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FEASIBILITY STUDY ON A NEW, BINDING OR NON-BINDING, EUROPEAN LEGAL
INSTRUMENT ON THE PROFESSION OF LAWYER

POSSIBLE ADDED-VALUE AND EFFECTIVENESS

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This report was commissioned by the Secretary General of the Council of Europe at the request of the European Committee on Legal Co-operation (CDCJ) in order to determine the added value and the effectiveness of a European convention on the profession of lawyer and, consequently, the feasibility of preparing either a convention or another type of legal instrument to protect the profession of lawyer appropriately. The report was presented to the CDCJ at its 95th plenary meeting (November 2020) on which occasion the committee agreed to approve its publication.

Disclaimer: The views expressed in this study are solely those of the author and do not necessarily reflect the views of the Council of Europe or its member states.

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EXECUTIVE SUMMARY

This study is concerned with the feasibility of adopting a new, binding or non-binding, European legal instrument on the profession of lawyers. It first examines the problems lawyers, in Council of Europe member States, face as regards the independent and secure exercise of their profession and the extent of these problems, insofar as this can be established.

It then considers, in turn, whether the existing instruments - in particular the European Convention on Human Rights and the case-law of the European Court of Human Rights, Committee of Ministers' Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer and other international instruments - offer protection as regards the problems in question, the level of the protection and the manner in which this is offered, and the use made of these instruments in practice; the advantages and disadvantages or risks of any possible future instrument, according to its nature (binding or non-binding) regarding its added-value and effectiveness; aspects other than the professional independence and security of lawyers that a new legal instrument might cover in order to address current challenges facing lawyers in Europe; the appropriateness of drafting a new European legal instrument and the nature of the possible instrument, as well whether other alternatives can be found to achieve the intended goal of an enhanced protection of lawyers; and provides a tentative outline of the personal and material scope of a new instrument.

It finds that the problems faced by the profession of lawyer, both individually and institutionally, are significant and seem to be becoming more extensive. These problems are inconsistent both with the broad thrust of the applicable soft law standards – including Recommendation No. R(2000)21 – and in many, but not all, cases with legally binding ones, notably the European Convention. However, the soft law standards are insufficiently precise and the coverage by the legally binding ones is not comprehensive.

The study identifies and evaluates a number of risks that need to be borne in mind when considering whether to adopt a new instrument, especially one that is legally binding. These risks include difficulties both in obtaining agreement as to its content and in gaining acceptance for an enhanced degree of protection for the profession of lawyer, as well as the possibility that a legally binding instrument could be too inflexible or that an implementation mechanism would result in unnecessary duplication of proceedings under the European Convention on Human Rights.

While not all these risks can be entirely discounted, the study considers that there are ways in which those that remain can be mitigated without depriving a new instrument of any added value.

Although it does not consider that there would be no added value in the adoption of a new Recommendation with more extensive and elaborate provisions than Recommendation No. R(2000)21 where this would be accompanied by some non-binding arrangements, the study doubts that a non-binding instrument relating to the profession of lawyer would really be sufficient to elicit the commitment needed to secure observance of the standards which it prescribes.

As a result, it is concluded that there would be sufficient justification for adopting a legally binding instrument on the profession of lawyer, setting out the standards in a manner that is both more precise and more comprehensive, with implementation being entrusted to a body with competence to give guidance on the application of its provisions and – on an optional basis - to issue opinions as to the application of complaints of a collective nature submitted by entities approved for this purpose.

1. INTRODUCTION

1. This study was commissioned by the European Committee on Legal Co-operation (CDCJ) in April 2020. Its objective is to explore the feasibility of adopting a new, binding or non-binding, European legal instrument on the profession of lawyers.

2. At present, there is no legally binding instrument, either at the regional or international level, that is specifically concerned with the profession of lawyer. However, although this profession is primarily a matter for regulation within national legal systems,² various soft law instruments have elaborated standards concerning the profession of lawyer. In addition, there are several soft law instruments concerned with the position of human rights defenders, a role which characterises the work that many lawyers perform. Furthermore, there are elements of regional and international legal obligations relating to human rights that can have significance for the position of lawyers and their profession even though these are not specifically concerned with them.

3. The case for drafting a European convention on the profession of lawyer is the subject of Recommendation 2121(2018) of the Parliamentary Assembly of the Council of Europe.³

4. The adoption of this Recommendation was prompted, in particular by concern about the occurrence of harassment, threats and attacks against lawyers in many Council of Europe member States.

5. After examining the Recommendation 2121(2018) in the light of the opinions of the Steering Committee for Human Rights (CDDH), the CDCJ, the European Committee on Crime Problems (CDPC) and the European Committee for the Efficiency of Justice, the Committee of Ministers instructed the CDCJ to prepare a feasibility study, in close consultation with these committees.⁴

6. The present study proceeds on the basis 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 European Convention on Human Rights (“the European Convention”).⁵

7. The adequacy of the protection available for the profession of lawyer is, therefore, clearly a matter worthy of attention.

² Certain European Union Directives may also be applicable; see Section C.2.c below.

³ This called upon the Committee of Ministers to draft and adopt a convention on the profession of lawyer, based on the standards set out in Recommendation No. R(2000)21, and in doing so: 7.1.1. take account also of other relevant instruments, including the Council of Bars and Law Societies of Europe’s Charter of Core Principles of the European Legal Profession, the International Association of Lawyers’ Turin Principles of Professional Conduct for the Legal Profession in the 21st Century and the International Bar Association’s Standards for the Independence of the Legal Profession, International Principles on Conduct for the Legal Profession and Guide for Establishing and Maintaining Complaints and Discipline Procedures; 7.1.2. ensure that guarantees in relation to fundamental issues such as access to a lawyer and lawyers’ access to their clients, legal professional privilege, civil and criminal immunity for statements made in the course of their professional duties and the confidentiality of lawyer-client communications are reinforced as necessary in order to respond to developments in the surrounding legal and regulatory context, including measures introduced to counter corruption, money laundering and terrorism; 7 1 3. include an effective control mechanism, giving particular consideration to the option of a committee of experts examining periodic reports submitted by States parties, with the possibility for civil society organisations, including lawyers’ associations, to make submissions 7 1 4. consider opening the convention to accession by non-member States; 7.2. establish an early-warning mechanism to respond to immediate threats to lawyers’ safety and independence and to their ability to perform their professional duties effectively, modelled on the Platform to promote the protection of journalism and safety of journalists. In this connection, the Assembly reiterates the call made in its [Recommendation 2085\(2016\)](#) on strengthening the protection and role of human rights defenders in Council of Europe member States to establish a platform for the protection of human rights defenders, which would include lawyers; 7.3 set up activities, including bilateral co-operation activities, to enhance implementation of Recommendation No. R(2000)21, pending ratification of a new convention by member States; 7.4 fully implement [Recommendation 2085\(2016\)](#). The Parliamentary Assembly’s Recommendation was accompanied by the report of the Committee on Legal Affairs and Human Rights, *The case for drafting a European convention on the profession of lawyer*, Doc. 14453, 15 December 2017.

⁴ CM/AS(2019)Rec2121-final, reply adopted on 30 January 2019 at the 1335th meeting of the Ministers’ Deputies.

⁵ *Ibid.*, para. 3.

8. The study is not concerned with the European and international standards concerned with public prosecutors.⁶ In some jurisdiction, this will be a discrete profession. However, even where that is not the case, those standards are concerned with the specific responsibilities involved in exercising the prosecutorial role, albeit that there may be some overlap with the ones relating to the profession of lawyer in general.
9. It covers the following points in turn:
- a. the problems lawyers, in Council of Europe member states, face as regards the independent and secure exercise of their profession and the extent of these problems, insofar as this can be established;
 - b. whether the existing instruments - in particular the European Convention and the case-law of the European Court of Human Rights ("the European Court"), and Committee of Ministers' Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer ("Recommendation No. R(2000)21) and other international instruments - offer protection as regards the problems in question, the level of the protection and the manner in which this is offered, and the use made of these instruments in practice;
 - c. the advantages and disadvantages or risks of any possible future legal instrument, according to its nature (binding or non-binding) regarding its added-value and effectiveness;
 - d. aspects other than the professional independence and security of lawyers that a new legal instrument might cover in order to address current challenges facing lawyers in Europe;
 - e. the appropriateness of drafting a new European legal instrument and the nature of the possible instrument, as well whether other alternatives can be found to achieve the intended goal of an enhanced protection of lawyers; and
 - f. a tentative outline of the personal and material scope of a new instrument.⁷

2. THE PROBLEMS

10. The problems faced by lawyers in Council of Europe member States with respect to the independent and secure exercise of their profession can be regarded as falling into two broad groups; (a) those affecting individual lawyers and (b) those of an institutional character.

11. Although in some ways discrete, these two groups are inevitably interlinked as the problems faced by individuals can have a destabilising effect on the profession as a whole. At the same time, institutional problems or shortcomings can facilitate action which affects the ability of individual lawyers to fulfil their professional responsibilities.

12. Furthermore, the first group of problems can be divided into three sub-groups, namely, (a) those that were the source of the specific concern prompting the adoption of Recommendation 2121(2018), (b) those directly interfering with and preventing the fulfilment of professional responsibilities or disregarding requirements connected with them and (c) those which involve the exploitation of admission, disciplinary and other legal processes, either to impede and prevent lawyers from fulfilling their professional responsibilities or to sanction them for having done so, as well as for having exercised rights such as freedom of expression, association and assembly.

⁶ These include: Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system; the *Compilation of Venice Commission Opinions and Reports Concerning Prosecutors*, (CDL-PI(2015)009) and *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System* (Study No. 494/2008, CDL-AD(2010)040, 3 January 2011; certain opinions of the Consultative Council of European Prosecutors (see <https://www.coe.int/en/web/ccpe/opinions/adopted-opinions>); the European Guidelines on Ethics and Conduct for Public Prosecutors adopted by the Conference of Prosecutor Generals of Europe (2005); and the UN Guidelines on the Role of Prosecutors of 1990.

⁷ An earlier report for the CDCJ was prepared by Ms Evelyne Severin; *The Added Value of a European Convention on the Profession of Lawyer: A Practice-Based Evaluation*, CDCJ(2019)3 prov., 22 August 2019.

13. It is important to underline that not all problems are, or can be, authoritatively or comprehensively documented. Nonetheless, they have been the subject of many reports or studies, in particular by the United Nations Special Rapporteur on the independence of judges and lawyers;⁸ international professional organisations;⁹ certain non-governmental organisations;¹⁰ and academics.¹¹

14. Certain of the problems also figure in reports and/or statements of the United Nations Special Rapporteur on the situation of human rights defenders¹² and the Council of Europe Commissioner for Human Rights,¹³ even if the individuals concerned are not specifically identified as lawyers.

15. In addition, some problems can feature in opinions adopted by the Working Group on Arbitrary Detention established by the United Nations Human Rights Council¹⁴ and can be addressed in judgments of the European and views of the United Nations Human Rights Committee.¹⁵

16. The following paragraphs seek to elaborate the nature of the problems being faced by the profession of lawyer. It is possible that, in at least some instances, there may be some dispute as to the exact circumstances referred to in the sources cited in some of the footnotes. However, these circumstances are only meant to be illustrative of the sort of problems that can be faced by lawyers and there are other sources substantiating the existence of these problems.¹⁶

2.1 Harassment, threats and attacks

17. Of those falling into the first sub-group, the most egregious problem concerns the apparent killing of lawyers for having performed their functions or in order to prevent them from doing so. In recent years, this is something that seems to have occurred in several member States.¹⁷

18. It is not possible to be more categoric as to the reason for such killings as no explanation is ever been given at the time the deaths occurred and those responsible are not always apprehended.

19. However, the surrounding circumstances – the controversial or sensitive nature of the work known to be being undertaken by the lawyers who were killed, the manner in which this occurred (essentially an assassination) and the absence of other explanations – tend to support a conclusion that the killing was linked to their professional activities.

20. Lawyers also face violence and intimidation when performing their functions. This can take the form of physical attacks and threats on or to them or members of their families.¹⁸ The use of such violence and intimidation may be by representatives of public authorities but it can also be by others, whether acting on behalf of those authorities or of others.

⁸ Report of the Special Rapporteur on the independence of judges and lawyers, A/71/348. 22 August 2016.

⁹ See, e.g., International Bar Association, and *Toolkit for Lawyers at Risk* (2020) and International Coalition of Legal Organisations, *Joint Stakeholder Submission to the UN Human Rights Council's Universal Periodic Review – TURKEY*, (The Law Society of England and Wales, 2020).

¹⁰ See, e.g., Human Rights House Network, *Human Rights Lawyers at Risk* (2015), International Commission of Jurists, *Between the Rock and the Anvil: Lawyers under Attack in Ukraine* (2020) and the Annual Reports of Lawyers for Lawyers (<https://lawyersforlawyers.org/en/funding-and-annual-reports/>).

¹¹ See, e.g., G. Boehringer, S. Russell, K. Boehringer and J. Moreira, "Defending the Defenders: Attacks on Lawyers – A Problem in Search of Solutions", Athens, ATINER's Conference Paper Series, No. SOC2015-1763 (2015).

¹² See <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx>.

¹³ See <https://www.coe.int/en/web/commissioner/human-rights-defenders>.

¹⁴ See, e.g., Opinion No 1/2017 concerning Rebi Metin Grge (Turkey); https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session78/A_HRC_WGAD_2017_1.pdf.

¹⁵ These are considered in the following section of the study.

¹⁶ E.g., in addition to the reports cited above, see the similar examples to those referred to in the following footnotes that are cited in the report of the Committee on Legal Affairs and Human Rights, *The case for drafting a European convention on the profession of lawyer*, Doc. 14453, 15 December 2017.

¹⁷ See, e.g., the reports of killings in the Netherlands (<https://www.icj.org/netherlands-icj-extremely-concerned-at-killing-of-lawyer/>), Serbia (<https://www.icj.org/serbia-killing-of-lawyer-must-be-urgently-investigated/>) and Ukraine (<https://www.icj.org/ukraine-killing-of-lawyer-must-be-investigated-promptly/> and <https://www.icj.org/ukraine-violent-death-of-a-lawyer-is-an-attack-on-the-legal-profession/>).

¹⁸ See, e.g., Council of Bars and Law Societies of Europe, *Threats to the Legal Profession* (2010, https://www.cbbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS/HR_Guides_recommendations/EN_HRL_20190218_Leaflet_Attacks-on-Lawyers_2019.pdf) and also <https://www.icj.org/russian-federation-authorities-must-repudiate-intimidation-of-lawyer/>.

21. The failure to investigate and bring proceedings against those responsible for such violence and intimidation, where reported, not only leads to impunity for such conduct but it also contributes to a climate of fear, which can itself lead to lawyers feeling intimidated or being discouraged from providing legal services to those who may require them.

2.2 Direct interference with professional responsibilities

22. The use of such violence and intimidation is closely linked to the one aspect of the second sub-group, namely, situations in which lawyers may be forcibly prevented from discharging their responsibilities, such as by being stopped from meeting with their clients,¹⁹ prevented from continuing to act as their representative or acting as a trial observer.²⁰

23. However, this sub-group also includes action taken against lawyers in disregard of their professional responsibilities, such as the monitoring of communications between lawyers and their clients and the conduct of searches of lawyers' offices, homes and property without observing the requirements of legal professional privilege,²¹ as well as the compulsion of lawyers to act as witnesses in proceedings against their clients.²² It can also include restrictions on or denial of access to the files and other information relevant to the proceedings in which they are acting.

24. In some instances, the taking of such action may reflect an excess of zeal in responding to a genuine problem (such as money-laundering) but it can also be the consequence of inadequate regulation and training, as well as a simple refusal to accept that the relevant standards are applicable because of the identification of the lawyers concerned with the supposed wrongdoing of their clients.

2.3 Inappropriate use of admission, disciplinary and other legal processes

25. The third sub-group - the use of admission, disciplinary and criminal proceedings against lawyers – concerns the taking of measures that will in many instances be entirely legitimate.

26. However, the concern is with, firstly, the use of admission procedures to prevent persons from becoming lawyers, notwithstanding that they actually meet all the necessary requirements for admission being granted, on account of them having exercised their rights to freedom of assembly, freedom of association and freedom of expression.

27. In addition, the concern about these measures relates to their use in circumstances where they are no more than a device to stop or sanction professional activities (including the fact of representing particular persons) that have been properly undertaken.

28. It also concerns situations where, even if they do not have such motives, their use is unjustified either because there has been a failure to have due regard to the propriety of the activities on which as the particular measures are based (such as objecting in some way to the treatment of a client, making public in some way such objections or drawing them to the attention of some regional or human rights mechanism) or there is a failure to observe the necessary procedural guarantees in the conduct of the relevant proceedings.²³

29. Thus, all such proceedings can have very serious consequences for the individuals concerned: entailing a bar on them entering into legal practice; their suspension from the ability to continue to do so;²⁴ their actual disbarment²⁵ and the imposition on them of fines and/or imprisonment.²⁶ At the same time, they can constitute a very serious interference with the discharge of their professional responsibilities.

¹⁹ See, e.g., the following reports: <https://www.icj.org/the-russian-federation-use-of-physical-force-and-detention-of-lawyers-must-be-promptly-investigated-icj-says/>, <https://www.icj.org/the-russian-federation-use-of-physical-force-against-lawyer-must-be-investigated/>; and <https://www.icj.org/russian-federation-criminal-proceedings-against-lawyer-raise-concerns/>.

²⁰ See, e.g., <https://www.icj.org/the-russian-federation-icj-urges-investigation-of-chechnya-attack-on-a-lawyer-and-a-journalist/>.

²¹ See, e.g., <https://www.icj.org/ukraine-icj-report-calls-for-urgent-measures-to-protect-lawyers-under-attack/>.

²² See, e.g., <https://www.icj.org/russian-federation-icj-calls-for-an-end-to-improper-interrogation-of-lawyers/>.

²³ See, e.g., International Commission of Jurists, *Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan* (2018), chs. 2 and 3.

²⁴ See, e.g., <https://www.icj.org/azerbaijan-lawyer-sadigov-should-be-applauded-not-sanctioned-for-acting-professionally/>.

²⁵ See, e.g., <https://www.icj.org/azerbaijan-lawyer-irada-javadova-disbarment-decided-in-unfair-proceedings/>.

²⁶ See, e.g., <https://www.icj.org/the-russian-federation-the-icj-calls-for-an-end-to-intimidation-and-prosecution-of-lawyers/>; <https://www.icj.org/ukraine-criminal-proceedings-against-lawyer-andriy-domanskyi-raise-concerns/>; and <https://www.icj.org/azerbaijan-icj-welcomes-release-of-human-rights-lawyer-intigam-aliyev/>.

30. Moreover, even if the proceedings do not have such outcomes, the bringing of them or the threat to do so might also be seen as a form of intimidation coming within the first sub-group, affecting not just the lawyers directly concerned but others also.

31. Closely linked to the misuse of such measures in respect of the professional activities of lawyers is their use in respect of the exercise of the rights to freedom of assembly, freedom of association and freedom of expression (particularly as regards issues concerned with law, the legal process and the rights of lawyers) in circumstances where there is no legitimate basis for suggesting that this would be inconsistent with their responsibilities as members of the legal profession.

2.4 Institutional shortcomings

32. The possibility of all such measures being pursued can be a reflection of the fact that the relevant professional bodies lack any or sufficient independence from public authorities, either formally or in substance.²⁷

33. Independence can be affected by the extent of the control that State bodies may have, as a matter of law, over matters such as the regulation of the profession, the development and implementation of codes of professional conduct and of rights of lawyers, admission to professional bodies, the conduct of disciplinary proceedings and the ability of professional bodies to represent the interests of their members.²⁸

34. In addition, the ability of professional associations to sustain themselves financially can affect their independence as this may otherwise be constrained by the need to seek funding from the State.

35. Furthermore, it is also possible that the decision-making of a professional association that is formally independent might nonetheless be affected by those responsible for it being influenced by political or other improper considerations.²⁹

2.5 Extent of the problems

36. The extent of the problems faced by lawyers as regards the independent and secure exercise of their profession is difficult to quantify for several reasons.

37. Firstly, they may not always be publicised or reported, in particular where attacks, harassment and intimidation are concerned, especially if there is no confidence that they will be treated seriously or there is concern that this will lead to further difficulties for the lawyers concerned.

38. Secondly, there is at present no mechanism in Europe (or indeed elsewhere) that collects data on a systematic basis regarding problems faced by lawyers.

²⁷ The fact that there is a problem in this regard is implicitly recognised by the United Nations Human Rights Council in its Resolutions 44/9, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers adopted on 16 July 2020 when it invited "States to take measures, including by adopting domestic legislation, to provide for independent and self-governing professional associations of lawyers and to recognize the vital role played by lawyers in upholding the rule of law and promoting and protecting human rights".

²⁸ See, e.g., Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/73/365, 5 September 2018 and International Commission of Jurists, *Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan* (2018). See also the concern about the possible implications for independence of legislative amendments affecting bar associations in Turkey; Human Rights Watch, *The Reform of Bar Associations in Turkey: Questions and Answers*, <https://www.hrw.org/news/2020/07/07/reform-bar-associations-turkey-questions-and-answers>.

²⁹ See International Commission of Jurists, *Defenceless Defenders: Systemic Problems in the Legal Profession of Azerbaijan* (2018), at p. 16.

39. The United Nations Special Rapporteur on the independence of judges and lawyers has clearly the mandate to examine such problems.³⁰ However, the implementation of this mandate, although global in focus, is supported by limited resources and has, in practice, been more concerned with the position of the judiciary.³¹

40. Moreover, the problems faced by lawyers are only an aspect of the work undertaken by the other regional and international human rights referred to above and they can either only deal with specific instances brought to their attention or highlight issues in a thematic rather than a quantitative manner.

41. Furthermore, the reports by international professional and non-governmental organisations tend to be a snapshot of the situation at a particular time. Although their coverage is probably the most comprehensive, they do not review the position in all member States.

42. Thirdly, the situations in member States vary significantly, reflecting their different traditions, arrangements and circumstances, so that it is not possible to discern the emergence of a general pattern. Some problems - notably those relating to attacks, harassment and intimidation – may be more extensive in some of them but their existence in others cannot be excluded. Others may be a consequence of specific organisational structures and law enforcement arrangements, which could mean that they may not be matters of general concern. In any event, the fact that such structures and arrangements have not so far been put to the test does not mean that they will necessarily be sufficiently robust in protecting the profession of lawyer should circumstances change. At the same time, some potential sources of problems – such as measures to tackle money-laundering – are only beginning to emerge or be appreciated, so that the extent to which the profession of lawyer is either appropriately protected or at risk in member States may not yet be entirely clear.

43. Nonetheless, the number of reports by international professional and non-governmental organisations in recent years and the increased attention given to the situation of lawyers by various regional and international human rights bodies,³² including a significant number of applications considered by the European Court, does suggest that the problems faced by lawyers face as regards the independent and secure exercise of their profession has become more extensive in recent years.³³

44. It is, therefore, appropriate to consider the adequacy of both existing standards concerning the profession of lawyer and the means for ensuring their observance.

3. EXISTING STANDARDS

45. As previously indicated, there are a number of instruments already in existence that are concerned with the profession of lawyer, either ones specifically focused on it or others that have some practical and significant relevance for it. Generally, those instruments having a specific focus on the profession of lawyer are soft law instruments³⁴ whereas the other instruments are – with the exception of those dealing with the position of human rights defenders, which are also soft law ones - comprised of human rights treaties with certain provisions that can be and have been invoked to address problems faced by lawyers.

