrictions is formalised via the Court's 'officers of the court' doctrine, whereas the media are subject to no restrictions based explicitly on their role. While arguments based on the role of lawyers are frequently used to restrict their rights, this does not appear to be the case as regards the media.

The best explanation for this ostensible divergence of case law – consistently elevated protection for the media, a mix-bag for lawyers – is presumably the following: It is primarily a difference of technique, not of outcome. The difference can be understood as being whether limitation to the particular role is applied at the level of restriction – which appears to be the case for legal services – or at the prior level of scope, which appears to be the case for the media. For both lawyers and the media, the Court has an implicit view of which parts of the role are 'essential' for the Convention system (for example, on the Court's view, freedom of expression of lawyers in court) and which parts are not important in the same way. Additional protection will apply only where the human-rights holder is acting within the scope of what the Court perceives their 'essential'[1632] role to be, whereas outside this area no additional protection will be applied.

On this analysis, the ostensible divergence between the media and legal services disappears if one construes the case law correctly. For lawyers, the separation between a role that is particularly protected and other activities that are not is formalised through the 'officers of the court' doctrine and the *Nikula* dictum. For the media, it initially seems as though there is no equivalent type of restriction. However, this is because the Court, for media

1630 Ibid, para 148.
1631 Ibid, para 148.
1632 In the sense of necessary for the Convention system, see n 1517.

cases, resolves the same problem not via an emphasis on additional restrictions, but by adopting a more limited view of the scope of protection. The Court's emphasis on the content of the statements concerned, clear from its focus on 'journalistic reporting on political issues and other matters of public concern',[1633] which the Court consistently applies as a requirement to engage its case law specifically protecting the media, effectively fulfils the same function of defining a role which will be particularly protected, but does so at the level of scope, rather than that of restriction. As a result, it may superficially seem as though the role of the media is used to restrict rights far less frequently than the role of lawyers – but this is due to the fact that the Court takes a more restrictive view of when the enhanced protective regime will be engaged in the first place. In fact, the results in both areas are similar, achieved for legal services via additional restrictions within the enhanced protective regime and for the media by a narrow definition of the requirements for that regime to be engaged.

This latter point is significant because the Court's increased focus on scope, rather than restrictions, for the protection of the media has allowed it to obtain greater clarity regarding the requirements for this protective regime to come into play. Unlike for legal services, where there is some remaining ambiguity in the Court's rhetoric as to whether special protection will apply based upon a certain status or based on the functions exercised,[1634] the Court's focus in media cases is explicitly on granting additional protection based on function rather than on status.[1635] This has been shown, inter alia, by the expansion of those to whom such protection will apply in line with the similar expansion of phenomena such as citizen journalism, and indeed, in *Magyar Helsinki Bizottság* the Grand Chamber explained at length that

> the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate and … may be characterised as a social 'watchdog' warranting similar protection under the Convention as that afforded to the press.[1636]

1633 cf eg *NIT SRL v Moldova [GC]* (n 1519), para 178, discussed at 312ff.

1634 See Chapter One, particularly at 60ff.

1635 Given that media members do not necessarily *have* a specific status, the risk of confusion in these cases was arguably lower than in many of the cases concerning lawyers.

1636 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 166.

Continuing this explicitly functional approach, the Court then

> considere[ed] that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public 'watchdog' … The Court would also note that … the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned.[1637]

This focus on increased protection where a certain function is being fulfilled is a constant feature of the Court's case law on the media,[1638] and is significantly clearer than the Court's case law regarding protection of legal services.

In line with this closer awareness of function, the Court has also been much clearer in identifying that the media are not a monolithic group. While the Court, for legal services, focuses its rhetoric largely on 'lawyers' as a whole with no further differentiation, ignoring the fact that not all lawyers are human rights defenders,[1639] the Court's focus in its media case law on criteria such as 'political speech or … debate on matters of public interest'[1640] allows it to link its specific case law not to the media as a whole, but to the media when fulfilling functions essential to the Convention system, ie enabling public debate as a precondition of democracy. This is an approach which is significantly more advanced than that applied to legal services: Rather than focusing on superficial similarities and applying a different set of norms regardless of whether the function essential for the Convention system is actually being fulfilled, the Court's differentiated case law on the media allows it to limit that case law to situations where what is at stake is actually a particular public interest under the Convention.

The core doctrinal parallel between the Court's case law on the media and on legal services, then, is this: In both areas, the Court has identified a (partly implicit) role which it considers 'essential' to the Convention system.[1641] For the media, this is, roughly speaking, enabling political debate on matters of public interest, whereas for legal services the Court, with some variations, sees it mainly as the role lawyers play in litigation.[1642]

1637 Ibid, para 168.

1638 cf eg *Szurovecz v Hungary* (n 1559), para 63.

1639 On this see Chapter One, 36ff.

1640 *NIT SRL v Moldova [GC]* (n 1519), para 215, see 311.

1641 On role-bearer rights from a conceptual point of view see Chapter Eight, 419ff.

1642 See now particularly clearly *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022), para 109, where the Court only mentioned the importance of lawyers

Where human-rights holders act within what the Court has defined as these roles, their human rights protection will be increased; however, as soon as they leave this role, their protection will not be increased, and may, in the case of lawyers, even be more restricted than that afforded to the general public.

iv. *The Court's greater awareness of the public interest in the media*

While this relates to the protection of individual members of the media or the legal profession while exercising their role, there are moreover significant differences in the way the Court approaches the overarching environment in which these roles are exercised, which largely reflect the Court's generally greater awareness of the public-interest importance of the media. As regards particularly audiovisual media, where States typically have a regulatory framework that serves, inter alia, to prevent market failure and secure pluralism, the Court has made clear statements regarding the States' regulatory obligations[1643] and their role as 'ultimate guarantor', even going so far as to require States to create 'a favourable environment for participation in public debate'.[1644] For legal services, no such statements exist. Instead, the Court seems to be largely unaware that the way legal services are regulated can have a significant impact on the protection of human rights under the Convention. Equally, the Court has not highlighted any kind of 'guarantor' role on the part of the State allocating it responsibility to ensure the availability of legal services, despite the Convention arguably imposing such an obligation on the States. The Court's legal-services case law is a far cry from the clarity of the media case law, where the Court explicitly holds that it is ultimately the State's task to guarantee that the segment of society that is essential for the Convention rights can fulfil its tasks, and that, consequently, the State is legally obliged to put in place reg-

'professional duties' related to 'the rights of the accused and the right of access to a court, which are essential components of the right to a fair trial guaranteed by Article 6 § 1 of the Convention'.

