Human Rights Institute

International Legal Digest: Lawyers' protection and states' obligations

In partnership with

LAWYERS FOR LAWYERS

BAR HUMAN RIGHTS COMMITTEE OF ENGLAND & WALES

HUMAN RIGHTS HOUSE FOUNDATION

Lawyers' Rights Watch Canada

CONTENTS

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About the International Bar Association's Human Rights Institute (IBAHRI)

The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 160 countries. The IBAHRI, an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

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About the Bar Human Rights Committee of England and Wales

The Bar Human Rights Committee (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. It has a membership comprised of barristers practising at the Bar of England and Wales, legal academics and law students. BHRC's Executive Committee members and general members offer their services pro bono, alongside their independent legal practices, teaching commitments and/or legal studies. BHRC also employs a full-time project coordinator.

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About Human Rights House Foundation

Human Rights House Foundation (HRHF) protects, empowers and supports human rights defenders and their organisations, and unites them in an international network of Human Rights Houses.

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About Lawyers for Lawyers

Lawyers for Lawyers (L4L) is an independent, non-political and not-for-profit lawyers' organisation established in 1986. L4L's mission is to promote the independent functioning of lawyers and the legal profession across the world in accordance with internationally recognised norms and standards, including the Basic Principles on the Role of Lawyers. Our work to support lawyers who are at risk as a result of discharging their professional duties, seeks to protect them from threats, risks and reprisals, strengthens their international recognition and protection in laws, policies and practices, and empowers them to fulfil their role as essential agents of the administration of justice. L4L was granted special consultative status with the UN Economic and Social Council in July 2013.

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About Lawyers' Rights Watch Canada

Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers and other human rights defenders working to promote international human rights law, advocacy rights, the integrity of legal systems and the rule of law through advocacy, legal research and education. LRWC is a volunteer-run non-government organisation in Special Consultative Status with the Economic and Social Council of the United Nations.

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LIST OF ACRONYMS

AfCHPR	African Charter on Human and Peoples' Rights
AfCmHPR	African Commission on Human and Peoples' Rights
AfCtHPR	African Court on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
ArCHR	Arab Charter on Human Rights'
AL	Allegation letter
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	Committee against Torture
CCBE	Council of Bars and Law Societies in Europe
CED	Committee on Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CoE	Council of Europe
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
HRCttee	Human Rights Committee
HRDs	human rights defenders
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
IBA	International Bar Association
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IGO(s)	international governmental organisation(s)
INGO(s)	international non-governmental organisation(s)
JAL	Joint allegation letter
JUA	Joint urgent action

NGO(s)	non-governmental organisation(s)
NHRI	National Human Rights Institution
OAS	Organization of American States
ODS	Official Documents System
OHCHR	Office of the United Nations High Commissioner for Human Rights
OL	Other letter
OPCAT	Optional Protocol to the Convention against Torture
OSJI	Open Society Justice Initiative
OSCE	Organization for Security and Co-operation in Europe
SDGs	Sustainable Development Goals
SPT	Subcommittee on Prevention of Torture
SR	Special Rapporteur
SRIJL	Special Rapporteur on the independence of judges and lawyers
UDHR	Universal Declaration of Human Rights
UA	Urgent appeal
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Council
UNGA	United Nations General Assembly
UPR	Universal Periodic Review

INTRODUCTION

A. Overview of the Toolkit for Lawyers at Risk

Background

With lawyers at the forefront of protecting human rights, the effective implementation and enforcement of United Nations and regional laws and standards relating to the independence and safety of the legal profession is at the heart of promoting and protecting human rights around the world.

General objective

To strengthen the protection of lawyers and those exercising lawyers' functions who face risks as a result of carrying out their professional functions.

Specific objectives

- to provide guidance on the international human rights framework that protects those exercising lawyers' functions;
- to provide guidance about prevention, including risk assessment and risk management, in the discharge of legal practice;
- to provide guidance on how to access response and protection mechanisms at the regional and UN levels based on the experience of the main international lawyers' organisations; and
- to support joint actions among organisations that support lawyers.

Scope

The Toolkit applies to those who perform the functions of a lawyer, in a professional manner, notwithstanding their title or registration to a specific association. As per the 1990 Basic Principles on the Role of Lawyers (the 'Basic Principles'), the functions of a lawyer mostly consist in:[1]

- advising clients as to their legal rights and obligations and as to the functioning of the legal system insofar as it relates to the legal rights and obligations of those clients;
- assisting clients in the appropriate manner, and taking legal action to protect their interests; and
- assisting clients before courts, tribunals or administrative authorities.

'In a professional manner' is understood as 'in accordance with recognised professional duties, standards and ethics'.[2]

Toolkit components

The Toolkit is composed of:

(1) training modules addressed to lawyers and organisations that support lawyers' work; and

(2) practical tools aimed at assisting lawyers at risk.

B. Overview of the Legal Digest

General objective

To outline the state's obligations to respect, protect, fulfil and promote the independence and security of lawyers,

1 Basic Principles on the Role of Lawyers (1990), Principle 13.

2 *Ibid*, Principle 16.

as well as their ability to perform their professional duties free from intimidation, hindrance, harassment, improper interference or reprisals from state or non-state actors. This is so as to provide lawyers with the legal framework underpinning, and the international jurisprudence and recommendations informing, the interpretation and implementation of these obligations.

Specific objectives

To support:

- the development of legal complaints regarding violations of lawyers' safety, independence or advocacy rights;
- the assessment of lawyers' protection at country level; and
- capacity-building of bar associations and other relevant in-country institutions.

C. Plan

Part I is an introduction to the current situation regarding the protection of lawyers and those exercising lawyers' functions in international law, as refined over the past 30 years. It provides key legal references to:

- **set up the case for the special protection of lawyers (Chapter A);**
- appraise the scope and content of the existing legal framework protecting lawyers and those exercising lawyers' functions. **Chapter B: Lawyers' protection: what protection?**, outlines the existing international legal framework concerning lawyers' protection, including the general international principles of law and treaty-based provisions applicable to all individuals, as well as the specific standards applicable to lawyers and human rights defenders (HRDs). 'International' is understood as encompassing norms and standards adopted by inter-governmental organisations at the UN and regional (ie, Organization of American States (OAS), African Union (AU) and Council of Europe (CoE)) levels, as well as professional standards developed by international non-governmental organisations (INGOs) (eg, the International Bar Association (IBA)). Together these (mostly soft law) rules shape the international legal ground for lawyers' protection; and
- **articulate state and non-state obligations with respect to lawyers' protection in Chapter C**: **Lawyers' protection: whose obligation?**

Part II provides an interpretation of the aforementioned international framework on the right to protection. It is drawn from materials and jurisprudence authored by the UN and regional human rights mechanisms, such as the UN Treaty Bodies (TBs) and Special Procedures (SP) and the regional human rights commissions and courts. The objective of this section is to highlight specific state obligations regarding lawyers' protection, which can be subsumed under four categories:

1. **the general principles underpinning the protection of lawyers' functions (Chapter A);**
2. **the guarantees for the organisation of an independent and self-governing legal profession (Chapter B).** This section considers the organisation of the legal profession as independent and self-governing as well as its regulation, (ie, the conditions to enter the legal profession, develop professional standards and set up disciplinary proceedings);
3. **the guarantees for lawyers' functioning (Chapter C),** including the principle of non-identification of lawyers with their clients' causes, the principle of confidentiality in the lawyer–client relationship and lawyers' rights to access clients and information related to the case and adequate time and facilities to prepare the defence; and
4. **lawyers' individual freedoms (Chapter D)** as necessary conditions for lawyers to fulfil their mission.

User's guide

Each chapter of the Legal Digest includes:

- a thematic compilation of key **international standards**. In order to facilitate the use of those provisions, standards are presented:

– in a systematic order, referring first to UN instruments, followed by regional instruments adopted by international governmental organisations (IGOs), and international standards adopted by INGOs;

– with a colour code identifying the geographic scope of the provision; and

– using italics to highlight that the provision is not a treaty-based provision (hard law)

- an **interpretation of the right** and its constitutive elements based on the jurisprudence and recommendations of international and regional human rights mechanisms; and

- a **checklist** intended to provide lawyers with practical questions highlighting the key legal issues surrounding the right or guarantee considered.

PART I. INTRODUCTION TO THE INTERNATIONAL LEGALFRAMEWORK PROTECTING LAWYERS AND PERSONS EXERCISING LAWYERS' FUNCTIONS

A major development in the history of human rights protection has been to give a human face to justice and a legal shield to those without whom human rights would not exist.

Since the 1980s states and professional organisations have worked to put lawyers' protection on the international agenda, with a view to achieving equal and effective access to justice.

Thirty years later, lawyers' protection in international law rests on three premises:

1. First, lawyers should enjoy a high level of protection attached to their function. Chapter A outlines the special role of lawyers in democratic societies, which justifies their special protection.
2. In addition to the general human rights protection regime applicable to any individual, lawyers may benefit from protections developed specifically for lawyers and HRDs. These three regimes complement and reinforce one another. They come into play depending on the legal environment of the region and country within which the individual practices law. Chapter B develops the scope of application and content of the three regimes.
3. Finally, states are the main authority responsible for guaranteeing lawyers' protection, and for holding accountable any state or non-state actor violating lawyers' rights. Moreover, bar associations are expected to play an active role in lawyers' protection. Chapter C maps out these responsibilities for the protection of lawyers.

A. Setting up the case for lawyers' special protection

Recognised in a number of international instruments and jurisprudence along with the right to a fair trial and the right to liberty and security, the right to legal counsel[3] reflects the central role the legal profession plays in upholding the rule of law and the protection of human rights.

The 1990 Basic Principles on the Role of Lawyers ('Basic Principles') and the 1993 Vienna Declaration on Human Rights, corroborated afterwards by a number of states' resolutions at the UN Human Rights Council (UNHRC) and General Assembly (UNGA),[4] firmly establish the independence of the legal profession as the hallmark of a

3 International Covenant on Civil and Political Rights (ICCPR) (1966), Art 14.3 (b) and (d); UN Convention on the Rights of the Child (CRC)(1989), Art 37(d) and Art 40.2 (b) (ii) and (iii); International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (ICMW) (1990), Art 18.3 (b) and (d); International Convention for the Protection of All Persons from Enforced Disappearance (CPED) (2006), Art 17.2(d); International Convention on the Rights of Persons with Disabilities (CRPD) (2006), Art 12.3; African Charter on Human and Peoples' Rights (AfCHPR) (1981), Art 7.1(c); American Convention on Human Rights (AmCHR) (1969), Art 8.2 (d)–(e); Arab Charter on Human Rights (ArCHR) (2004), Art 16.4–5; European Convention on Human Rights (ECHR) (1950), Art 6.3 (c). See also, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court (2015), Principle 9, Principle 21 (para 42), Guideline 8, Guideline 17 (paras 93 (d) and 96 (b)), and Guideline 20 (para 106 (e)); UN Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules') (2015), Rule 61; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Guidelines on Legal Aid') (2012), Principles 1–5; UN Declaration on Human Rights Defenders ('UN Declaration on HRDs') (1998), Art 9.3 (c); Basic Principles, Principles 1–8; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), Principles 11.1–2, 17.1 and 18.1; UN Standard Minimum Rules for the Administration of Juvenile Justice (1985), Rule 15.1; African Commission on Human and Peoples' Rights (AfCmHPR), Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (2015), Part 3 (B) (iii); AfCmHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa ('Luanda Guidelines') (2014), Guidelines 4(d) and 8 (d) (i); AfmCHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ('AfCmHPR Guidelines on the Right to a Fair Trial') (2003), Part A.2 (f), Parts G–H, Part M.2 (e) and (f) and Part N (2); AfCmHPR, Guidelines for the Prohibition and Prevention of Torture in Africa ('Robben Island Guidelines') (2002), Guideline 20 (c) and 31; Council of Europe (CoE), Recommendation No R (2000)21 on the Freedom of Exercise of the Profession of Lawyer (2000) ('CoE Recommendation No R (2000) 21'), Principle IV. 1–4; Inter-American Commission on Human Rights (IACmHR), Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V. See also UN Human Rights Committee (HRCttee), 'General Comment No 32, Art 14, Right to Equality before Courts and Tribunals and to Fair Trial' ('General Comment No 32') (2007) UN Doc CCPR/C/GC/32, para 34; UNHRC, 'Safeguards to Prevent Torture during Police Custody' (2016) UN Doc A/HRC/RES/31/31, para 12(d).

4 See, eg, UNHRC, 'Human Rights in the Administration of Justice, including Juvenile Justice' (2019) UN Doc A/HRC/42/11; UNGA, 'Human Rights in the Administration of Justice, including Juvenile Justice' (2018) UN Doc A/RES/73/177; UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12; UNHRC, 'Independence and

democratic system. They underpin the state obligation to guarantee an independent and impartial judiciary and an independent legal profession 'as essential to the full and non-discriminatory realization of human rights', and 'indispensable to the processes of democracy and sustainable development'.[5] This obligation was later mirrored in the 2030 Sustainable Development Goals (SDGs) agenda, as providing the 'necessary elements in the realization of Sustainable Development Goal 16 […] in which Member States committed, inter alia, to provide equal access to justice for all and build effective, accountable and inclusive institutions at all levels'.[6]

The following sections address:

- the rationale behind lawyers' protection (Section 1); and
- lawyers' protection at the international level (Section 2).