³⁰ Amongst the tasks given to Special Rapporteur are:” (b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned; (c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers”; E/CN.4/RES/1994/41, 4 March 1994.

³¹ Of the 10 reports on visits by the Special Rapporteur to Council of Europe member States since the beginning of 2000, only those in respect of Russia and Turkey have discussed any issues relating to the profession of lawyer, notably as regards admission to the profession, harassment and intimidation, identification with clients and consultation on legislative changes affecting their rights. For the reports, see <https://www.ohchr.org/EN/Issues/Judiciary/Pages/Visits.aspx>.

³² In its Resolutions 35/12 44/9, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers adopted respectively on 22 June 2017 and 16 July 2020, the Human Rights Council expressed “its deep concern about the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession”.

³³ Cf. the noting in 1997 of only confidentiality and privilege, search and seizure and freedom of expression, together with the lawyer’s role in ensuring a fair trial as issues of concern for the profession in the conclusions to *The role and responsibilities of the lawyer in a society in transition*, (Council of Europe, 1999), at pp. 160-161.

³⁴ Certain European Union Directives are, however, legally binding on the member States concerned.

46. The soft law instruments have been adopted not only by regional and universal organisations but also by a number of international professional organisations. The human rights treaties of particular relevance are the European Convention and the International Covenant on Civil and Political Rights (“the International Covenant”).

47. This section considers, in turn, the soft law instruments and the treaties and other legally binding instruments, considering their relevance for the problems faced by lawyers, the extent to which they provide protection and how this is done, as well as the actual use made of these instruments and provisions.

3.1 Soft law instruments

48. The soft law instruments of particular relevance for the profession of lawyer are the Basic Principles on the Role of Lawyers (“the Basic Principles”)³⁵ and Recommendation No. R(2000)21, as well as certain standards adopted by international professional organisations and some standards concerned with human rights defenders.

3.1.1 The Basic Principles

49. The Basic Principles comprised the first soft law instrument specifically concerned with the profession of lawyer.³⁶ They were adopted in 1990 within the framework of the United Nations.

50. Although primarily concerned with lawyers, the Basic Principles are also - according to their preamble - applicable “as appropriate” “to persons who exercise the functions of lawyers without having the formal status of lawyers”.

51. The Basic Principles are comprised of twenty-nine paragraphs organised under six headings.

52. The first two headings are concerned with access to legal services and special safeguards in criminal justice matters. As such, their content is directed essentially to the beneficiaries of the services that lawyers can provide rather to the profession of lawyer.

53. However, the subsequent headings address issues of direct concern for the profession of lawyer, namely, ones relating to qualifications and training, duties and responsibilities, freedom of expression and association, professional associations of lawyers and disciplinary proceedings.

54. As is evident from their headings, these sections are potentially of direct relevance for many of the problems discussed in the preceding section.

³⁵ Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

³⁶ Many elements of them had previously been set out in the Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”) prepared in 1985 for the United Nations Subcommission on Prevention of Discrimination and Protection of Minorities; E/CN.4/Sub.2/1985/18/Add.5/Rev.1.

55. Of particular importance, in this regard are the provisions dealing with discrimination regarding entry into and continued practice in the profession,³⁷ guarantees for the functioning of lawyers,³⁸ freedom of expression, belief, association and assembly,³⁹ the formation and membership of self-governing professional associations,⁴⁰ standards of professional conduct and the handling of disciplinary proceedings.⁴¹

56. However, unsurprisingly for a statement of principles, their formulation is marked by a level of generality, which means that it is easy to agree with them without being certain that particular acts or omissions would necessarily be considered as inconsistent to them.

57. This lack of precision is exacerbated by the reliance placed on certain notions in the principles which are not necessarily self-evident or are matters where there may be quite differing understandings in practice. This is especially so as regards “the functions of lawyers”,⁴² “the ideals and ethical duties of the lawyer”,⁴³ “recognized standards and ethics of the legal profession”,⁴⁴ “recognized professional duties, standards and ethics”⁴⁵ and “recognized international standards and norms”.⁴⁶

58. This is not to suggest that it would not be possible for clarity and agreement regarding these notions to be established. However, there is no arrangement in place to give an authoritative interpretation to them and, more generally as to the content of the principles so as to provide guidance as to their application in concrete situations. Furthermore, there is no body with specific responsibility for overseeing the observance and implementation of the Basic Principles.

59. This undoubtedly weakens the potential impact of what are, otherwise, potentially important and valuable statements of principle.

60. Nonetheless, this does not mean that the Basic Principles have not been seen as having some use in drawing attention to the problems faced by lawyers.

³⁷ “10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory”.

³⁸ “16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. 17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities. 18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions. 19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles. 20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority. 21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time. 22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential”.

³⁹ “23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession”.

⁴⁰ “24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference”.

⁴¹ “26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms. 27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice. 28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review. 29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles”.

⁴² In the Preamble.

⁴³ Paragraph 9.

⁴⁴ Paragraphs 14, 23, 25 and 29.

⁴⁵ Paragraph 16.

⁴⁶ Paragraph 26 (as regards codes of professional conduct).

61. Thus, they have been cited by international non-governmental and professional organisations in support of expressions of concern about problems facing lawyers.⁴⁷ In addition, they have also been referred to in submissions to the United Nations Human Rights Council in the course of its periodic review of the human rights situation in certain countries.⁴⁸ International professional organisations have also referred to them in the elaboration of their own soft law standards.⁴⁹

62. Moreover, the Basic Principles have been taken into account in various proceedings before the European Court.

63. Thus, they have been cited in the variously headed sections concerned with relevant material for the proceedings⁵⁰ in nine cases but without any comment on them in the substantive ruling⁵¹. In addition, they have been cited by a few individual judges in their separate opinions,⁵² as well as by applicants themselves⁵³ and third-party intervenors in proceedings before the Court.⁵⁴

64. In eleven of the fifteen cases, the application to the European Court was by one or more lawyers complaining about alleged interferences with their professional activities. Three other cases were concerned with acts affecting a lawyer which were alleged to have violated the rights of the applicants, who were either clients⁵⁵ or family members of the lawyer concerned.⁵⁶ Only one case was concerned with the adequacy of services provided by a lawyer.⁵⁷

⁴⁷ See, e.g., International Commission of Jurists, *Between the Rock and the Anvil: Lawyers under Attack in Ukraine* (2020).

⁴⁸ See, e.g., International Coalition of Legal Organisations, *Joint Stakeholder Submission to the UN Human Rights Council's Universal Periodic Review – TURKEY*, (The Law Society of England and Wales, 2020)

⁴⁹ Namely, in the instruments discussed below.

⁵⁰ I.e., “Comparative Law and Practice”, “International Legal Materials”, “Principles adopted by international organisations”, Relevant Domestic and International Law”, “Relevant domestic law and practice”, “Relevant International Documents”, Relevant international legal instruments” and “Relevant Non-Convention Material”.

⁵¹ *Nikula v. Finland*, no. 31611/96, 21 March 2002, at para. 27 and *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005, at para. 58 (both referring to the paragraph 20 on the enjoyment by lawyers of “civil and penal immunity for statements made in good faith in written or oral pleadings in their professional appearances before a court, tribunal or other legal or administrative authority”), *André and Others v. France*, no. 18603/03, 24 July 2008, at para. 20 (referring to paragraphs 16 and 22 on non-interference with professional functions and immunity for statements), *Kulikowski and Others v. Poland*, no. 18353/03, 19 May 2009, at para. 32 (referring to paragraphs concerned with the duties of lawyers towards their clients but also paragraph 14 on the requirement for “Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession”), *Morice v. France* [GC], no. 9369/10, 23 April 2015, at para. 57 (referring to paragraphs 16 and 22 on non-interference with professional functions and confidentiality of communications), *Hajibeyli and Aliyev v. Azerbaijan*, no. 6477/08, 19 April 2018, at para. 40 (referring to paragraphs 10 and 23 on non-discrimination regarding legal practice and freedom of expression), *Altay v. Turkey (No. 2)*, no. 11236/09, 9 April 2019 (referring to paragraphs 8, 16 and 22 on the ability of arrested persons to consult lawyers, non-interference with professional functions and confidentiality of communications), *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, at para. 31 (referring to paragraphs 26-29 on disciplinary proceedings), *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020, at para. 102 (referring to paragraph 22 on confidentiality of communications) and *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020, at para. 40 (referring to paragraphs 10, 16 and 23 on non-discrimination in respect of legal practice, non-interference with professional functions and freedom of expression).

⁵² In a joint partly concurring and partly dissenting opinion of Judges Lazarova Trajkovska and Pinto de Albuquerque in *Bljakaj and Others v. Croatia*, no. 74448/12, 18 September 2014 (in a footnote to their statement that “The State is therefore called not only to punish, but also to prevent such acts, and ultimately to take the measures necessary to ensure the lawyer’s safety, in order to guarantee the rule of law and the rights to a fair trial and access to justice, as provided by Article 6 of the Convention, in addition to the lawyer’s right to life and physical integrity. To reiterate a well-enshrined principle, where the safety of lawyers is threatened as a result of discharging their duties, they must receive appropriate protection from the State authorities”) in the joint concurring opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković in *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015 (referring to paragraph 1 on the entitlement of all persons to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings”, paragraph 5 on the need for a person when arrested, charged or detained to be promptly informed of the right to legal assistance of his or her choice and paragraph 7 on the requirement for governments to ensure that all persons who are arrested or detained should have access to a lawyer within forty-eight hours from the time of their arrest or detention).

⁵³ *Elçi and Others v. Turkey*, no. 23145/93, 13 November 2003, at para. 564 (referring to paragraphs 14, 16, 18, 20 and 22 in a case concerned with the detention and ill-treatment of lawyers, as well as the search of their offices) and *Michaud v. France*, no. 12323/11, 6 December 2012, at para. 67 (referring obliquely to paragraph 15 regarding the requirement that “Lawyers shall always loyally respect the interests of their clients in suggesting that an obligation to report suspicions was incompatible with this duty).

⁵⁴ The Council of Bars and Law Societies of Europe (CCBE) in *Michaud v. France*, no. 12323/11, 6 December 2012, at para. 77 (stressing the importance of preserving the independence of the legal profession and protecting legal professional secrecy and the confidentiality of exchanges between lawyers and their clients) and the International Commission of Jurists in *Annagi Hajibeyli v. Azerbaijan*, no. 2204/11, 22 October 2015, at para. 61 (referring generally to the standards on non-interference with the work of lawyers enshrined in them).

⁵⁵ *Altay v. Turkey (No. 2)* and *Dvorski v. Croatia*, which respectively concerned interference with the confidentiality of communications and choice of lawyer.

⁵⁶ *Bljakaj and Others v. Croatia*, which concerned the murder of a lawyer.

⁵⁷ *Kulikowski and Others v. Poland*.

65. Violations of the European Convention were found in all but one of the cases. In view of the limited nature of the reference to the Basic Principles, it is unlikely that their citation had a decisive influence on the outcome but they certainly have reinforced the finding that certain rights had been violated.

66. However, the case in which no violation was found is probably of more significance for evaluating the adequacy of the Basic Principles. In this case, the European Court had concluded that an obligation for lawyers to report suspicions about their clients in respect of money-laundering and related crime, at least as practised in France, did not constitute a disproportionate interference with the professional privilege of lawyers.⁵⁸

67. This ruling not only dealt with a matter that was not really under consideration when the Basic Principles were adopted but it also underlines that broad principles by themselves are insufficient to establish how they are to be applied when there are valid competing interests that need to be taken into account when doing so, such as the prevention of disorder or crime.

3.1.2 Recommendation No. R(2000)21

68. The Committee of Ministers adopted Recommendation No. R(2000)21 in 2000,⁵⁹ with a number of considerations in mind.

69. In particular, there was a desire “to promote the freedom of exercise of the profession of lawyer in order to strengthen the Rule of Law” and an awareness of “the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason”.⁶⁰

70. For the purpose of Recommendation No. R(2000)21, the term “lawyer” is defined to mean “a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters”.⁶¹ Thus, unlike the Basic Principles, it does not apply to “persons who exercise the functions of lawyers without having the formal status of lawyers”.

71. Recommendation No. R(2000)21 is comprised of six principles, each of which is elaborated in a number of paragraphs, ranging from three to eight and totalling twenty-nine, the same as in the Basic Principles.

72. Only one of the principles – Principle IV – Access for all persons to lawyers – has limited relevance for the exercise of the profession of lawyer, being more concerned with the beneficiaries of legal services.⁶²

⁵⁸ *Michaud v. France*, no. 12323/11, 6 December 2012. Particular importance was attached to the fact that (a) the obligation did not relate to judicial proceedings or the giving of legal advice (unless this was provided for the purpose of money-laundering or terrorist financing or with the knowledge that the client requested it for the purpose of money-laundering or terrorist financing) so that this did not go to the very essence of the lawyer’s defence role and (b) the reporting was through the Chairman of the Bar; paras. 127-131.

⁵⁹ On 25 October at the 727th meeting of the Ministers’ Deputies.

⁶⁰ Preamble.

⁶¹ Preamble.

⁶² In particular, this is true of the paragraphs directed to ensuring effective access to legal services and the provision of services to persons in an economically weak position. However, the stipulation in paragraph 4 that “Lawyers’ duties towards their clients should not be affected by the fact that fees are paid wholly or in part by public funds” is undoubtedly relevant to the exercise of the profession of lawyer.

73. The others⁶³ – General principles on the freedom of exercise of the profession of lawyer,⁶⁴ Legal education, training and entry into the legal profession,⁶⁵ Role and duty of lawyers,⁶⁶ Associations⁶⁷ and Disciplinary proceedings⁶⁸ – are all clearly pertinent to issues involved in the exercise of the profession.

74. All these principles are undoubtedly relevant to the problems faced by the profession of lawyer.

75. The elaboration of the principles in the various paragraphs is in many respects similar to the approach of the Basic Principles but there are a number of differences worth noting.

76. One is the fact of having a statement of general principles in Principle I, only some elements of which are developed in the other Principles.

77. Those not covered in the other Principles concern: the body taking decisions on authorisation to practice; freedom of belief, expression and movement; protection from sanctions or pressure when acting in accordance with professional standards; access by lawyers to their clients; access to clients; access to court and to files; and the right to equal respect by the court.

78. All of these are of crucial relevance for various problems faced by the profession of lawyer. Only the points about protection and access to court and files are also found in the Basic Principles.

79. In addition to the statement of general principles, the elaboration goes further than the Basic Principles in that the requirement for no discrimination in entry to and continued exercise of the profession includes the grounds of sexual preference and membership of a national minority and, although it appears narrower in that the grounds do not include national or social origin and economic or other status, the list of grounds is made non-exhaustive through the use of “in particular” at the outset of their specification.

80. Moreover, the list of duties is wider in that it includes the duties first and foremost to endeavour to resolve a case amicably, to avoid conflicts of interest and to not take on more work than can reasonably be managed.

81. However, there is no reference to lawyers loyally respecting the interests of their clients or, to them - in protecting the rights of their clients and promoting the cause of justice - seeking to uphold human rights and freedoms.

82. Furthermore, the paragraphs on disciplinary proceedings do not, unlike the Basic Principles require the codes of conduct to be in accordance with any particular criteria, albeit that the reference in the Basic Principles to recognised international standards and norms is somewhat vague. On the other hand, they are more specific in requiring the proceedings to be in accordance with the principles and rules laid down in the European Convention and the principle of proportionality to be respected in determining sanctions.

83. Also, the requirement concerning freedom of expression is wider in that the possibility of lawyers suggesting legislative reforms is recognised but, unlike the Basic Principles, there is no specific reference to them being able to take part in public discussion on matters concerning the promotion and protection of human rights. However, also unlike the Basic Principles, there is no express stipulation that lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

⁶³ Respectively, Principles I, II, III, V and VI.

⁶⁴ Covering non-discrimination and improper interference in the exercise of the profession, authorisation to practice by an independent body, freedom of belief, expression, movement, association and assembly and participation in public discussions, threats, sanctions and pressure, confidentiality of the lawyer-client relationship, access to court and equal respect by the court.

⁶⁵ Covering non-discrimination in entry into and continued exercise of the profession, training and continuing education and the content of education.

⁶⁶ Covering the drawing up of professional standards and codes of conduct, professional secrecy, duties towards clients and respect to the judiciary.

⁶⁷ Covering the ability to form and join professional local, national and international associations, the self-governing nature of these associations, their role in protecting members and ensuring the independence of lawyers and the action to be taken by them when various measures are taken against lawyers.

⁶⁸ Covering the taking of disciplinary proceedings for action not in accordance with professional standards, the role of professional associations in such proceedings, the procedural requirement for these proceedings and the proportionality of any sanctions imposed.

84. Recommendation No. R(2000)21 is more specific about the defence of lawyers' interests by bar associations and other professional lawyers' associations in connection with action involving the arrest and detention of lawyers, proceedings calling into question their integrity, searching them or their property, seizing documents and other material in their possession and responding to press reports on their behalf.
85. Finally, unlike the Basic Principles, there is no specific requirement for authorities to adequately safeguard lawyers who are threatened as a result of discharging their functions and no prohibition on identifying lawyers with their clients or their clients' causes as a result of discharging their functions.
86. All the differences identified could, of course, be seen as reflecting too literal an approach to the text and many, if not all, supposed omissions might be resolved through interpretation.
87. However, the formulation of Recommendation No. R(2000)21 already entrusts certain other important matters to those who are expected to apply it, notably through its use in a number of provisions of formulations such as "all necessary measures should be taken", "professional standards" and "where appropriate".
88. At the same time, the requirement that account should be taken of the relevant provisions of the European Convention in determining the measures required to respect, protect and promote the freedom of exercise of the profession without discrimination and improper interference does have the potential for securing some useful guidance as to how all the provisions in Recommendation No. R(2000)21 are to be applied, albeit that this depends upon the issues actually being raised in proceedings before the European Court.
89. Furthermore, there is some scope for confusion in the second paragraph Principle I in that its first sentence is categoric in stating that decisions concerning authorisation to practice or to accede to the profession should be taken by an independent body. Yet, the second sentence then provides that "[s]uch decisions, whether or not they are taken by an independent body" should be subject to review by an independent and impartial judicial authority. Undoubtedly, the dual approach was intended to accommodate potentially different approaches in member States. However, there can be a significant difference between a decision on the merits by an independent body and the formal review by a judicial authority of the legality of a decision taken by a body that is not independent.
90. In addition, it is not clear why the requirement of an independent body – insofar as it exists – should be applicable to authorisation to practice and accession to profession but not decisions involving the imposition of sanctions, especially suspension from the right to practice and expulsion from the profession, for which Principle VI only explicitly provides judicial review as some guarantee of independent decision-making.
91. Moreover, it is also not entirely clear from the text what, if any relationship there is intended to be between this independent body and Bar associations and other professional lawyers' association.
92. According to Principle V, these associations should be "self-governing bodies, independent of the authorities and the public". The reference to them being independent could mean that they are also meant to be the independent body referred to in Principle I. However, this is not necessarily the case, not least because these associations are primarily seen in Principle V to have role of promoting and protecting lawyers and are only encouraged in its last sentence to "maintain respect by lawyers for the standards of conduct and discipline" and, in Principle VI, as possibly only participating in the conduct of disciplinary proceedings and not necessarily being responsible for them.

93. In a draft Explanatory Memorandum prepared for what became Recommendation No. R(2000)21 but which was not attached to it,⁶⁹ it was suggested that the independent body “may be a professional body or a body composed of members of the judiciary, members of the general public and other members, in addition to a number of representatives of the legal profession”.⁷⁰ This sort of body would not necessarily be incompatible with the notion of independence but it gives no indication as to the approach needed for composing it in this manner so that the result is one that is genuinely independent of the authorities and the public.
94. The lack of precision on these matters undermines the ability to insist that a particular approach to regulating the profession of lawyer is inconsistent with the provisions of Recommendation No. R(2000)21.
95. There is no body charged with providing an authoritative interpretation of its provisions and, although the European Court has dealt with a significant number of issues of relevance for the profession of lawyer,⁷¹ there has only been reference to Recommendation No. R(2000)21 in twenty cases.
96. In most instances, this has been under the variously headed sections concerned with relevant material for the proceedings⁷² but without any comment on particular provisions of the Recommendation cited there in the substantive ruling itself.⁷³
97. In addition, there has been a reference to it in two separate opinions⁷⁴ and in a reference to the summary of the submissions by the applicant in one case.⁷⁵
98. Remarkably, there are just six cases in which the Recommendation was not only listed in the section on relevant material but also specifically referred to in the Court’s opinion.⁷⁶
99. The applicants in all but five of the cases were either lawyers, had been a lawyer, were seeking to become one or were relatives of a lawyer whose death was the subject of the application.⁷⁷
100. Unfortunately, the nature of most of these references has not shed great light on the provisions of the Recommendation as regards the profession of lawyer.

⁶⁹ It can be accessed at https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680502fe8.

⁷⁰ Paragraph 23 of the draft Explanatory Memorandum.

⁷¹ See further sub-Section 2.a below.

⁷² I.e., “Comparative law and practice”, “International legal materials”, “Relevant domestic and international law”, “Relevant domestic law and practice”, “Relevant international law and practice”, “Relevant International Materials” and “Relevant Non-Convention Material”.

⁷³ *Nikula v. Poland*, no. 31611/96, 21 March 2002, at para. 28 and *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005 (referring to Principles I and III in connection with threats and sanctions and respecting the judiciary); *Petri Sallinen v. Finland*, no. 50882/99, 27 September 2005, at para. 52, *Smirnov v. Russia*, no. 71362/01, 7 June 2007, at para. 33, *Sorvisto v. Finland*, no. 19348/04, 13 January 2009, at para. 54 and *Dudchenko v. Russia*, no. 37717/05, 7 November 2017, at para. 84 (referring to Principle I as regards respecting the lawyer-client relationship); (referring to Principles I and III in connection with threats and sanctions and respecting the judiciary); *Sialkowska v. Poland*, no. 8932/05, 22 March 2007, at para. 55, *Staroszczyk v. Poland*, no. 59519/00, 22 March 2007, at para. 72 and *Kulikowski and Others v. Poland*, no. 18353/03, 19 May 2009, at para. 35 (all referring to the paragraphs in Principle IV); *André and Others v. France*, no. 18603/03, 24 July 2008, at para. 19 (referring to the paragraph in the preamble concerned with guarantees of independence of lawyers in the discharge of their professional duties); *Morice v. France* [GC], no. 29369/10, 23 April 2015, at para. 56 (referring to Principle I as regards respecting, protecting and promoting the free exercise of the profession); *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018, at para. 74 (as regards Principles III and V in connection with the role and duty of lawyers and of associations); and *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020, at para. 103 (referring to paragraph 6 in Principle I on confidentiality of communications).

⁷⁴ Namely, in the dissenting opinion by Judge Pavlovski in *Amihalachioaie v. Moldova*, no. 60115/00, 20 April 2004 (referring to the stipulation that “lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules ...”) and the joint partly concurring and partly dissenting opinion of Judges Lazarova Trajkovska and Pinto de Albuquerque in *Bljakaj and Others v. Croatia*, no. 74448/12, 18 September 2014 discussed in fn. 51 above.