1643 cf 315ff and the Court's constant jurisprudence that '[i]n such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism' (*Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 134), as well as the discussion of *Manole and others v Moldova* (n 1547).

1644 *Uzeyir Jafarov v Azerbaijan* (n 1556), para 68, discussed at 317.

ulation ensuring this outcome. For the media, the Court has held explicitly that the State has an obligation to ensure that this activity, essential to the Convention, take place, whereas for the legal services sector it has not to date found a hard-law obligation on the State to guarantee the existence of legal services.

Finally, this wider lack of awareness of the role that regulation plays in affecting the legal services sector's ability to fulfil its functions also manifests in different case law as regards professional organisations. As discussed in Chapter Five,[1645] Bar associations, as a rule, are not entitled under the Court's case law to bring Art. 34 applications since for Convention purposes they are treated as part of the State.[1646] Given the function professional organisations play in protecting their members against the State, this finding is open to debate.[1647] As such, it is noteworthy that for media organisations the Court takes a different view:[1648] Even where such organisations are organised as public bodies, they will nonetheless be entitled to seek recourse before the Court under Art. 34.[1649] While, as has been previously argued,[1650] the problems caused by Bar associations' inability to rely on Art. 34 should perhaps not be overstated, it is a notable difference that the Court secures the independence of the media, but not the 'independence of the legal profession', which it has taken such pains to highlight,[1651] by allowing these professional organisations to apply to the Court.

1645 294ff.

1646 cf eg *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* App no 34118/11 (ECtHR, 21 May 2013), discussed in Chapter Five at 294.

1647 See Chapter Five, 296.

1648 Which, however, may also be premised on the fact that they do not exercise public power in the narrow sense of eg the regulatory roles discussed in Chapter Five at 291ff, cf eg *Österreichischer Rundfunk v Austria* App no 35841/02 (ECtHR, 07 December 2006), para 49ff.

1649 cf eg *Radio France and others v France (dec)* App no 53984/00 (ECtHR, 23 September 2003); *Österreichischer Rundfunk v Austria* (n 1648), the latter focusing on the existence of 'a framework which ensures the Austrian Broadcasting's editorial independence and its institutional autonomy', para 53.

1650 Chapter Five, 296.

1651 cf eg Chapter Two, 122ff, Chapter Five, 299ff.

2. Media and legal services: The Court's analyses

All of these similarities in individual strands of the Court's case law on the media and legal services are manifestations of a more significant commonality between the two: their 'essential'[1652] nature for the Convention, which is reflected in the Court trying to secure a minimum level of the given activity taking place. The Court has not been this clear for either area, but the fact that this is its main concern – securing a minimum activity level – is clear from a choice of wording that appears for both media and legal services, and indeed, at least for the Grand Chamber, rarely appears *outside* these areas:[1653] That of 'chilling effect', a term which abounds in both areas of law.[1654]

'Chilling effect', in the Court's view, is the risk that certain factors – which the Court guards against in its more specific jurisprudence, and which can range from threats by private actors to negative reactions on the part of the State – can render the exercise of an activity protected by human rights less attractive and thus reduce the level of exercise of that activity.[1655] Wherever the Court refers to 'chilling effect', it is therefore clear that it sees a certain level of the activity in question as desirable from the Convention point of view. The Court does not use this term in relation to any of the multitude of activities that, from a Convention view, are neutral, reflecting exclusively a personal choice on the part of the person exercising the right. Instead, the phrase 'chilling effect' so far appears only where there is a *public* interest in an activity taking place that renders factors which reduce activity level problematic from the Convention point of view.

This is perhaps the most significant argumentative similarity between the Court's case law on the media and on legal services: Both of these make

1652 cf n 1517.

1653 Of the 16 Grand Chamber judgments which rely on the concept, 11 concern either the media or legal services.

1654 For the media, see eg *Pedersen and Baadsgaard v Denmark [GC]* App no 49017/99 (ECtHR, 17 December 2004), para 93, which explicitly cites *Elçi and others v Turkey* (n 1517), discussed in detail in Chapter Five, 240ff, as well as n 1539; for legal services, see eg *Kyprianou v Cyprus [GC]* (n 1624), para 175, 181. The term appears to have first been used by the Court in *Goodwin v UK [GC]* (n 1529), para 39, a case regarding journalists' rights, where one commentator argues it may have been borrowed 'from the case law of the US Supreme Court relating to the First Amendment', Laurent Pech, *The Concept of Chilling Effect* (Open Society European Policy Institute 2021) 8.

1655 cf, as regards 'criminal defence work or human rights protection in Turkey', *Elçi and others v Turkey* (n 1517), para 714.

extensive reference to 'chilling effect', reflecting the Court's position that these activities are desirable *in principle* and that therefore factors reducing the level of activity are inherently problematic. In this way, the focus on 'chilling effect' confirms what has been suggested in the first chapters of this piece: Like the media, legal services are, from the Convention point of view, a necessary, 'essential' condition that cannot, therefore, be fully reduced to the private interests of any individual.

Despite this underlying common consideration, the Court has been far clearer in the way it stresses the public-interest importance of the media than as regards legal services. The State's responsibility to ensure the functioning of media as a segment of society is clearly enunciated in the case law of the Grand Chamber, which explicitly names the State as the 'ultimate guarantor' in this regard.[1656] Such clarity on a State obligation to ensure this level of activity is notably absent for legal services; while even on the Court's case law legal services have a particular importance,[1657] rendering the idea of the State as an 'ultimate guarantor' ripe for transfer, no such transfer has so far taken place, and instead the Court struggles to address the public-interest dimension of legal services.

Against this backdrop, the present section analyses the similarities and differences in the Court's techniques when dealing with cases concerning the media and legal services and which thus concern human rights exercised in the interests of persons other than the rights holder. As has already been shown, the case law on the media is significantly clearer than that on legal services. Nonetheless, there are a number of tendencies where the Court's lines of reasoning converge.