1. The right to legal counsel and lawyers' unique role in a democratic society

The legal profession fulfils a special role in democratic societies, facilitating the administration of and guaranteeing access to justice and upholding human rights and the rule of law. In its General Comment No 32 (2007), the UN Human Rights Committee (HRCttee), interpreting Article 14 of the International Covenant on Civil and Political Rights (ICCPR) on the right to a fair trial, qualifies the right to communicate with counsel of one's own choosing as an 'important element of the guarantee of a fair trial and an application of the principle of equality of arms'.[7] Likewise, the Preamble of the Basic Principles highlights that adequate protection of human rights and fundamental freedoms requires 'effective access to legal services provided by an independent legal profession'. The Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa ('AfCmHPR Guidelines on the Right to Fair Trial') affirm that '[l]egal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms'.[8]

The refocus operated in the 1980s in international law highlights the role court officers play in supporting access to justice. Lawyers and, more broadly those exercising lawyers' functions, serve the purpose through a range of actions, including:

- advocacy, law reform, drafting of new legislation and legal education so as to ensure the existence of rights enshrined in laws, as well as raising awareness and understanding of those rights. The legal community has the skills, expertise and tools to identify and address challenges where the law is either part of the cause or part of the solution, and can therefore promote legal interpretations compatible with human rights, the rule of law and evidence-based policy reforms;
- legal assistance and representation to ensure effective access to dispute resolution mechanisms as part of justice institutions that are both formal (ie, institutions established by the state) and informal (ie, indigenous courts, councils of elders and similar traditional or religious authorities, and mediation and arbitration). They therefore contribute to the legal empowerment of the most vulnerable groups through their work. Legal representatives also provide legal support and technical assistance to governments and civil society organisations aimed at strengthening the understanding of the importance of legal frameworks in the context of sustainable development; and

Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2015) UN Doc A/HRC/29/6; UNGA, 'Report of the Secretary General, Human Rights in the Administration of Justice' (2018) UN Doc A/73/2018; UNGA, 'Human Rights in the Administration of Justice' (2018) UN Doc 73/177; 'Report of the 2014 Social Forum' (2014) UN Doc A/HRC/26/46.

5 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 27. See also, Basic Principles, Preamble; OSCE, Countering Terrorism, Protecting Human Rights: A Manual (OSCE Office for Democratic Institutions and Human Rights 2007), p 171, fn 518 quoting the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990 Copenhagen Document), Preamble and para 5.13, available at www.osce.org/documents.

6 UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 7th preambular paragraph. See also, UNGA, 'Report of the Secretary General, Human Rights in the Administration of Justice' (2018) UN Doc A/73/2018, para 6. UNGA, 'Human Rights in the Administration of Justice' (2018) UN Doc 73/177, para xx

7 HRCttee, General Comment No 32, para 32.

8 AfCmHPR Guidelines on the Right to a Fair Trial, Part N(2)a.

- monitoring of dispute resolution mechanisms to ensure the provision of just, fair, impartial and enforceable solutions, complying with international law**.** Legal representatives may directly apply international law in cases where national legislation or practice does not align with international law and the latter provides greater protection.

While they play a critical role in upholding human rights,[9] the complexity of lawyers' function 'as intermediaries between the public and the courts'[10] rests on the multiple interests they are to protect, and which may conflict at times. A special protection is therefore granted to lawyers to allow for this. The other way around, they can also be held accountable if they are found to deviate from their legal and professional duties.

> The complexity of lawyers' role in protecting multiple interests is captured by the Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE), which underlines that:
>
> '[I]n a society founded on respect for the rule of law, the lawyer fulfils a special role. The lawyers' duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits […] A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:
>
> – the client;
>
> – the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf;
>
> – the legal profession in general and each fellow member of it in particular; and
>
> – the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.'[11]

2. Lawyers' privileges and guarantees

The special protection granted to lawyers materialises through a number of guarantees and privileges recognised at international, and often domestic, levels.[12]

Some of these guarantees are legally absolute, that is, non-derogable. This is the case for: the principle of independence of the legal profession; the principle of non-identification of lawyers with their clients and client's causes; the immunities attached to the function; and the right to work effectively, freely, autonomously, independently and without any intimidation, harassment or improper interference.

Others guarantees can be restricted in exceptional circumstances subject to the conditions set up in international law (see Part I, Chapter C, Section 2). For example, confidentiality in the lawyer–client communication, which aims to cement the lawyers' core function of providing independent and effective legal assistance and legal representation, can be restricted under specific circumstances. However, international and regional mechanisms recognise a high threshold of protection and enforce strict conditions to permit derogation from these privileges. The rationale behind this framework is that a restriction put upon lawyers, or upon HRDs more broadly, is a restriction put upon a broader range of human rights enjoyed by all or part of a community. In the same vein,

9 UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2020) UN Doc A/HRC/44/L.7, 13th preambular paragraph; and UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 5th and 9th preambular paragraphes and para 15. See also Basic Principles, Principle 14.

10 ECtHR, *Amihalachioaie v Moldova*, No 60115/00, 20 April 2004 (FINAL 20 July 2004), para 27; ECtHR, *Casado Coca v Spain*, No 15450/89, 24 February 1994, para 54.

11 CCBE, Code of Conduct for European Lawyers, para 1.1.

12 See Part II, Chapters B, C and D.

international mechanisms implement strict conditions for any restriction on rights and freedoms that serve a free and democratic society, including the rights of those working for the protection and promotion of human rights.[13]

> The **ECtHR** has made clear that freedom of action on the part of lawyers is critical to the maintenance of the rule of law. In one case involving the detention of 16 lawyers, the Court made a very strong statement as to the importance of recognising lawyers as independent of the alleged actions of their client:
>
> > 'The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.'[14]

This high standard of protection equally applies to lawyers in the context of state emergency and national security (see below Part I, Chapter C, Section 2.4). While national security is often invoked as a legitimate aim to derogate guarantees of independence of the legal profession, it is exactly when national interests are the most at stake that guarantors of a democratic society, including an independent legal profession, should be protected.

> **SR on HRDs:**
>
> '[…] derogations from and exceptions to applicable human rights standards, including the Declaration [on HRDs], should be required to meet a higher standard when they are applied to human rights defenders. This should be the case with regard to security legislation. It should be even more rigorously the case in the context of emergencies during which the most atrocious and large-scale human rights violations are committed. At these times of great risk to human rights, it is essential that there be some form of independent monitoring and accounting of the actions of the protagonists in the context of threats to security and emergencies. The Special Representative considers that it would be contrary to the spirit of international human rights standards to argue that at these same moments of greater risk the right to defend human rights can be legally stifled.'[15]

B. Lawyers' protection: what protection?

Three regimes of international law protect lawyers and those exercising lawyers' functions: the general human rights regime, the specific regime applicable to lawyers, and that applicable to HRDs. This section provides a schematic overview of:

- the key international instruments and their legal bearing (Section 1);
- the scope of protection, raising the issue of the definition of 'lawyer' and that of the protection of lawyers as 'HRDs' (Section 2); and

13 UNGA, 'Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst' (2018) UN Doc A/73/215, para 24, available at: http://undocs.org/A/73/215; IACHR, 'Report on the Situation of Human Rights Defenders in the Americas' (2006) OEA/Ser.L/V/II.124 Doc 5 rev 1. See also, HRCttee, 'General Comment No 34, Art 19, Freedom of Opinion and Expression' ('General Comment No 34') (2011) UN Doc CCPR/C/GC/34, para 2: '[[f]reedom of opinion and freedom of expression] constitute the foundation stone for every free and democratic society'.

14 ECtHR, *Elçi and Others v Turkey*, Nos 23145/93 and 25091/94, 13 November 2003 (FINAL 24 March 2004), para 669.

15 UNGA, 'Report presented by the Special Representative on Human Rights Defenders, Hina Jilani' (2003) UN Doc A/58/380, para 66. See also UNGA, 'Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst' (2018) UN Doc A/73/215, para 24.

- the content of the rights and guarantees constituting the protection regime for lawyers (Section 3).

1.Mapping of norms and standards

The ICJ Statute[16] identifies the following as sources of international law: international conventions, international custom, general principles of law recognised by nations, and judicial decisions and teaching of experts.

In light of Art 38.1 of the ICJ Statute, the pyramid of international norms protecting lawyers incorporate:

- general principles of international law and customary international law insofar as they protect the rule of law, equal access to justice and non-discrimination in the justice system, the independence of the judiciary and lawyers, and the right to a fair trial;
- core human rights treaties ('hard law'), which recognise fair trial rights, the rights to liberty and security, legal counsel and effective remedy, and the fundamental rights of lawyers, which constitute the core legal grounds underpinning lawyers' protection;
- international standards developed by intergovernmental organisations ('non-conventional norms' or 'soft law'). These norms are developed in accordance with Article 13 of the UN Charter to assist states in the implementation of legal obligations arising from treaties and general legal principles. These standards constitute authoritative statements of state duties. They serve the interpretation of international law by lawyers and international, regional and domestic courts. By virtue of their unanimous adoption and subsequent widespread endorsement in multiple fora, these standards can contribute to the development of customary norms and general principles of international law, which are sources of international law, as per Article 38 of the ICJ Statute. They are particularly relevant in lawyers' protection, as well as the administration of justice more broadly. They encompass soft law instruments protecting lawyers and HRDs, such as the Basic Principles and the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' ('UN Declaration on HRDs'); and
- international standards developed by and for the legal profession, which inform the practice and ethics of the profession. These standards unify the legal profession around core values and cement professional solidarity as a core feature in the protection of legal practitioners. In practice, professional standards corroborate and complement the UN standards.

16 Art 38.1 of the Statute of the ICJ provides for four sources of law:

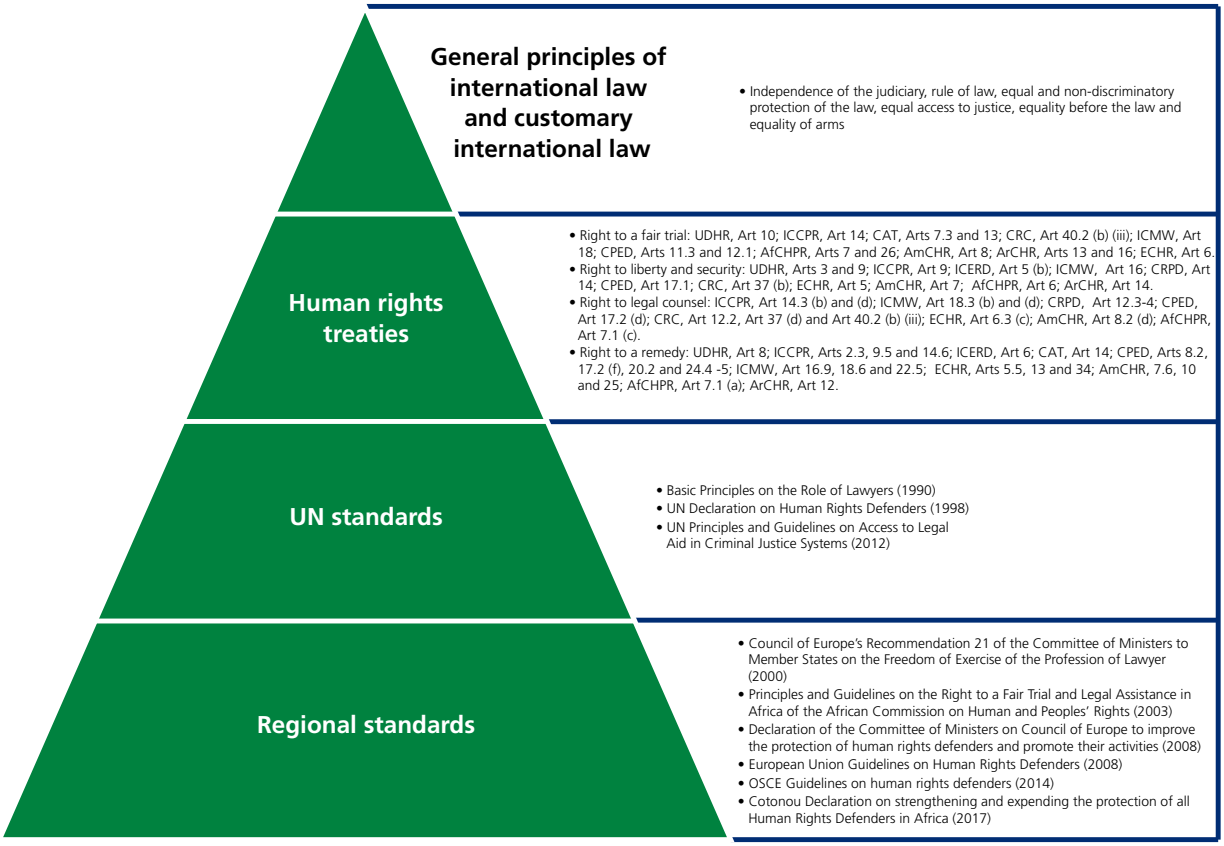
'a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

Table 1



2. Scope of protection

2.1 General human rights protection

Core international and regional human rights treaties provide a number of rights that are particularly relevant for lawyers' protection. From the outset, it should be clear that exercising lawyers' functions does not in any way imply the waiving of one's human rights and cannot be interpreted as such. Lawyers benefit from the human rights guaranteed in the core human rights treaties while exercising their professional functions.