⁷⁵ *Michaud v. France*, no. 12323/11, 6 December 2012, at para. 67 (in support of his view that an obligation to report suspicions about his client was incompatible with the lawyer’s duty of loyalty to his clients, notwithstanding that there is no reference to loyalty in Recommendation No. R(2000)21).

⁷⁶ *Lekavičienė v. Lithuania*, no. 48427/09, 27 June 2017, at para. 31 and *Jankauskas v. Lithuania (No. 2)*, no. 50446/09, 27 June 2017, at para. 49 (as regards Principle I and II in connection with authorisation to practice and entry to the legal profession); *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018, at paras. 74 and 141 (referring to Principles III and V particularly as regards the duties of lawyers), *Hajibeyli and Aliyev v. Azerbaijan*, no. 6477/08, 19 April 2018, at paras. 39 and 60 (referring to Principles I and II particularly in connection with freedom of expression and decisions about access to the profession), *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, at paras. 30 and 50 (referring to Principle VI in connection with the proportionality of sanctions) and *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020, at paras. 39 and 101 (referring to Principles I and III in connection with authorisation to practice and the duty to act independently but also, without mentioning Principle VI, the need for proportionality in sanctions).

⁷⁷ *Sialkowska v. Poland*, *Staroszczyk v. Poland*, *Sorvisto v. Finland*, *Kulikowski and Others v. Poland* and *Dudchenko v. Russia*.

101. Thus, three of the references were not really concerned with that issue since the provisions referred to were ones relating to access to lawyers in cases that dealt with the extent to which the operation of the legal aid system complied with the right of access to court under Article 6(1) of the European Convention.⁷⁸ In most of the other cases there was reference to Principles of particular relevance to the profession of lawyer but there was no discussion as to what these required.

102. Furthermore, one case – as already seen in the discussion of the Basic Principles⁷⁹ – dealt with a matter that was not fully considered at the time the Recommendation was adopted, namely, an obligation to report suspicions about money-laundering by a client. In that case, the Court did not relate its finding that such an obligation did not constitute a disproportionate interference with the professional privilege of lawyers to the exceptions to legal professional privilege authorised by Principle I on the basis of being “compatible with the Rule of Law”, even if that might be implicit in a measure to prevent disorder or crime.⁸⁰

103. However, in two cases, the European Court considered the impact of non-disclosure of a conviction and of convictions for forgery and fraud for respectively admission and readmission to the profession.⁸¹

104. Moreover, in three of the more recent cases,⁸² it is significant that the Court, in finding violations of Article 8 of the European Convention on account of the refusal to admit to practice or the disbarment of the applicants concerned, considered “it necessary to draw attention to Recommendation No. R(2000)21 of the Council of Europe’s Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, which clearly states that the principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers”.⁸³

105. Moreover, in another recent case, the consideration of the scope of the exercise of the right to freedom of expression drew attention to the emphasis in Recommendation No. R(2000)21 that, in view of the role of lawyers in the administration of justice, “the profession of an advocate must be exercised in such a way that it strengthens the rule of law”.⁸⁴

106. These rulings underline the fact that the Recommendation is still recognised as providing important guidance in respect of the regulation of the profession of lawyer, at least in broad terms.

107. Apart from proceedings before the European Court, Recommendation No. R(2000)21 is also regularly cited by international professional and non-governmental organisations when drawing attentions to problems faced by individual lawyers and the profession in general.⁸⁵

108. However, it remains the case that, without the possibility also of proceedings before the European Court, there is no scope either to get any kind of ruling as to what its Principles require in concrete situations or to get any compliance with what is required in the event of this being ignored or flouted.

3.1.3 Standards elaborated by professional organisations

109. There are seven instruments drafted by international professional organisations dealing with issues relevant to the profession of lawyer.

⁷⁸ *Sialkowska v. Poland, Staroszczyk v. Poland and Kulikowski and Others v. Poland.*

⁷⁹ See para. 66 above.

⁸⁰ *Michaud v. France*, no. 12323/11, 6 December 2012.

⁸¹ *Jankauskas v. Lithuania (No. 2)*, no. 50446/09, 27 June 2017, at paras. 49 and 77 and *Lekavičienė v. Lithuania*, no. 48427/09, 27 June 2017, at paras. 31 and 54 (as regards Principle I and II in connection with authorisation to practice and entry to the legal profession).

⁸² *Hajibeyli and Aliyev v. Azerbaijan, Namazov v. Azerbaijan and Bagirov v. Azerbaijan.*

⁸³ At paragraphs 60, 50 and 101 respectively.

⁸⁴ I.e., *Correia de Matos v. Portugal [GC]*, no. 56402/12, 4 April 2018, at para. 141.

⁸⁵ See, e.g., the reports cited in fns 8, 9, 22 and 27 above.

110. These are, in order of adoption: the CCBE's Code of Conduct for European Lawyers;⁸⁶ the International Bar Association ("IBA") Standards for the Independence of the Legal Profession;⁸⁷ the Turin Principles on Conduct for the Legal Profession in the 21st Century of the Union internationale des avocats ("UIA");⁸⁸ the CCBE's Charter of Core Principles of the European Legal Profession;⁸⁹ the IBA's Guide for Establishing and Maintaining Complaints and Discipline Procedures;⁹⁰ the UIA's Core Principles of the Legal Profession;⁹¹ and the IBA's International Principles on Conduct for the Legal Profession.⁹²

111. In addition, a report by the IBA's Presidential Task Force on the Independence of the Legal Profession ("the IBA's Presidential Task Force Report") elaborates a number of indicators relevant to the implementation of this particular standard,⁹³ which will also be discussed in this part of the study.

112. The CCBE's Code of Conduct for European Lawyers was adopted as a statement of common rules applicable to all lawyers from the European Economic Area. Many of the issues covered are broadly similar to those in the Basic Principles and/or Recommendation No. R(2000)21.

113. However, there are matters of detail that go further: the emphasis on independence being from personal interests as much as external pressure;⁹⁴ the indication that confidentiality is not limited in time;⁹⁵ the possibility of prohibition from undertaking certain "incompatible" occupations;⁹⁶ the entitlement to publicise services;⁹⁷ and relations with clients and between lawyers.⁹⁸

114. The IBA Standards for the Independence of the Legal Profession – which were adopted to assist in the task of promoting and ensuring the proper role of lawyers - are also broadly similar to the provisions in the Basic Principles and/or Recommendation No. R(2000)21.

115. However, notable additions include: a right to raise an objection for good cause to the participation or continued participation of a judge in a particular case, or to conduct of a trial or hearing;⁹⁹ guarantees of professional independence in respect of their publicly-funded work;¹⁰⁰ and the election by members of the council or executive body of lawyers' associations.¹⁰¹

⁸⁶ Originally adopted in 1988 but amended in 2002 and 2006.

⁸⁷ 1990.

⁸⁸ 2002.

⁸⁹ 2006.

⁹⁰ 2007.

⁹¹ 2018.

⁹² 2019.

⁹³ The Independence of the Legal Profession Threats to the bastion of a free and democratic society (2016).

⁹⁴ Paragraph 2.1.1.

⁹⁵ Paragraph 2.3.3.

⁹⁶ Paragraph 2.5.

⁹⁷ Paragraph 2.6.

⁹⁸ Extensively covered in Sections 3 and 5.

⁹⁹ Paragraph 10.

¹⁰⁰ Thus paragraph 16 provides: "Lawyers engaged in legal service programmes and organisations, which are financed wholly or in part from public funds, shall enjoy full guarantees of their professional independence in particular by: a) the direction of such programmes or organisations being entrusted to an independent board with control over its policies, budget and staff; b) recognition that, in serving the cause of justice, the lawyer's primary duty is towards the client, who must be advised and represented in conformity with professional conscience and judgement".

¹⁰¹ Thus paragraph 17 provides: "There shall be established in each jurisdiction one or more independent self-governing associations of lawyers recognised in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists".

116. There a number of points where the UIA's Turin Principles of Professional Conduct for the Legal Profession in the 21st Century go beyond the Basic Principles and/or Recommendation No. R(2000)21 in a significant manner.

117. These points concern: the role of lawyers;¹⁰² protecting their independence;¹⁰³ freedom to choose clients;¹⁰⁴ the duty to report;¹⁰⁵ the relationship with the Bar or Law Society;¹⁰⁶ regulation of practice;¹⁰⁷ communication technologies;¹⁰⁸ and fees.¹⁰⁹

118. The CCBE's Charter of Core Principles of the European Legal Profession is comprised of ten principles seen as expressing "the common ground which underlies all the national and international rules which govern the conduct of European lawyers".¹¹⁰

119. The principles are: (a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case; (b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy; (c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; (e) loyalty to the client; (f) fair treatment of clients in relation to fees; (g) the lawyer's professional competence; (h) respect towards professional colleagues; (i) respect for the rule of law and the fair administration of justice; and (j) the self-regulation of the legal profession.

120. Apart from the fair treatment of clients in relation to fees, the principles reflect those seen in the Basic Principles and Recommendation No. R(2000)21.

¹⁰² "It is the Lawyer's role to ensure the protection of all persons before the law. Lawyers have the right and the duty to practice their profession in a manner that furthers knowledge, understanding and application of the law, whilst protecting the interests entrusted to their care".

¹⁰³ "Lawyers have the duty to preserve their independence by avoiding any situation in which their actions could be compromised by interests inconsistent with those of their client".

¹⁰⁴ "Lawyers have the right freely to agree or refuse to represent any client according to the Lawyer's own conscience, and if the Lawyer agrees, the decision shall not be interpreted to mean that the Lawyer identifies with the client's cause. Lawyers have the duty to refuse to represent any client whom they believe they cannot represent in a competent, independent and diligent manner".

¹⁰⁵ "Lawyers should not be compelled to report facts which they discover in practising their profession. Where a Lawyer learns of an activity that could endanger human life, he or she must take all precautions to protect that life, as permitted by the attorney-client privilege. Whenever a Lawyer discovers a criminal or unlawful activity, he or she must of course refuse to take part in it. Even then, the Lawyer should be under no obligation to report it to the authorities, but rather has the duty to withdraw from the matter as soon as the Lawyer has grave suspicions that the activity described may conceal unlawful acts, and that the client does not intend to refrain from that activity".

¹⁰⁶ "Depending on the country, a Lawyer has the duty or the right to be a member of a Bar or Law Society and to ensure that the profession is governed by rules laid down by the representative bodies of which he or she is a member, and that they are observed. Provided that the Bar observes the principles set out in the Basic Principles on the Role of Lawyers endorsed by the UN, Lawyers have the duty to recognise the Bar's right to establish such rules and to ensure compliance by conforming their conduct to the rules laid down by their own Bar and those of the other jurisdictions in which they practise".

¹⁰⁷ "Lawyers have the right to practise their profession in the form they deem most appropriate, either individually or in partnership, in accordance with the laws of their own country and those of the country in which they provide their services. Lawyers have the duty to preserve the personal and exclusive nature of their representation of their client, even when they practice in a larger entity.

¹⁰⁸ "A Lawyer's Web site forms part of the Lawyer's office. The content of the firm's Web site may be freely developed subject to observance of the fundamental principles which govern the legal profession. Lawyers should avail themselves of communication technologies which are available at reasonable cost in order to improve service to their clients. In doing so, Lawyers should take care to maintain the confidentiality of Lawyer-client communications".

¹⁰⁹ "A Lawyer has the right to a fair fee for services rendered. The Lawyer's fee may either be fixed or based on the services provided. The fee may take into account the result obtained, provided that the client consents. The Lawyer has the duty to practice in a spirit of service, in accordance with the rules of the profession, without allowing economic or financial considerations to take precedence".

¹¹⁰ A Commentary on the Charter of Core Principles of the European Legal Profession, p. 6.

121. However, although covering points found in those two instruments, there are some useful observations in the Commentary, notably as regards independence,¹¹¹ confidentiality,¹¹² the dignity and honour of the profession¹¹³ and respect for the rule of law and the fair administration of justice¹¹⁴.

122. In addition, while a strong element of self-regulation is seen as guaranteeing lawyers' professional independence vis-à-vis the state, it is also noted that most European legal professions display a combination of state regulation and self-regulation. Thus, it is observed that "[i]n many cases the state, recognising the importance of the core principles, uses legislation to buttress them – for instance by giving statutory support to confidentiality, or by giving bar associations statutory power to make professional rules".

123. As its title indicates, the IBA's Guide for Establishing and Maintaining Complaints and Discipline Procedures ("the Guide") differs from both the Basic Principles and Recommendation No. R(2000)21 in that it deals with the examination of complaints before the institution of disciplinary proceedings. This is significant in that it underlines the important point that not every alleged failing by a lawyer should lead to disciplinary proceedings.

124. The Guide also requires that the code of conduct by which a lawyer's conduct is to be considered in both procedures should be based on IBA principles.¹¹⁵ These are not specified but may be those in the IBA Standards but, even if not, the approach is significant in that it represents an attempt to clarify the criteria for assessing the conduct of lawyers.

125. The institutional and procedural requirements for complaint handling and disciplinary proceedings are slightly more elaborate than in the Basic Principles and Recommendation No. R(2000)21 but they are consistent with the fair hearing approach required in them.

126. In addition, the Guide goes beyond the Basic Principles and Recommendation No. R(2000)21 in specifying the range of possible sanctions that can be imposed in disciplinary proceedings,¹¹⁶ giving some basis for applying the proportionality test set out in the Recommendation.

127. The UIA's Core Principles of the Legal Profession are comprised of eight points: independence of the lawyer and the Bar; legal professional privilege and confidentiality; prohibition of conflicts of interest; competence; dignity, probity, loyalty and diligence; respect towards professional colleagues; contribution to the proper administration of justice and respect for the rule of law; and right to fair remuneration.

¹¹¹ "A lawyer needs to be free - politically, economically and intellectually - in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed, without this independence from the client there can be no guarantee of the quality of the lawyer's work".

¹¹² "It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle - observing confidentiality is not only the lawyer's duty - it is a fundamental human right of the client. The rules of "legal professional privilege" prohibit communications between lawyer and client from being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. Principle (b) encompasses all these related concepts - legal professional privilege, confidentiality and professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act".

¹¹³ "To be trusted by clients, third parties, the courts and the state, the lawyer must be shown to be worthy of that trust. That is achieved by membership of an honourable profession; the corollary is that the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. This does not mean that the lawyer has to be a perfect individual, but it does mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession. Disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession".

¹¹⁴ "A lawyer must never knowingly give false or misleading information to the court, nor should a lawyer ever lie to third parties in the course of his or her professional activities. These prohibitions frequently run counter to the immediate interests of the lawyer's client, and the handling of this apparent conflict between the interests of the client and the interests of justice presents delicate problems that the lawyer is professionally trained to solve".

¹¹⁵ Paragraph 1.

¹¹⁶ Thus paragraph 19 provides: "The Disciplinary Tribunal and the Appeal Tribunal must have a range of sanctions available so that it can impose a suitable penalty including the power to: • dismiss or uphold the complaint; • reprimand the lawyer; • fine and/or order the lawyer to pay restitution of money paid as fees, if the latter is compatible with the legal system of the jurisdiction; • suspend or revoke the lawyer's license to practice; • require the lawyer to undertake further a course of education; or • impose restrictions on the lawyer's license to practice".

128. These are seen, according to the Explanatory Memorandum, as “the expression of an ideal foundation common to all Bars, which constitutes both a summary of the principal national and international rules that govern the legal profession, and a goal to be achieved in an ideal state that respects the rule of law”.

129. Apart from fair remuneration, the points in the UIA’s Core Principles of the Legal Profession are all addressed in the Basic Principles and Recommendation No. R(2000)21.

130. However, there are some points of detail that provide useful additions also not covered in other soft law instruments.

131. Thus, the Explanatory Memorandum explains that the independence of the lawyer “is guaranteed in two ways: either by the courts, in countries where professional conduct disputes fall under the jurisdiction of independent judges, or by the regulatory authorities, i.e., the Bars, which have specific jurisdiction over matters of conduct and discipline. These two systems are incidentally not mutually exclusive”. Entry to the profession is not, however, discussed.

132. Also, the reference to freedom to choose clients under independence is qualified by “[e]xcept where the law requires otherwise to ensure due process”.

133. In addition, in respect of legal professional privilege, it is recognised that in some countries that there are “exceptions, which, depending on the case, obligate or authorize the lawyer to disclose information that is protected by legal professional privilege in particular in the event of an imminent threat of death or serious injury to a person or a group of persons”.

134. Moreover, with respect to the prohibition of conflicts of interest, it is noted that “the lawyer must avoid acting for a client if that client has confidential information obtained from another former or current client of the lawyer”.

135. The IBA’s International Principles on Conduct for the Legal Profession (“IBA International Principles”) are comprised of ten principles, with a Commentary. Their aim is to establish “a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world. In addition, the purpose of adopting these International Principles is to promote and foster the ideals of the legal profession”.

136. The ten principles are: independence; honesty, integrity and fairness; conflicts of interest; confidentiality/professional secrecy; clients’ interest; lawyers’ undertaking; clients’ freedom; property of clients and third parties; competence; and fees.

137. The IBA International Principles do not cover new ground but, given their aim, the approach to formulation is characterised by what is required of lawyers rather than in terms of their rights or the requirements needed for the profession to operate.

138. Nonetheless, in the Commentary there are expectations for the legal framework regarding independence, while recognising the diversity of approaches that can exist.¹¹⁷

139. In addition, there is recognition in the Commentary of the lawyer’s responsibility for diversity and equality.¹¹⁸

¹¹⁷ “While the principles of independence of the lawyer and of the legal profession are undisputed in all jurisdictions adhering to, and striving for, the improvement of the Rule of Law, the respective regulatory and organisational frameworks vary significantly from jurisdiction to jurisdiction. In certain jurisdictions, the bars enjoy specific regulatory autonomy on a statutory and sometimes constitutional basis. In others, legal practice is administered by the judicial branch of government and/or governmental bodies or regulatory agencies. Often the courts or statutory bodies are assisted by bar associations established on a private basis. The various systems for the organisation and regulation of the legal profession should ensure not only the independence of practicing lawyers but also administration of the profession in a manner that is itself in line with the Rule of Law. Therefore, decisions of the Bars should be subject to an appropriate review mechanism. There is an ongoing debate as to the extent to which governmental and legislative interference with the administration and conduct of the legal profession may be warranted. Lawyers and bars should strive for and preserve the true independence of the legal profession and encourage governments to avoid and combat the challenges to the Rule of Law”.

¹¹⁸ “Regarding diversity and equality, a lawyer shall not discriminate unlawfully, or victimise or harass anyone, in the course of professional dealings. A lawyer shall provide services to clients in a way that respects diversity. A lawyer shall approach recruitment and employment in a way that encourages equality of opportunity and respect for diversity”.

140. Furthermore, in the Commentary on confidentiality/professional secrecy there is an attempt to address the duties imposed on lawyers to assist in the prevention of terrorism, money-laundering and organised crime.¹¹⁹

141. There have been some references to the above instruments in a few cases before the European Court that have concerned the following issues relevant to the profession of lawyer: admission to or reinstatement in the profession; confidentiality and professional secrecy; effective representation; and freedom of expression

142. Most have concerned the CCBE's Code of Conduct for European Lawyers and its Charter of Core Principles of the European Legal Profession. Generally, the references have – as with the Basic Principles and Recommendation No. R(2000)21 - been confined to the sections dealing with relevant materials for the proceedings,¹²⁰ with this being prompted in two of them by third-party interventions by the CCBE itself.¹²¹

143. Only in one case was one of the instruments – the Charter – considered in the substantive ruling. In this case the European Court drew attention to the values of the dignity and honour of the legal profession, the integrity and good standing of the individual advocate, respect towards professional colleagues as well as respect for the fair administration of justice set out in the Charter when considering the limits to the exercise of freedom of expression by a lawyer.¹²²

144. In addition, the relevant material for the proceedings in one case included a reference to CCBE's Code of Conduct for European Lawyers where a national code of professional ethics had stipulated that advocates may follow its rules insofar as there was no contradiction between them.¹²³ However, there was still no substantive discussion of the Code.

145. Also, there has been a reference to the Code in one dissenting opinion in support of the view that the majority judgment – which found a violation of the right to freedom of expression as a result of a fine imposed on a lawyer for contempt of court - would trigger a lowering of standards of professional conduct.¹²⁴

146. This dissenting opinion also referred to the IBA's International Principles for the same reason as it did to the Code.

147. Finally, one case has referred, without comment, to a number of the above instruments in a reference to the Parliamentary Assembly's invitation to the Committee of Ministers to draft and adopt a convention on the profession of lawyer.¹²⁵

148. All the foregoing standards are, of course, referred to by the international professional organisations concerned when they raise concerns about the treatment of individual lawyers and developments that have or are likely to affect the profession in general.

¹¹⁹ "Many bars are opposed in principle to the scope of this legislation. Any encroachment on the lawyer's duty should be limited to information that is absolutely indispensable to enable lawyers to comply with their legal obligations or to prevent lawyers from being unknowingly abused by criminals to assist their improper goals. If neither of the above is the case and a suspect of a past crime seeks advice from a lawyer, the duty of confidentiality should be fully protected. However, a lawyer cannot invoke confidentiality/ professional secrecy in circumstances where the lawyer acts as an accomplice to a crime".

¹²⁰ Thus, both instruments were referred to in *Michaud v. France*, no. 12323/11, 6 December 2012, at para. 77 (in connection with the importance of preserving the independence of the legal profession and protecting legal professional secrecy and the confidentiality of exchanges between lawyers and their clients); *Morice v. France* [GC], no. 29369/10, 23 April 2015, at para. 60 (referring in the case of the Code to extracts from Opinion no. (2013) 16 on the relations between judges and lawyers, adopted by the Consultative Council of European Judges (CCJE) on 13-15 November 2013, in which the Code was cited and in the case of the Charter to all its ten principles); and *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018, at para. 75, *Lekavičienė v. Lithuania*, no. 48427/09, 27 June 2019, at para. 32 and *Jankauskas v. Lithuania (No. 2)*, no. 50446/09, 27 June 2019, at para. 50 (just mentioning the Code's existence but referring to the following principles in the Charter (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; (h) respect towards professional colleagues; (i) respect for the rule of law and the fair administration of justice; and (j) the self-regulation of the legal profession.

¹²¹ Namely, *Michaud v. France* and *Morice v. France*.

¹²² *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018, at para. 141.

¹²³ *V.K. v. Russia*, no. 9139/08, 4 April 2017, at paras. 20 and 21. This case concerned the deprivation of the applicant's liberty but a relevant issue was his effective representation; "The Court accepts that Mrs L. as a court-appointed lawyer might have concluded that it was in her client's best interests to undergo treatment. However, any effort to serve the interests of justice and discharge the duty to the court should not have resulted in unconditional endorsement of the hospital's proposal without any reference to the client's position. Therefore, her conduct could not have been reconciled with the requirements of effective representation" (para. 39).

¹²⁴ By ad hoc Judge Galič in *Čeferin v. Slovenia*, no. 40975/08, 16 January 2018, at para. 8, in connection with the proposition that "staunch advocacy and zealous, fierce, and vigorous pursuit of a client's case does not legitimise and is no excuse for unprofessional, discourteous, or uncivil behaviour toward any person involved in the legal process".

¹²⁵ *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020, at para. 105; namely, the CCBE's Charter of Core Principles of the European Legal Profession, the Turin Principles, the IBA Standards and the IBA International Principles.