(a) *Human rights in the interests of others*

The first of these is that the Court's case law on both the media and legal services is somewhat unusual from the Convention point of view in that it concerns not only rights, but, in the words of Art. 10 § 2, 'duties and responsibilities' that come with the exercise of these activities. Indeed, the Court, in both types of cases, frequently even makes reference to 'tasks'[1658]

1656 See *NIT SRL v Moldova [GC]* (n 1519), para 184, as well as 313.

1657 See Chapter Five, particularly at 225ff.

1658 For the media cf 323 and eg *von Hannover v Germany (No 2) [GC]* (n 1535), para 102; *Bozhkov v Bulgaria* (n 1560), para 43; for legal services see particularly

that the applicants fulfil, a choice of language that clearly reflects the at least partially public nature of the activity they perform, or, to put it in the Court's words, the 'special position of journalists',[1659] which is itself eerily evocative of the 'special status of lawyers'.[1660]

For both legal services and the media, this use of human rights to further the interests of persons other than the rights holder marks a significant departure from traditional individualistic understandings of human rights, which ground human rights in what they do for the rights holder.[1661] Rather than the classic weighing of the private interests of the rights holder against countervailing public interests, the Court's systemic conception of freedom of expression means that, where the media are concerned, the 'interests to be weighed … are both public in nature'.[1662] Similarly to the cases on legal services, the balancing exercise is no longer just between private and public interests, but between several different public interests. This questions whether doctrines initially developed for balancing between private and public interests, such as proportionality analysis, can or should be applied in the same way,[1663] particularly since in some cases the Court seems to focus so strongly on the public interest that the rights of the individual journalist totally disappear in the balancing exercise.[1664] Indeed, the balancing

Chapter Five, 225ff and eg *Morice v France [GC]* (n 1626), para 149; *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 55.

1659 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1528), para 165.

1660 *Nikula v Finland* (n 1624), para 45, discussed in detail in Chapter Five, 227ff.

1661 On these different conceptions of human rights see Chapter Eight.

1662 *Stoll v Switzerland [GC]* (n 1532), para 116; *Pentikäinen v Finland [GC]* (n 1532), para 94; *Erdtmann v Germany (dec)* (n 1532), para 21; *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 76. See also Oppitz (n 1546) 158, noting that effectively this means that democracy is on both sides of the scale, legitimising both freedom and restriction of freedom, replacing balancing with an internal conflict.

1663 See Chapter Eight, 436ff.

1664 cf eg *Selmani and others v the former Yugoslav Republic of Macedonia* (n 1532), para 76, where the Court weighed 'the interests of the security service in maintaining order in Parliament and ensuring public safety' against 'the interests of the public in receiving information on an issue of general interest' without even referring to the journalist's own rights, or *Goodwin v UK [GC]* (n 1529), para 45, where the Court weighed a third party's interests against 'the interest of democratic society in securing a free press' and 'the vital public interest in the protection of the applicant journalist's source' without any reference to the position of the applicant themselves. This approach appears frequently in the Court's case law, cf also *Erdtmann v Germany (dec)* (n 1532), para 21, or *Bozhkov v Bulgaria* (n 1560), para 51.

exercise performed in *Goodwin v UK* (1996) itself highlights the drastically different role that balancing can assume in these cases: In *Goodwin*, the public interest was weighed against a private one, but in reversed roles – the *public* 'interest of democratic society in securing a free press'[1665] was used to justify *exercise* of the human right, while the *private* interest of the third-party company in obtaining disclosure of the applicant's sources was invoked to justify restrictions on the applicant's rights.[1666] Whether such balancing of competing *public* interests is best done in the form of human rights litigation is open to debate, particularly in light of the fact that the Court continues to ostensibly balance the applicant's rights against the public interest.

In line with this emphasis on the public rather than the private, the Court has also clearly taken into account the wider 'constitutional dimension' of cases concerning both the media and legal services.[1667] It does this, in particular, by drawing on the general context beyond the individual case at hand when deciding on applications,[1668] as well as by drawing heavily on the abstract norms contained in soft-law documents. However, it is worth noting that the Court has generally recognised more clearly the constitutional dimension of cases involving the media, where it highlights the 'essential role' in practically all cases,[1669] than that of cases concerning legal services, where the cases in which it explicitly discusses the wider implications of legal services for the Convention system are comparatively rare and even then the Court's analysis is frequently far from clear.[1670]

1665 *Goodwin v UK [GC]* (n 1529), para 45.

1666 Ibid, para 45.

1667 Which is also reflected in the large number of third-party interventions in both groups of cases, see, for media freedoms, eg *Centro Europa 7 Srl and Di Stefano v Italy [GC]* (n 1546), para 126, or *Khadija Ismayilova v Azerbaijan* (n 1521), para 72ff, and for legal services Chapter Five, n 1239, 1458.

1668 Which may also be seen as a reflection of its case law requiring the State to create a 'favourable environment for participation in public debate', cf eg *Huseynova v Azerbaijan* (n 1573), para 120. Note, for a legal-services case that discusses the wider context extensively, eg *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), especially para 214ff and the points following the Court's finding that 'the applicant's situation cannot be viewed in isolation'.

1669 Although this may also be due to the Court's more restrictive approach to the application requirements of its 'media' case law (discussed at 331ff), where contribution to a public debate will already be a criterion to even engage the separate 'media' regime.

1670 See, for a recent example of the difficulties in the Court's approach to legal services, *Mesić v Croatia* (n 1642), discussed in detail at 344ff below.

Nonetheless, even for cases concerning lawyers, where the Court has the impression that the group as a whole is concerned – such as in the cases using the *Elçi and others v Turkey* (2003) dictum –,[1671] the Court will generally elevate the level of Convention protection.

This focus on context beyond the individual case at hand is significant because it underlines the finding above that the Court is not just concerned with the realisation of the Convention guarantees in an individual case, but with ensuring that a certain minimum level of the activity in question takes place. The Court argues in individual cases based on the impact on other people exercising a similar activity, since '[a]llowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned'.[1672] This is particularly clear in the more recent case law regarding countries with a deteriorating human rights record.[1673] Here, the Court will go beyond the facts of the present case to include the general situation in a given country in its reasoning. For example, in *Khadija Ismayilova v Azerbaijan* (2019), the Court '[took] note of the reports on the general situation in Azerbaijan concerning the freedom of expression and safety of journalists' and

> consider[ed] that such an environment may produce a grave chilling effect on freedom of expression, including on the 'public watchdog' role of journalists and other media actors and on open and vigorous public debate, all of which are essential in a democratic society.[1674]

1671 Discussed in Chapter Five, 240ff.

1672 *MAC TV sro v Slovakia* (n 1530), para 44. See also eg *Kozan v Turkey* App no 16695/19 (ECtHR, 01 March 2022), para 68, where the Court focused on an 'effet dissuasif, non seulement sur le magistrat concerné lui-même, mais aussi sur la profession dans son ensemble'.