This Legal Digest focuses on the core UN[17] and regional[18] human rights treaties. The two sets of rights of particular relevance for lawyers' protection are:

- The right to security and liberty, the right to an effective remedy and the right to a fair trial. These remain the main avenues as treaty-based provisions for the protection of lawyers' functioning. These rights are composed of a number of guarantees, among which are the right to legal counsel. All successive standards adopted regarding lawyers' functions remain anchored in the protection of these rights.
- Fundamental rights that come into play in the protection of lawyers as they exercise their professional functions, for example, the rights to life, security, movement, property, freedom of expression, association and assembly and participation in public life.

2.2 Protection as 'lawyer'

The Legal Digest focuses on the following instruments for the protection of lawyers and those exercising lawyers' functions:

17 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)(1965); ICCPR; International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)(1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)(1984); CRC; ICMW; CPED; and CRPD.

18 AfCHPR, AmCHR and the ECHR, and ArCHR.

- Basic Principles (1990);
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Guidelines on Legal Aid') (2012);
- CoE Recommendation No R(2000)21 on the Freedom of Exercise of the Profession of Lawyer (2000) ('CoE Recommendation No R(2000)21');
- AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ('AfCmHPR Guidelines on the Right to a Fair Trial') (2003);
- IBA Standards for the Independence of the Legal Profession ('IBA Standards') (1990);
- IBA International Principles on Conduct for the Legal Profession ('IBA Principles') (2011); and
- IBA Guidelines on Legal Aid Principles on Civil, Administrative and Family Justice Systems and its Commentary ('IBA Guidelines on Legal Aid') (2019).

The scope of protection these instruments provide depends on whether they adopt a procedural or functional approach to lawyering. The Basic Principles, the UN Guidelines on Legal Aid and the IBA Guidelines on Legal Aid explicitly apply to lawyers and those exercising lawyer's functions. Conversely, the CoE Recommendation No R(2000)21 and the IBA Principles have a narrower definition of lawyer, limited to those with formal status (also referred to as 'certified' lawyers).

Procedural approach to lawyering

A procedural approach recognises a lawyer as a legal professional holding a specific licence to practise law, according to requirements established in national law, such as higher legal education, probation, qualification exam, licensing, internship and membership in a professional legal association.

The following instruments adopt a formal definition of lawyers:

> **IBA Principles:**
>
> For the purpose of the document, the 'legal profession' is understood as 'the body of lawyers qualified and licensed to practise law in a jurisdiction or before a tribunal, collectively, or any organised subset thereof, and who are subject to regulation by a legally constituted professional body or governmental authority'.[19]
>
> **CoE Recommendation No R(2000)21:**
>
> For the purpose of the recommendation, a lawyer is defined as 'a person qualified and authorized 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'.[20]
>
> The Explanatory Memorandum of the CoE Recommendation states that 'in certain countries, the terms "qualified and authorised" presuppose admission to a register, membership of, or similar attachment to, a professional organisation for lawyers'.[21]

19 IBA, International Principles on Conduct for the Legal Profession (2011), p 34.

20 CoE Recommendation No R(2000)21, Preamble, last paragraph. This definition is close to that proposed in the Montreal Declaration on the independence of Justice (1983) and the Draft Universal Declaration on the Independence of Justice (the 'Singhvi Declaration), which constituted the first attempts to codify international standards on the independence of justice. See 'Draft Universal Declaration on the Independence of Justice' (the 'Singhvi Declaration') 1989, reproduced in ICJ, *International principles on the independence and accountability of judges, lawyers and prosecutors. A practitioners guide* (International Commission of Jurists, 2nd edn, 2007), p 107: 'a person qualified and authorised to plead and act on behalf of his clients, to engage in the practice of law and appear before the courts and to advise and represent his clients in legal matters'. See also Montreal Declaration on Independence of Justice (1983), para 3.01(a): '"lawyer" means a person qualified and authorized to practice before the courts, and to advise and represent his clients in legal matters'.

21 CoE Recommendation No R(2000)21, Explanatory Memorandum, para 20.

By granting protection to those specifically qualified as lawyers, the procedural approach to lawyering best fits countries where a monopoly is granted to lawyers over all or part of the legal services market. In such cases, non-lawyers are not allowed to provide these services. To practise despite this regulation is punishable under law.[22]

Conversely, this system may create protection gaps and opportunity for discrimination, when lawyers and other legal practitioners are allowed by law to provide the same services, but are not recognised the same rights.

In practice other distinctions may be operated that are problematic. For instance, in some countries of Central Asia and Eastern Europe, non-licensed lawyers who have not been admitted to the bar association, can represent clients before administrative and civil courts. Those lawyers do not benefit from the same protections and guarantees as licensed lawyers do. This situation occurs in a context where the admission process to the bar association is arguably not fair, objective and transparent and as such does not comply with international standards. This issue is addressed below (see Part II, Chapter B, Section 4.2).

Functional approach to lawyering

At the core of lawyers' protection lies the overarching objective to ensure that all persons have equal protection under the law and equal right to legal counsel, understood as the right to independent, competent and effective counsel. In a functional approach to lawyering, protection is granted to anyone who performs the functions of a lawyer in a professional manner, for example, providing legal assistance and legal representation, notwithstanding his/her title or registration or membership to a specific association. 'In a professional manner' is understood as 'in accordance with recognised professional duties, standards and ethics', as per Principle 16 of the Basic Principles.

The following instruments adopt a functional approach to lawyering:

> **Basic Principles, Preamble:** 'These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.'
>
> **UN Guidelines on Legal Aid:** (referred to in the IBA Guidelines on Legal Aid)[23]
>
> 'States should recognize and encourage the contribution of lawyers' associations, universities, civil society and other groups and institutions in providing legal aid.' (Principle 14)
>
> 'Where there is a shortage of qualified lawyers, the provision of legal aid services may also include non-lawyers or paralegals.' (Guideline 13, para 65)
>
> 'For this purpose, States should, in consultation with civil society and justice agencies and professional associations, introduce measures: 'a) to develop, where appropriate, a nationwide scheme of paralegal services with standardized training curricula and accreditation schemes, including appropriate screening and vetting' (Guideline 14, para 68(a))

AfCmHPR Guidelines on the Right to a Fair Trial: 'States that recognize the role of para-legals should ensure that they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence.' (Part H (k))

Criteria for a functional definition of lawyering

On the basis of the Basic Principles and the instruments referred to above, it appears that two cumulative conditions must be met to benefit from the lawyers' protection:

22 This is the case in Canada and Ireland. In Portugal, an 'unauthorised person' will face a prison sentence of up to a year, whereas in Slovenia non-lawyers will be punished with a fine. Source: Martin Henssler, 'The protection of the Legal Profession', in Martin Schauer and BeaVerschraegen (Eds), General Reports of the XIXth Congress of the International Academy of Comparative Law (Springer 2017), p 261, p 264.

23 IBA, Guidelines on Legal Aid Principles on Civil, Administrative and Family Justice Systems and its Commentary ('IBA Guidelines on Legal Aid') (2019), see Part 3 'Definitions', definition of 'legal aid providers', pp 12-13.

- providing legal assistance or undertaking legal representation to clients. Principle 13 of the Basic Principles lists as lawyers' main functions:
  - advising clients as to their legal rights and obligations, and as to the working of the legal system insofar as it is relevant to the legal rights and obligations of the clients;
  - assisting clients in every appropriate way, and taking legal action to protect their interests; and
  - assisting clients before courts, tribunals or administrative authorities, where appropriate.
- practising law 'in accordance with recognised professional duties, standards and ethics' as mentioned in Basic Principle 16. The UN Guidelines on Legal Aid and the IBA Guidelines refer to a similar obligation for legal aid providers.[24]

A functional approach to lawyering aligns with the overarching objective of ensuring access to prompt, effective, competent and independent legal assistance.

One direct implication of this is that anyone providing independent, competent and effective legal assistance should receive adequate protection to fulfil their functions.[25] Lawyers' guarantees and immunities must apply to persons exercising lawyers' functions regardless of their formal status in the domestic legal system, to the extent necessary to ensure the unimpeded provision of legal services. In particular, the state duty to take special protection measures in case of threat should apply equally to all those exercising lawyers' functions in accordance with recognised professional duties, standards and ethics.

This approach is reflected in the UN Guidelines on Legal Aid and IBA Guidelines on Legal Aid, which spell out for legal aid providers a similar regime as that recognised to lawyers. Under a nationwide legal aid scheme administered by an independent authority, legal aid providers are subject to an accreditation and training system, a code of ethics and oversight mechanisms.26 In return, legal aid providers benefit from the same rights, guarantees and privileges as lawyers to the extent relevant for the discharge of their functions.[27]

A functional approach more accurately reflects the reality on the ground, where several types of professionals may exercise similar advisory and representative functions.

The UN Guidelines on Legal Aid explicitly encourage states to 'a move towards a functional approach to legal aid that builds on partnerships or agreements with a range of legal service providers, meets the needs of poor people and is affordable in the long term to Governments'.[28]

The UN Guidelines thus call upon states to:

> 'diversify legal aid service providers by adopting a comprehensive approach, for example, by encouraging the establishment of centres to provide legal aid services that are staffed by lawyers and paralegals and by entering into agreements with law societies and bar associations, university law clinics and non-governmental and other organisations to provide legal aid services'.[29]

Non-exhaustive list of professionals protected under a functional approach

- practising lawyers, whether working as sole practitioners, part of a partnership or an employee in a law firm in private practice, in-house counsel, government lawyers, or lawyers operating in non-governmental organisations (NGOs) or legal clinics;
- persons providing representation in administrative, civil and criminal cases, in specific circumstances defined

24 UN Guidelines on Legal Aid, Principle 13, para 38. IBA Guidelines on Legal Aid, Principles 23 and 25.

25 UN Guidelines on Legal Aid, Principle 12. See for the protection of paralegals with similar rights as afforded to lawyers 'to the extent necessary to enable them to carry out their function with independence', AfCmHPR, Guidelines on the Right to a Fair Trial, Part H(k).

26 UN Guidelines on Legal Aid, Principle 13 ('Competence and accountability of legal aid providers'), Guideline 14 (para 68), Guideline 15 ('Regulation and oversight of legal aid providers'), and Guideline 16 (para 71(b) and (c)).

27 *Ibid*. Principle 12.

28 UNODC, Access to Legal Aid in Criminal Justice Systems in Africa (2011), p 42.

29 UN Guidelines on Legal Aid, Guideline 16 (para 71(e)).

by law. Shortage of lawyers and/or other factors has necessitated allowing people without certified legal qualifications to perform some specified lawyer functions in order to meet an increasing and diversified demand for legal assistance. Such legally trained persons are thus allowed to litigate (eg, in Finland and Slovenia)[30] or in the case of chartered secretaries of notaries public, to provide specifically identified legal services or ancillary legal services, (eg, in Canada, Ireland and the United States).[31] These legal professionals must fulfil the required training, apply for authorisation to provide specific legal services and provide such services according to the applicable laws. They may be bound to follow the same professional rules as apply to lawyers or work under the supervision of the Bar;

- paralegals,[32] who are not fully qualified as lawyers but are trained in legal matters and undertake specifically delegated legal work, often under the supervision of a lawyer. The objective is to provide suspects and defendants with legal advice where this would have otherwise been impossible;
- trainee lawyers;
- non-licensed lawyers, who, due to state-imposed restrictions, are limited to civil and administrative litigation. In that case, the persons have all the legal qualifications to pass the bar exam, but have not been admitted; and
- counsel before international and regional courts, where the formal status of lawyer is not required.

Lawyers' rights and guarantees

The Basic Principles, complemented by the UN Guidelines on Legal Aid, the CoE Recommendation No R(2000)21, and the AfCmHPR Guidelines on the Right to Fair Trial, spell out a number of rights and guarantees applicable to lawyers and those exercising lawyers' functions as further detailed below (see Section 3, Table 1) and that fall under:

- the organisation of the legal profession as independent and self-regulatory;
- guarantees for exercising lawyers' functions, including the principle of non-identification with his/her clients or causes; immunities; protection from harassment, threat and intimidation; continued, prompt and effective access to one's clients; access to adequate information and facilities to prepare the client's defence; and confidentiality in the communication with ones' clients; and
- individual freedoms particularly at stake in the discharge of the lawyers' functions, for example, the freedoms of expression, association and assembly.