149. Overall, these standards can be seen as not only can be seen as reinforcing many of the points made in the Basic Principles and Recommendation No. R(2000)21 but adding some important details, which can contribute to the implementation of general principles in concrete situations.

150. The latter is also true of the IBA's Presidential Task Force Report,¹²⁶ which does not seek to elaborate new standards relating to the independence of the legal profession. Rather, it comprises a set of indicators to demonstrate the presence of independence¹²⁷ and of the threats to that independence.¹²⁸

151. Not all the indicators are specifically concerned with lawyers - notably those concerned with the judiciary and public opinion - as there is a clear recognition that the environment in which lawyers work can have a significant impact on their independence in practice.

152. However, taken together, all the indicators provide useful detail regarding the enjoyment of independence by the profession of lawyer, as well as a way of measuring the sort of factors that may weaken or destroy it.

3.1.4 Standards relating to human rights defenders

153. Instruments concerned with human rights defenders have been adopted within the framework of the United Nations, the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights ("ODIHR").

3.1.4.a United Nations

154. The United Nations General Assembly has adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedom ("**the Declaration on human rights defenders**").¹²⁹

¹²⁶ Adopted in 2016.

¹²⁷ Namely, constitutional guarantees of judicial independence; freedom to associate through independent bar associations and organisations; clear and transparent rules on admission to the Bar, disciplinary proceedings and disbarment; protection of legal professional privilege/professional secrecy – the scope of protection, and procedural guarantees; effective independent regulation of the profession; comprehensive legal education and professional training; freedom of choice in representation, including freedom from fear of prosecution in controversial or unpopular cases; ability to uphold the rule of law in situations of heightened national security concerns; ability to respond to political, media or community pressures in times of war, terror or emergency; and ability to adapt and react to business practices and quasi-legal practices without undermining exercise of independent judgment in the best interest of the client.

¹²⁸ Namely, lack of constitutionally guaranteed independence of the judiciary; a weakened judicial system and judiciary in transitional and post-conflict societies; • allegations and occurrences of judicial bribing; existence of national legislation that prohibits the public and lawyers from criticising and/or challenging the judiciary; excessive governmental control of the judiciary; inadequate remuneration for judges; legislative attempts by government to restrict the rights of lawyers to join independent NGOs; legislative attempts by government to restrict the structure, aim and scope of permissible activities by NGOs; vague regulations on admission; vague regulations on disciplinary proceedings and disbarment; lack of publicly available information on the process of disbarment and disciplinary proceedings; lack of publicly available disciplinary orders; frequent reports of arbitrary disbarments or targeted disciplinary proceedings; intrusive or onerous legislation that forces lawyers to breach the principle of lawyer-client confidentiality; high incidence of reports of such breaches, particularly in situations where they occur without the knowledge and consent of the client, or in the context of criminal trials; existence and enforcement of criminal sanctions against lawyers who fail to disclose confidential client information; existence of tipping-off prohibitions; a regulatory framework that is predominantly or exclusively made up of government-appointed members; a regulatory framework that is funded by the executive; high incidence of reports of arbitrary disbarments and targeted disciplinary measures; legislative attempts by the government to strip away the power of the profession to regulate itself; lack of financial resources for the purposes of education and training; no educational admission standards, or very low admission standards; high incidence of reports of bribing for the purposes of obtaining educational or professional qualifications, and to secure admission to academic or vocational courses; incidents of violence, harassment and intimidation of lawyers; legislative attempts to limit the freedom of expression and freedom of association; arbitrary arrests and detention of lawyers; open and notorious attacks against lawyers by private actors and the public; enactment of vague and imprecise anti-terrorism legislation, which permits for wide and expansive definitions of the term 'terrorist', 'act of terrorism' and/or other terms that define liability; reports of alleged harassment and intimidation of lawyers in the context of investigations carried out under anti-terrorism legislation; legislation that allows for expansive surveillance, including surveillance of private communications between lawyer and client, as well as the confiscation of private and confidential work product in the context of legal advice, representation or court proceedings; negative political, societal and even media propaganda in times of war, terror and emergency; Frequent public attacks against the profession by prominent political figures; negative public opinion of the legal profession, and a general tendency by the public to associate lawyers with their clients, corruption, dishonesty and greed; and lack of effective communication and collaboration between the media and the legal profession, which could lead to misinformation about the role of lawyers in society, and consequently inaccurate reporting.

¹²⁹ Annexed to Resolution 53/144 on 9 December 1998.

155. **The Declaration on human rights defenders is applicable to everyone. However, a number of its provisions are particularly relevant to the work undertaken by lawyers and the action taken against them may sometimes viewed through this prism, either in addition to or as an alternative to other instruments.**

156. These provisions concern, firstly, the acquisition of knowledge relating to human rights and its dissemination, as well as expressing views on their observance.¹³⁰

157. In addition, the provisions deal with or are relevant to advocacy of change in the law,¹³¹ seeking remedies for human rights violations¹³² and protection for professional activities.¹³³

158. The Declaration **on human rights defenders** has been reaffirmed in a subsequent General Assembly Resolution¹³⁴ and the provisions in the latter concerning the protection of human rights defenders,¹³⁵ including their legal representatives, have been referred to as relevant material by the European Court in one case about the detention of a lawyer and the search of his home and office.¹³⁶

159. The mandate of the United Nations Special Rapporteur on the situation of human rights defenders includes promoting the effective implementation of the Declaration **on human rights defenders** in cooperation and dialogue with Governments and other actors.

160. This includes taking up individual cases with governments, country visits and an annual report to the Human Rights Council and to the General Assembly, providing a record of the year's activities, describing the primary trends and concerns identified during the year and making recommendations as to how these should be addressed.¹³⁷

¹³⁰ Article 6 provides: "Everyone has the right, individually and in association with others: (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems; (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters".

¹³¹ Articles 7 and 8(2) respectively provide: "Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance" and "...the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms".

¹³² Article 9 provides: "3. ...everyone has the right, individually and in association with others, inter alia: (a) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay; (b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments; (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms. 4. To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms".

¹³³ Article 11 provides: "Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession". In addition, Article 12 provides: 2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration. 3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms".

¹³⁴ 70/161. Human rights defenders in the context of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 17 December 2015.

¹³⁵ Notably, "5. Strongly condemns the violence against and the targeting, criminalization, intimidation, torture, disappearance and killing of any individuals, including human rights defenders, for reporting and seeking information on human rights violations and abuses, and stresses the need to combat impunity by ensuring that those responsible for violations and abuses against human rights defenders, including against their legal representatives, associates and family members, are promptly brought to justice through impartial investigations; 6. Condemns all acts of intimidation and reprisal by State and non-State actors against individuals, groups and organs of society, including against human rights defenders and their legal representatives, associates and family members, who seek to cooperate, are cooperating or have cooperated with subregional, regional and international bodies, including the United Nations, its representatives and mechanisms, in the field of human rights".

¹³⁶ *Aliyev v. Azerbaijan*, no. 68762/14, 20 September 2018, in which violations of Articles 3, 5(1), 5(4), 8 and 18 of the European Convention were found.

¹³⁷ See further: <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/MethodsWork.aspx>.

3.1.4.b Council of Europe

161. The second instrument of relevance for human rights defenders is the **Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities** (“the Council of Europe Declaration”).¹³⁸

162. This calls, in particular, for an environment conducive to the work of human rights defenders, effective measures to protect, promote and respect them, human rights defenders and ensure respect for their activities, effective remedies for those whose rights and freedoms are violated and effective measures to prevent attacks on or harassment of them.

163. As such, the Council of Europe Declaration does not go beyond the provisions in the Declaration **on human rights defenders**.

164. However, the Council of Europe Declaration also invited “the Commissioner for Human Rights to strengthen the role and capacity of his Office in order to provide strong and effective protection for human rights defenders”.¹³⁹

165. The activities of the Commissioner for Human Rights in this connection have involved raising with governments the cases of human rights defenders, including ones who are lawyers,¹⁴⁰ and also intervening in cases concerned with them when they are being considered by the European Court.¹⁴¹

3.1.4.c ODIHR

166. ODIHR issued its Guidelines on the Protection of Human Rights Defenders (“the ODIHR Guidelines”) in 2014.

167. The provisions in them of particular relevance for lawyers include the following ones found in the United Nations instruments and/or ones specifically concerned with lawyers: protection from threats, attacks and other abuses; protection from judicial harassment, criminalization, arbitrary arrest and detention; and a safe and enabling environment to empower human-rights work (including freedom of opinion and expression and of information, freedom of peaceful assembly, freedom of association, right to private life and right to access and communicate with international bodies).

168. In addition, the ODIHR Guidelines deal with confronting stigmatization and marginalization¹⁴² and freedom of movement and human rights work within and across borders.¹⁴³

169. There is no specific mechanism to implement the ODIHR Guidelines.

170. However, “ODIHR assists national authorities in fulfilling their commitments to protect human rights defenders by monitoring their ability to operate and conduct advocacy and by building their capacity through education and training in human rights”.¹⁴⁴

¹³⁸ Adopted on 6 February 2008 at the 1017th meeting of the Ministers’ Deputies.

¹³⁹ In particular, “by: i) continuing to act upon information received from human rights defenders and other relevant sources, including ombudsmen or national human rights institutions; ii) continuing to meet with a broad range of defenders during his country visits and to report publicly on the situation of human rights defenders; iii) intervening, in the manner the Commissioner deems appropriate, with the competent authorities, in order to assist them in looking for solutions, in accordance with their obligations, to the problems which human rights defenders may face, especially in serious situations where there is a need for urgent action; iv) working in close co-operation with other intergovernmental organisations and institutions, in particular the OSCE/ODHIR focal point for human rights defenders, the European Union, the United Nations Secretary General’s Special Representative on Human Rights Defenders and other existing mechanisms”.

¹⁴⁰ See further: <https://www.coe.int/en/web/commissioner/human-rights-defenders>.

¹⁴¹ Including the one discussed at para. 158 above.

¹⁴² Notably, “State institutions and officials must refrain from engaging in smear campaigns, negative portrayals or the stigmatization of human rights defenders and their work. This includes the negative labelling of human rights defenders, discrediting human rights work and human rights defenders or defaming them in any way”.

¹⁴³ Notably, “States should recognize the importance of human rights work within and across borders and should fully comply with their commitments and relevant international standards concerning freedom of movement, including when human rights defenders leave or enter a country and when they move within their own country or seek to do so for the purpose of human rights work”.

¹⁴⁴ See <https://www.osce.org/odihr/human-rights-defenders#:~:text=ODIHR%20assists%20national%20authorities%20in,and%20training%20in%20human%20rights>.

171. The ODIHR Guidelines – particularly those concerned with protection and a safe and enabling environment to empower human-rights work – were referred to as relevant material in one case before the European Court, in which reference was also made to the United Nations General Assembly Resolution.¹⁴⁵

3.2 Legally binding instruments

172. The legally binding instruments of relevance for the profession of lawyer are two human rights treaties – the European Convention and the International Covenant – and a European Union Directive, together certain other European Union provisions. The latter are specifically concerned with the profession of lawyer whereas provisions in the two treaties can be and have been invoked to deal with some of the problems faced by individual lawyers.

3.2.1 The European Convention

173. The European Convention is significant not only for the obligation undertaken by the High Contracting Parties to it to secure the rights set out in it to everyone within their jurisdiction but also for the enforcement mechanism which it established to secure the fulfilment of that obligation.

174. There are many rights guaranteed by the European Convention that are potentially relevant to the problems faced by lawyers, most notably, the right to life, the prohibition of torture and inhuman and degrading treatment and the rights to liberty and security, fair trial, respect for private life, home and correspondence, freedom of expression and freedom of assembly and association.¹⁴⁶

175. Moreover, importance of the profession of lawyer has been recognised in many judgments of the European Court.

176. In some instances, this has been in the context of applications brought by clients of lawyers rather than by lawyers themselves. However, the rights in the European Convention have also been successfully relied upon in a significant number of applications brought by or in respect of lawyers.¹⁴⁷

177. The proceedings in cases involving lawyers – as indeed those concerned with other applicants – are not generally resolved very speedily. As the cases referred to below illustrate, it will be very unusual for judgment in a case to be given in less than two years after an application has been submitted (which may be up to 6 months after the final domestic decision relating to it has been taken) , with perhaps a delay of between 4-6 years being more usual and even longer ones occurring in some instances.

178. Nonetheless, at least some of the situations which are likely to lead to applications in respect of lawyers will fall within the first two categories of applications within the priority policy of the European Court.¹⁴⁸ Others will, however, fall outside it because the violation does not entail a continuing problem for the lawyer concerned or is of a repetitive nature.

179. There is, at least in theory, a possibility of seeking interim measures where there is an imminent risk of irreparable harm before the determination of an application. Generally, this will be in cases where there is a threat to life or a risk of ill-treatment but, they can be exceptionally applied in cases involving the right to fair trial and the right to respect for private and family life. However, interim measures tend to be applied mainly in extradition and expulsion cases and will not be helpful in cases where the alleged violation is not an ongoing one.¹⁴⁹

¹⁴⁵ See fns. 51 and 55.

¹⁴⁶ Namely, Articles 2, 3, 5, 6, 8, 10 and 11.

¹⁴⁷ Some of them have already been noted above in the context of the use made of the Basic Principles and Recommendation No. R(2000)21.

¹⁴⁸ Namely, “Urgent applications (in particular risk to life or health of the applicant, the applicant deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights, other circumstances linked to the personal or family situation of the applicant ...)” and “Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system)”.

For the priority policy, see https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

¹⁴⁹ For the refusal of interim measures in respect of a lawyer on hunger strike, see [https://stockholmcf.org/european-rights-court-denies-application-for-turkish-lawyer-on-hunger-strike/#:~:text=The%20European%20Court%20of%20Human,%20Association%20\(%C3%87HD\)%20announced%20on](https://stockholmcf.org/european-rights-court-denies-application-for-turkish-lawyer-on-hunger-strike/#:~:text=The%20European%20Court%20of%20Human,%20Association%20(%C3%87HD)%20announced%20on). On interim measures generally, see https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

180. After the judgment, several more years may elapse before it is executed.¹⁵⁰

181. The use of the rights guaranteed by the European Convention in respect of the profession of lawyer will be considered in relation to the different groupings of problems faced by its members that have been previously outlined.¹⁵¹

3.2.1.a Harassment, threats and attacks

182. The European Court has stated on a number of occasions that “persecution and harassment of members of the legal profession strikes at the very heart of the Convention system”. However, this has always been in cases concerned with searches of their offices¹⁵² and only in two of those cases were there factors that might actually have suggested persecution of the lawyer concerned.¹⁵³

183. There do not seem to have been any cases concerned with the killing of lawyers in which there was a violation of the right to life on account of an unlawful use of force. Nonetheless, this aspect of the right guaranteed by Article 2 would be applicable to lawyers and their families as much as to anyone else.

184. There have, however, been instances in which the European Court has found, in respect of the killing of lawyers, breaches of the State’s obligation under Article 2 to safeguard the right to life by putting in place all reasonable measures to ensure the safety of individuals from violent acts¹⁵⁴ and to carry out a prompt and effective investigation into an alleged unlawful killing by its agents.¹⁵⁵

185. In addition, where lawyers have been detained and subjected to torture and inhuman and degrading treatment in circumstances in which this seemed to have been motivated by their representation of particular clients, this has been found to be in violation of the rights guaranteed, respectively, by Articles 5 and 3 (both substantively and as regards the obligation to investigate).¹⁵⁶

186. Other actions taken against lawyers or their families that might fall within this grouping do not appear to have led to applications alleging violations of the European Convention. Nonetheless, it is clear from the case law of the European Court that the use of serious physical violence, as well as the failure to protect persons from ill-treatment would entail violations of the prohibition on inhuman and degrading treatment in Article 3.¹⁵⁷ Moreover, a threat of such violence is also capable of giving rise to a violation of that provision or of Article 8.¹⁵⁸

¹⁵⁰ As to the process of execution, see <https://www.coe.int/en/web/execution/the-supervision-process>.

¹⁵¹ A lawyer can, of course, rely upon rights in the European Convention even when their alleged violation is not established to have any connection with her/his professional activities; see, e.g., *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008, in which the applicant’s detention and the absence of sufficient care during it were found, respectively, to be in violation of Articles 5 and 3. It was not considered necessary to examine separately his complaint that his criminal prosecution pursued purposes other than those stipulated in Articles 5.

¹⁵² See: *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008, at para. 214; *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009, at para. 31; *Heino v. Finland*, no. 56720/09, 15 February 2011, at para. 43; *Yuditskaya and Others v. Russia*, no. 5678/06, 12 February 2015, at para. 27; *Annagi Hajibeyli v. Azerbaijan*, no. 2204/11, 22 October 2015, at para. 68; *Aliyev v. Azerbaijan*, no. 68762/14, 20 September 2018, at para. 181; and *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020, at para. 125. The search in *Annagi Hajibeyli* was found to be contrary to the obligation under Article 34 not to hinder the right of individual application and was also found to be a violation of Article 8 in the *Aliyev* case, which was brought by the lawyer of the applicant in the former case.

¹⁵³ Namely in the *Aleksanyan* and *Aliyev* cases, in both of which violations of Article 18 were alleged and, in the second of them, upheld.

¹⁵⁴ See, e.g., *Bljakaj and Others v. Croatia*, no. 74448/12, 18 September 2014 (which concerned a shooting spree carried out by a mentally disturbed individual, who had known the lawyer killed in it from the divorce proceedings in which she, as a lawyer, had been representing his wife).

¹⁵⁵ See, e.g., *Finucane v. United Kingdom*, no. 29178/95, 1 July 2003 (which concerned the investigation into the killing of a lawyer which was alleged to have occurred in circumstances giving rise to suspicions of collusion of the security forces with his killers).

¹⁵⁶ See *Elçi and Others v. Turkey*, no. 23145/93, 13 November 2003.

¹⁵⁷ See, e.g., as regards the former, see *Opuz v. Turkey*, no. 33401/02, 9 June 2009 (a case of domestic violence) and, as regards the latter, *97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, no. 71156/01, 3 May 2007 (which concerned the failure by the police to protect members of a religious congregation from ill-treatment).

¹⁵⁸ See, e.g., as regards the former, *Gäfgen v. Germany* [GC], 22978/05, 1 June 2010 (threat of torture) and *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015 (which concerned serious threats, but also some sporadic physical abuse in illustration of the reality of the threats, that rendered the fear, anxiety and insecurity experienced sufficient to reach the threshold required for Article 3) and, as regards the latter, *Đorđević v. Croatia*, no. 41526/19 24 July 2012 (which concerned ongoing harassment of children).

187. Moreover, where an interference with a lawyer's rights can be shown to be motivated by improper reasons and their actual purpose was to silence and to punish her/him for her/his activities in the area of human rights as well as to prevent her/him from continuing those activities, there will be a violation not only of the substantive rights but also of Article 18, which prohibits the application of restrictions permitted under the European Convention for any purpose other than those for which they have been prescribed.¹⁵⁹

188. In the case of proceedings brought to the European Court itself, in exercise of the right of individual application, any form of pressure covering not only direct coercion and flagrant acts of intimidation of the legal representatives of applicants or potential applicants but also improper indirect acts or contacts designed to dissuade or discourage them from pursuing this remedy will amount to a breach of the obligation under Article 34 not to hinder the exercise of this right.¹⁶⁰

3.2.1.b Direct interference with professional responsibilities

189. Any interference with the choice of a lawyer to represent a person will, if unjustified and having an impact on the fairness of the trial, only entail a violation of that person's rights under Article 6(3)(c) in criminal proceedings and Article 6(1) in the case of civil ones.¹⁶¹

190. Moreover, the cases in which the issue of interference in some way with actual access by lawyers to their clients has been successfully challenged are generally ones in which the applicant was the client, as s/he will have been the direct victim of an violation of the right to legal assistance under Article 6(3)(c).¹⁶²

191. However, the apprehension of a lawyer while raising concerns on behalf of her/his client without any objective basis for such action would entail a violation of the right to liberty and security of the person under Article 5.¹⁶³ Similarly, preventing a lawyer from going to see her/his client in a police station or other place could in some circumstances be inconsistent with the right to freedom of movement under Article 2 of Protocol No. 4.¹⁶⁴ On the other hand, the temporary disqualification of lawyers to prevent them from disclosing statements by their client to the press was not considered a disproportionate interference with their right to freedom of expression where previous statements by them had not concerned his defence or formed part of the exercise of the right to inform the public about the functioning of the justice system but rather could be seen as conveying his views on such matters as the strategy to be adopted by his former armed organisation.¹⁶⁵

192. Where a denial or delay in access to a lawyer is considered to have been justified, the only outstanding issue will then be whether this has resulted in a denial of a fair trial for the client and not whether any right of the lawyer has been violated.¹⁶⁶

193. The focus on a right of the client – as opposed to one of the lawyer - will often also be the situation where there is interference with the confidentiality of discussions between them when they are meeting, as reliance will then have to be placed upon the right under Article 6(3)(c).¹⁶⁷

¹⁵⁹ See, e.g., *Aliyev v. Azerbaijan*, no. 68762/14, 20 September 2018 (which concerned the detention without any reasonable suspicion and the search of a lawyer's home and office without observing the conditions discussed, i.e., in violation of Articles 5 and 8).

¹⁶⁰ *Kurt v. Turkey*, no. 24276/94, 25 May 1998, at para. 160. See, e.g., *Fedotova v. Russia*, no. 73225/01, 13 April 2006 (summons for an interview with police about claim for just satisfaction).

¹⁶¹ See, e.g., *Klimentyev v. Russia*, no. 46503/99, 16 November 2006 and *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015.

¹⁶² See, e.g., *Moiseyev v. Russia*, no. 62936/00, 9 October 2008 and *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015.

¹⁶³ As was found in *François v. France*, no. 26690/11, 23 April 2015, which concerned a lawyer assisting a person in police custody who – following a dispute concerning the written observations he wished to add to the file and his request that his client undergo a medical examination -was himself taken into police custody and subjected to a full body search and alcohol test, neither of which had been justified by objective indications. See also *Moulin v. France*, no. 37104/06, 23 November 2010, in which a violation of Article 5(3) had been found as a result of lawyer who had been placed in police custody on suspicion of breaching the confidentiality of an investigation not having been brought before a competent legal authority to consider the merits of her detention.

¹⁶⁴ There is, however, no case raising such an issue.

¹⁶⁵ *Tuğluk and Others v. Turkey* (dec.), no. 30687/05, 4 September 2018. See also, *Öcalan v. Turkey (No. 2)*, no. 24069/03, 18 March 2014, at para. 132; "The Court notes that the periods when the applicant was refused lawyer's visits preceded the commencement of proceedings against some of the applicant's lawyers, who had been accused of having acted as messengers between him and the PKK".

¹⁶⁶ See *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016 and *Beuze v. Belgium* [GC], n° 71409/10, 9 November 2018.

¹⁶⁷ See, e.g., *S. v. Switzerland*, no. 12629/87, 28 November 1991 (surveillance of the applicant's contacts and correspondence with his lawyer); *Brennan v. United Kingdom*, 39846/98, 16 October 2001 (presence of police officer during consultation with lawyer); *Rybacki v. Poland*, no. 52479/99, 13 January 2009 (meetings always within earshot of prosecutor or person appointed by him); *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013 (inability to have a private discussion with lawyers during a trial); and *R. E. v. United Kingdom*, no. 62498/11, 27 October 2015 (covert surveillance of consultations between detainees and their legal advisors).