1673 cf eg, as regards Turkey, *Ali Gürbüz v Turkey* App no 52497/08 (ECtHR, 12 March 2019), para 77, where the Court noted 'that the criminal proceedings repeatedly brought against the owners, publishers and editors-in-chief of newspapers and magazines, like the applicant, on the sole grounds that they had published statements [made by organisations prohibited under Turkish law] may also have the effect of partly censuring media professionals and limiting their ability publicly to express an opinion which has its place in a public debate', or, as regards the Russian Federation, the critical reference in *Novaya Gazeta and others v Russia* (n 1533), para 61.

1674 *Khadija Ismayilova v Azerbaijan* (n 1521), para 161 – note the reference to Recommendation CM/Rec(2016)4 and the description 'by the Commissioner for Human Rights of the Council of Europe, the third-party interveners and the applicant herself'.

Similarly, the Court has generally been particularly vigilant where the context of a case indicates that it may have a particular 'chilling effect',[1675] while it has granted States a wider margin of appreciation where eg '[t]he applicant's conviction amounted only to a formal finding of the offence committed by him and as such could hardly, if at all, have any "chilling effect" on persons taking part in protests … or on the work of journalists at large'.[1676] This case law is strikingly similar to that concerning the condition of legal services, where the Court has equally drawn on context beyond the case at hand to modify the legal standards it applies.[1677]

Given that the cases concerned often relate to broader, abstract problems, it is unsurprising that the Court tries to react by referring to abstract norms,[1678] which, for both media and legal services, are typically soft-law provisions.[1679] Case law here is plentiful, and reflects the plethora of existing soft-law documents.[1680] However, as regards the media, since the

1675 *Huseynova v Azerbaijan* (n 1573), para 115.

1676 *Pentikäinen v Finland [GC]* (n 1532), para 113. See also eg *Erdtmann v Germany (dec)* (n 1532), para 26, explicitly ruling out a chilling effect ('the Court is satisfied that this penalty would not discourage the press from investigating a certain topic or expressing an opinion on topics of public debate') – both cases show, once again, that the Court will be less concerned where it thinks that there is no likely impact on the activity level regarding media.

1677 Discussed in detail in Chapter Five, 240ff in the section on the *Elçi* dictum, with particular reference, once again, to the problematic situation in Azerbaijan.

1678 Conversely, use of comparative law is far more pronounced in relation to the media (cf *NIT SRL v Moldova [GC]* (n 1519), para 110ff) than as regards the legal services sector, where the Court generally pays no attention to the large differences in approach within Europe.

1679 With, of course, all the associated problems which this brings. For an introduction, see eg Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (15th edn, Dalloz 2020), para 405ff; Vladislav Leonidovič Tolstyx, *Kurs Meždunarodnogo Prava* (Prospekt 2019) 157ff; Andreas von Arnauld, *Völkerrecht* (4th edn, C. F. Müller 2019), para 278ff. As Grabenwarter and Pabel (n 1518), § 5, para 12, note, the non-binding nature of these instruments is not reflected in the role they occupy in the Court's case law. Soft law on legal services is discussed in Chapter One, 34ff.

1680 As regards use of soft law by the Court in relation to the media, see, among many others, eg the Grand Chamber judgments in *NIT SRL v Moldova [GC]* (n 1519), para 97ff, *Pentikäinen v Finland [GC]* (n 1532), para 55ff, or *Goodwin v UK [GC]* (n 1529), para 39. Notably, this use of soft law is not confined to the Grand Chamber, with other formations citing soft law, cf eg the almost 20 pages cited in *Manole and others v Moldova* (n 1547), para 51ff. As regards the use of soft law in cases related to legal services, see, in particular, the *Elçi and others v Turkey* (n 1517) line of cases (discussed in detail in Chapter Five, 240ff), as well as cases such as eg *Cazan v Romania* (n 1616), particularly at para 42.

passing of Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, the Court has concentrated most of its citations on that document as the most recent authoritative statement. Typically, it has not only listed it in the section on relevant legal materials but explicitly cited the Recommendation in the course of its reasoning.[1681] This case law would tend to show a gradual 'hardening' of that soft-law document,[1682] as the Court has drawn on it significantly in its interpretation of the (legally binding) European Convention on Human Rights.

(b) *Rights to provide and receive*

While use of soft law is thus a unifying feature of the case law on the media and on legal services, there are also significant differences between the techniques employed by the Court in both areas. This concerns, in particular, the way the Court uses the complex of rights to provide and to receive. While the Court highlights that other human-rights holders have a right to *receive* the information communicated by the media, it does not appear that this second set of rights has had any significant impact on the case law. There do not appear to be cases of potential recipients of media communication bringing individual applications based on their right to receive information. This stands in stark contrast to legal services; as shown in Chapter Two,[1683] the Court will often rely *exclusively* on the rights of the recipient of legal services, particularly when it comes to issues concerning the internal relationship between recipient and provider of legal services,

1681 *Huseynova v Azerbaijan* (n 1573), para 72; *Mazepa and others v Russia* (n 1563), para 73; *Khadija Ismayilova v Azerbaijan* (n 1521), para 69, 161; *Ali Gürbüz v Turkey* (n 1672), paras 46, 64, 66–67; *Szurovecz v Hungary* (n 1559), para 15; *Man and others v Romania (dec)* (n 1586), para 131. Depending on the outcome of that process, this is one potential future for the project of a 'European Convention on the Profession of Lawyer', discussed in Chapter One at 47.

1682 As in *Ali Gürbüz v Turkey* (n 1672), para 67, where the Court explicitly 'subscribe[d] to the affirmation set out in the aforementioned Committee of Ministers Recommendation to the effect that the frivolous, vexatious or malicious use of the law and legal process can become a means of pressure and harassment, especially in the context of multiple law suits', or *Man and others v Romania (dec)* (n 1586), para 131, where the Court drew on the Recommendation to better define the 'broad scope of protection' that 'journalists should enjoy'.

1683 cf Chapter Two, 95ff, 119ff.

although it seems difficult to find a clear rationale for when the Court will use which set of rights.