2.3 Protection as 'human rights defender'

The Legal Digest focuses on the following instruments and guidelines for the protection of HRDs:

- UN Declaration on HRDs (1998);
- European Union Guidelines on Human Rights Defenders ('EU Guidelines on HRDs') (2008); and
- Organization for Security and Co-operation in Europe (OSCE) Guidelines on the Protection of Human Rights Defenders ('OSCE Guidelines on the Protection of HRDs') (2014).

30 Martin Henssler, 'The protection of the Legal Profession', in Martin Schauer and BeaVerschraegen (Eds), *General Reports of the XIXth Congress of the International Academy of Comparative Law* (Springer 2017), p 261, p 264.

31 *Ibid*.

32 For a definition of 'paralegal', see OSJI, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (Open Society Foundations 2012), p 19: 'paralegal denotes a non-lawyer who has the necessary skills and training to carry out some of the functions of a lawyer, and who may specialize in working with suspects, defendants and those who have been convicted of a criminal offense, or in providing broadly defined justice services'.

'HRD': definition

The UN Declaration on HRDs refers to 'individuals, groups and associations […] contributing to […] the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals' (Preamble, fourth paragraph). Article 1 of the Declaration recognises that: 'Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.'

As a minimum, HRDs must recognise the universality of all without distinction of any kind and defend human rights by peaceful means.[33]

- Lawyers protected as HRDs

The Basic Principles acknowledge that adequate protection of human rights and fundamental freedoms requires effective access by all persons to legal services provided by an independent legal profession.[34] Lawyers shall 'seek to uphold human rights and fundamental freedoms recognised by national and international law' as an integral part of their functions.[35]

> **SRIJL:** In her 2016 report dedicated to lawyers at risk, the then SRIJL highlighted that:
>
> 'When acting on behalf of their clients in defending their human rights and fundamental freedoms, lawyers should also be regarded as human rights defenders, and in that role they should fall under the protective scope 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'.[36]

A *contrario*, as explicitly stated in the SRIJL report, not all lawyers are HRDs 'simply by virtue of their professional affiliation'.[37] The SRIJL highlights here that although all lawyers are expected to ensure respect and protection of human rights in their respective legal practice, when issues related thereto occur, the reality may be different. As a result, lawyers will be protected under the UN Declaration on HRDs insofar as they are actually engaging in the protection and promotion of human rights, whether on a permanent or ad hoc basis, and whether or not it is in relation to their legal practice. Protection under the Basic Principles is not restricted in this way.

Human rights-based litigation in relation to legal practice can be a risky activity. It involves advocating 'rights against governments',[38] challenging the status quo with regard to the law and policies in place or their application. Lawyers are at risk when they discharge their duties in the face of countervailing political, social, economic or cultural pressure, and in particular when:[39]

- human rights recognition or justiciability is controversial in the country. This is the case, for instance, for lawyers defending lesbian, gay, bisexual, transgender and intersex rights or women's rights in some countries;
- lawyers provide representation in cases involving particularly sensitive crimes, for instance, narco-trafficking, terrorism, crimes against humanity, blasphemy or war crimes. Social, media and governmental pressure can undermine fair trial guarantees of the accused; and

33 OSCE, *Guidelines on the Protection of Human Rights Defenders* (OSCE Office for Democratic Institutions and Human Rights 2014), Guideline 2. OHCHR, 'Who is a defender', available at www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx.

34 Basic Principles, Preamble.

35 Basic Principles, Principle 14. See n 3 and 4.

36 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mónica Pinto – Protecting the independence of lawyers and the legal profession' (2016) UN Doc A/71/348, para 35.

37 *Ibid*, para 36.

38 O G Igwe, 'A Legal Assessment of the Role of Lawyers in the Enforcement of Human Rights in Nigeria' (2014) 6 Port Harcourt Law Journal, available at www.researchgate.net/publication/275270833.

39 For further instances putting lawyers at risk, see Human Rights House Network, 'Human Rights Lawyers at Risk: Making the Case for Protection of Legal Professionals in Azerbaijan, Belarus, Moldova, Russia, and Ukraine' (2015) available at https://humanrightshouse.org/noop-media/documents/21177.pdf.

- litigation interferes with economic interests. Lawyers may be at risk when powerful economic actors seek to suppress recognition of claimants' rights and/or repress opposition to projects. This is particularly the case for projects or litigation involving the use, occupancy and/or degradation of land, environmental damage and/or increased greenhouse gas emissions, and the land rights or environmental concerns of indigenous peoples, minorities or marginalised groups.

Outside the courtroom and their legal practice, lawyers may also engage in human rights activities through associations, protests, political debates or personal writings, which may put them at risk. Though not strictly associated with their legal practice, these activities will benefit from a specific visibility, legitimacy and authority because of the lawyer's status. The Basic Principles state in Principle 23 that lawyers in particular 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 organisations and attend relevant meetings. As a result, the protection attached to the lawyer's status protects all forms of human rights advocacy activities.

Lawyers' engagement may also materialise in strategic litigation, which combines advocacy and legal practice. In this context, lawyers serve even more as agents of change as well as protectors of their client's rights.

ii. HRDs' rights

Instruments protecting HRDs recognise the right to protect and promote human rights in international human rights law. This right consists of a number of sub-component rights. The most relevant of these to a lawyer's functions are:

- right to promote and strive for the protection and realisation of human rights, including the right to develop new human rights ideas;[40]
- right to communicate with NGOs and INGOs in the context of the right to information,[41] and with international human rights bodies in the context of the right to an effective remedy;[42]
- right to access information about human rights and fundamental freedoms and their implementation;[43]
- right to participate in the conduct of public affairs;[44]
- right to provide professionally qualified legal assistance in defending human rights in the context of the realisation of the right to an effective remedy;[45]
- right to the lawful exercise of his/her occupation or profession, with the correlated duty to respect human rights when this profession affects human rights;[46]
- right to protection in the case of violence, threats, retaliation, de facto or de jure discrimination, pressure or any other arbitrary action;[47]
- state responsibility to train lawyers in human rights;[48]
- lawyers' duty to educate about human rights;[49]
- lawyers' duty to uphold the relevant national and international standards of occupational and professional conduct or ethics;[50] and

40 UN Declaration on HRDs, Arts 1 and 7.
41 *Ibid*, Art 5 (c).
42 *Ibid*, Art 9.4.
43 *Ibid*, Art 6.
44 *Ibid*, Art 8.
45 *Ibid*, Art 9.3(c).
46 *Ibid*, Art 11.
47 *Ibid*, Art 12.
48 *Ibid*, Art 15.
49 *Ibid*, Art 16.
50 *Ibid*, Art 11.

- everyone's duty to promote human rights and fundamental freedoms and contribute to the promotion and advancement of democratic societies, institutions and processes, and social and international orders conducive to human rights.[51]

3. International rights and guarantees protecting lawyers and those exercising lawyers' functions

General principles of international law:

Rule of law, equal and non-discriminatory protection of the law, equal access to justice, equality before the law and equality of arms

Right to a fair trial: UDHR Art 10; ICCPR, Art 14; CAT, Arts 7.3 and 13; CPED, Arts 11.3 and 12; CRC, Art 40.2(b) (ii); ICMW, Art 18; ECHR, Art 6; AmCHR, Art 8; AfCHPR, Arts 7 and 26; ArCHR, Arts 13 and 16.

Right to liberty and security: UDHR, Arts 3 and 9; ICCPR, Art 9; ICERD, Art 5(b); ICMW, Art 16; CRPD, Art 14; CPED, Art 17.1; CRC, Art 37(b); ECHR, Art 5; AmCHR, Art 7; AfCHPR, Art 6; ArCHR, Art 14.

Right to legal counsel: ICCPR, Art 14.3(b) and (d); ICMW, Art 18.3 (b) and (d); CRPD, Art 12.3-4; CPED, Art 17.2(d); CRC, Art 12.2, Art 37 (d) and Art 40.2(b)(iii); ECHR, Art 6.3(c); AmCHR, Art 8.2(d); AfCHPR, Art 7.1(c).

Right to a remedy: UDHR, Art 8; ICCPR, Arts 2.3, 9.5 and 14.6; ICERD, Art 6; CAT, Art 14; CPED, Arts 8.2, 17.2(f), 20.2 and 24.4 -5; ICMW, Art 16.9, 18.6 and 22.5; ECHR, Arts 5.5, 13 and 34; AmCHR, 7.6, 10 and 25; AfCHPR, Art 7.1(a); ArCHR, Art 12.

Guarantees for the organisation of an independent and self-governing legal profession

The law regulating the legal profession should:

- be elaborated with the meaningful participation of the legal profession, and concerns raised by lawyers effectively addressed (SR IJL (2018) A/73/365);
- establish an independent and self-governing bar association (Basic Principles, Principle 24; CoE Recommendation 21, Principle V (2); AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Principle I (l)); and
- include, at a minimum, provisions relating to the: (1) independence of such associations; (2) their composition; and (3) the definition of their functions (SR IJL (2018) A/73/365).

States shall further:

- ensure the independence of the legal aid system, whether provided by state and/or non-state actors (UN Guidelines on Legal Aid in Criminal Justice, Principle 12) and guarantee collaboration with professional associations of lawyers to ensure that everyone has effective and equal access to legal services (Basic Principles, Principle 25);
- respect the role of professional associations in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, and providing legal services (Basic Principles, Preamble); CoE Recommendation 21, Principles V.3 and V.5);
- ensure a non-discriminatory, independent, transparent, objective and fair admission process into the legal profession (Basic Principles, Principles 10–11);
- ensure representativeness of the legal profession (Basic Principles, Principle 11);
- ensure initial and continuing education requirements in law, ethics and human rights, UN Declaration on HRDs, Art15 (Basic Principles, Principle 9; CoE Recommendation 21, Principle II, (1)–(3) and Principle V (4)g; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I (a));

Guarantees to lawyers' functioning

States shall guarantee the lawyers':

- right to practice free from any intimidation, harassment or interference, including prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics (Basic Principles, principles 16, 17, 19, 20 and 25; UN Guidelines on Legal Aid, principle 12; UN Declaration on HRDs, Arts 9.3 (c), 11 and 12; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, part H (k) and part I (b), (e) and (f); CoE Recommendation 21 (2000), principles I.1, I.4, I.7, I.8, V.3, V.4 (b) and V.5);
- right not to be identified with one's client's cause (Basic Principles, Principle 18; African Guidelines on the Right to a Fair Trial, principle I (g));
- right to access one's clients (ICCPR Art 14.3 (b); CPED, Art 17.2 (d); UN Declaration on HRDs, Art 9.3 (c); Basic Principles, principle 16 (b); AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, part I (b) 2 and part M2 (e); CoE Recommendation 21, principle I.5);
- right to adequate time, facilities and access to all appropriate information to prepare the client's defence: ICCPR, Art 14.3 (b); CRC, Art 40.2 (b) (ii); ICMW, Art 18.3 (b); AfCHPR, Art 7.1 (c); AmCHR, Art 8.2 (b) and (c); ArCHR, Art 16.2; ECHR, Art 6.3 (b); Basic Principles, principle 21; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, parts I (d), M.2 (e) and N.1 (a) and (c); CoE Recommendation 21, principle I (7);

Lawyers' individual rights

States shall guarantee the lawyers':

- right to life: UDHR, Art 3; ICCPR, Art 6; AfCHPR, Art 4; AmCHR, Art 4; ArCHR, Art 5; ECHR, Art 2;
- right not to be subjected to torture: UDHR, Art 5; ICCPR, Art 7; CRC, Art 37(a); CMW, Art 10; CRPD, Art 15; AfCHPR, Art 5; AmCHR, Art 5.2; ArCHR, Art 8; ECHR, Art 3;
- freedom of opinion and expression: UDHR, Art 19; ICCPR, Art 19; ICERD, Art 5.d (viii); ICMW, Art 13; CRPD, Art 21; AmCHR, Art 13; AfCHPR, Art 9; ArCHR, Art 32; ECHR, Art 10; Basic Principles, Principle 23;
- freedom of association and assembly: UDHR, Art 20; ICCPR, Arts 21 and 22; ICESCR, Art 8; ICERD, Art 5.d (ix); ICMW, Arts 40 and 26; AfCHPR, Arts 10 and 11; AmCHR, Arts 15 and 16; ArCHR, Art 24; ECHR, Art 11; Basic Principles, principles 23 and 24;
- freedom of movement: UDHR, Art 13; ICCPR, Art 12; ICERD, Art 5 (d) (i) and (ii); CRPD, Art 18; AfCHPR, Art 13; AmCHR, Art 22; ArCHR, Arts 26 and 27;
- right to participate in public affairs: UDHR, Art 21; ICCPR, Art 25; CEDAW, Art 7; ICMW, Art 41; CRPD, Art 29; AfCHPR, Art 13; AmCHR, Art 23; ArCHR, Art 24; Basic Principles, principle 23; UN Declaration on HRDs, Art 8; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part I (k); CoE Recommendatiom 21, principles I.3 and V.4(d);
- right to property: UDHR, Art 17; ICERD, Art 5 (d) (v); CMW, Art 15; AfCHPR, Art 14; AmCHR, Art21; ArCHR, Art 31; ECHR, Protocol 1, Art 1;
- right to work: UDHR, Art 23; ICESCR, Arts 6, 7; ICERD, Art 5.e (i); CEDAW Art 11; ICMW, Arts 25, 55 and 70; CRPD Art 27; AfCHPR, Art 15; ArCHR, Art 34; and

51 *Ibid*, Art 18.2.