194. However, the interception of any form of written communications sent from or to the lawyer – and thus its confidentiality - would engage the right to respect for private life, home and correspondence under Article 8 of both the client¹⁶⁸ and the lawyer.¹⁶⁹

195. Such interception of communication could, however, be regarded as compatible with these rights where there is a well-founded basis for believing that genuinely improper conduct is occurring¹⁷⁰ or for reasons of national security.¹⁷¹

196. Nonetheless, surveillance of a lawyer's communications will be in violation of Article 8 where the relevant legislation does not specify: the categories of persons and communications affected; the offences for which the measure may be used; the basis for applying such measures; the maximum duration of any measure; the procedure for examining, using and storing the data gathered; the permitted use of and access to the material gathered; the circumstances in which the material will be destroyed or erased; and the arrangements for record-keeping and its independent supervision.¹⁷² Particularly pertinent in this regard will be the existence of effective protection for communications covered by legal professional privilege.¹⁷³

197. Moreover, where the interception of the telephone calls of a client has been authorised in connection with a criminal investigation, the lawyer must benefit from "effective control" in order to be able to challenge the eavesdropping of her/his telephone calls with the client when these are recorded and used in the context of a criminal case.¹⁷⁴

198. However, the European Court has not found objectionable the transcription of an exchange between a lawyer and her/his client in the context of lawful interception of the client's telephone conversations where the contents of that exchange gave rise to a presumption that the lawyer her/himself was participating in an offence, and in so far as the transcription did not affect the client's defence rights.¹⁷⁵

199. A search of a lawyer's office, as much as her/his home, has long been regarded as coming within the protection afforded by Article 8.¹⁷⁶

¹⁶⁸ As in *Pawlak v. Poland*, no. 39840/05, 15 January 2008 and *Altay v. Turkey (No. 2)*, no. 11236/09, 9 April 2019 (in which the interferences were respectively contrary to domestic law and under a provision that did not meet the foreseeability requirement for law) and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013 (extensive interference with written communications throughout the investigation and trial);. In none of these cases was the lawyer also an applicant.

¹⁶⁹ See, e.g., *Schönenberger and Durmaz v. Switzerland*, no. 11368/85, 20 June 1988 (failure to forward a letter from a lawyer to his client) and *Laurent v. France*, no. 28798/13, 24 May 2018 (interception by a police officer of papers that a lawyer had handed over to his clients, who were under police escort, in the lobby of a court building).

¹⁷⁰ Such as preventing information being passed on to suspects still at large, as was not demonstrated in *Brennan v. United Kingdom*, no. 39846/98, 16 October 2001 and other interferences with the conduct of criminal proceedings, as was not demonstrated in *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013. See also *Laurent v. France*, no. 28798/13, 24 May 2018, in which it was held that the interception of papers that a lawyer had written and handed over to his clients in full view of the senior escorting officer, without attempting to conceal his actions, could not be justified in the absence of any suspicion of an unlawful act.

¹⁷¹ As in *R. E. v. United Kingdom*, no. 62498/11, 27 October 2015.

¹⁷² These requirements were found not to be fulfilled in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, a case brought by lawyers working for a non-governmental organisation. Also, in *R. E. v. United Kingdom*, no. 62498/11, 27 October 2015 – which concerned an application by a detainee - the legislative provisions concerning the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings may or must be erased or the material destroyed were not considered to provide sufficient safeguards for the protection of the material obtained by covert surveillance of communications between detainees and their legal advisors undertaken for reasons of national security.

¹⁷³ In the *Iordachi* case, the European Court observed that: "while the Moldovan legislation (...) guarantees the secrecy of lawyer-client communications (...), it does not provide for any procedure which would give substance to the above provision. The Court is struck by the absence of clear rules defining what should happen when, for example, a phone call made by a client to his lawyer is intercepted" (para. 50). Similarly, in *Dudchenko v. Russia*, no. 37717/05, 7 November 2017, the interception of a suspect's telephone conversations with his lawyer was found to violate Article 8 as the law provided no specific safeguards applicable to interception of lawyers' communications but these were subject to the same legal provisions on interception concerning anyone else and those provisions did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse. Moreover, there were no procedures to be followed in cases where, while tapping a suspect's telephone, the authorities accidentally intercepted the suspect's conversations with his or her counsel. However, also important is the nature of the person responsible for determining what is covered by legal professional privilege. Thus, in *Kopp v. Switzerland*, no. 23224/94, 25 March 1998, it had been considered astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge.

¹⁷⁴ See *Prutenau v. Romania*, no. 30181/05, 3 February 2015, in which this was found not to be possible.

¹⁷⁵ In *Versini-Campinchi and Crasnianski v. France*, no. 49176/11, 16 June 2016.

¹⁷⁶ In *Niemietz v. Germany*, no. 13710/88, 16 December 1992.

200. Such a search, and the seizure of material there, will be a violation of that provision where: there was a lack of precision in the legislation as to the circumstances in which privileged material could be subject to search and seizure;¹⁷⁷ there was no requirement for independent or judicial supervision of the authorisation to undertake the search;¹⁷⁸ there was no proper authorisation or (and thus was not in accordance with law);¹⁷⁹ there was no legitimate aim for this being undertaken;¹⁸⁰ there was no reasonable suspicion that the lawyer concerned was implicated in the commission of an offence¹⁸¹ or that evidence would be found at her/his office/home;¹⁸² there was a failure to give compelling and detailed reasons for authorising a course of action with implications for lawyer-client confidentiality and to put in place particular measures to safeguard the privileged materials protected by professional secrecy;¹⁸³ the authorisation was drawn in broad terms;¹⁸⁴ the search was carried out without observing the procedural safeguards applicable¹⁸⁵ or without regard to respecting legal professional privilege;¹⁸⁶ or the search was carried out solely on account of difficulties in an investigation concerned with the clients of the lawyer concerned.¹⁸⁷

201. In all those situations, a search and seizure will also violate the right of the client under Article 8 and, indeed, s/he may be the only person to complain to the European Court.¹⁸⁸

202. However, the conduct of such a search under the supervision of a lawyer, whose task was to identify which documents were covered by legal professional privilege and should not be removed will not be regarded as being in violation of Article 8,¹⁸⁹ so long as this is effective in practice.¹⁹⁰

¹⁷⁷ As in *Petri Sallinen v. Finland*, no. 50882/99, 27 September 2005 and *Golovan v. Ukraine*, no. 41716/06, 5 July 2012 (in which the European Court was concerned that “the absolute statutory ban, aimed at protecting the inviolability of the legal profession, could not be consistently applied without the introduction of further binding rules governing justified interference with privileged material. The current status of the domestic law thus afforded the authorities full discretion in determining how section 10 of the Bar Act should be corresponded with the Code of Criminal Procedure and other legislative provisions in each particular case”, para. 60).

¹⁷⁸ As in *Petri Sallinen v. Finland*, no. 50882/99, 27 September 2005 and *Heino v. Finland*, no. 56720/09, 15 February 2011.

¹⁷⁹ As in *Elçi and Others v. Turkey*, no. 23145/93, 13 November 2003, *Taner Kılıç v. Turkey*, no. 70845/01, 24 October 2006 and *Golovan v. Ukraine*, no. 41716/06, 5 July 2012.

¹⁸⁰ As in *Aliyev v. Azerbaijan*, no. 68762/14, 20 September 2018, in which the European Court stated that, having found that administrative irregularities allegedly committed by the applicant with respect to the receipt and use of the grants by the Association, for which he was prosecuted and detained during the period at issue, could not give rise to liability under criminal law and, having regard to the restrictive definition of the exceptions provided by Article 8(2) and its rigorous supervision of them, it could not accept that the interference complained of pursued the legitimate aim of prevention of crime within the meaning of this Article.

¹⁸¹ As in *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009 and *Yuditskaya and Others v. Russia*, no. 5678/06, 12 February 2015.

¹⁸² As in *Golovan v. Ukraine*, no. 41716/06, 5 July 2012.

¹⁸³ As in *Mancevschi v. Moldova*, no. 33066/04, 7 October 2008, *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008, *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009, *Xavier Da Silveira v. France*, no. 43757/05, 21 January 2010 and *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020.

¹⁸⁴ As in, e.g., *Niemietz v. Germany*, no. 13710/88, 16 December 1992, *Smirnov v. Russia*, no. 71362/01, 7 June 2007, *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008, *André and Others v. France*, no. 18603/03, 24 July 2008, *Mancevschi v. Moldova*, no. 33066/04, 7 October 2008, *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008, *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009, *Yuditskaya and Others v. Russia*, no. 5678/06, 12 February 2015 and *Leotsakos v. Greece*, no. 30958/13, 4 October 2018.

¹⁸⁵ As in *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007; a particular problem was the failure to follow a sifting procedure in respect of electronic data.

¹⁸⁶ As in *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009 and *Yuditskaya and Others v. Russia*, no. 5678/06, 12 February 2015.

There was also no sifting procedure in respect of electronic data.

¹⁸⁷ As in *André and Others v. France*, no. 18603/03, 24 July 2008.

¹⁸⁸ As in *Sorvisto v. Finland*, no. 19348/04, 13 January 2009. However, in *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013, the search of the office of the applicant’s lawyer and the seizure of papers found there was treated as an interference with the secrecy of their communications that was incompatible with Article 6(3)(c).

¹⁸⁹ See, e.g., *Tamosius v. United Kingdom* (dec.), no. 62002/00, 19 September 2002 (“The Court is not persuaded that it can be required, in order to prevent any possibility of error, that all documents to which privilege could prima facie attach should be covered”), *Sérvulo & Associados – Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, 3 September 2015 and *Lindstrand Partners Advokatbyrå AB v. Sweden*, no. 18700/09, 20 December 2016. Cf. *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008; “while the search was carried out in the presence of two certifying witnesses, they were neighbours who were not legally qualified (...). This may be considered problematic, as this lack of legal qualification made it highly unlikely that these observers were truly capable of identifying, independently of the investigation team, which materials were covered by legal professional privilege, with the result that they did not provide an effective safeguard against excessive intrusion by the police into the applicant’s professional secrecy”. It took the same view in *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009, *Golovan v. Ukraine*, no. 41716/06, 5 July 2012, *Leotsakos v. Greece*, no. 30958/13, 4 October 2018 and *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020.

¹⁹⁰ Thus, in *André and Others v. France*, no. 18603/03, 24 July 2008 the presence of the chairman of the Bar Association and his specific objections were insufficient to prevent the actual inspection of all the documents at the practice, or their seizure.

203. Moreover, there will be no violation of Article 8 where there is judicial control over the scope of the material seized before this can be inspected as part of an investigation.¹⁹¹ However, any ex post facto judicial control over a search must actually be effective.¹⁹²

204. In addition, a lawyer can also rely upon the right to a fair trial where s/he does not have an effective remedy to challenge interferences with the right to respect for one's home resulting from a search.¹⁹³

205. Furthermore, search and seizure in respect of the office of a lawyer that resulted in the seizure of the case file of an applicant to the European Court, with the consequence that the applicant and his lawyer were deprived of access to it for a lengthy period of time, without any justification and without any compensatory measures, will be regarded as constituting in itself an undue interference with the integrity of the proceedings and a serious hindrance to the effective exercise of the applicant's right of individual petition contrary to Article 34.¹⁹⁴

206. Any proceedings before a judicial body for lifting the professional confidentiality binding on someone in her/his capacity as a lawyer will require an opinion to be sought from an independent body because of the nature of the information involved.¹⁹⁵

207. A requirement for lawyers to report to the administrative authorities suspicions about another person's involvement in money-laundering and associated crimes will - where that resulted from information which came into their possession through exchanges with that person - be regarded as an interference with their right to respect for their correspondence and also with their right to respect for their "private life", as that includes activities of a professional or business nature.

208. However, such a requirement will not be considered to be in violation of the right guaranteed by Article 8, where it does not go to the very essence of the lawyer's defence role – seen as the very basis of legal professional privilege – and there is a filter to protect that privilege.¹⁹⁶

209. There has been a case in which consideration was given to the fact that a lawyer had been summoned by the prosecution for questioning in connection with his client. Although the lawyer had refused to do so, referring to his status as an advocate and the client's representative in the proceedings, the European Court did accept that such summonses might have had a chilling effect on the applicants' defence team. However, it also emphasised that, even if they had been unlawful, the lawyer had refused to testify, and that refusal had not led to any sanctions against him. In these circumstances, it concluded that lawyer-client confidentiality had not been breached on that account.¹⁹⁷

¹⁹¹ As in *Sérvulo & Associados – Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, 3 September 2015 and *Lindstrand Partners Advokatbyrå AB v. Sweden*, no. 18700/09, 20 December 2016. No such possibility was found to exist in *Xavier Da Silveira v. France*, no. 43757/05, 21 January 2010.

¹⁹² This was found not to be the case in *Vinci Construction et GTM Génie Civil et Services v. France*, no. 63629/10, 2 April 2015 (in which there was no tangible examination of the documents after it had been acknowledged that they contained correspondence with a lawyer), *Leotsakos v. Greece*, no. 30958/13, 4 October 2018 (in which the prosecutor's submissions were all accepted in a few words without hearing the applicant's representations as this was not provided for in domestic law) and *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020 (in which certain lawyers had been barred from participating in the proceedings and a complaint by another was refused on the grounds that the criminal case against third persons, within the framework of which that warrant had been issued, had been by that moment sent for trial).

¹⁹³ As in *André and Others v. France*, no. 18603/03, 24 July 2008.

¹⁹⁴ See *Annagi Hajibeyli v. Azerbaijan*, no. 2204/11, 22 October 2015. In that case, the European Court did not deal with the search and seizure in general (which was found to violate Article 8 in *Aliyev v. Azerbaijan*, no. 68762/14, 20 September 2018) but it noted that the seizure of the applicant's case file did not come within the scope of the search warrant and there was no other justification for seizing the documents concerning the application in the context of the criminal proceedings against the applicant's lawyer. The Court considered that, at the very least, the applicant should have been informed of the seizure in a timely manner and given an opportunity to make and retain copies of all the material in the case file, to enable him to participate effectively in the proceedings after the seizure. At the same time, it did not regard as material that no correspondence or activity relating to the applicant's case had actually taken place during the period when his case file was in the authorities' possession.

¹⁹⁵ See *Ferrinho Bexiga Villa Nova v. Portugal*, no. 69436/10, 1 December 2015, in which the proceedings related to the bank statements of the applicant, who was suspected of tax fraud. The requirement of effective control was also not satisfied as a challenge to the decision concerned was not examined on its merits.

¹⁹⁶ See *Michaud v. France*, no. 12323/11, 6 December 2012. The obligation in that case did not apply to judicial proceedings, whether the information had been received or obtained before, during or after said proceedings, including any advice given with regard to the manner of initiating or avoiding such proceedings, nor to any legal advice given, unless the information was provided for the purpose of money-laundering or terrorist financing or with the knowledge that the client requested it for that purpose. In addition, the information was to be transmitted through the President or Chairman of the Bar Council of which the lawyer is a member.

¹⁹⁷ See *Khodorkovskiy and Lebedev v. Russia*, no. 1082/06, 25 July 2013, at para. 631.

210. The lawyer had not been an applicant in these proceedings. Nonetheless, it is difficult to see such summonses in this case or in any other where a lawyer is treated as a witness in her/his client's case as constituting a potential violation of any rights that s/he might have had under the European Convention.

211. Any difficulties experienced by a lawyer in gaining access to the files in criminal proceedings will be addressed from the perspective of the client's rights to adversarial proceedings and equality of arms and to have adequate time and facilities for the preparation of the defence under Article 6(1) and (3)(b).¹⁹⁸

212. A similar approach would apply where a judge does not give proper consideration to motions submitted by a lawyer, such as ones seeking her/his recusal or relating to the summoning or examination of witnesses. This could lead to a violation of the client's rights to an impartial trial and to summon and examine witnesses under Article 6(1) and (3)(d). However, the judge's conduct might ultimately be examined if the lawyer is sanctioned for his or her remarks in respect of it.¹⁹⁹

213. In the above cases, issues relating to the exact professional status of the "lawyers" involved has not generally been raised.

214. However, in one case concerned with the failure to forward an applicant's letter to a lawyer, the European Court did not attach any importance to the fact that at the time the lawyer had not been formally appointed by the client.²⁰⁰ That might, however, be possibly of less significance for a complaint about a violation of Article 8, the subject of that case, as opposed to one relating to Article 6(3)(c).

215. Of more importance, perhaps, was the view taken in two other cases that persons who either did not have licences to practice as lawyers or were practising lawyers but not members of the Bar could still be applicants in cases concerned with potential or actual interferences with professional secrecy.

216. In the first case, no distinction was made between those lawyers working for a non-governmental organisation and those who had a licence to practice from the Ministry of Justice.²⁰¹

217. In the second case, the law provided that legal advice, as well as representation in court proceedings, could be provided by advocates and by "other persons", with few limitations. However, professional secrecy was protected only to the extent that advocates were involved, thus leaving exposed the relationships between clients and other kinds of legal advisers. The European Court accepted that it was for States to determine who is authorised to practice within their jurisdiction and under what conditions, as well as to establish a system of particular safeguards of professional secrecy in the interests of proper administration of justice given lawyers' role as intermediaries between litigants and the courts.

218. Nonetheless, although it conceded that potential clients should be aware of the difference between the status of advocates and that of other legal advisers, it considered that "it would be incompatible with the rule of law to leave without any particular safeguards at all the entirety of relations between clients and legal advisers who, with few limitations, practise, professionally and often independently, in most areas of law, including representation of litigants before the courts" As a result, the Court found a violation of Article 8 in respect of those applicants who were practising lawyers but not members of the Bar on the basis that the searches of their premises had not been conducted with sufficient procedural safeguards against arbitrariness.²⁰²

¹⁹⁸ See, e.g., *Edwards and Lewis v. United Kingdom* [GC], no. 39647/98, 27 October 2004 and *Moiseyev v. Russia*, no. 62936/00, 9 October 2008.

¹⁹⁹ As to which, see the discussion of the right to freedom of expression and disciplinary and other proceedings below.

²⁰⁰ See, e.g., *Schönenberger and Durmaz v. Switzerland*, no. 11368/85, 20 June 1988.

²⁰¹ See *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, in which two of the five lawyers concerned had such licences. Of some significance for the view taken by the Court was that "at the time when the present case was declared admissible Lawyers for Human Rights acted in a representative capacity in approximately fifty percent of the Moldovan cases communicated to the Government" (para. 32).

²⁰² See *Kruglov and Others v. Russia*, no. 11264/04, 4 February 2020, at para. 137.

3.2.1.c Inappropriate use of admission, disciplinary and other legal processes

219. The issue of admission to the legal profession has not featured in many cases before the European Court, whereas it has had to give much more extensive consideration to the imposition of disciplinary and criminal penalties on lawyers.

220. Thus, the European Court has established that restrictions on registration as a member of a profession – including access to the legal profession - fall within the sphere of the right to private life.²⁰³ However, this does not necessarily mean that such restrictions will be regarded as incompatible with the ones permitted under Article 8. Nonetheless, this could be the conclusion resulting from the manner of their application.²⁰⁴

221. The importance of members of the public having confidence in the ability of the legal profession to provide effective representation if it is also to have confidence in the administration of justice²⁰⁵ – which the European Court has emphasised on many occasions – would undoubtedly justify requirements regarding the knowledge and skills to act as a lawyer.

222. Similarly, the need recognised for professional conduct to be discreet, honest and dignified²⁰⁶ has implications for other qualities that might also be insisted upon.

223. These qualities include, as the European Court has found, the need for high moral character, for the determination of which may not only be convictions of certain offences but also the disclosure of information of them or other potentially relevant material when seeking admission.²⁰⁷

224. Nonetheless, the decision-making process must satisfy the requirements of fairness²⁰⁸ and there must be scope to demonstrate that any defect previously found to exist has since been remedied.²⁰⁹

225. Similar considerations have been regarded as applicable to readmission as a lawyer, whether following a voluntary withdrawal or expulsion as a consequence of disciplinary proceedings.²¹⁰

226. However, a refusal of admission to the profession on grounds not envisaged by the applicable legislation could potentially lead to a finding that the civil right of the person concerned has been determined. Moreover, insofar as those grounds related to the exercise of rights protected by the European Convention, such a refusal would certainly amount to a violation of the right concerned.²¹¹

227. The European Court has long emphasised that, once admitted to practice, lawyers have a key role as intermediaries between the public and the courts. Furthermore, it considers that such a role means that it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence in the courts, as well as to have regard to the standing of public officials and the reputation of private individuals.

²⁰³ See, e.g., *Campagnano v. Italy*, no. 77955/01, 23 March 2006 (bankruptcy) and *Bigaeva v. Greece*, no. 26713/05, 28 May 2009 (nationality).

²⁰⁴ Thus, a violation of Article 8 was found in *Campagnano v. Italy* where entry in the bankruptcy register was automatic, the application of the resulting restrictions was not examined or reviewed by the courts and a length period of time had to elapse before rehabilitation could be obtained. Similarly, in *Bigaeva v. Greece*, a violation of Article 8 was found in respect of the application of a nationality requirement for sitting the bar examinations on account of the lack of coherence and respect to the applicant where the issue of her nationality was only raised after she had been allowed to carry out her pupillage as part of the admission process.

²⁰⁵ See, e.g., *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005, at para. 175.

²⁰⁶ See, e.g., *Morice v. France* [GC], no. 29369/10, 23 April 2015, at para. 133.

²⁰⁷ See, *Jankauskas v. Lithuania (No. 2)*, no. 50446/09, 27 June 2017 (failure to disclose convictions for abuse of office and bribery that had been expunged from the applicant's record).

²⁰⁸ Indeed, this is seen as applicable to all admission decisions. Thus, it has been emphasised by the Court that decisions concerning access to the profession should be subject to review by an independent and impartial judicial authority; see *Hajibeyli and Aliyev v. Azerbaijan*, no. 6477/08, 19 April 2018, at para. 60 (a complaint under Article 6 was considered admissible but not determined in view of the finding of a violation of Article 10).

²⁰⁹ Both these requirements were considered to be fulfilled in *Jankauskas*.

²¹⁰ See *Lekavičienė v. Lithuania*, no. 48427/09, 27 June 2017 (the applicant in that case had withdrawn voluntarily because of a pending prosecution for forgery, in which she was subsequently convicted) and *H. v. Belgium* [P], no. 8950/80, 30 November 1987 (the applicant was seeking restoration after having been disbarred). In the latter case, a violation of Article 6(1) was found on account of the inadequate procedural safeguards and reasoning, as well as the absence of a public hearing.

²¹¹ As in *Hajibeyli and Aliyev v. Azerbaijan*, no. 6477/08, 19 April 2018, in which applications for admission to the bar association had been dismissed, without stating whether the applicants had failed to comply with any requirement for admission. The applicants had only been questioned about their stance on the functioning of the bar association and the state of the legal profession in the country and no comment had been made on the fulfilment of the applicable requirements.

228. This role may, therefore, mean that the imposition of criminal penalties and/or disciplinary penalties will be regarded as justified in respect of their behaviour both in the courts and outside. Certainly, in principle such penalties can be seen as serving the legitimate aim of “the prevention of disorder”, since they concern the regulation of the legal profession which participates in the good administration of justice.²¹²

229. However, this does not mean that the European Court will necessarily accept such measures as compatible with the rights to freedom of expression and to peaceful assembly and association under Articles 10 and 11.