This finding is noteworthy because it shows that, despite highlighting for both groups of cases that there is an interest protected by human rights both in providing and in receiving reporting on matters of public interest and legal services, the Court uses this dyad of human rights differently. While legal services are framed more clearly in terms of rights on the parts of both provider and recipient, the Court is inconsistent in the way it uses this complex. Conversely, as regards the media, there is a mismatch between the Court's rhetoric and its practice: Although the Court does highlight that there is a right to receive information by means of the media, case law directly concerning this right is noticeable by absence, with the Court's case law dominated almost entirely by media organisations complaining that their ability to *provide* such coverage is being interfered with. This means that the inconsistencies of the Court's case law as regards legal services, where it is not clear according to which standards the Court will choose whether to use rights to receive, rights to provide, or both, are not repeated for the media. However, it also means that an argument framed in the language of human rights is not reflected in actual enforceable human rights claims. At present, despite ostensible emphasis on a right to receive information on matters of public interest, there is no equivalent in the Court's case law to the 'internal' provider-recipient relationship identified for legal services in Chapter Two in relation to the media. Instead, the Court uses the recipients' rights only incidentally when assessing the provider's claims – which, in fact, is a parallel to an argument used in the cases brought by providers of legal services.[1684]

The most probable explanation for why the Court does not use rights to receive to a significant degree in its case law on the media may be a desire to prevent *actio popularis* claims. Unlike legal services in the Court's case law, where the number of potential claimants is inherently limited by the Court's focus on a 'relationship … based on mutual trust

1684 cf *Nikula v Finland* (n 1624), para 49, discussed in Chapter Three at 159ff, the Court noting that it 'would not exclude the possibility that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. "Equality of arms" and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties'.

and understanding',[1685] the lack of a special relationship between media provider and recipient means that the group of persons who could bring a claim arguing that their right to *receive* information has been violated is hard to define ahead of time. Using the rights of recipients in media cases would therefore create tension with the Convention's firm stance against *actio popularis* claims, expressed, for example, in the requirement of victim status in Art. 34 ECHR, since it would not be clear how the Court should differentiate between those who can claim a right to receive and those who cannot. The end result is that, while the Court highlights it in its statements, a right to receive has not played a significant role in the Court's case law on the media. Simultaneously, this also raises the question whether focusing only on rights is really appropriate here,[1686] since the Court uses these rights in name only but then refuses to further subjectivise the public interest in a functioning media sector.

Moreover, the inconsistencies identified above are indicative of a broader problem: Unlike the 'media' cases, which the Court sees as a separate group of cases treated by reference to common standards and citing other media cases, the Court, by and large, seems to be far less aware that there even *is* a category of 'legal services' cases. Instead of resolving cases concerning legal services according to standards applied to other cases concerning legal services, the Court will frequently mix and match the case law it uses, drawing on cases from a variety of fields rather than focusing on legal services. This is in keeping with a broader difference between the Court's case law on media and on legal services: The Court, by and large, struggles far more to analyse the latter in a coherent and convincing manner that reflects all the aspects involved.

(c) *The Court's difficulties with legal services:* Mesić v Croatia *as a model case*

A model case is the recent First Section judgment in *Mesić v Croatia* (2022), which demonstrates all of the difficulties and inconsistencies in the

1685 See Chapter Two, 70ff. It is worth noting that the Court has not yet had occasion to deal with legal services provided outside of such personalised relationships, which, with the advent of legal tech, are likely to become more widespread in at least some areas of law.

1686 On this point see Chapter Seven.

Court's current approach to legal services. The facts of the case[1687] can be summarised as follows: A lawyer in France, Ivan Jurašinović, filed a criminal complaint on behalf of a client alleging that a group including the then-President of Croatia, Stjepan 'Stipe' Mesić, had been implicated in an attempt on the client's life.[1688] Asked about this serious allegation by the media, Mesić made derogatory statements about the lawyer's mental health,[1689] which led Jurašinović to successfully sue for defamation in the Croatian courts.[1690] Mesić then applied to the Strasbourg Court, arguing that the civil judgment ordering him to pay damages had violated his right to freedom of expression.[1691]

The case, therefore, involved essentially two elements: Jurašinović's reputation and the protection of lawyers' professional activities on behalf of clients, leading to a combination of different private (Jurašinović's own private interests in his reputation; the client's interest in his being able to represent him effectively) and public (the interest in lawyers being able to provide effective representation as a precondition of the rule of law) interests in play. Instead of acknowledging this complex situation, the Court focused only on Jurašinović's interests: It 'accept[ed] that the interference pursued a legitimate aim, as it was intended to protect the reputation or rights of others – namely the reputation of Mr Jurašinović'.[1692] In essence, the Court therefore identified as a legitimate aim only Jurašinović's private interest, rather than eg creating a link to 'maintaining the authority and impartiality of the judiciary' by means of protection of legal services.[1693]

1687 To the extent relevant here – the case also concerned an Article 6 § 1 'reasonable time' claim (*Mesić v Croatia* (n 1642), para 116ff), which, however, is not specific to legal services and thus not discussed below.

1688 Ibid, para 6.

1689 Ibid, para 11, 'Why this advocate who lodged the criminal complaint says that I am [H.P'.s] political patron is probably known only to him, but I would suggest to him that he visit Vrapče [a psychiatric hospital] when he comes to Zagreb because people [such as him] can receive effective treatment there. It is a great opportunity; it won't cost him a lot and our physicians are known for their efficiency'.

1690 Ibid, paras 14, 23, ultimately resulting in the enforcement of a claim of some EUR 17,000 against Mesić.

1691 Ibid, para 27.

1692 Ibid (n 1642), para 78.

1693 cf the argument advanced in Chapter Nine at 474, which runs, in essence, that, since the Court has interpreted 'authority of the judiciary' under Art. 10 § 2 as 'includ[ing], in particular, the notion … that the public at large have respect for and confidence in the courts' capacity to fulfil [their] function' (*The Sunday Times (No 1) v UK [Plenary]* App no 6538/74 (ECtHR, 26 April 1979), para 55) and that

The Court then went on to balance only between 'freedom of expression, as protected by Article 10, and on the other [hand] the right to respect for private life enshrined in Article 8', making reference to the media case of *Axel Springer AG v Germany [GC]* (2012)[1694] and completely ignoring the fact that legal services were at issue in the present case, and that even Jurašinović himself had explicitly 'submitted that he had an interest in intervening in the present case both in his professional capacity as an advocate, and in his private capacity as the victim of the applicant's statement'.[1695] Without clarifying which weight was to be attached to these, the Court went on to state, after a list of criteria developed for the press,[1696] that

> [i]n cases such as the present one, domestic courts may also be required to take into account certain additional criteria: in this case, for example, the applicant's status as a politician and as a high-ranking State official, and on the other hand, Mr Jurašinović's status as an advocate, may be of importance for the outcome of the balancing exercise.[1697]

Having found that 'the domestic courts did not apply the criteria laid down in the Court's case law for balancing freedom of expression with the right to reputation', the Court 'f[ound] that it must carry out the required balancing exercise itself'.[1698] Despite noting that Jurašinović 'had lodged the criminal complaint in his professional capacity – namely as an advocate acting on behalf of his client'[1699] and including a separate sub-heading entitled 'The applicant's status as a high-ranking State official and Mr Jurašinović's status

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'for the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation' (*Kyprianou v Cyprus [GC]* (n 1624), para 175), one could easily class protection of legal services as part of protection of the authority of the judiciary.