- provide the legal profession with a primary role in the drafting of professional standards (Basic Principles, Principle 26; CoE Recommendation 21, Principle V (1) and (4) g; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I (m)); and
- ensure that lawyers' disciplinary proceedings are in accordance with the applicable professional standards and ethics of the legal profession, the disciplinary body is independent, lawyers have a right to due process and the right to judicial appeal (Basic Principles, Principles 26–29; CoE Recommendation 21, Principle VI; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I (n–p)).

- right to confidentiality in the lawyer–client communications (AmCHR, Art 8.2 (d); UN Guidelines on Legal Aid, guideline 3, para 43 (d); Basic Principles, principles 8 and 22; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part I (c); CoE Recommendatiom 21, principles I.5 and I. 6 and III.2)
- immunities for statements made in court or outside of a court of law in the course of representing their clients (UN Guidelines on Legal Aid, principle 12; Basic Principles, principles 16 (c) and 20; AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, part I, (b) 3 and (e); CoE Recommendation 21, principles I.4)
- right to promote and strive for the protection and realisation of human rights (UN Declaration on HRDs, Art 1) including the right to develop new human rights ideas and advocate their acceptance (UN Declaration on HRDs, Art 7);
- right to communicate with NGOs and intergovernmental organisations (UN Declaration on HRDs, Art 5) and access and communicate with international human rights bodies, in the context of the right to an effective remedy (UN Declaration on HRDs, Art 9.4);
- right to access information about human rights and fundamental freedoms and their implementation (UN Declaration on HRDs, Arts 6(a) and 14);
- right to provide professionally qualified legal assistance in defending human rights (UN Declaration on HRDs, Art 9.3(c)) in the context of the realisation of the right to an effective remedy (UN Declaration on HRDs, Art 9(1));
- right to the lawful exercise of his/her occupation or profession, with the correlated duty to respect human rights, when this profession affects human rights (UN Declaration on HRDs, Art 11) ;
- duty to educate on human rights (UN Declaration on HRDs, Art 16); and
- promote human rights and fundamental freedoms, and contribute to the promotion and advancement of democratic societies, institutions and processes, and social and international orders conducive to human rights (UN Declaration on HRDs, Art 18).

- right to privacy: UDHR, Art 12; ICCPR, Art 17; CRPD, Art 22; AmCHR, Art 11; ArCHR, Art 21; ECHR, Art 8.

C. Lawyers' protection: whose obligation?

Lawyers fulfil the state obligation to provide legal assistance. For that purpose, they must receive state protection, which enables them to carry out their professional duties free from interference, intimidation, harassment and reprisals from state or non-state actors. Adequate protection of lawyers is therefore a key component of the state's obligation to protect human rights.

While states are the primary duty-bearers of the obligation to protect lawyers, they share this responsibility with bar associations. The Basic Principles explicitly establish that 'professional association[s] of lawyers shall cooperate with Governments to ensure that [...] lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics' (Principle 25). This shared

responsibility has been pointed out by the SRIJL in several reports.[52] When entrusted with the protection of the integrity and independence of the legal profession, bar associations play a strategic role in ensuring the protection of individual lawyers and the legal profession as a whole.

The following sections address:

- states' obligations in ensuring lawyers' protection; (Section 1);
- conditions under which state restrictions to the right to legal counsel are permissible (Section 2); and
- bar associations' responsibilities in protecting lawyers (Section 3).

1. States' obligations to respect, protect, promote and fulfil lawyers' rights

UN and regional human rights mechanisms share a similar interpretation of human rights, according to which civil, political, economic, social and cultural rights generate four levels of duties for any state adhering to a rights regime, namely the duty to respect, protect, promote and fulfil these rights.[53]

While the duty to respect is a negative obligation (ie, an obligation to restrain), states bear positive obligations under the duty to protect, promote and fulfil human rights, all three of which are closely interrelated.[54] The level of emphasis placed on the application of these duties varies depending on the type of rights under consideration.

For rights recognised in the ICCPR, including the right to liberty and security and the right to a fair trial, the HRCttee has determined that the duty of states to take steps to give effect to rights guaranteed by the ICCPR is 'unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the state'.[55]

1.1 Duty to respect

The obligation to respect entails that the state should refrain from interfering in the enjoyment of fundamental rights: it should respect rights-holders, their freedoms, autonomy, resources and liberty. As pointed out by the IACtHR in its interpretation of Article 1 of the AmCHR, 'whenever a state organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention'.[56]

- Under their duty to respect, states shall ensure, as absolute guarantees, that lawyers and those exercising lawyers' functions:
  - are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;[57]
  - are able to travel and to consult with their clients freely both within their own country and abroad;[58]

52 See, in particular, UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, pp 17-18, at https://undocs.org/A/73/365.

53 AfCmHPR, Social and Economic Rights Action Center (SERAC) and the *Center for Economic and Social Rights v Nigeria*, No 155/96, 27 May 2002, para 44.

54 AfCmHPR, SERAC, para 47. HRCttee, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' ('General Comment No 31') (2004) UN Doc CCPR/C/21/Rev.1/Add.13.

55 HRCttee, General Comment No 31, para 14.

56 IACtHR, Velásquez *Rodríguez v Honduras*, Series C No 4, 29 July 1988, para 169.

57 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 15); UN Guidelines on Legal Aid, Principle 2 (para 16) and Principle 12; UN Declaration on HRDs, Arts 9.3 (c), 11 and 12; Basic Principles, Principles 16, 17, 19, 20 and 25. See also, AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (k) and (e) (3) and Part I (b), (e) and (f); CoE Recommendation 21 (2000), Principles I.1, I.4, I.7, I.8, V.3, V.4(b) and V.5; IBA Standards, preamble, paras 6, 8, 12 and 18(c)and 20. See also, UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/RES/35/12, para 7.

58 ICCPR Art 14.3(b); CRC, Art 37(d), ICMW, Art 18.3(b); CPED, Art 17.2 (d); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 13); UN Guidelines on Legal, Aid Principle 7 (para 28), Guideline 3 (para 43), Guideline 14 (para 68 (f)-(g)); UN Declaration on HRDs, Art 9.3 (c); Basic

  - do not suffer, or are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics and 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; [59] and
  - are not identified with their clients or their clients' causes as a result of discharging their functions.[60]
- states shall further ensure that 'no court or administrative authority before whom the right to counsel is recognized […] 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';[61]
- states can only restrain guarantees for lawyers' functioning in exceptional circumstances, subject to the conditions set up in international human rights law (see Section 2 below); and
- states shall respect the vital and crucial role of professional associations of lawyers in upholding and guaranteeing professional standards and ethics; handling and/or monitoring disciplinary proceedings against their members consistent with due process guarantees; and protecting individual lawyers from persecution, attacks and improper restrictions.[62]

For instance, the state violates its duty to respect lawyers' right to work without interference if it interferes in the regulation of the legal profession and the independence of bar associations. The state also violates its obligation if it utilises criminal and administrative legal powers to restrain access to the legal profession, lawyers' freedom of expression or access by lawyers to their client(s).

Along the same lines, abusive legislation that affects civil society more broadly may equally impact lawyers. This is the case regarding laws governing the registration, functioning and funding of associations; defamation, *lèse majesté,* insult, terrorism and blasphemy legislation, alongside other laws that criminalise the exercise of internationally protected rights and human rights advocacy or restrict the activities of trade unions and the enjoyment of other fundamental rights at work; restrictions on access to information of public interest; laws relating to the internet and other information and communications technology services; laws regarding public morale; and anti-terrorism and national security legislation, including surveillance legislation.[63]

1.2 Duty to protect

States' duty to prevent, punish, investigate and remedy human rights violations

The duty to protect has been construed internationally and regionally as the positive obligation to take all necessary measures and to exercise due diligence to prevent, punish, investigate and remedy human rights violations by state entities or private persons or entities,[64] whether through legal, political, economic or social interference.[65] Measures taken by states can be of a legal, political, administrative or cultural nature. For the protection of HRDs, the IACmHR has encapsulated these different obligations under the notion of an overall 'integral protection policy'.[66]

Principles, Principle 16(b); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 15 and 18 AfCmHPR, Guidelines on the Right to a Fair Trial, Part I(b)(ii) and Part M2(e); CoE, Recommendation No R(2000)21, Principle I.5; IBA standards, para 13 (b).

59 UN Guidelines on Legal Aid, Principle 12; Basic Principles, Principles 16(c) and 20; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (b) (iii) and (e); CoE Recommendation 21, Principles I.4; IBA Standards, paras 8 and 11.

60 Basic Principles, Principle 18; AfCmHPR, Guidelines on the Right to a Fair Trial, Principle I (g); IBA Standards, para 7.

61 Basic Principles, Principle 19. See also, CoE, Recommendation No R(2000)21, Principle I.7.

62 Basic Principles, Preamble, Principles 24–29; CoE, Recommendation No R(2000)21, Principle V; IBA Standards, paras 18(c) and 20.

63 See UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders, Michel Forst' (2017) UN Doc A/72/170, para 35.

64 HRCttee, General Comment No 31, para 8; IACtHR, *Luna López v Honduras*, Series C No 269, 10 October 2013, para 118; see also IACtHR, Velásquez Rodríguez, para 166. UNGA, 'Human rights in the administration of justice' (2019) UN Doc A/Res/73/177, para 10.

65 AfCmHPR, SERAC, para 46.

66 IACmHR, 'Towards Effective Integral Protection Policies for Human Rights Defenders' (2017) OEA/Ser.L/V/II.Doc.207/17, para 114.

Under their obligation to protect, states shall:

- take all necessary measures to enable lawyers to discharge their functions freely, independently and without any fear of reprisal[67] and protect lawyers, alongside their families and professional associates, against all forms of violence, threat, retaliation, intimidation or harassment resulting from the discharging of their functions;[68]
- take protection measures in case of threats,[69] which are real and imminent and when there are reasonable possibilities of preventing or avoiding that danger;[70]
- respect and support the role of bar associations in the protection of their members;[71]
- condemn any attacks or interference of any sort against lawyers, ensure that they are promptly, thoroughly and impartially investigated, and that perpetrators are held to account;[72] and
- provide effective remedies in the event of breach.[73]

State's duty to protect lawyers from non-state actors

Lawyers may receive threats or be subject to attacks from non-state actors, such as organised criminal groups, individuals or businesses.

Given the *erga omnes* effect of human rights, states are obliged to enforce protection rules and ensure the effectiveness of human rights under all circumstances and for everyone. [74] They are thus required to take positive and proactive measures and provide effective remedies to protect the safety and independence of lawyers and ensure that they are in a position to discharge their professional functions without intervention or interference of any sort, including from non-state actors.[75]

Likewise, the OSCE Guidelines on the Protection of HRDs provide that states have a duty to protect human rights defenders from abuses by non-state actors. 'Non-state actors should respect and recognize the rights of

67 See n 57.

68 UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/RES/35/12, para 9.

69 Basic Principles, Principle 17; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I(f).

70 IACtHR, *Velásquez Paiz et al v Guatemala*, Series C No 307, 19 November 2015, para 109; IACtHR, *Yarce et al v Colombia*, Series C No 325, 22 November 2016, para 182; IACtHR, Luna López, para 123; IACtHR, *Human Rights Defender et al v Guatemala*, Series C No 283, 28 August 2014, para 140; IACtHR, *Pueblo Bello Massacre v Colombia*, Series C No 140, 31 January 2006, para 123; IACtHR, *Mapiripán Massacre v Colombia*, Series C No 134, 20 June 2005, para 111. See ECtHR, *Kiliç v Turkey*, No 22492/93, 28 March 2000, para 63; ECtHR, *Osman v The United Kingdom* [GC], No 23452/94, 28 October 1998, para 116.

71 Basic Principles, Principle 25; CoE Recommendation 21 (2000), Principles V.3, V.4(b) and V.5; IBA Standards, preamble, paras 18(c) and 20. UNGA, A/HRC/73/365, para 112. UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 15th Preambular paragraph. See below, Part I, Chapter C, Section 3.

72 UNHRC, A/HRC/RES/35/12, para 10. UNHRC, 'Human Rights in the Administration of Justice, including Juvenile Justice' (2019) UN Doc A/HRC/RES/42/11, para 10. See also HRCttee, General Comment No 31, para 8.