230. Certainly, any offences alleged to have been committed must actually be prescribed by law.²¹³

231. In addition, there is a need to take account of the balance struck between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession.

232. It will, therefore, be inappropriate to respond to a lawyer's strongly-worded criticisms - where made in court in defence of a client's interests - of judges, prosecutors, other lawyers, experts and officials in respect of actions taken by them in the course of the proceedings,²¹⁴ so long as these are not personally insulting²¹⁵ or malicious²¹⁶ or discourteous.²¹⁷

233. However, the imposition of a sanction for allegations made in the course of proceedings that are not supported by any facts is likely to be considered justified.²¹⁸

234. Also, the European Court sees the need for a slightly stricter view of statements made by lawyers outside the courtroom, even where made in defence of a client, emphasising that they are not journalists given that they are “protagonists in the justice system, directly involved in its functioning and in the defence of a party”.²¹⁹ As a result, the defence of a client by her/his lawyer should not normally be conducted in the media.

²¹² See, e.g., *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, at para. 44.

²¹³ This was found not to be the case with respect to a call for protests and the alleged breach of lawyer confidentiality that had been partly relied upon in the proceedings considered in *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020. As the Court observed, it did not “see any provision of domestic law preventing a lawyer from calling for peaceful protests against police brutality for the purpose of preventing violence” (para. 58) and the disciplinary decisions “decisions disregarded the fact that the wording of Article 17 (l) of the Law clearly indicated that information falling under lawyer confidentiality must be obtained by a lawyer in the furtherance of his professional activity and that the applicant was not E.A.'s mother's lawyer on 28 February 2011 when he made the impugned statement” (para. 60). In *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, the Court left open the question of whether the notion of “grounds serving as a basis” for exclusion lacked sufficient clarity and precision to comply with its quality of law requirement.

²¹⁴ See, e.g., *Nikula v. Finland*, no. 31611/96, 21 March 2002 (a prosecutor); *Steur v. Netherlands*, no. 39657/98, 28 October 2003 (an investigating officer); *Radobuljac v. Croatia*, no. 51000/11, 28 June 2016 (judge); *Čeferin v. Slovenia*, no. 40975/08, 16 January 2018 (certified experts and the prosecutor); and *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020 (the judge). In the last case, it was particularly significant that the comments, while possibly offensive, mainly expressed objections to decisions made by the courts in the criminal proceedings against his client, in respect of which the Court itself had already found violations of Articles 5 and 18 of the Convention and subsequently found a number of other serious shortcomings in them).

²¹⁵ See, e.g. *Meister v. Germany* (dec.), no. 25157/94, 18 October 1995; *Meister v. Germany* (dec.), no. 30549/96, 10 April 1997; *W.R. v. Austria* (dec.), no. 26602/95, 30 June 1997; *Mahler v. Germany* (dec.), no. 29045/95, 14 January 1998; *A. v. Finland* (dec.), no. 44998/98, 8 January 2004; *Žugić v. Croatia*, no. 3699/08, 31 May 2011; *Kincses v. Hungary*, no. 66232/10, 27 January 2015; *Bono v. France*, no. 29024/11, 15 December 2015; and *Rodriguez Ravelo v. Spain*, no. 48074/10, 12 January 2016.

²¹⁶ See, e.g. *Prince v. United Kingdom* (dec.), no. 11456/85, 13 March 1986.

²¹⁷ As in *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005 and *Igor Kabanov v. Russia*, no. 8921/05, 3 February 2011.

²¹⁸ None were found in *Schmidt v. Austria*, no. 513/05, 17 July 2008 (written observations stating that the Vienna Food Inspection Agency had acted improperly when bringing charges against the applicant's client) nor in *Fuchs v. Germany* (dec.), no. 29222/11, 27 January 2015 (deliberate submission of misleading information to public prosecution and allegations that an expert had created new data in order to obtain the result desired by public prosecution and that he had a personal interest in falsifying evidence). See also *Ayhan Erdoğan v. Turkey*, no. 39656/03, 13 January 2009 (in which it was found that the determination of a defamation claim brought by a mayor in respect of the strong criticism of him in a petition submitted to the court by a lawyer on behalf of a client had failed to take account of the context and form in which the comments were made) and *Prompt v. France*, no. 30936/12, 3 December 2015 (in which a defamation claim was upheld in respect of a rash accusation about a participant in proceedings in which a lawyer had acted made by the latter in a book that he subsequently published).

²¹⁹ See *Morice v. France* [GC], no. 29369/10, 23 April 2015, at para. 148.

235. Nonetheless, criticism and remarks in the media about judicial decisions or the conduct of investigation or judicial proceedings on issues of general interest should not - in the European Court's view - be regarded as beyond the bounds of what is acceptable,²²⁰ so long as the remarks were not grave or insulting to the judges, police or prosecutors concerned.²²¹

236. A similar approach will be taken by it to other public statements made in good faith outside the courtroom in the interests of a lawyer's clients.²²²

237. It is also considered important by the European Court that account is taken of the context in which any remarks are made.²²³

238. Nonetheless, the European Court will not see it as inappropriate to impose a sanction on complaints made through the media about the administration of justice in a pending case, where the statement was supposedly made as a last resort when there was actually a judicial remedy available that was subsequently used and was partly successful.²²⁴ However, such an approach would not preclude protection for a statement that was designed to secure a remedy that the lawyer could not exercise her/himself.²²⁵

239. On the other hand, remarks made in respect of judges who are no longer involved in proceedings that are continuing will not be regarded as directly contributing to the task of defending a lawyer's client.²²⁶

240. Furthermore, a lawyer making unfounded allegations against a judge after the conclusion of proceedings can be subjected to civil liability so long as the amount of compensation awarded is not excessive.²²⁷

241. The enforcement of restrictions on advertising through disciplinary proceedings has also been held to be compatible with the right to freedom of expression.²²⁸

²²⁰ See, e.g., *Amihalachioaie v. Moldova*, no. 60115/00, 20 April 2004 (the decision concerned had brought to an end the system whereby lawyers were organised within a single structure and the applicant was the chair of an association of lawyers); *Foglia v. Switzerland*, no. 35865/04, 13 December 2007 (an investigation by the Public Prosecutor's Office was described as superficial and hasty); *Alfantakis v. Greece*, no. 49330/07, 11 February 2010 (criticism in a television programme of prosecutor in client's case); *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, 29 March 2011 (an article about some legislative reforms in which a judge was criticised in an acerbic, even sarcastic, tone without being insulting); *Morice v. France* [GC], no. 29369/10, 23 April 2015 ("the impugned remarks by the applicant did not constitute gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis" (para 174); and *Ottan v. France*, no. 41841/12, 19 April 2018 (remarks concerning the functioning of the judiciary, and in particular proceedings before an assize court sitting with a lay jury and the conduct of a criminal trial relating to the use of firearms by law-enforcement agents). See also *Reznik v. Russia*, no. 4977/05, 4 April 2013, which concerned defamation proceedings against the president of a bar association on a television programme about the treatment of a lawyer visiting her client in prison. These were found to have a sufficient factual basis, notwithstanding that the correct legal terminology was not used, with the Court emphasising that the applicant "could not be held accountable for his choice of words to the same standard of precision as could be expected of him when delivering a speech before a court of law or making written submissions to the same" (para. 44).

²²¹ As they were found to be in *Coutant v. France* (dec.), no. 17155/03, 24 January 2008 (in which the police were accused of "using methods worthy of the Gestapo and the Militia"), *Karpetas v. Greece*, no. 6086/10, 30 October 2012 (statements capable of suggesting corruption without a factual basis) and *Szpiner v. France* (dec.), no. 2316/15, 25 January 2018 (an article by the lawyer for the victims in a prosecutor referring to a prosecutor, whose father had been a Nazi collaborator, as "genetically a traitor").

²²² See, e.g., *Veraart v. Netherlands*, no. 10807/04, 30 November 2006 (questioning the professional qualifications of a person who had supported very serious accusations against the clients who had retained the applicant to seek redress for the injury caused them and to defend their reputation); *Foglia v. Switzerland*, no. 35865/04, 13 December 2007 (suggesting that the employees of a bank could not have been unaware of the embezzlement of which the lawyer's client was being tried).

²²³ See *Ottan v. France*, no. 41841/12, 19 April 2018; the "remarks should be placed in the context of the troubled atmosphere in which the verdict was delivered (...) [and they were] made immediately after the delivery of the Assize Court's verdict and in the context of a rapid oral exchange of questions and answers, so that there was no possibility of reformulating, refining or retracting the statements before they were made public" (para. 69).

²²⁴ As in *Schöpfer v. Switzerland*, no. 25405/94, 20 May 1998. Cf. *Morice v. France* [GC], no. 29369/10, 23 April 2015, in which the impugned statements related to a problem after using the available remedies.

²²⁵ As in *Ottan v. France*, no. 41841/12, 19 April 2018, which concerned a statement made by the lawyer of the civil party in a prosecution at the exit from the courtroom that was apt to help persuade the principal public prosecutor to appeal against the decision to acquit the accused.

²²⁶ See *Morice v. France* [GC], no. 29369/10, 23 April 2015, at para. 149.

²²⁷ See *Pais Pires de Lima v. Portugal*, no. 70465/12, 13 February 2019, which concerned a lawyer's confidential complaint to the High Council of the Judiciary about a lack of impartiality on the part of a judge in the wake of a case in which he had acted for the defence. An award of EUR 50,000 was considered excessive given that the lawyer was not responsible for the leaking of the complaint.

²²⁸ See *Casado Coca v. Spain*, no. 15450/89, 24 February 1994, in which the mild penalty (a reprimand) and the diverse practice across Europe were significant considerations.

242. However, the fact of making trial documents available to the press where this was not illegal and this disclosure of information took place in the context of media interest should be regarded as corresponding to the public's right to receive information on the activities of the judicial authorities.²²⁹ Moreover, it has been recognised that there may be exceptional cases in which the exercise of the rights of the defence could make a breach of professional confidence necessary.²³⁰

243. The court or body conducting the criminal or disciplinary proceedings must observe the requirements of the right to a fair trial under Article 6.²³¹ There is a need, therefore, for: the body to be impartial;²³² the disclosure of relevant documents;²³³ the case to be fairly examined against the lawyer concerned;²³⁴ the ruling to be adequately reasoned;²³⁵ and the proceedings to be concluded within a reasonable time.²³⁶ However, an oral hearing may not be considered necessary at the first instance.²³⁷

244. The nature of the sanction imposed may be an additional factor taken into account in concluding that a particular interference with freedom of expression is disproportionate.²³⁸ In particular, the European Court has drawn attention to the indirect repercussions that even the lightest of sanctions may have for lawyers in terms of their image or the confidence placed in them by the public and their clients. Furthermore, it has emphasised that "the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings".²³⁹

²²⁹ See, e.g., *Foglia v. Switzerland*, no. 35865/04, 13 December 2007.

²³⁰ See, e.g., *Mor v. France*, no. 28198/09, 15 December 2011 (concerning comments to a newspaper on information in an expert report covered by the rules of professional confidence that had already been disseminated in the newspaper but which thereby undermined its confidentiality. The applicant was representing the family in proceedings concerned with a death following a vaccination and the expert report was critical of the health authorities).

²³¹ Disciplinary proceedings in which the right to continue to practise a profession is at stake give rise to litigation over "civil rights" within the meaning of Article 6(1); *A. v. Finland* (dec.), no. 44998/98, 8 January 2004. However, a minor fine for contempt of court will not be regarded as amounting to a "criminal charge"; *Žugić v. Croatia*, no. 3699/08, 31 May 2011.

²³² See, e.g., *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005 (in which this was found to be lacking under both the objective and subjective tests); *Igor Kabanov v. Russia*, no. 8921/05, 3 February 2011 (the judges hearing the case were chosen by the court president who had lodged the complaint); *Radobuljac v. Croatia*, no. 51000/11, 28 June 2016 (the decision to fine the applicant was made by the same judge who felt personally offended by his remarks); *Čeferin v. Slovenia*, no. 40975/08, 16 January 2018 (in which the impugned judge had not actually taken part in the relevant proceedings); and *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020 (the presidents of the disciplinary commission and the bar association openly criticised the applicant for his frequent appearances in the media and his affiliation to an opposition political party, which were not related to the subject matter of the disciplinary proceedings instituted against him).

²³³ See, e.g., *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, in which there had been an explicit refusal to provide the applicant with a copy of a court decision and extracts from transcripts of court hearings which had been referred to when deciding to impose a disciplinary sanction on him.

²³⁴ See, e.g., *Steur v. Netherlands*, no. 39657/98, 28 October 2003 (in which there was no attempt to establish the truth or falsehood of the impugned statement or to address whether it was made in good faith); *Veraart v. Netherlands*, no. 10807/04, 30 November 2006 (the decision by the disciplinary appeals tribunal was based on an inadequate assessment of the facts and the reasons given therefore lacked relevance).

²³⁵ See, e.g., *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020 (in which the court's decision referred to the applicant's previous disciplinary sanctions, disregarding the fact that a serious warning supposedly given in 2006 was not a disciplinary sanction under the relevant legislation and in which no reason was given for not imposing a more lenient sanction than disbarment) and *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020 (in which the reasons for disbarment were not considered relevant and sufficient and there was a failure to explain why the impugned statement by the applicant in court was such a serious misconduct that it justified the harshest disciplinary sanction).

²³⁶ See, e.g., *W.R. v. Austria*, no. 26602/95, 21 December 1999; *Malek v. Austria*, no. 60553/00, 12 June 2003; *Schmidt v. Austria*, no. 513/05, 17 July 2008; *Karpetas v. Greece*, no. 6086/10, 30 October 2012; and *Kincses v. Hungary*, no. 66232/10, 27 January 2015.

²³⁷ See *A. v. Finland* (dec.), no. 44998/98, 8 January 2004 (in which the applicant, in the case of a sanction involving a public warning or disbarment, could have appealed to the Court of Appeal).

²³⁸ See, e.g., *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, 29 March 2011 (a large fine).

²³⁹ See *Morice v. France* [GC], no. 29369/10, 23 April 2015, at para. 176. In that case, it noted that the applicant's punishment was not limited to a conviction, involving a fine, an award of damages and a requirement to contribute to legal costs, with his status as a lawyer being relied upon to justify greater severity.

245. However, even where the lawyer's conduct is not seen as consistent with professional standards, the proportionality of any sanction imposed should be assessed in the light of any alternative course of action available²⁴⁰ and of the nature of the sanction itself.²⁴¹ This is seen as particularly important given that the sanction could have a "chilling effect" on the performance of lawyers of their duties as defence counsel.

246. In this connection, the Court has underlined that – against the background of a pattern of cases before it of arbitrary arrest, detention or other measures taken in respect of government critics, civil society activists and human rights defenders and notwithstanding the duties, in particular, with respect to their conduct, with which all lawyers must comply - the alleged need in a democratic society for a sanction of disbarment of a lawyer in circumstances such as criticism of a judge in the course of proceedings before her/him would need to be supported by particularly weighty reasons.²⁴²

247. The imposition of a disciplinary sanction on a lawyer on account of her/his participation in a procession or other demonstration will be an interference with her/his right to freedom of peaceful assembly. Moreover, such a sanction – even if at the lower end of possible penalties - will be inconsistent with the right under Article 11 if the lawyer had not her/himself committed any reprehensible act, notwithstanding that others may have done so.

248. In so finding, the European Court has emphasised that the pursuit of a just balance between a purpose such as prevention of disorder and the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places "must not result in avocats being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions".²⁴³

249. The threat of criminal or disciplinary proceedings invoked against the lawyer of an applicant in proceedings before the European Court,²⁴⁴ as well as the actual institution of criminal proceedings against a lawyer involved in the preparation of an application to the Court,²⁴⁵ is almost certainly going to be regarded as a breach of the obligation under Article 34 not to hinder the exercise of the right of application to it.

3.2.1.d Institutional shortcomings

250. The European Court has emphasised on many occasions that the independence of the legal profession from the State is crucial for an effective functioning of the fair administration of justice. In particular, it has done so when indicating that a lawyer, even if officially appointed, cannot incur the State's liability under the European Convention, except in special circumstances where problems of legal representation are brought to the attention of the relevant authorities.²⁴⁶

²⁴⁰ Such as a rebuke during the proceedings, an adjournment, reporting the lawyer to the professional body or removal from the proceedings; see, e.g., *Nikula v. Finland*, no. 31611/96, 21 March 2002, *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005; and *Bono v. France*, no. 29024/11, 15 December 2015.

²⁴¹ A relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred may still be seen as having a chilling effect (*Nikula v. Finland*, no. 31611/96, 21 March 2002) and even a warning will not necessarily be seen as a trivial matter for a lawyer (*Ottan v. France*, no. 41841/12, 19 April 2018). See also the finding as disproportionate in *Bono v. France*, no. 29024/11, 15 December 2015 of a reprimand accompanied by disqualification from professional bodies for five years for remarks in written pleadings that were not therefore capable of undermining or threatening the functioning of the justice system or the reputation of the judiciary among the general public. A similar view was taken *Rodriguez Ravelo v. Spain*, no. 48074/10, 12 January 2016 of a daily fine of 30 euros for nine months and a custodial penalty in the event of default imposed for remarks in a written application. Furthermore, imprisonment or disbarment would be disproportionate for mere discourtesy; see *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005 and *Igor Kabanov v. Russia*, no. 8921/05, 3 February 2011. Cf. the conclusion that there was no lack of proportionality in a modest or moderate fine (as in *Schöpfer v. Switzerland*, no. 25405/94, 20 May 1998 and *Coutant v. France* (dec.), no. 17155/03, 24 January 2008 (with emphasis also on this having no impact on the lawyer's professional activity)), a written reprimand (*Schmidt v. Austria*, no. 513/05, 17 July 2008) and a large fine for a serious allegation (*Karpetas v. Greece*, no. 6086/10, 30 October 2012).

²⁴² See *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020, at para. 103. The possible chilling effect of disbarment was also emphasised in *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, at para. 50.

²⁴³ See *Ezelin v. France*, no. 11800/85, 26 April 1991, at para. 52.

²⁴⁴ See, e.g., *Kurt v. Turkey*, no. 24276/94, 25 May 1998, at para. 164 and *McShane v. United Kingdom*, no. 43290/98, 28 May 2002, at paras. 147-152. See also *Ryabov v. Russia*, no. 3896/04, 31 January 2008 (in which an investigation was opened into the validity of a legal assistance agreement in respect of the proceedings and there was an attempt to obtain privileged material from the office of the applicant's lawyer without any legal basis. These were seen by the Court as moves calculated to prevent the lawyer from effectively participating in the Strasbourg proceedings) and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013 (in which the institution of disbarment proceedings and an extraordinary tax audit against one lawyer and the denial of visas to foreign lawyers for the applicant directed primarily, even if not exclusively, at intimidating the first of the lawyers working on the case before the Court).

²⁴⁵ See, e.g., *Şarlı v. Turkey*, no. 24490/94, 22 May 2001, at paras. 85-86.

²⁴⁶ See, e.g., *Sialkowska v. Poland*, no. 8932/05, 22 March 2007, at para. 111.

251. It has also done so in the context of the freedom of expression of lawyers²⁴⁷ and of their regulation,²⁴⁸ the latter being most pertinent as regards institutional problems.

252. The recognition of the importance of independence undoubtedly underpins the deference that is shown by the European Court in judging whether the right balance has been struck between the exercise of the right to freedom of expression and the needs of the administration of justice.²⁴⁹

253. In addition, it has recognised that independence is necessary for the fundamental role that professional associations of lawyers play in ensuring the protection of human rights, with self-regulation of the profession being paramount.

254. Nonetheless, there has been no concrete guidance as to what such independence or self-regulation means.

255. Bar and other professional associations of lawyers are unlikely to have the protection afforded by the right to freedom of association by Article 11 of the European Convention, at least where these have a public function in regulating the legal profession.²⁵⁰

256. This does not preclude lawyers from setting up other associations that do not have such a public function.²⁵¹ However, it does not help identify what should be the proper limits of interference by, for example, the executive, with decision-making by associations with that function.

257. Nor, has any conclusion been drawn by the European Court as to the possibility that independence and self-regulation might somehow be absent or weakened in situations where it has found the decision-making of bar associations to be seriously deficient as regards fulfilment of the requirements of the European Convention, notably where senior members of a professional association were noted as having “openly criticised the applicant for his frequent appearances in the media and his affiliation to an opposition political party, which were not related to the subject matter of the disciplinary proceedings instituted against him”.²⁵²

3.2.2 The International Covenant

258. The International Covenant guarantees essentially the same rights of potential relevance for the problems faced by lawyers as those in the European Convention.

259. Non-compliance with these rights can be the subject of communications leading to the adoption of Views by the United Nations Human Rights Committee.

260. The resulting case law is less extensive in substance and volume than that of the European Court and will not, therefore, be reviewed.

261. However, it should be noted that problematic matters, notably ones relating to institutional shortcomings, can be raised by the United Nations Human Rights Committee in its concluding observations on the periodic reports submitted to it by State parties on how the rights in the International Covenant are being implemented.²⁵³

²⁴⁷ See, e.g., *Morice v. France* [GC], no. 29369/10, 23 April 2015, at para. 135.

²⁴⁸ See, e.g., *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, at para. 46.

²⁴⁹ As espoused, e.g., in *Schöpfer v. Switzerland*, no. 25405/94, 20 May 1998, at para. 33.

²⁵⁰ See *A. and Others v. Spain* (dec.), no. 13750/88, 2 July 1990 and *Bota v. Romania* (dec.), no. 24057/03, 12 October 2004.

²⁵¹ *Ibid.*

²⁵² Namely, in *Namazov v. Azerbaijan*, no. 74354/13, 30 January 2020, at para. 49.

²⁵³ E.g., in its Concluding Observations on the second periodic report submitted by Azerbaijan, it considered that “the new Law on the Bar may compromise lawyers’ free and independent exercise of their functions” and recommended that the “State party should furthermore ensure that the criteria for access to and the conditions of membership in the Bar do not compromise the independence of lawyers. The State party should provide information on the distinction between “licensed lawyer” and member of the Bar” (CCPR/CO/73/AZE, para. 14, 12 November 2001) and in its concluding observations on its fourth report it expressed concern “about reports that lawyers providing legal aid are insufficiently remunerated and take on heavy workloads, which in turn affects the quality of the legal assistance provided, as well as about the deficient legal representation provided by State-appointed lawyers” and recommended that the “State party should redouble its efforts to address effectively the shortage of lawyers in the country, including by ensuring that admission to the Bar can only be denied on the basis of objective criteria such as relevant knowledge and qualification” (CCPR/C/AZE/CO/4, para. 24, 16 November 2016).

3.2.2.a European Union Law

262. There are various provisions of European Union law that have relevance for the profession of lawyer, particularly those working in a member State other than the one in which they initially became a member of the profession. Several are not specifically concerned with the profession but there is also one Directive for which this is its principal focus.

263. Firstly, it has been established that the European Union Treaties – which are not otherwise relevant - do not preclude national rules which prevent part-time public officials from practising the profession of lawyer, despite their being qualified to do so, by laying down that they are to be removed from the register of the competent Bar Council.²⁵⁴

264. Secondly, the Charter of Fundamental Rights of the European Union (“the EU Charter”) guarantees all the rights previously discussed with respect to the European Convention. It thus has potential relevance to problems faced by lawyers involving harassment, threats and attacks, direct interference with professional responsibilities and inappropriate use of admission, disciplinary and other legal processes. However, the EU Charter is no more likely than the European Convention to be of great assistance in respect of institutional shortcomings.