1694 *Axel Springer AG v Germany [GC]* (n 1524). *Mesić v Croatia* (n 1642) is in general noteworthy for once again applying a colourful mix of cases on the media and on legal services to resolve a case that does not concern the media.

1695 *Mesić v Croatia* (n 1642), para 64. The public dimension was also highlighted by the French National Bar Council and the Paris Bar Association, who, in their third-party interventions, focused only on 'the need to protect the freedom of expression of advocates', ibid, para 74.

1696 Ibid, para 85, with reference to *Axel Springer AG v Germany [GC]* (n 1524) and *Couderc and Hachette Filipacchi Associés v France [GC]* (n 1627).

1697 *Mesić v Croatia* (n 1642), para 86.

1698 Ibid, para 93. This is in itself noteworthy, since in other cases the Court has already focused on the mere absence of a balancing exercise. See eg the Court's statements in *Reznik v Russia* App no 4977/05 (ECtHR, 04 April 2013), para 43, discussed in Chapter Four, 211ff.

1699 *Mesić v Croatia* (n 1642), para 94.

as an advocate',[1700] the Court did not clarify exactly what the relationship between the latter's human rights and legal services was. Instead, the Court simply skipped to the following general considerations:

> The Court has in a number of cases emphasised that lawyers play a vital role in the administration of justice and that the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the Convention …
>
> It is further mindful of the occurrence of harassment, threats and attacks against lawyers in many Council of Europe member States. …
>
> … it considers that high-ranking State officials attacking the reputation of lawyers and making them objects of derision with a view to isolating them and damaging their credibility – as the applicant did in the present case – is often as effective as a threat in preventing lawyers from exercising their professional duties. Such statements could, as noted by the interveners …, have serious consequences for the rights of the accused and the right of access to a court, which are essential components of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.[1701]

Instead of explicitly clarifying that the State is under both obligations derived from individuals' private interests and under undirected duties based on public interests,[1702] the Court instead opted for this series of largely free-floating remarks, which bear only a tenuous relationship to the legitimate aim the Court had identified earlier, the protection of Jurašinović's reputation.[1703] Rather than attaching these arguments to Jurašinović's activity as providing legal services, or to the rights of his client in receiving them, or to an undirected duty on the State as a guarantor for legal services, the Court did not choose any clear normative point of reference for arguments that, clearly, were central to its reasoning.

To encompass the full range of possible inconsistencies, the Court then turned to the 'consequences of the statement and the severity of the sanction',[1704] where it held that

1700 Ibid, para 103.
1701 Ibid, paras 107–109. Note the departure from Jurašinović's own rights, which the Court had previously identified as the legitimate aim the State measures had been pursuing.
1702 For this analysis see Chapter Seven (introducing these concepts) and Chapter Nine (applying them to legal services).
1703 *Mesić v Croatia* (n 1642), para 93.
1704 Ibid, para 111.

> [m]oreover, as established above ..., the applicant's statement was not only injurious to Mr Jurašinović's reputation but was also capable of having a 'chilling', dissuasive effect on his exercise of his professional duties as an advocate. Therefore, the award of damages in the present case was, despite its size, an appropriate sanction to neutralise that chilling effect and proportionate to the legitimate aim of protecting the reputation of Mr Jurašinović.[1705]

Given the Court's analysis up to this point, this reasoning is a non-sequitur. The fact that the applicant's statement was capable of having a chilling effect on the exercise of Jurašinović's professional duties as an advocate was relevant not to the legitimate aim of protecting the reputation of Mr Jurašinović, but instead to the aim of securing the ability of lawyers to fulfil their functions, in line with the interests – Mr Jurašinović's and his client's private interests as well as the public interest in lawyers' activities – identified above. In this regard, *Mesić v Croatia* shows clearly the difficulties with the Court's current analysis of legal-services cases: The Court's exclusive use of directed duties[1706] based on human rights, a tool traditionally premised on the private interests of the rights holder, struggles to adequately conceptualise situations where the interests of other persons and the public interest are involved.[1707] Conversely, as regards the media, the Court's case law is significantly more developed, largely due to the explicit naming of a public interest in the media fulfilling their functions and a corresponding undirected duty on the State.[1708]

To complete this picture, the Court in *Mesić* closed by noting that

> [h]aving regard to all the foregoing considerations, the Court concludes that the interference with the applicant's freedom of expression was 'necessary in a democratic society' for the protection of Mr Jurašinović's reputation and to avoid a 'chilling effect' on professional duties carried out by advocates,[1709]

totally ignoring that only six pages earlier it had accepted 'that the interference pursued a legitimate aim, as it was intended to protect the reputation or rights of others – namely the reputation of Mr Jurašinović',[1710] which was equally the only point it referred to above when 'balancing freedom of expression with the right to reputation'.[1711] '"Chilling effect" on the pro-

1705 Ibid, para 113.
1706 Discussing directed and undirected duties see Chapter Seven, 358ff.
1707 Discussing this in greater detail Chapter Seven and Chapter Eight.
1708 See 310ff.
1709 *Mesić v Croatia* (n 1642), para 114.
1710 Ibid, para 78.
1711 Ibid, para 93.

fessional duties carried out by advocates'[1712] – advocates plural, ie going beyond Mr Jurašinović himself – appears out of nowhere *after* the Court's reasoning, in the conclusion. This shows that the Court, while arguably aware that there is something special about these cases which goes beyond the applicant's private interests, does not know quite how to deal with these points.

Mesić therefore shows that the Court, for legal-services cases, still struggles significantly with the complex of private and public interests identified above. In this regard, the Court's media case law is far more advanced. There, the Court consistently highlights the multifaceted role of human rights exercise in media cases – serving not only the rights holder's own interests, but also the interests of others and the public interest in debate on matters of public interest –,[1713] and reinforces the media's position due to its role in securing other interests and a corresponding obligation on the State to guarantee this activity. For legal services, rather than highlighting this complex human rights situation, the Court typically flees into vague language and general considerations,[1714] avoiding a clearer normative foundation of additional protection for legal services as securing human rights and part of a State obligation to secure the rule of law – where it even notices this public-interest dimension at all, as there are also cases[1715] where the Court has seen *only* the public interest in the media and overlooked that in legal services.