73 For a general recognition of the right to remedy for human rights violations, see UDHR, Art 8; ICCPR, Arts 2.3, 9.5 and 14.6; ICERD, Art 6; CAT, Art 14; CPED, Arts 8.2 and 24.4 -5; AfCHPR, Art 7.1(a); AmCHR, Art 25; ArCHR, Art 12; ECHR, Arts 13 and 34; UN Declaration on HRDs, Art 9; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 33 and 35; AfCmHPR, Guidelines on the Right to a Fair Trial, Part C and Part P(a). For a recognition of the right to remedy to challenge the lawfulness of detention and obtain reparation for arbitrary detention: ICCPR, Art 9.5; ICMW, Art 16.9; CPED, 17.2(f); AmCHR, Art 7.6; ECHR, Arts 5.5; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principles 2 and 15, Guideline 16, and Guideline 20 (para 107(f)); AfCmHPR, Guidelines on the Right to a Fair Trial, Part M.1(h); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 3; AfCmHPR, Guidelines on the Right to a Fair Trial, Part M.5(b). See also recognition of the right to remedy in case of miscarriage of justice (ICCPR, Art 14.6; ICMW, Arts 16.9, 18.6, and 22.5; AmCHR, Art 10), and in case of denial or delayed access to legal counsel (UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 8 (para 70)).

74 IACtHR, Pueblo Bello Massacre, para 123; IACtHR, Mapiripán Massacre, para 111.

75 AfCmHPR, SERAC, para 46. See also HRCttee, General Comment No 31, para 8.

humanrights defenders and be guided by international human rights norms in carrying out their activities'.[76] If non-state actors fail to do so, states must hold them accountable, in accordance with domestic legal procedures and standards.[77]

Accordingly, states can thus be held accountable for not preventing a violation caused by a non-state actor, where (1) the risk was real and imminent for a specific individual or a group of individuals, (2) the state knew or should have known of that real and imminent risk, and (3) there were reasonable possibilities of preventing or avoiding that danger.[78]

Box 1. Business, lawyers and human rights

The UN Guiding Principles on Business and Human Rights (2011) is a soft law instrument providing an interpretation for businesses of how to implement human rights law.

Guiding Principles 11–24 recognise that businesses should respect human rights by avoiding infringing on the human rights of others and by addressing adverse human rights impacts with which they are involved. In order to fulfil this obligation, business enterprises should have in place human rights policies and processes, including a policy commitment to meet their responsibility to respect human rights, and a human rights due diligence process to identify, prevent, mitigate and account for how they address their human rights impacts.

Businesses also have a responsibility to set up processes to enable the remediation of any adverse human rights impact that they cause or to which they contribute.

Businesses' decisions are usually engineered and cleared by in-house counsel or law firms responsible for risk management in the businesses' legal practice, such as contracts and agreements, land acquisition, development and use of resource exploration, labour and employment, bilateral treaty negotiation and arbitration.

The uneven respect for human rights in business law may be the fault of in-house counsel, law firms and/or government lawyers. As a result, businesses may operate in partial or total disregard for human rights, and lawyers taking on business-related human rights cases may find themselves in a vulnerable situation that puts them at risk of threat and attack.

It is the responsibility of the legal profession as a whole to ensure that human rights are integral to the practice of law and legal training, as well as to its professional standards. In this respect, the IBA has developed the IBA Business and Human Rights Guidance for Bar Associations (2015) and the IBA Practical Guide on Business and Human Rights for Business Lawyers (2016).

1.3 Duties to promote and fulfil

The duties to promote and fulfil are closely linked and interact with the positive obligations of states to ensure an enabling legal environment where 'individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures'.[79] 'It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.'[80]

In order to ensure that lawyers are able to play their role as intermediaries between the court and the public, the state shall:

- promote and support, in cooperation with professional associations of lawyers, innovative forms of education for the public regarding access to justice and the role of lawyers in providing effective and equal access to

76 OSCE, Guidelines on the Protection of HRDs, para 8, p 2.
77 *Ibid*.
78 See n 70.
79 AfCmHPR, SERAC, para 46.
80 *Ibid*, para 47.

legal services, including legal aid;[81]

- provide, in cooperation with bar associations and professional associations of lawyers, adequate legal training to future lawyers and access to opportunities for continued legal education to all lawyers, including on professional ethics and human rights;[82] and
- promote lawyers' active participation in public affairs and the administration of justice.[83]

2. Permissible state restrictions on the right to legal counsel and guarantees for lawyers functioning under international human rights law

International human rights law and jurisprudence define strict conditions under which states can restrain their obligations through:

- a reservation to international treaties;
- limitations; [84] or
- derogations, which effectively consist in the temporary suspension of rights, in case of emergency.[85]

Limitations and derogations can be seen as a continuum. States should have recourse to the latter only as a last resort, when limitations have proven to be manifestly insufficient to respond to a public emergency.[86] Derogations might become necessary the longer the restrictions last, since limitations 'of a long duration are particularly likely to be disproportionate to the legitimate aim pursued'.[87]

Interpreting Art 4 of the ICCPR setting conditions for derogation in case of emergency, the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' ('Siracusa Principles'), adopted by a number of civil society organisations,[88] provide the general benchmarks against which the permissibility of limitations and derogations is assessed by international mechanisms, and which rest on the principles of legality, necessity and proportionality to a legitimate aim in a democratic society.

81 UN Guidelines on Legal Aid, Principle 2 (paras 17-19), Principle 8 (para 30) and Guideline 2; Basic Principles, Principles 4 and 25; AfCmHPR, Guidelines on the Right to a Fair Trial, Part G (c); and IBA Standards, paras 5 and 18(h).

82 For requirement of appropriately trained and skilled lawyers, see n 396. For specific requirements of training on human rights and ethics, see n 397.

83 Basic Principles, Principle 23; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I(k); CoE Recommendation No R(2000)21, Principles I.3 and V.4(d); IBA Standards, para 18(g).

84 See for instance, UDHR, Art 29 (2); ICESCR, Art 4; CPED, Art 20. See for specific restrictions on the right to legal counsel, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 4, Principle 12 (para 20), Guideline 3 and Guideline 13, (paras 80 and 81); UN Declaration on HRDs, Art 17; and UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 15, 16.4, 18.3 and 36.2. HRCttee, General Comment No 31, para 6.

85 ICCPR, Art 4; ECHR, Art 15; AmCHR, Art 27; ArCHR, Art 4. See for specific derogations to the right to legal counsel: UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 16.

86 UN Human Rights Committee, 'General Comment No. 29: Article 4: Derogations during a State of Emergency' ('General Comment No 29') (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 5. See also UN Economic and Social Council, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' ('Siracusa Principles') (1984) UN Doc E/CN.4/1985/4, Part II, A, para 39.

87 ECtHR, *Kuimov v Russia*, No 32147/04, 8 January 2009, para 96.

88 The Siracusa Principles were adopted during a high-level international conference on the limitation and derogation provisions of the ICCPR, held at Siracusa (Italy) from 30 April to 4 May 1984. It was sponsored by: the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights and the International Institute of Higher Studies in Criminal Sciences. The Principles have been since referred to by a number of UN human rights mechanisms and UN agencies. See also, International Commission of Jurists, Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis is an instrument (2011) and its Commentary, available here: https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf.

2.1 Right to legal counsel: a right subject to restrictions?

The right to practise as a lawyer is directly or indirectly impacted by state restrictions imposed on the right to legal counsel as well as related rights and guarantees attached to the right to liberty and security, the right to an effective remedy and the right to a fair trial.

International law distinguishes between non-derogable and derogable (or 'qualified') rights within human rights.

Non-derogable rights can be:

- *absolute* when they cannot under any circumstances be derogated from or limited. Rights identified as non-derogable under Article 4 (2) of the ICCPR and a number of international instruments[89] are: the right not to be arbitrarily deprived of life; freedom from torture and other cruel, inhuman or degrading treatment or punishment;[90] freedom from slavery and servitude;[91] freedom from imprisonment for inability to fulfil a contractual obligation;[92] prohibition against the retrospective operation of criminal laws;[93] the right to recognition before the law;[94] and freedom of thought, conscience and religion and freedom from coercion to have or adopt a religion or belief other than by choice;[95] or
- *limited* when they are subject to specific exceptions established in international and regional law. Limited rights are the right to life[96] and the right to liberty.[97] These rights cannot be balanced against the needs of other individuals or against any general public interest.[98]

By principle, all other rights are qualified rights, which may be interfered with in order to protect the rights of another or the wider public interest.[99] Some may be recognised with a specific restriction clause, for example, freedom of expression. For others, general conditions of international human rights law, as explicitly mentioned in the UDHR and developed in the Siracusa Principles, apply.

International human rights mechanisms have recognised distinct levels of protection to the right to a fair trial as a whole, on the one hand, and its different components, on the other.

- **The right to a fair trial as a whole can never be compromised**

As established by the HRCttee and the ECtHR, the right to a fair trial as a whole can never be compromised.[100] The right depends on the entire conduct of the trial and is broader than the sum of the individual core guarantees recognised in international law.[101] The AfCmHPR Guidelines on the Right to a Fair Trial thus provide explicitly that: '[n]o circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial'.[102] The ArCHR includes the right to a fair trial as non-derogeable.[103]

Along the same lines, the 2007 OSCE Manual *Countering Terrorism, Protecting Human Rights* highlights that:

> 'the right to a fair trial, as a procedural right, is somewhat different from other guarantees of human rights

89 See n 85 and Siracusa Principles, Part II (E), para 69.
90 ICCPR, Art 7.
91 *Ibid*, Arts 8 (1)–(2).
92 *Ibid*, Art 11.
93 *Ibid*, Art 15.
94 *Ibid*, Art 16.
95 *Ibid*, Art 18.
96 *Ibid*, Art 6.
97 *Ibid*, Art 5.
98 See CoE, ECHR Toolkit to inform public officials about the State's obligations under the European Convention on Human Rights, Definition of 'unqualified right', available at www.coe.int/en/web/echr-toolkit/definitions.
99 *Ibid*. Definition of 'qualified right'.
100 HRCttee, General Comment No 29, paras 11 and 16. OSCE, *Countering Terrorism, Protecting Human Rights: A Manual*, p 168.
101 HRCttee, General Comment No 32, para 3. ECtHR, *Murray*, paras 62-63. OSCE, *Countering Terrorism, Protecting Human Rights: A Manual*, p 168.
102 AfCmHPR Guidelines on the Right to a Fair Trial, Part R.
103 ArCHR, Art 4.2.

> protection and is subject to its own rules of interpretation. Although it may be possible in time of emergency to derogate from aspects of the right to a fair trial, the derogation cannot undermine the whole notion of due process and the rule of law. The separate

ingredients of the right to a fair trial can be limited in certain circumstances, as long as the right to a fair trial as a whole is not compromised.'[104]

The non-derogable nature of the right to a fair trial 'as a whole' arises, in particular, from the obligation states have to observe and guarantee the rights recognise in the treaties and to offer the possibility of an effective remedy in the event of a violation, as provided for under Art 2.3 of the ICCPR.[105] The right to an effective remedy is treated as non-derogable[106] and as 'a treaty obligation inherent in the Covenant' that must be observed at all times.[107] When the protection of non-derogable rights is at stake, courts must always be available for such cases, where a judicial order would be necessary for the remedy to be effective.[108]

- **The independence of the legal profession is an absolute right**

The independence of the legal profession is an absolute guarantee, 'as prerequisite for the protection of human rights and the application of the rule of law and for ensuring fair trials and the administration of justice without any discrimination'.[109] In the same way, the requirement of competence, independence and impartiality of a tribunal under Article 14.1 of the ICCPR is 'an absolute right that is not subject to any exception'.[110]

- **Constituent fair trial rights, including the right to legal counsel, may be restricted in exceptional circumstances subject to the conditions set up in international law**

Limitations to non-absolute rights are allowed when they are prescribed by law, pursuant to a legitimate aim and when such limitation is necessary in a democratic society and proportionate to the identified legitimate aim, meaning that no other less restrictive alternative is available.[111] Limitations shall never be interpreted so as to jeopardize the essence of the right concerned.[112] Any restriction to fair trial rights shall thus never irretrievably undermine the persons' right to a defence (see Part II Chapter C, Section 2).

The OSCE Manual on *Countering Terrorism, Protecting Human Rights* states that:

> 'Constituent fair trial guarantees (but not a fair trial as a whole) are sometimes subject to interpretation in the public interest. This does not mean that they are qualified rights. It is essential that any attempt to limit the constituent elements of the right to a fair trial is differentiated from the approach taken to qualify rights such as freedom of expression and privacy […] Where there may be a need to limit certain elements of the right to a fair trial, the motivation and process for doing so are different. The aim is to ensure the fairness of

104 OSCE, C*ountering Terrorism, Protecting Human Rights: A Manual*, p 168.

105 See n 73 and Siracusa Principles, Part II.D. para 59.

106 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 4, and Guideline 3; Siracusa Principles, Part II.D. para 59. See also HRCttee, General Comment No 29, para 14; HRCttee, 'Concluding Observations of the Human Rights Committee on Albania' (2004) UN Doc CCPR/CO/82/ALB, 2, para. 9.