265. Furthermore, the EU Charter is primarily addressed to the institutions and bodies of the Union, which are not currently the source of the problems affecting the legal profession. Its provisions are applicable to Member States only when they are implementing European Union law, which is likely to be a significant limitation on the assistance it can afford for present purposes.

266. Thirdly, account needs to be taken of the regulation within the European Union, the European Economic Area and Switzerland of the provision of services by lawyers by the Services and Establishment Directives.²⁵⁵

267. The provisions in the Establishment Directive are of particular relevance for the present purpose. These provisions concern: practice of a lawyer from one Member State in another; the rules of professional conduct, representation in professional bodies and disciplinary proceedings.

268. Lawyers who wish to practise in a Member State other than that in which they obtained their professional qualification (“the home Member State”) are required to register with the competent authority in that State (“the host Member State”).²⁵⁶ They can either practice under their home-country professional title or, after three years, seek to gain admission to the profession of lawyer in the host Member State.²⁵⁷

269. Such lawyers remain under the obligation to know the national law applicable in the cases handled but are released from the obligation to prove that knowledge in advance, allowing gradual assimilation of knowledge through practice.²⁵⁸ Furthermore, lawyers from another Member State may be forbidden to pursue certain activities and may be subjected to certain obligations with regard to the representation or defence of clients in legal proceedings.²⁵⁹

²⁵⁴ In particular, Articles 3(1)(g) EC, 4 EC, 10 EC, 81 EC and 98 EC; Case C-225/09, *Edyta Joanna Jakubowska v. Alessandro Maneggia*, 2 December 2010.

²⁵⁵ Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (“Services Directive”) and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (“Establishment Directive”). See further, CCBE, *Guidelines for Bars & Law Societies on Free Movement of Lawyers within the European Union* (2016); https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/EUL_Guides_recommendations/EN_FML_2016_Guide.pdf.

²⁵⁶ Article 3, with a requirement under Article 9 to give reasons for the refusal or cancellation of such registration and to provide a remedy before a court or tribunal. There cannot be a requirement to challenge the decision at first instance before a body composed exclusively of lawyers practising under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts; Case C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, 19 September 2006.

²⁵⁷ Under the conditions in Article 10 of the Establishment Directive. It would not be precluded for a national of a Member State from travelling to another Member State in order to acquire there the professional qualification of lawyer and then returning to the Member State of which s/he is a national in order to practise there the profession of lawyer under the professional title obtained in the Member State where that professional qualification was acquired; Joined Cases C-58/13 and C-59/13, *Angelo Alberto Torresi (C-58/13), Pierfrancesco Torresi (C-59/13) v. Consiglio dell'Ordine degli Avvocati di Macerata*, 17 July 2014.

²⁵⁸ Case C-168/98, *Grand Duchy of Luxembourg v. European Parliament and Council of the European Union*, 7 November 2000, at para. 43.

²⁵⁹ Article 5(2) and (3). Furthermore, those who are so practising in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise, restrictions on the exercise of the profession of lawyer concurrent with that employment, may be subjected to specific restrictions so long as these do not go beyond what is necessary in order to attain the objective of preventing conflicts of interest and apply to all the lawyers registered in that Member State. Case C-225/09, *Edyta Joanna Jakubowska v. Alessandro Maneggia*, 2 December 2010.

270. However, a prior language test cannot be required²⁶⁰ and additional registration requirements cannot be imposed, notwithstanding that these preclude certain persons from becoming lawyers solely in the host Member State.²⁶¹

271. As regards professional conduct, lawyers practising under their home-country professional titles are required to observe the rules of professional conduct of the host Member State.²⁶²

272. Such lawyers are to be granted appropriate representation in the professional associations of the host Member State, which shall involve at least the right to vote in elections to those associations' governing bodies.²⁶³

273. In the event of failure by any such lawyer to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State will be applicable. In addition, there is an obligation to inform the competent authority in the home Member State before initiating such proceedings, which should then be able to make submissions to the bodies responsible for hearing any appeal. That authority can also decide what action to take under its own procedural and substantive rules.²⁶⁴

274. None of the provisions in the Establishment Directive preclude any national rule requiring membership of a body such as a bar association in order to practise the profession of lawyer under the title of lawyer of the host Member State.²⁶⁵

275. Finally, it should also be noted that there is a Directive specifically concerned with access to a lawyer but, as with the similar requirement under the European Convention, its provisions are framed in terms of the right of the person needing access and not of the lawyer.²⁶⁶

3.2.2.b Conclusion

276. It is evident from the above discussion that there is already a wealth of existing standards applicable to the legal profession.

277. Furthermore, there is no real contradiction between them. Rather they differ somewhat as regards what is or is not covered, the degree of elaboration and the availability of specific means of implementation or enforcement.

278. As the object of this study is concerned with the issue of adopting a new Council of Europe instrument, it would be appropriate to recall what is missing from Recommendation No. R(2000)21 in comparison with what is found in at least some of the other standards.

²⁶⁰ Case C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, 19 September 2006, and Case C-193/05, *Commission of the European Communities v. Grand Duchy of Luxembourg*, 19 September 2006.

²⁶¹ See *Monachos Eirinaios, kata kosmon Antonios Giakoumakis tou Emmanouil v. Dikigorikos Syllogos Athinon*, Case 431/17, 7 May 2019, which concerned the prohibition on a lawyer who has the status of monk, and who is registered as a lawyer with the competent authority of the home Member State, from registering with the competent authority of the host Member State in order to practise there under his home-country professional title. It would, however, be permissible to impose guarantees required for the practice of the profession of lawyer – such as, in particular, independence vis-à-vis the ecclesiastical authorities to which he is subject, the ability to devote himself entirely to practice of the profession of lawyer, the ability to handle contentious cases, actual establishment in the area of the court of first instance concerned and observance of the prohibition on providing services without remuneration – “provided that the rules laid down for that purpose do not go beyond what is necessary in order to attain the objectives pursued. In particular, the absence of conflicts of interest is essential for practice of the profession of lawyer and requires, inter alia, that lawyers should be in a situation of independence vis-à-vis the authorities, by which they must never be influenced” (para. 33).

²⁶² Article 6(1).

²⁶³ Article 6(2).

²⁶⁴ Article 7 of Directive 98/5/EC. There is also a reciprocal obligation for the competent authority in the home Member State to inform the competent authority of the host Member State where it initiates any disciplinary proceedings. The temporary or permanent withdrawal by the competent authority in the home Member State of the authorisation to practise will automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State.

²⁶⁵ Case C-359/09, *Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara*, 3 February 2011.

²⁶⁶ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

279. Amongst the most significant omissions are references to: freedom to choose clients; loyally respecting the interests of clients; prohibition on identifying lawyers with their clients or their clients' causes; limitation on the duty to report on clients; independence in respect of publicly-funded work; ability to object for good cause to a judge's conduct or participation; ability to take part in the public discussion on matters concerning the promotion and protection of human rights; taking cases to international procedures; civil and penal immunity for statements made in good faith in pleadings or professional appearances; freedom of choice in organisation of legal practice; communication and advertising; the election by members of the council or executive body of lawyers' associations; the duty of authorities to adequately safeguard lawyers who are threatened.

280. In addition, other instruments have fuller elaboration of requirements relating to: independence; self-governance; the dignity and honour of the profession; and responsibilities relating to the rule of law and the administration of justice.

281. This is not to suggest that any other standard taken by itself would be an adequate substitute for what is set out in Recommendation No. R(2000)21 as none of them can be regarded as covering comprehensively all the issues that might be relevant for the profession of lawyer.

282. Moreover, as has been previously indicated, what might be seen as omissions from, or lack of detail in, Recommendation No. R(2000)21 could nonetheless be regarded as at least implicit in its provisions.

283. However, although this might be a valid observation, it is not a satisfactory response in practice as there is actually no basis for providing an authoritative interpretation of those provisions. Furthermore, although considered in the course of various proceedings before the European Court, the rulings ultimately given in the cases concerned either do not explicitly refer to Recommendation No. R(2000)21 or are not categoric as to what a particular provision requires where they do refer to it.

284. Important as authoritative interpretation is where there is a wish to implement the provisions of Recommendation No. R(2000)21, its absence is only part of the problem concerning its implementation.

285. In addition, as the analysis of the problems currently being faced by lawyers illustrate, there is also a failure to observe its requirements even when there cannot genuinely said to be a problem of interpretation, notably as regards threats and harassment and giving effect to provisions linked to requirements in the European Convention, such as those concerned with disciplinary procedures.

286. As the analysis of the case law of the European Court demonstrates, there are many aspects of provisions in Recommendation No. R(2000)21, as well as those in other standards, that can be satisfactorily addressed through reliance on rights guaranteed by the European Convention.

287. This case law is useful in giving a fuller indication as to what is entailed by some of the requirements applicable to the profession of lawyer. Moreover, this case law is still evolving, and it has responded to some of the recent challenges facing lawyers in member States.

288. Nevertheless, it would not be appropriate to regard the existence of the European Convention and the availability of recourse to the European Court as reasons for not considering there to be no need to adopt a new instrument.

289. In the first place, the case law of the European Court does not, and probably cannot, deal with all the issues relevant to the profession of lawyer.

290. This is partly because the application of some of the rights guaranteed by the European Convention will be approached only from the perspective of the client, even though they may have significance for legal practice and the interests of an individual lawyer.

291. Moreover, these rights reflect a minimum standard and it may be that somewhat higher standards would be appropriate where issues relating to the profession of lawyer are involved.²⁶⁷

292. Also, issues of an institutional nature will only ever be addressed interstitially – as an element of a case such as one dealing with disciplinary proceedings - rather than directly.

293. Secondly, the possibility of having recourse to the European Court is unlikely ever to be adequate.

294. In part this is because it cannot deal with all the issues or can only deal with some if the client rather than her/his lawyer makes the application and the former will not always have an interest in doing this.

295. However, the possibility of recourse cannot ever be expected to be always adequate even where issues of concern to a lawyer can be addressed. This is because of the process itself, which in most instances is unable – on account of all the other demands upon it - to deal with the vast majority of such issues in an expeditious manner and will not necessarily see particular issues raised before it as evidence of a systematic failing that needs to be tackled.²⁶⁸

296. An institutional issue has been the subject of two opinions by the European Commission for Democracy through Law (“the Venice Commission”).²⁶⁹ The focus of opinions of the Venice Commission is, however, limited to draft or adopted legislation rather than actual practice.

4. POSSIBLE ADVANTAGES AND RISKS

297. The previous section has sought to illustrate the nature of the various standards that have been developed with respect to the profession of lawyer, as well as the extent to which there are adequate arrangements to ensure their implementation in practice. It is clear that there are a number of shortcomings both as regards the scope of the standards and the arrangements for their implementation.

298. However, in considering the possibility of adopting a new instrument concerned with the profession of lawyer – whether legally binding or non-binding – there is a need to bear in mind not only the advantages of doing this in terms of possible added-value and effectiveness but also whether this would entail any risks.

299. This issue needs to be examined both in terms of the possible content of a new instrument and the arrangements for its implementation, although these are, in some respects, interconnected.

300. As has been seen, there are various matters that are not addressed in Recommendation No. R(2000)21 but which are covered in other standards. In some respects, that is a reflection of subsequent developments relevant to the functioning of the legal profession. However, it also results from the level of detail given to particular aspects important for the profession.

301. The issue of formulation is not just a matter of whether there is specific reference to this or that aspect of a topic of concern. In some instances, there is also a degree of imprecision or vagueness in the language used, notably as regards some issues of key importance.

302. The elaboration of a new instrument would provide an opportunity to deal with those omissions that are now seen as especially significant. It would also be an occasion to provide some greater precision in respect of certain issues.

303. The result would thus be a text that is both more comprehensive and clearer as to the requirements that should be observed if the profession of lawyer is to be afforded adequate protection for the discharge of its responsibilities and for the individual rights of lawyers to be respected.

²⁶⁷ E.g., in *Michaud v. France* [GC], no. 12323/11, 6 December 2012, the European Court was not prepared to go as far as international professional organisations thought appropriate in setting limits on a reporting obligation with respect to clients suspected of involvement in money-laundering. This does not mean that the views of the international professional organisations should necessarily be accepted but it may be that the balance set between rights and the limitations permitted under the European Convention is not always sufficient to protect the legitimate interests of the profession.

²⁶⁸ The ruling in *Bagirov v. Azerbaijan*, no. 81024/12, 25 June 2020, at para. 103, is a notable exception in this regard as far as cases involving lawyers are concerned.

²⁶⁹ See CDL-AD(2011)039, Joint Opinion on the draft law on the bar and practice of law of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe and CDL-AD(2020)029, Joint Opinion on the July 2020 amendments to the attorneyship law of 1969.

304. Furthermore, the adoption of a new instrument, even if non-binding in nature, is likely to be taken into account by the European Court in its interpretation of the European Convention, which might enhance the protection that can be obtained through the latter. However, this would be unlikely to allow complaints by lawyers on matters that are seen as only involving the rights of clients or with some of the institutional problems that have been identified.

305. Moreover, there are several possible downsides to the adoption of a new text.

306. Firstly, account will need to be taken of whether it would be possible when considering the issue afresh to secure agreement on the part of all member States as to what should be retained from Recommendation No. R(2000)21.

307. The former issue might be assumed to be unproblematic as there have been no express suggestions that its content is inappropriate as at least a minimum standard, even if the standards elaborated by international professional organisations indicate that its coverage is not sufficient. However, the nature of the problems being experienced in practice by the legal profession, as well as the subject matter of certain applications to the European Court discussed above, might be an indication that the commitment to the existing content is not necessarily whole-hearted on the part of all member States.

308. There could possibly, therefore, be a reluctance to endorse what has already been accepted as that might be seen as giving them fresh legitimacy when this is being challenged in practice.

309. On the other hand, many aspects of the existing standards can be linked to provisions in instruments that are already binding on member States, namely, the European Convention and the International Covenant. It could, therefore, be argued that agreeing to the existing standards would not involve any new undertaking on the part of member States. Although this is broadly so, the analysis of the cases above suggests that the rights under these two instruments cannot be relied upon to secure all aspects of Recommendation No. R(2000)21, whether because it is the client rather than the lawyer who can invoke them or because their interpretation has not (and may not) be regarded as covering certain of the elements needing greater precision.

310. It has not been possible to identify any instances where established standards have been weakened or not accepted in a new instrument. However, that does not mean that member States might not consider this appropriate because of changing circumstances.²⁷⁰

311. Nonetheless, although the refusal to endorse the existing standards is a risk, it is probably only one that is more likely to be realised in the event of the proposed form of a new instrument being one that will be legally binding rather than non-binding and/or be accompanied by an implementation mechanism.²⁷¹

312. Secondly, there might be more difficulty in obtaining agreement to the inclusion in the instrument of additional or enhanced provisions to those already found in Recommendation No. R(2000)21.

313. There are two reasons why there might be such difficulty.

314. The first relates to the potential difficulty of elaborating with greater precision certain concepts – notably independence and self-regulation – which might prove harder than expected. This would be because of the challenge of specifying these concepts in a detailed manner while still taking account of the diverse nature of the present arrangements governing the legal profession across member States, notwithstanding that the latter may, in principle, accept them as requirements applicable to the regulation of the legal profession.

²⁷⁰ See, e.g., the argument made in *Saadi v. Italy* [GC], no. 37201/06, 28 February 2008 for some weakening of the protection under Article 3 of the European Convention against expulsion in cases involving international terrorism.

²⁷¹ As to which, see further below.

315. However, it is also possible that this supposed difficulty may be overstated. Much would depend on whether the aim of the relevant standard would be to legislate with a high level of detail so that every conceivable organisational arrangement is covered or the object is only to specify the relevant considerations which would have a bearing on the way in which the concepts are to be fulfilled, without an expectation that these be given effect in exactly the same manner.²⁷²

316. An approach to drafting that allows for some variation in the approach taken by individual member States while providing a form of checklist by which a particular approach can be measured could ensure that this potential difficulty does not actually become an obstacle to the adoption of a new instrument.

317. However, while such an approach could probably be quite easily accommodated in an instrument that took the form of a Recommendation of the Committee of Ministers,²⁷³ it might be less useful in practice as part of an instrument that was binding unless there was also some mechanism whereby an assessment of the degree of compliance with the different considerations could be undertaken.²⁷⁴

318. The second is linked to the discussion about a possible reluctance even to accept existing standards. If there is already such a possibility, then this could be expected to be even greater as regards an instrument in which it is proposed to go beyond them and to set more exacting requirements for member States.

319. Such reluctance could be especially pronounced in the event of the nature of the proposed new instrument being a legally binding one. Thus, even if it proves possible to reach agreement on a text that can then be opened for signature and ratification, it does not follow that either of these - but particularly the latter - will follow, either at all or in a matter of a few years after adopting the text.

320. For example, a review of the 48 conventions opened for signature within the framework of the Council of Europe since the beginning of 2000 shows that, although all but 8 have entered into force, 18 took at least 3 years to do so and, while 30 have been ratified by more than 10 member States, only 9 have been ratified by more than 40 of them.²⁷⁵

321. Of course, there can be many reasons for a delayed ratification or a failure to ratify at all. These can include internal legislative difficulties and different policy priorities as much as an unwillingness to accept the obligations that would be undertaken through ratification.

322. However, while the risk of non-ratification certainly exists, it is important to keep in mind that the subject-matter of the new instrument is one that is central to two of the aims set for the Council of Europe, namely, human rights and the rule of law. While there have been difficulties in securing ratification by all member States of treaties regarded as “key” or “core” for the organisation,²⁷⁶ this has not been a discouragement to adding to the treaties that can be so categorised.

²⁷² See the range of considerations on independence that might be extracted from the following observations in a report by the Special rapporteur on the independence of judges: “23. A bar association is generally deemed to be independent when it is mostly free from external influence and can withstand pressure from external sources on matters such as the regulation of the profession, the development and implementation of codes of professional conduct and the right of lawyers to join the association. Government controls, whether direct or indirect, is eliminated or minimized to the greatest extent possible. 24. State involvement in the regulation of the legal profession varies greatly. Not all kinds of external intervention jeopardize the independence of the bar association. In some countries, such intervention is limited to the adoption of legislation on the legal profession, often in consultation with the bar association. States may also retain the power to determine, in collaboration with the bar association, lawyers’ fees, the requirements and procedures for access to the legal profession or the development and management of legal aid schemes. 25. In other countries, State interference is more significant, for instance where the Government participates directly in the work of the executive and disciplinary bodies of the association, or appoints some of the members of the disciplinary committee established by the bar association to handle disciplinary proceedings against lawyers. In those cases, it is important that appropriate safeguards be adopted to ensure that the delegation of regulatory competences to external actors does not undermine the independence and integrity of the legal profession. 26. The best guarantee of independence is a self-governing body, understood as an organization independent from the State or other national institutions. All existing legal standards stress that bar associations should be self-governing. In practice, that means that the bar association should be able to set its own rules and regulations, make its own decisions free from external influence, represent its members’ interests and be able to sustain itself. That entails the profession’s right to set up bodies to oversee compliance with such regulations, through the power to admit, discipline and disbar” (A/73/365, 5 September 2018).

²⁷³ E.g., the guidelines approach seen in Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, adopted on 8 April 2020.

²⁷⁴ However, see the opting-in and opting-out possibilities allowed in respectively the European Social Charter in its original and revised forms and the Convention on Mutual Administrative Assistance in Tax Matters.

²⁷⁵ On the issue of participation of member States in council of Europe treaties more generally, see J. McBride, “The Council of Europe” in M. J. Bowman and D. Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (2018), 966, at 980-983.

²⁷⁶ *Ibid.*, at pp. 975-976.

323. Moreover, the absence of full participation in a treaty should not in itself be regarded as a failure. The participation in one linked to the core values of the organisation by a significant number of member States still serves to reinforce those values. Furthermore, the successful operation of a treaty that is not generally adopted at an early stage can ultimately encourage others to ratify it at a later point in time.²⁷⁷

324. Thirdly, the adoption of an instrument with a more elaborate set of standards might be seen as too inflexible as compared to a broader set of principles, which can be adapted to changing situations.

325. In particular, it might be thought that, as the nature of the legal profession has undergone a considerable evolution since the adoption of Recommendation No. R(2000)21, there is every reason to believe that this process will continue so that it is unwise to try and pin down the approach that member States should adopt with respect to the legal profession.

326. Such a view has some merit should the comparison be made with an instrument such as the European Convention, where there is the possibility for the application of relatively broad provisions to concrete situations to be determined through a contentious process that builds upon the resolution of previous disputes as to how such provisions should be applied.

327. It seems less compelling as regards a slightly more elaborate version of Recommendation No. R(2000)21, which as can be seen above, has been invoked in general terms as a kind of moral pressure, without any of its provisions really having a decisive influence on the outcome of a particular dispute.

328. In any event, being more specific as to the requirements governing the legal profession does not necessarily mean that they need to be so specific that they cannot be adapted to evolving circumstances.

329. Nonetheless, the risk that particular provisions might be seen as incapable of taking account of such circumstances could only really be avoided by the existence of some mechanism for interpreting and applying those provisions in specific situations, although that need not be in an individual case-based system such as seen in the system established by the European Convention.

330. This necessarily leads to the inclusion of some form of implementation mechanism in – or to accompany - the instrument as both an opportunity and an advantage that might be afforded by the adoption of an entirely new instrument.

331. At present, the absence of any kind of mechanism with a specific focus on the profession of lawyer does seem to mean that there is both insufficient focus on the problems faced by the legal profession and insufficient protection for individual lawyers.

332. The extent to which this deficiency would be remedied would depend upon the nature of the mechanism adopted.

333. The options available are:

- a. a system of periodic reports (whether to or by a supervisory body²⁷⁸) with the addition of the possibility of a recommendation being adopted by the Committee of Ministers;²⁷⁹
- b. a body with responsibility for interpreting or elaborating in more detail the standards applicable to the profession;²⁸⁰
- c. a body with the possibility of drawing attention to problems seen in particular member States;²⁸¹

²⁷⁷ E.g., 24 of the 34 ratifications of the Council of Europe Convention on preventing and combating violence against women and domestic violence have come after it entered into force.

²⁷⁸ An instance of the former can be seen in Chapter IX of the Council of Europe Convention on preventing and combating violence against women and domestic violence and an example of the latter is found in the country monitoring work of the European Commission against Racism and Intolerance ("ECRI").

²⁷⁹ As is the case with the European Social Charter and the European Charter for Regional or Minority Languages.

²⁸⁰ E.g., a Steering Committee under the Committee of Ministers and, in particular, the European Committee on Legal Cooperation, which commissioned the present study. See also the preparation of Opinions by the Consultative Councils of European Judges and of European Prosecutors and the General Policy Recommendations issued by ECRI.

²⁸¹ Such as the reports on the status and situation of judges and prosecutors by the Consultative Councils of European Judges and of European Prosecutors (made at the request of member States) and the public statements by the European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") after a failure to act on its recommendations.