While this point and the other differences identified above are true inconsistencies, some of the discrepancies between cases involving the media and involving legal services arise from characteristics inherent to the cases brought before the Court. One such difference is the prevalence, in media cases, of multipolar relationships involving multiple competing[1716] human rights. An almost classic constellation of cases involves balancing the media's rights against third-party rights such as the right to respect

1712 Ibid, para 114.

1713 See 310ff.

1714 See Chapter Five, 225ff.

1715 cf eg *Aquilina and others v Malta* (n 1520), para 43ff; *Semik-Orzech v Poland* App no 39900/06 (ECtHR, 15 November 2011), para 41ff, discussed in greater detail in Chapter Four at 204ff. See also Chapter Nine, 456ff.

1716 In this regard, these cases differ from the 'rights to provide/rights to receive' dynamic discussed above because rights to provide/receive legal services or information on matters of public interest are not in competition with each other, but mutually reinforcing.

for private and family life under Art. 8 ECHR.[1717] While there are also legal-services cases where this is an issue, particularly as regards freedom of expression for lawyers versus the personality rights of other participants to the proceedings,[1718] these cases are rarer because there are significant doubts as to whether persons acting in the exercise of a State function can properly be seen as exercising human rights.[1719] As such, it is generally more common for legal-services cases to involve balancing against public interests, such as in effective criminal prosecution.[1720]

Finally, in addition to the similarities and differences discussed above, it is also worth noting that the case law on the media and on legal services share some of the same blind spots. This relates particularly clearly to the economic dimension of those activities.[1721] For both legal services and the media, the Court has not yet addressed threats caused by economic factors negatively affecting the activity level in the area concerned, such as the provision of such services being so unattractive economically that the activity ceases.[1722] This oversight may be because, on the Court's present analysis, this point is difficult to capture: The economic conditions of a given market are difficult to analyse from the perspective of the private interests of any individual participant on that market because the very nature of the market economy requires competition in which there will invariably be winners and losers. In this regard, an analysis of the kind proposed in Chapter

1717 To pick a single emblematic case: *von Hannover v Germany (No 2) [GC]* (n 1535) and the multitude of references therein.

1718 cf *Nikula v Finland* (n 1624) and *Morice v France [GC]* (n 1626) as well as Chapter Three, 154ff, and, recently, *Mesić v Croatia* (n 1642) itself.

1719 Discussing this point Chapter Eight, particularly at 426ff.

1720 cf eg *M v the Netherlands* App no 2156/10 (ECtHR, 25 July 2017). This focus is also partly due to the very litigation-focused role that the Court accords to lawyers.

1721 Notably, what little awareness the Court has shown, particularly in the *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) line of cases (discussed in Chapter Five at 231ff), has been focused primarily on a perceived tension between legal services' commercial and public-interest dimensions. To the extent ascertainable, this point does not seem to have arisen in media cases.

1722 As regards, for example, criminal defence in England see eg Catherine Baksi, 'Criminal defence: dead in a decade?' (2022) <https://www.lawgazette.co.uk/commentary-and-opinion/criminal-defence-dead-in-a-decade/5111081.article> accessed 08 August 2024, the underlying Christopher Bellamy, *Independent Review of Criminal Legal Aid* (2021), particularly para 1.33ff and, now, The Law Society, 'Westminster update: Law Society wins criminal legal aid judicial review' (2024) <https://www.lawsociety.org.uk/topics/blogs/law-society-wins-criminal-legal-aid-judicial-review> accessed 08 August 2024.

Seven may hold the key to providing guidance on State obligations without creating overly strong positions on the part of any identifiable individual.

3. The Court's case law on the media: A source of inspiration for the case law on legal services?

Having examined the similarities and differences between the Court's case law on legal services and its case law on the media, the question arises to what extent the case law on legal services could be usefully informed by that on the media. The background to assessing the potential of such a transplant is the parallel nature of the problem as identified above: that of a certain – independent – social activity that the Court has identified not only as reflecting the rights holder's own interests, but as 'essential'[1723] to the Convention system because it furthers a variety of public and private interests.

While the problem, at this level of abstraction, is very similar, the Court, on the whole, has been far more aware of the wider, public-interest importance of the media than of that of legal services. References to the key role of the media abound and, crucially, have a distinct impact on the Court's case law. Conversely, while the Court has at times found kind words regarding legal services, its case law does little to secure that this segment of society, proclaimed as part of 'the very heart of the Convention system',[1724] can actually fulfil its functions in the Convention system. In this respect, the case law on the media is far clearer and more explicit than that on legal services.

To a certain extent, this could be a side-effect of the stricter approach to the application of the regime concerning the media than of that regarding legal services.[1725] While the Court focuses on 'lawyers'[1726] or 'the legal profession'[1727] globally, without visibily noticing the significant difference as regards the level of human rights defence involved,[1728] its case law on the media is explicitly limited to those situations where the media are actually

1723 cf n 1517.
1724 *Elçi and others v Turkey* (n 1517), para 669, discussed in detail in Chapter Five, 240ff.
1725 cf 330ff.
1726 cf the *Nikula* dictum, discussed in detail in Chapter Five, 227ff.
1727 cf the *Elçi* dictum, discussed in detail in Chapter Five, 240ff.
1728 On this see Chapter One, 36ff.

performing a function of value to a public interest under the Convention: political speech or debate on matters of public interest.[1729] The Court's 'media' case law explicitly applies not wherever anyone publishes material, but only where the relevant actors are making a contribution within the ambit of the role that is significant to the Convention. This focus on role-based protection, technically manifested through an additional requirement at the level of scope which determines whether the enhanced protection of the Convention applies, allows the Court to custom-tailor its case law to protect only those activities which, from the Convention point of view, are actually key, filtering out other activities that may outwardly look similar but do not further any Convention interest.