107 UNHRC, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy' (Classifications of the situations addressed by the Special Rapporteur 1994–2006/The rule of law and states of emergency/Major developments in international justice) (2007) UN Doc A/HRC/4/25, para 50.

108 Siracusa Principles, Part II.D para 60 and Part II. E, para 70. HRCttee, General Comment No 29, para 15. ICJ, Legal commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges & Lawyers in Times of Crisis (2011), pp 184-185.

109 UNHRC, A/HRC/RES/35/12, fifth preambular paragraph. See also, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 15); UN Guidelines on Legal Aid, Principle 2 (para 16) and Principle 12; UN Declaration on HRDs, Arts 9.3(c), 11 and 12; Basic Principles, Preamble and Principle 16; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I and Part H(e)(3); CoE Recommendation R(2000)21, Preamble, Principles I.1, V.1 and V.4; IBA Standards, Preamble, paras 6, 12, 16 and para 18(c); and IBA Principles, Principle 1.

110 HRCttee, General Comment No 32, para 19.

111 CPED, Art 20; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 3; Siracusa Principles, Part I (A), para 10. HRCttee, General Comment No 31, para 6; CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' ('General comment No 14')(2000) UN Doc E/C.12/2000/4, paras 28-29.

112 ICESCR, Art 4; CPED, Art 20; Siracusa Principles, Part I (A), para 2. HRCttee, General Comment No 31, para 6.

the trial, while at the same time acknowledging that to ensure fairness to all involved, including the public interest, it may be necessary to adopt different procedures'.[113]

The most straightforward example may be where a witness had been directly threatened by the defendant and the cross-examination may be limited to protect the witness' rights.

- **Constituent fair trial rights, including the right to legal counsel, cannot be subject to derogation where this would circumvent the protection of non-derogable rights**

The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.[114] In such circumstances, minimum criminal guarantees, including the right to legal counsel, are non derogable.[115] In addition to the rights recognised non-derogeable in international conventions, the Siracusa Principles state that customary international law prohibits in all circumstances the denial of (a) the right to life; (b) freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation; (c) the right not to be held in slavery or involuntary servitude; and, (d) the right not to be subjected to retroactive criminal penalties as defined in the Covenant.[116]

Consequently, any trial leading to the imposition of the death penalty, including during a state of emergency, must comply with all of the requirements of a fair trial and the defendant must have access to independent legal counsel.[117] Likewise, the right to legal counsel cannot be unduly delayed in a case where the individual is detained, as this would violate the absolute interdiction of detention in *communicado*.[118]

2.2 Conditions for reservations to a treaty provision

A state can restrict its duty to comply with some provisions of an international instrument through 'reservations' or interpretative declarations. In both cases, a state announces that it will limit its commitment to a specific right guaranteed by a treaty. The ability for a state to do so is limited in order to avoid any abuse on the part of the state, and it is impossible to make reservations on key elements of a convention.

The HRCttee highlights that 'while reservations to Article 14 of the ICCPR may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant'.[119]

2.3 General conditions for human rights Limitations

Art 29(2) UDHR spells out that' in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. Similar wording can be found in the restriction provisions of a number of instruments,[120] as well as the long-standing practice of international human rights mechanisms.[121] Accordingly, state limitations are permissible

113 OSCE, *Countering Terrorism, Protecting Human Rights: A Manual,* p 168.

114 Siracusa Principles, Part II (D) para 60 and Part II (E), para 70; HRCttee, General Comment No 32, para 6; ICJ, Legal commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges & Lawyers in Times of Crisis (2011), pp 181-196.

115 Siracusa Principles, Part II (E), para 70 (g). See also, ArCHR, Art 4.2.

116 Siracusa Principles, Part II (E), para 69.

117 *Ibid*, Part II (E), para 70(g). HRCttee, General Comment No 32, para 38; AfCmHPR, Guidelines on the Right to a Fair Trial, Principle H(c); HRCttee, *Robinson v Jamaica*, No 223/1987, 30 March 1989, para 10.4, reiterated in a number of cases, and more recently in *Larrañaga v the Philippines*, No 1421/2005, 24 July 2006, para 7.6. See also OSCE, *Legal Digest of International Fair Trial Rights*, fn 618.

118 OSCE, *Countering Terrorism, Protecting Human Rights: A Manual*, p 185; AfCmHPR, *Liesbeth Zegveld and Mussie Ephrem v Eritrea Comm*, No 250/2002 (2003), para 55; ECtHR, *Benham v The United Kingdom* [GC], No 19380/92, 10 June 1996, para 61; IACtHR, *Vélez Loor v Panama*, Preliminary Objections, Merits, Reparations, and Costs, Series C No 132, 23 November 2010, para 146.

119 HRCttee, General Comment No 32, para 5.

120 See n 84, in particular CPED, Art 20; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 4, Principle 12 (para 20), Guideline 3, Guideline 13, (paras 80 and 81); Siracusa Principles, Part I (A), para 10.

121 See, in particular, HRCttee, General Comment No 31, para 6; CESCR, General Comment No 14, paras 28–29; UN HRC, 'The Promotion and Protection of Human Rights in the Context of Peaceful Protests' (2018) UN Doc HRC/38/11. See European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Law relating to access to justice (Publications Office of the

under international law, when they are prescribed by law, pursuant to a legitimate aim in a democratic society and when such limitations are necessary and proportionate to that aim, and no other less restrictive alternative is available. All limitations shall be interpreted in the light and context of the particular right concerned.[122] Such limitations must be in accordance with the state's obligations under applicable international human rights instruments,[123] and if imposed, administrative or judicial review that is prompt, competent, independent and impartial, should be available.[124]

One of the earliest international expressions of the protection of the right to legal counsel is contained in Principles 18 and 36 of the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides strict conditions for restriction:

> 'Principle 18, para 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in *exceptional* circumstances, *to be specified by law or lawful regulations*, when it is considered *indispensable* by a judicial or other authority in order to maintain *security and good order.' [emphasis author's own]*
>
> 'Principle 36, para 2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the *process of investigation or the administration of justice*, or *for the maintenance of security and good order in the place of detention* shall be forbidden.' [emphasis author's own]

Similar strict conditions have been spelt out to justify that states restrain minimum criminal guarantees[125] and might, in particular, (1) not recognise the same procedural rights to all the parties;[126] (2) restrain the right to access information for one person's defence;[127] (3) interfere with the confidentiality in the lawyer-client communication;[128] (4) hold closed, rather than public, hearings;[129] and (5) establish special tribunals.[130]

Article 17 of the UN Declaration on HRDs further states that:

> 'in the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

In order to find a violation of the right to legal counsel under Art 6.3 (c) of the ECHR, the ECtHR has established a two-stage process assessing (1) whether the restriction to legal counsel took place for 'compelling reasons'; and (2) the fairness of the overall proceedings:

- **ECtHR: '[…]restrictions on access to a lawyer for *compelling reasons*, at the pre-trial stage,**

European Union 2016) ('FRA, Handbook on European Law'), p 113.

122 Siracusa Principles, Part I (A). para 4.

123 Siracusa Principles, Part I (A), para 5. See n 84, in particular UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 3 (para 50(f)).

124 Siracusa Principles, Part I (A), para 8. See n 84, in particular, CPED, Art 20; UNHRC, 'The Promotion and Protection of Human Rights in the Context of Peaceful Protests' (2018) UN Doc HRC/38/11, para 13.

125 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 4, Principle 12 (para 20), Guideline 3 and Guideline 13 (paras 80 and 81).

126 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 12 (para 20). HRCttee, General Comment No 32, para 13.

127 CPED, Art 20; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 12 (para 20), Guideline 13 (paras 80 and 81).

128 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18.3.

129 ICCPR, Art 14.1.

130 HRCttee, General Comment No 32, para 22.

> **are permitted only in *exceptional circumstances,* must be *of a temporary nature* and must be based on an *individual assessment of the particular circumstances of the case'***[131]
>
> **'Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not *unduly prejudice* the rights of the accused under Article 6'**[132] [emphasis author's own]

The conditions for any limitation on the exercise of the rights are cumulative.[133] In other words, states must meet all of the requirements concerning legality, permissible grounds, necessity and proportionality.

- **Restrictions must be prescribed by law, in accordance with international law**

One of the fundamental guarantees of due process is the principle of legality,[134] that is, the requirement that state power be authorised by law. International and regional human rights bodies have recognised that the mere existence of a law pursuant to which a public body acts is not sufficient on its own for the requirement of conformity with the law to be met. The law must:

- be clear, unambiguous as to the nature of the conduct declared to constitute a criminal offence and the corresponding penalties, and formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[135] An unclear provision should be clarified or in favour of those exercising the right;[136]
- be accessible to the public;[137]
- be promulgated democratically, that is, subject to broad consultations with any individuals and associations concerned, including civil society, prior to its adoption, and, once adopted, publicised using the appropriate channels to ensure that the public is aware of what constitutes punishable behaviour;[138]
- not confer 'unfettered discretion' for the restriction of the right on those charged with its execution;[139]
- be non-retrospective;[140] and

131 ECtHR, *Beuze v Belgium* [GC], No 71409/10, 9 November 2018, para 161. See also para 145.

132 ECtHR, *Salduz v Turkey* [GC], No 36391/02, 27 November 2008, para 55. *Ibid*, para 137.

133 UNHRC, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association' (2013) UN Doc A/HRC/23/39, para 19.

134 UDHR, Art 11(2); ICCPR, Art 15; CPED, Art 20; AfCHPR, Art 7(2); AmCHR, Art 9; American Declaration of the Rights and Duties of Man (ADHR) (1948), Art 26; ASEAN Declaration of Human Rights (2012), Art 20(2); ECHR, Art 7. See n 111. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 2; Additional Protocol I to the Geneva Convention 1949, Art 75 (4) (c) (1977); Additional Protocol II to the Geneva Conventions 1949, Art 6 (2) (c) (1977). ECtHR, *Coëme and Others v Belgium*, Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, para 145.

135 HRCttee, 'General Comment No 34, Article 19: Freedoms of opinion and expression' (2011) CCPR/C/GC/34, para 25; UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya' (2012) UN Doc A/67/292, para 64, available at: https://undocs.org/A/67/292; IACmHR, 'IACHR and Special Rapporteurship on Freedom of Expression express deep concern over decision to declare protests illegal in Nicaragua' (2018), available at: https://www.oas.org/en/iachr/media_center/PReleases/2018/222.asp. HRCttee, *McLawrence v Jamaica*, No 702/1996, 26 April 1996, para 5.5; ECtHR, *Sunday Times v The United Kingdom* (No 1), No 6538/74, 26 April 1979, para 49; ECtHR, *SW v The United Kingdom,* No 20166/92, 22 November 1995, paras 34–35; ECtHR, *CR v The United Kingdom*, No 20190/92, 22 November 1995; ECtHR, *Del Río Prada v Spain* [GC], No 42750/09, 21 October 2013; ECtHR, *Vasiliauskas v Lithuania*, No 35343/05, 20 October 2015; ECtHR, *Kafkaris v Cyprus*, No 21906/04, 12 February 2008, para 140; IACtHR, *Usón Ramírez v Venezuela*, Report No 36/06, 20 November 2009, OEA/Ser.L/V/II.127, doc 4 rev 1, para 56; IACtHR, *Norín Catrimán et al v Chile*, Series C No 279, 29 May 2014, para 163.

136 Siracusa Principles, Part I (A), para 3.

137 HRCttee, General Comment No 34, para 25.

138 UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya (2012) UN Doc A/67/292, para 65, available at https://undocs.org/A/67/292.

139 HRCttee, General Comment No 34, para 25.

140 See n 132. HRCttee, *Hicks v Australia*, No 2005/2010, 5 November 2015 (Extradition), para 10. HRCttee, *Teófila Casafranca de Gómez v Peru*, No 981/2001, 19 September 2003 (Terrorism), para 7.4, about how an accused shall benefit from any subsequent change to the law providing for a lighter penalty than the one that was in effect at the time of the offence. See IACtHR, *Ricardo Canese v Paraguay*, Series C No 111, 31 August 2004, para 187.