- d. opinions on legislative changes by the Venice Commission;²⁸²
- e. the possibility of individual lawyers or professional associations and/or non-governmental organisations putting on the record problems that they have identified (with or without some arrangement for a reaction to this);²⁸³
- f. an individual office with specific responsibility for raising concerns about the profession;²⁸⁴ and
- g. a body with responsibility for ruling on individual or collective complaints about non-compliance with the standards set out in the instrument.²⁸⁵

334. Such options are not all mutually exclusive and some combination of a mechanism that provides fuller guidance as to what the standards in the instrument entail and is a means of getting the particular problems faced by individual lawyers is most likely to be most useful in tackling the shortcomings that have been identified. This is considered further in the section Possible Alternatives below.

335. While the introduction of a mechanism could potentially give added value to any new instrument that might be adopted, there are also certain possible risks that need to be borne in mind.

336. Firstly, it has already been noted, there could be a reluctance to ratify a new instrument that is legally binding but, whether binding or non-binding, an instrument for which an implementation mechanism of some kind is also envisaged might be a dissuasive factor on some member States, whether because they do not really wish for the relevant provisions to be more effectively implemented or because they do not want the additional burdens (financial and administrative) that it might impose on them.

337. Such a risk cannot be discounted but it should be noted that it has not deterred significant numbers of member States from ratifying treaties in recent years that include within them some form of implementation mechanism.²⁸⁶ Nonetheless there have been no individual complaint mechanisms adopted since the European Convention and only limited support exists for the collective complaints' procedure under the European Social Charter.²⁸⁷

338. On the other hand, member States cooperate willingly with several mechanisms that are not treaty-based²⁸⁸ so that the risk of non-acceptance may be less where attention is drawn to general evaluations of problems than in the case of a mechanism making a fairly conclusive determination about a particular situation.

339. Secondly, there might be thought to be a risk of either duplication or forum-shopping in the case of an individual complaints' mechanism with proceedings before the European Court.

340. However, such a mechanism would be regarded by the European Court as "another procedure of international investigation or settlement" rendering subsequent applications to it inadmissible under Article 35(2)(b).²⁸⁹ Such a restriction could similarly be introduced into any new complaints' mechanism. It would then be a matter of judgement for a potential claimant as to which body was best placed to resolve the problem that s/he was facing.

341. Thirdly, there will be the risk that the body does not, in practice, add any value to the existing available mechanisms. This is not something that can be completely dismissed but it has not been the experience with the other mechanisms introduced within the framework of the Council of Europe. Whether such a risk does actually come to be realised will turn on the composition of the body concerned and the level of support which can be given to it by the Secretariat of the Council of Europe.

²⁸² This would not be a new mechanism. At present it can give opinions at the request of governments, heads of state and parliaments in member States, the Secretary General, the Committee of Ministers, Parliamentary Assembly and the Congress of Local and Regional Authorities within the Council of Europe, the European Union and several international organisations.

²⁸³ Such as the Platform for the Protection of Journalism and the Safety of Journalists.

²⁸⁴ Such as the Council of Europe Commissioner for Human Rights.

²⁸⁵ Such as respectively under the European Convention and the Collective Complaints procedure in respect of the European Social Charter.

²⁸⁶ Notably, the Council of Europe Convention on Action against Trafficking in Human Beings (ratified by all member States) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (ratified by 34 member States).

²⁸⁷ 15 member States have accepted this possibility.

²⁸⁸ This is especially so in the case of ECRI.

²⁸⁹ See, e.g., such a view taken in *Peraldi v. France* (dec.), no. 2096/05, 7 April 2009 of applications made to the United Nations Working Group on Arbitrary Detention.

342. Finally, and linked to the preceding point, is the risk that a new mechanism would be an undue burden financially and administratively for the Council of Europe, which has been faced with budgetary constraints for many years.

343. Such a risk is undoubtedly a genuine one. However, it is something that can be factored into the choice made as to whether to have any mechanism at all or as to the particular form that the mechanism should take. It is not, therefore, an insurmountable obstacle in itself.

5. POSSIBLE COVERAGE

344. The terms of reference for this study require an indication of aspects other than the professional independence and security of lawyers that a new legal instrument might cover in order to address current challenges facing lawyers in Europe.

345. There are several such aspects that ought to be covered, as is evident from the analysis of the Recommendation No. R(2000)21 and the other existing standards, including the European Convention.

346. However, although these aspects are significant, it is important to underline the necessity of the instrument also addressing in a substantive manner - as far as they are linked to issues of protection of the profession of lawyers - the requirements for independence and self-governance of professional associations which do not have the protection of associations under Article 11 of the European Convention.

347. This is crucial since the lack of clarity as to what is entailed by independence and self-governance goes to the heart of many of the problems faced by the legal profession.²⁹⁰

348. There is no point in expecting lawyers not to be attacked and threatened if there is not a clear understanding that they are independent professionals who should not be identified with their clients or the claims that they espouse on their behalf and that their representation of them is fundamental to the rule of law and the proper administration of justice.

349. Furthermore, there is also no point in expecting professional associations to deal with supposed disciplinary infractions involving the legitimate exercise of rights to freedom of assembly, association and expression or to protest about the treatment of lawyers if they are not themselves independent.

350. Such general statements can be readily made but a more concrete elaboration of what they entail is undoubtedly a precondition, if not a guarantee, for their realisation in practice.

351. In addition, an important preliminary issue to be addressed in a new instrument will be its understanding of the term "lawyer". Undoubtedly, the principal focus should be on those who are formally authorised to practice after fulfilling certain requirements.

352. However, as both the Basic Principles and the European Court have recognised, the provision of legal services is not limited to those with such a formal authorisation. Thus, many legal services are provided in practice by trainees, paralegals and also by persons who have legal training but are not members of the bar or other legal profession. It may be that the new instrument should not be applicable to such persons in every respect. Nonetheless, their contribution to the administration of justice is often critical and many of the standards seen as necessary for "authorised lawyers" will be equally relevant to them. Indeed, without the protection of these standards it will be possible to deny access to justice to many people.²⁹¹

²⁹⁰ See the recent consideration of this issue in the Venice Commission's Joint Opinion on the July 2020 amendments to the attorneyship law of 1969 (CDL-AD(2020)029).

²⁹¹ In this connection it should be noted that, in *Dmitrijevs v. Latvia* (dec.), no 62390/00, 7 November 2000, the European Court considered "effective" for the purpose of Article 6(3)(c) of the legal assistance provided by a trainee lawyer who did not have the status of a registered attorney.

353. Also needing attention in the new instrument will be the inclusion of provisions that give greater clarity to the relationship between lawyers and their client. One aspect of that as regards independence has already been discussed. However, there is also a need to make clearer the freedom of lawyers to choose their clients, even in the context of an obligation to take part in the provision of legal aid services,²⁹² as well as what is involved in loyally respect their interests and any limits to that.

354. There should also be a clear right for lawyers to object for good cause to a judge's conduct or participation so that it is not just the client who can complain about such conduct or participation in the event of either of them being problematic.

355. Furthermore, the instrument needs to strengthen the guarantee of a lawyer's freedom of expression both by stipulating that there is a right to take part in the public discussion on matters concerning the promotion and protection of human rights and by requiring that they enjoy civil and penal immunity for statements made in good faith in their pleadings or professional appearances before courts, tribunals and other bodies. Consideration should also be given to expression in the evolving methods of communication that can be used, as well as possibly to the limits on advertising services.

356. There should also be account taken of how the standards should be applied in the context of legal practice that is increasingly occurring beyond the limits of the jurisdiction in which a lawyer initially qualified.

357. In this connection, there should also be clear recognition that taking cases to regional and international procedures, as well as communication on behalf of a client or in the public interest with other regional and international bodies, is an entirely legitimate activity for lawyers to undertake.

358. Finally, there ought to be some criteria governing the basis for the institution of disciplinary proceedings and also some elaboration of the disciplinary process itself. The focus of such criteria and elaboration should only be on ensuring that no arbitrary disciplinary processes can be instituted and that lawyers are protected in the free exercise of their profession.

6. A NEW INSTRUMENT AND POSSIBLE ALTERNATIVES

359. In the light of the foregoing sections, it is finally necessary to consider whether there is a real need for a new instrument concerned with the profession of lawyer, (if so) what should its nature be and also whether there are any alternatives ways to the adoption of a new instrument through which the protection for lawyers could be enhanced.

360. The starting point for such a consideration must be that there are genuine and extensive problems facing the legal profession, both as regards its members and the institutions regulating it. These problems are not the same – either in nature or extent – in all member States but there is good reason to believe that the problems have become more prevalent in recent years.

361. The ability to resolve these problems is affected by limitations on the scope of the standards currently existing and on the means for securing their implementation, i.e., the requirements for their resolution has both a substantive and a remedial dimension.

362. Some of these problems are certainly capable of being addressed through proceedings that invoke rights in the European Convention.

363. However, this possibility cannot be a sufficient or adequate solution in most instances for the reasons already given, notably, the inapplicability of all relevant rights to lawyers as opposed to their clients, the lack of coverage for issues of an institutional nature, the length of time generally required for such proceedings and the limited attention given to systemic problems.

364. Thus, the present situation involves, in the first place, the absence of a sufficiently clear and comprehensive set of standards applicable to the profession of lawyer that can serve both as a guide for national law and practice and as a basis by which alleged problems faced by lawyers individually and institutionally can be satisfactorily examined. In addition, in the event of alleged problems proving to be well-founded, there are not sufficient means to ensure that they will be appropriately remedied.

²⁹² The European Court established in *Van der Musselle v. Belgium* [P], no. 8919/80, 23 November 1983 that such an obligation, even without remuneration and payment of expenses, would not amount to forced or compulsory labour contrary to Article 4(2) of the European Convention where it did not impose an excessive or disproportionate burden, was compensated by advantages attaching to the profession and services concerned did not fall outside the usual work of members of the Bar either by their nature or by any restriction of freedom in the conduct of the case.

365. The need for an improved set of standards is clear but should it be legally binding or non-binding?

366. The non-binding route has already been taken within the Council of Europe in Recommendation No. R(2000)21. It has undoubtedly had some influence but its specific impact is far from clear, not least as it is invoked along with the Basic Principles and it may be suffering from a degree of competition from the array of other soft law standards elaborated by international professional organisations. It is also only occasionally relied upon by the European Court.

367. Furthermore, given the extent of the problems currently being faced by lawyers individually and institutionally, it would seem that – even on the matters that it does cover – Recommendation No. R(2000)21 no longer has sufficient authority regarding the appropriate approach in respect of the profession of lawyer.

368. This state of affairs would seem to stem from the absence of arrangements to clarify what Recommendation No. R(2000)21 requires and to ensure that this is respected by member States, in other words, appropriate arrangements for implementation.

369. There can, of course, be situations where standards are in many respects implemented without the need to go beyond their stipulation in a precisely formulated but non-binding Recommendation.

370. A good example might be the European Prison Rules in Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules.²⁹³ However, the implementation of the European Prison Rules undoubtedly owes much to the exacting monitoring undertaken by the CPT, whose existence and mandate has a convention basis.²⁹⁴

371. Even if a new instrument for the profession of lawyer was clearer and more comprehensive in respect of the standards to be followed, the only entity currently in existence that might be expected to fulfil a similar role to that played by the CPT in respect of the European Prison Rules is the European Court. However, that would be insufficient given the limitations on the mandate of the European Court – the rights in the European Convention – and on its “monitoring” capacity already discussed.

372. An alternative body could conceivably be established for this purpose, such as an equivalent for the legal profession to the Consultative Councils of European Judges and European Prosecutors or, if a more active monitoring role was considered appropriate, to ECRI.

373. However, apart from issue of the suitability of these models for the problems faced by the profession of lawyer, which is discussed further in connection with implementation arrangements below, it is doubtful whether such a bifurcated approach could prove to be a really satisfactory solution without the authority of a convention behind it. This is because the problems now being faced by lawyers would seem to suggest that a non-binding instrument is insufficient to elicit the commitment needed to secure observance of the standards which it prescribes.

374. As a result, there do seem to be good reasons – in spite of the risks associated with it, as discussed earlier - to go beyond the adoption of a new non-binding instrument and to prepare one that is intended to be legally binding, namely, one in the form of a Council of Europe convention. However, this would only really add value if this instrument also included some arrangements for the implementation of the standards elaborated in it.

375. However, that then raises the issue of what those arrangements should be.

376. Certainly, the nature of a convention concerned with the profession of lawyer is not really akin to the many treaties adopted within the Council of Europe that seek to achieve harmonisation of national legislation. Rather, it would be more like treaties that deal with human rights and matters such as corruption,²⁹⁵ money-laundering²⁹⁶ and terrorism²⁹⁷ which not only prescribe standards but also establish new mechanisms or rely on ones already established²⁹⁸ with a view to securing their implementation.

²⁹³ Adopted on 11 January 2006.

²⁹⁴ The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

²⁹⁵ CETS Nos. 173, 174 and 191.

²⁹⁶ CETS Nos. 141 and 198.

²⁹⁷ CETS Nos. 90, 190, 196 and 198.

²⁹⁸ Such as the Group of States against Corruption – GRECO.

377. The different kinds of arrangements that could be included in the convention have already been outlined above.²⁹⁹

378. There are two aspects of those arrangements that seem particularly pertinent when considering the problems being faced by the profession of lawyer, both individually and institutionally.

379. The first is some means whereby more detail might be provided as to what the standards in the convention require. Notwithstanding that the convention should, in at least some respects go beyond the level of detail in Recommendation No. R(2000)21, it is more than likely that it will be useful to have some guidance as to what those standards require that can draw on experience in applying them and best practices in different member States.

380. The second is some means of addressing situations where the standards are not being observed in respect of lawyers, whether in individual cases or more generally. Such an arrangement can, of course, also serve as guidance as to the application of the standards. However, it would not be a sufficient means of doing so as it would depend on whether problems are actually raised in this form and the experience of proceedings before the European Court indicates that this can happen very slowly and may not actually deal with some matters of concern.

381. On the other hand, it is not evident that the issue of the profession of lawyer is such that there would need to be an ongoing monitoring process – involving periodic reports – that addresses the implementation of all the standards in every member State. Although a range of problems have been identified, there is no evidence that there is a generalised problem of compliance with the matters that would be covered by the standards. Rather, there are different elements of them – varying from member State to member State – that seem to need attention. In these circumstances, a general monitoring process would not seem to be a particularly good use of resources.

382. It is also doubtful whether it would be useful to place the responsibility for raising concerns about the profession on a single office such as the Commissioner for Human Rights. To some extent this would duplicate the work already undertaken by the Commissioner and it would not lead to any conclusive ruling.

383. The capacity of the Venice Commission to give opinions on legislative changes would undoubtedly be enhanced by the adoption of a convention which has clearer and more comprehensive standards. However, this is very much an ad hoc rather than ongoing process and it would not be a substitute for the two aspects relating to implementation that have been identified. Nonetheless, the performance of this role could be a useful complement to them, in much the same way as the Venice Commission's work can complement that of other bodies within the Council of Europe, including the European Court.

384. In terms of the first aspect, it would be appropriate to draw on the experience of the Consultative Councils, ECRI and various Steering Committees in determining both the procedure and composition of the body expected to provide guidance as to what the standards in the convention require. The issue of its composition will be especially important given the institutional shortcomings that have been referred to. As a result, the selection of members exclusively by the government of a member State might be seen by some members of the profession as undesirable. The involvement of the Committee of Ministers in the appointment process, as is the case with the CPT, could serve as a corrective to such a view.

385. As regards the second aspect, it is doubtful that the possibility of individual lawyers or professional associations and/or non-governmental organisations putting on the record problems that they have identified in some form of alert system would really add much value. In many ways, this is what is already being done by national and international professional organisations, as well as by some non-governmental organisations, albeit not in a formalised manner. Certainly, it could lead to some problems getting a higher profile, but it would not result in any assessment as to whether the alleged problem was well-founded.

386. This would leave, some form of individual or collective complaints mechanism as a potentially more useful approach to deal with specific individual or institutional problems.

387. There could, of course be concern that an individual complaints mechanism would duplicate proceedings before the European Court. However, as already seen, Article 35(2)(b) of the European Convention would preclude the bringing of applications to the European Court that have already been examined by another body and it would be possible to provide such a restriction in a reverse form for an individual complaints mechanism.

²⁹⁹ See para. 333.

388. Nonetheless, the need for a new individual complaints' mechanism seems questionable for two reasons.

389. Firstly, the majority of the issues of concern to individual lawyers can already be dealt with in proceedings before the European Court. It might be more useful for its priority policy to be re-examined so that these can be dealt with more speedily than is generally the case at present.

390. Secondly, there are some issues affecting individual lawyers that cannot be dealt with in proceedings before the European Court because under the European Convention they are perceived as affecting the rights only of clients. However, such problems tend to be more systemic in character, as are the problems affecting institutional independence and self-governance. It might, therefore, be preferable for both these sorts of problems to be addressed through a mechanism that is concerned with systemic problems that could be raised not by any individuals directly affected but through a process similar to that under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. However, like that process, it can be expected that there would still be some reluctance on the part of all member States to participate in such a mechanism and, at most, its inclusion in the convention would probably be possible only if it entailed an optional undertaking.

391. Although professional associations in a member State might be recognised as competent to raise issues before such a mechanism, it would not be appropriate to restrict it to them given that their operation might be the source of the problem requiring attention. As with the process under the European Social Charter, there could be a list of entities with competence to claim, notably international professional organisations and non-governmental organisations with demonstrated interest in matters relating to the administration of justice.

392. While the optional nature of the complaints mechanism would not, at least at first, result in extensive participation by member States, the "case law" established through it could still contribute to clarifying what is needed for the protection of the profession of lawyer.

7. POSSIBLE OUTLINE OF THE INSTRUMENT

393. It is not possible to be too precise as to the substance of a new instrument taking the form of a convention as there are certain issues where some choices might wish to be made, such as regards who should be treated as a lawyer for the purpose of its provision, the elements to be specified as contributing to independence and the exact scope of confidentiality in dealings with clients, as well as the need to make some accommodation for variations in national arrangements.

394. Nonetheless, a convention would need to deal with the following matters:

- **Preamble** – this should include recognition of the vital role played by lawyers in upholding the rule of law and promoting and protecting human rights.
- **Purpose** – this should be to set minimum standards for the organisation of the practice of law and the rights and responsibilities of those who practice it and, in particular, to ensure that those who practice law are protected from harassment, threats, attacks and interference in the performance of their activities.
- **Lawyers** – how this term should be understood (whether it should cover persons who are not formally authorised to practice - including by trainees, paralegals and persons who have legal training but are not members of the bar or other legal profession - but are performing functions generally associated with that of lawyers and, if so, the extent to which the provisions of the convention would be applicable to them).
- **Clients** – how this term is to be understood (in particular by not limiting to persons who have given a formal authorisation to act on their behalf but covering those endeavouring to obtain services from a lawyer).

- **Professional associations** – what are the crucial elements for their independence and self-governing character (in particular, to what extent and under what conditions should it be possible for the executive to have any part to play in their decision-making, financing and operation, what should be the arrangements for the election by lawyers of bodies running the associations and what duties should apply to those on such bodies - including possibly in respect of personal and political relationships with members of the executive - and where should the initiative lie with regard to legislative changes relating to the profession); whether there are functions that should be exclusive to professional associations; whether some regulatory functions can be performed by other bodies subject to certain guarantees as to their independence; and what are the responsibilities of professional associations to lawyers and to others.
- **Admission** – what matters ought not to be taken into account (including the prohibited grounds of discrimination) and who should be responsible for the application of the criteria for admission in individual cases.
- **Professional activities** – what activities should be regarded as covered for the purpose of the convention (including taking cases to international procedures as well as communication on behalf of a client or in the public interest with other regional and international bodies) and the irrelevance to this issue of whether the activities are publicly-funded or pro bono.
- **Protection** – the right not to be subjected to any form of harassment, threat, attack or unlawful interference with the conduct of professional activities or in response to such conduct and the duty of authorities to adequately safeguard lawyers who are subjected to any such harassment, threat, attack or interference.
- **Professional rights** – the scope of the freedom to choose clients (including the extent of obligations to provide advice and representation); the ability to meet and communicate with clients in confidence; access to files relevant to proceedings on behalf of clients; the ability to object for good cause to a judge's conduct or participation; the requirements governing search and seizure of offices, homes and elsewhere; the requirement of respect by judges and representatives of other parties to proceedings; freedom of choice in organisation of legal practice; and advertising.
- **Professional responsibilities** – what should be the relationship with clients (including the freedom to choose them, the extent of obligations of loyalty and confidentiality, the prohibition of conflicts of interest and the prohibition of any identification of lawyers with them or their causes and interests); what obligations (if any) should be owed to judges, other lawyers, public officials and the public, as well as any other matters considered relevant to the dignity and honour of the profession and responsibilities relating to the rule of law and the administration of justice; and the requirement to undergo continuing education and training while in practice.
- **Expression** – the provision of civil and penal immunity for statements made in good faith in pleadings or professional appearances before courts, tribunals and other bodies; the extent of protection for statements about parties and proceedings elsewhere; and the ability to take part in the public discussion on matters concerning the administration of justice, legal reform and the promotion and protection of human rights.
- **Assembly and Association** – the freedom to take part in demonstrations that are not inconsistent with their professional responsibilities; the freedom to establish associations of lawyers that do not perform the functions of professional associations; and the freedom to decline to undertake publicly-funded work in disputes about the level of remuneration for it.
- **Discipline** – criteria governing the basis for the institution of disciplinary proceedings and elaboration both of the requirements for disciplinary process itself (including as to the bodies with responsibility for its conduct) and of the sanctions that can be imposed.
- **Jurisdiction** – whether and how the standards should be applied in the context of legal practice occurring beyond the limits of the jurisdiction in which a lawyer is formally qualified.
- **Implementing body** – the requirements for its composition and functioning and its competence to issue opinions as to the application of the standards in the convention.
- **Collective complaints** – the determination of the bodies with competence to submit these, the formal requirements for submission, the procedure for determining them and the status of findings of non-compliance with the standards in the convention.

8. CONCLUSION

395. The problems faced by the profession of lawyer, both individually and institutionally, are significant and they seem to be becoming more extensive. These problems are inconsistent both with the broad thrust of the applicable soft law standards – including Recommendation No. R(2000)21 – and in many, but not all, cases with legally binding ones, notably the European Convention.

396. However, the soft law standards are insufficiently precise and the coverage by the legally binding ones is insufficient.

397. The adoption of a new instruments is not without risks. These include difficulties both in obtaining agreement as to its content and in gaining acceptance for an enhanced degree of protection for the profession of lawyer, as well as the possibility that a legally binding instrument could be too inflexible or that an implementation mechanism would result in the unnecessary duplication of proceedings under the European Convention on Human Rights.

398. While not all these risks can be entirely discounted, there do seem to be ways in which those that remain can be mitigated without depriving a new instrument of any added value.

399. It cannot be said that there would be no added value in the adoption of a new Recommendation with more extensive and elaborate provisions than Recommendation No. R(2000)21 where this would be accompanied by some non-binding arrangements for implementation. However, it seems unlikely that a non-binding instrument relating to the profession of lawyer would really be sufficient to elicit the commitment needed to secure observance of the standards which it prescribes.

400. As a result, it is concluded that there would be sufficient justification for adopting a legally binding instrument on the profession of lawyer, setting out the standards in a manner that is both more precise and more comprehensive, with implementation being entrusted to a body with competence to give guidance on the application of its provisions and – on an optional basis – to issue opinions on complaints of a collective nature submitted by entities approved for this purpose.