This lack of a similar differentiation within the groups of 'lawyers' or 'the legal profession' may go some way towards explaining why the case law on the media is so much better developed: Introducing an additional requirement linked to human rights defence when determining the scope of the Court's enhanced protection case law allows the Court to limit its statements to those areas where the activity being fulfilled actually pulls towards the relevant Convention public interest. This, in turn, allows the Court to more clearly elevate protection for those activities, since it does not have to pay attention to the impact its case law will have for activities that, actually, do not reflect such a broader Convention goal. Simultaneously, such an explicit focus on whether the applicant is acting in a role that furthers a public interest under the Convention also permits for clearer discussion of how such roles should be understood, which is currently inhibited by the Court's largely tacit approach.[1730]

The approach currently taken by the Court, of ostensibly applying additional protection to all 'members of the legal profession' regardless of their link to human rights defence, is therefore problematic; as the Court itself seems to sense when it comes to the level of restriction, it *does* make a difference for Convention purposes whether the lawyer in question is acting

1729 *NIT SRL v Moldova [GC]* (n 1519), para 215; *Axel Springer AG v Germany [GC]* (n 1524), para 91; as well as 312ff.

1730 See, for example, the amount of analysis that was necessary to establish, in Chapter Three, that the Court essentially sees lawyers' representative role as limited to litigation (see now also *Mesić v Croatia* (n 1642), para 107ff, arguing exclusively by reference to Art. 6 and the 'full implementation of the fundamental right to a fair trial') – whether lawyers' human rights defence role is really limited this way is surely a debate that needs to be had, but which is currently obstructed by the Court's lack of transparency in its approach.

as a human rights defender or not. However, due to its prior unequivocal wording regarding a different regime for the entire group, the Court, if it wants to reflect the differentiation between human rights defence and other types of legal work, is then forced into case law that, outwardly, looks inconsistent. This problem does not arise for the media, where the Court in the first place only applies its additional protective case law if a human rights defence function is being fulfilled, allowing it to develop a more coherent and robust system for those human-rights holders that fulfil 'essential' Convention functions.

If there are therefore good arguments to be made that the Court could learn from its own case law regarding the media to bring greater clarity to its case law on legal services, this also extends to the clarity with which the Court has enunciated the State's obligation to maintain the functioning of this sector. The State, in the Court's jurisprudence, is nothing less than the 'ultimate guarantor' of a functioning media sector. This is because without such a media sector, States cannot reach the goals – democracy, human rights, rule of law – to which they have subscribed, with binding legal force, in ratifying the Convention. This case law could be easily transferred to the legal services sector, at least for those segments which truly concern human rights defence: Without legal services in the defence of human rights, the Convention goals cannot be reached, which explains why the Court has taken the strong step of referring to 'the very heart of the Convention system'.[1731]

Nonetheless, the Court has so far shied away from naming the State as responsible for ensuring a functioning legal services sector. While for a functioning media sector, the State is classed as an 'ultimate guarantor' with corresponding obligations to ensure a favourable environment,[1732] no such finding has been made as regards the State's responsibility to ensure the existence of legal services. Indeed, even though eg the *Elçi* dictum identifies a similar problem to the difficulties that defects in the media sector pose to the Convention system, and the Court, in subsequent case law, has called for increased scrutiny by the State judiciary in these cases,[1733] the Court

1731 cf the *Elçi* dictum, discussed in detail in Chapter Five, 240ff.

1732 See 315ff.

1733 cf Chapter Five, 255, citing *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 214; *Kolesnichenko v Russia* App no 19856/04 (ECtHR, 09 April 2009), para 31; *Yuditskaya and others v Russia* App no 5678/08 (ECtHR, 12 February 2015), para 27; *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020), para 125.

has not highlighted that the State is equally the 'ultimate guarantor' of the existence of legal services. Perhaps the Court thought that this much was already clear from its reference to 'the very heart of the Convention system'; but finding explicitly that the States have undertaken a guarantee for this 'heart' would bring greater clarity by making the foundations of the State judiciary's obligations of scrutiny clearer and linking this to a wider legal obligation on the State to ensure that legal services exist, which could then be clearly put into relation with applicants' rights.

Nevertheless, the Court has so far avoided clarifying exactly what the responsibility of the State is in this area. It is submitted that just as the State is the 'ultimate guarantor' of a functioning media sector, it is also the 'ultimate guarantor' of the existence of legal services. Explicitly finding such an obligation, and a corresponding obligation to regulate to promote a favourable environment for this area of human activity – as the Court has done for the media – would significantly clarify the interpretation of the Convention.

The aforementioned focus on a certain role which is to be 'guaranteed' also goes some way towards addressing a related ambiguity in the Court's case law: whether it focuses on function or on status.[1734] As discussed above, much of the Court's language sounds as though it attaches to a specific status, when in reality, for Convention purposes, it is the *function* of providing legal services in the defence of human rights that is decisive. For the media, the Court has never fallen into this trap: Since the media typically do not have a certain 'status', there was no risk of the Court confusing status and function – for the media, the Court has always been aware that from the Convention point of view, what counts is what is done rather than the formal status of the person doing it. Once again, the Court's case law on the media reaches similar results as that on legal services, but is much clearer in doing so – as such, it seems like a fruitful source of inspiration for the case law on legal services.

Drawing on the case law on the media would thus be a useful starting point, since for the media the Court seems clear on the fact that the Convention contains a legal obligation which is not fully directed to individuals. The theoretical implications of this position, as well as possible analyses that can contribute to greater clarity, will be discussed in the following chapters (Chapter Seven to Chapter Ten), which attempt to study the root of the problems underlying the Court's case law.

1734 Discussed in Chapter One, 60ff.

III. Conclusion: Comparing legal services and the media

Structurally, there is thus a certain similarity between legal services and the media: In both cases, human rights further not only the private interests of the rights holder, but also the rights of others and public interests. For the media, the Court has not only developed a number of lines of case law that are similar to those concerning legal services, but has established a complex web of obligations on the State that aim to secure the media's ability to fulfil their Convention functions. Notably, the Court has explicitly imposed a duty on the State as the 'ultimate guarantor' of pluralism, which leads to obligations to create a favourable environment for public debate and to protect media activities. Despite certain doctrinal similarities, the approach the Court has taken as regards the media is generally clearer, since it engages more directly with the complex of interests identified above. This stands in stark contrast to the legal-services cases, where the Court's reasoning does not seem to clearly engage with the weight to be given to these interests and the way they should be reflected normatively. Although the case law on the media thus provides a number of useful starting points to clarify the Court's reasoning on legal services, the underlying conceptual problem remains largely unaddressed – that of focusing primarily on rights, a conceptual tool traditionally understood as reflecting the private interests of the rights holder. The following chapters address this problem and attempt to provide a more convincing alternative approach.