- be in accordance with applicable international obligations.[141]

The ECtHR states that law comprises statutory and case law, as well as non-statutory provisions, such as prison rules.[142]

A 'law' does not need to be foreseeable with absolute certainty. Even though such certainty is desirable, the law must be able to keep pace with changing circumstances.[143] Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and the interpretation and application of which are questions of practice.[144] The degree of precision depends to a considerable degree on the content of the instrument at issue, the field it is designed to cover and the number and status of those to whom it is addressed.[145]

> **ECtHR:** 'although the acts that give rise to liability are not defined or set out with absolute precision in the legislation, the Court finds that in view of his legal training and professional experience as Chairman of the Bar, the applicant could reasonably have foreseen that his remarks were liable to fall within the scope of the aforementioned provision of the Code of Constitutional Procedure'.[146]

As criminal law is the most restrictive and severe means available to the state for establishing liability for unlawful conduct, the principle of *nullum crimen, nulla poena sine lege certa* ('no crime, nor punishment without clear law') is enshrined in any international convention to pre-empt baseless criminal investigations, unfounded charges or charges founded on vague and ambiguous definitions.[147]

The OSCE Guidelines on the Protection of HRDs state: 'Legal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute HRDs for their work, should be amended or repealed. Full due process protections, in line with international fair trial standards, must be ensured.'[148]

- **Restrictions must pursue a legitimate aim in conformity with the specific permissible grounds of limitations set out in the relevant international standards**

Restrictions must pursue a legitimate aim.[149] For certain rights, international law[150] contains express limitation clauses, which set out the specific parameters by which rights may be limited. In the case of the right to a fair trial, general conditions apply, if not otherwise specified.[151]

In practice, the OSCE identifies as the overarching objective to be pursued that to 'ensure the fairness of the trial, while at the same time acknowledging that to ensure fairness to all involved, including the public interest, it may be necessary to adopt different procedures'.[152] Thus the person's right to self -defend or choose the lawyers of her/his choice may be restrained in the interests of justice.[153]Lawyer's freedom of expression for the discharge of

141 CPED, Art 20; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 4, Principle 12 (para 20), Guideline 3 (para 50(c)), Guideline 13 (paras 80 and 81); UNGA, 'Annotations on the text of the draft International Covenants on Human Rights, Chapter VI — civil and political rights' (1955) UN Doc A/2929, para 94; UN Declaration on HRDs, Art 17; Siracusa Principles, Part I (A), para 5. For the definition of international obligations containing both treaties and customary international law, see ECtHR, 'Guide on Article 7 of the European Convention on Human Rights, no punishment without law: the principle that only the law can define a crime and prescribe a penalty' (2018), para 10.

142 ECtHR, Kafkaris, para 139.

143 ECtHR, *Groppera Radio AG and Others v Switzerland*, No 10890/84, 28 March 1990, paras 28 and 68.

144 ECtHR, *Sunday Times* (No 1), para 49 and ECtHR, *Hertel v Switzerland*, No 53440/99, 25 August 1998, para 35.

145 ECtHR, *Groppera Radio AG and Others*, paras 26 and 68.

146 ECtHR, *Amihalachioaie*, para 30.

147 UDHR, Art 11 (2); ICCPR, Art 15; AfCHPR, Art 7.2; AmCHR, Art 9; ADHR, Art 26; ASEAN Declaration of Human Rights, Art 20(2); ECHR, Art 7; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 2.

148 OSCE, *Guidelines on the Protection of HRDs*, para 25.

149 CPED, Art 20; Siracusa Principles, Part I (A), para 10(c); UN Declaration on HRDs, Art 17.

150 ICCPR, Arts 12, 19, 21 and 22; ECHR, Arts 8, 10 and 11; AmCHR, Arts 13, 15, 16 and 22; ECHR, Art 2 of Protocol No 4. For the protection of human rights defenders, see UN Declaration on HRDs, Art 17.

151 CPED, Art 20.

152 OSCE, *Countering Terrorism, Protecting Human: A Manual*, pp 168-169.

153 See HRCttee, General Comment No 32, para 37.

his/her functions can be restrained in order to protect the administration of justice.[154] The objective of 'national security'[155] or the 'needs of the investigation'[156] may justify to restrain the right to be notified charges, rights and proceedings after an arrest,[157] access to legal councel,[158] access to the information for the person's defence or the confidentiality in the lawyer-client communication.[159]

Article 6 of the ECHR does not define a 'legitimate aim', but the ECtHR case law provides some examples. They include restrictions on the right of access to court to protect those responsible for the care of patients from being unfairly harassed by litigation;[160] to ensure the proper administration of justice;[161] to protect the free speech of parliamentarians;[162] and to maintain the separation of powers between the judiciary and the legislature.[163]

- **Restrictions must be necessary in a democratic society and proportionate to the aim pursued**

Restrictions must be:

- appropriate to achieve their protective function;
- the least intrusive instrument among those that might achieve the desired result;[164] and
- proportionate to the interest to be protected.[165]

The HRCttee states that '[t]he principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law'.[166]

154 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 36.2.

155 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 36.2. Siracusa Principles, Part I (A), para 29.

156 See CPED, Art 20, in case the transmission of information would 'hinder a criminal investigation'. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 16.4 and 36.2.

157 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16.4.

158 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18.3.

159 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 13 (para 80(a)); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18.3.

160 ECtHR, *Kijewska v Poland*, No 73002/01, 6 September 2007, para 46.

161 ECtHR, *Ashingdane v The United Kingdom*, No 8225/78, 28 May 1985, para 57.

162 ECtHR, *Harrison McKee v Hungary*, No 22840/07, 3 June 2014.

163 ECtHR, *A v The United Kingdom*, No 35373/97, 17 December 2002, para 17.

164 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 3 (para 50 (c)); Siracusa Principles, Part I (A), para 11. ECtHR, *Saint-Paul Luxembourg SA v Luxembourg*, No 26419/10, 18 April 2013, para 44.

165 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 3 (para 50 (c)); HRCttee, 'General Comment No 27, Art 12, Freedom of Movement' ('General Comment No 27') (1999) UN Doc CCPR/C/21/Rev 1/Add 9, para 14; ECtHR, *Van Mechelen and Others v the Netherlands*, Nos 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, paras 59–65.

166 HRCttee, General Comment No 27, para 15.

Box 2: 'Necessary' restrictions in a democratic society: a high threshold when applicable to lawyers and human rights defenders

As per the UDHR and the Siracusa Principles, in order to be 'necessary' a limitation must respond to a pressing public or social need 'in a democratic society'. 'In a democratic society' is understood as a society which respects the rights set forth in the UN Charter and the UDHR.[167]

As intermediaries between the public and the courts, lawyers serve as guarantors of a democratic society, upholding human rights. As a result, derogations from and limitations to their rights are subject to very strict conditions.

As set forth in the OSCE *Guidelines on the Protection of HRDs,* 'the threshold to meet the principles of necessity and proportionality is considered to be particularly high in situations where limitations concern rights in connection with human rights work'.[168]

Along the same lines, the SR on HRDs has established that 'derogations from and exceptions to applicable human rights standards […] should be required to meet a higher standard when they are applied to human rights defenders'.[169]

- **Restrictions cannot be applied or invoked in a manner that would unduly prejudice the rights of an accused to defence**

States should always be guided by the principle that limitations must not impair the essence of the right.[170] The HRCttee notes that the relationship between a right and a restriction and between a norm and an exception must not be reversed.[171] Freedom is the rule and limitation is the exception.[172] The ECtHR holds that restrictions on access to a lawyer must be 'proportionate to the aim sought' and should not be such that they 'unduly prejudice' or 'impair' the rights of the defence.[173]

The right to a fair trial and the right to defence can therefore never be jeopardised by restrictions placed on fair trial guarantees.

For instance, the denial of access to counsel during the early stage of an investigation amounts to a violation of Article 14 of the ICCPR and Article 6 of the ECHR, where the rights of the defence will in principle be irretrievably prejudiced, for instance, when incriminating statements made during a police interrogation without access to a lawyer are subsequently used to obtain a conviction.[174]

- **Restrictions cannot generate discrimination**

In order to be legitimate in a free and democratic society, laws that impose limitations must be compatible with other fundamental human rights norms, such as the prohibition of discrimination[175] and the principles of pluralism, tolerance and broadmindedness. The ECtHR sees 'pluralism, tolerance and broadmindedness' as elements without which there can be no democratic society.[176]

- **Anyone subject to a restriction shall have access to an administrative or judicial review that is prompt, competent, independent and impartial**

167 Siracusa Principles, Part I (B), para 21.
168 OSCE, Guidelines on the Protection of HRDs, para 62.
169 UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders, Michel Forst' (2018) UN Doc A/73/215, para 66.
170 CPED, Art 20; HRCttee, General Comment No 27, para 13; General Comment No 31, para 6; General Comment No 34, para 26.
171 HRCttee, General Comment No 27, para 13.
172 See UNHRC, 'Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai' (2012) UN Doc A/HRC/20/27, para 16.
173 ECtHR, Salduz, para 55. ECtHR, *Beuze*, para 137. *Ibid*.
174 ECtHR, Salduz, para 55; *Yoldaş v Turkey* (2010) ECHR 1620, para 49, (available in French only).
175 ICCPR, Art 2; AfCmHPR, *Constitutional Rights Project and Others v Nigeria*, No 102/93, (1998), para 59; UNGA, 'Protecting human rights defenders' (2013) UN Doc A/HRC/RES/22/6, paras 4 and 11 (g).
176 ECtHR, *Steel and Morris v The United Kingdom*, No 68416/01, 15 February 2005.

The right to a remedy may not be suspended or restricted in any circumstances.[177]

2.4 Conditions for derogation in case of state of emergency

International human rights conventions outline conditions in which a state can suspend a right, when strictly required by the exigencies of an emergency situation, that is, an emergency declared under Article 4 of the ICCPR, Article 15 of the ECHR, Article 27 of the AmCHR and Article 4 of the ArCHR as one threatening the nation. In addition to the Siracusa Principles developed by civil society organisations, the HRCttee has interpreted Article 4 of the ICCPR, especially in its General Comment No 29.[178] States shall adopt derogative measures only to the extent that they are strictly required by the exigencies of the situation and are not inconsistent with the State's other obligations under international law, including the principle of non-discrimination. Derogations must also follow the notification procedure outlined in Article 4 of the ICCPR and Article 15 of the ECHR respectively, which require that the state of emergency be publicly proclaimed and appropriately communicated.

From an international law standpoint, the declaration and application of a state of emergency are governed by eight basic principles which are widely applied, namely the principle of legality; the principle of proclamation; the principle of notification; the principle of temporality; the principle of exceptional threat; the principle of proportionality; the principle of non-discrimination; and the principle of the compatibility, consistency and complementarity of the various provisions of international law.[179]

States need to provide careful justification that:

- their decision to proclaim a state of emergency is authorised by law and respects the eight basic principles; and
- any specific measures based on such a proclamation are consistent with, and do not exceed those strictly required by, the 'exigencies of the situation' and the 'duration, geographical coverage and material scope', which must be tailored to a particular situation.[180]

Where a state of emergency is justified, no measures may derogate from:

- the requirement of competence, independence and impartiality of a tribunal in the sense of Article 14.1 of the ICCPR. The role of the judiciary is particularly important in verifying that the formal requirements applying to the state of emergency are met, monitoring the state's compliance with its international obligations during states of emergency and ensuring that all principles are respected. The judiciary has the authority to suspend any emergency measures that are unnecessary or go beyond what is allowed under domestic law and international treaties.[181] The public and democratic oversight of the measures taken, at the national and international level, is essential in ensuring that the use of emergency powers is not normalized, and that the restricted rights can expand again to their original form as soon as possible; nor
- procedural rights to the extent that such measures would circumvent the protection of non-derogable rights, such as the right to life; prohibition of torture or cruel, inhuman or degrading treatment; the principle of legality; or freedom of thought.[182] In that respect, any person charged with a criminal offence shall be entitled, inter alia, to the right to communicate confidentially with ones' lawyer, the right to a lawyer of one's choice, the right to free legal assistance if the individual does not have the means to pay for it, and the right to be informed of one's right.[183]

177 CPED, Art 20.2.

178 See n 86.

179 UNHRC, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy' (Classifications of the situations addressed by the Special Rapporteur 1994-2006/The rule of law and states of emergency/Major developments in international justice) (2007) UN Doc A/HRC/4/25, paras 40–47 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/103/18/PDF/G0710318.pdf?OpenElement.

180 HRCttee, General Comment No 29, para 5. HRCttee, General Comment No 32, para 6.

181 UNHRC, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy' (Classifications of the situations addressed by the Special Rapporteur 1994-2006/The rule of law and states of emergency/Major developments in international justice) (2007) UN Doc A/HRC/4/25, para 43.

182 See n 85.

183 Siracusa Principles, Part II (E), para 70(g).

In 2020, the HRC reaffirmed that:

'emergency measures, including those that relate to the administration of justice, taken by States in response to extraordinary situations, including the COVID-19 pandemic and other crisis situations, must be necessary, proportionate to the evaluated risk and applied in a non-discriminatory way, have a specific focus and duration, and be in accordance with the State's obligations under applicable international human rights law.'

2.5 In focus: restrictions on the ground of counterterrorism or national security

In 2007 the SRIJL noted that:

> 'use is made of exceptional measures under ordinary circumstances, in disregard of international obligations governing the state of emergency, namely those of proclamation, notification, exceptional threat, proportionality and non-discrimination. Together with the persistence of unlawfully extended states of emergency and the consequent human rights violations, nowadays restrictions are frequently imposed that go far beyond the limitations and derogations allowed under ordinary circumstances, generally by means of laws on national security, anti-terrorist and immigration'.[184]

'Terrorism is increasingly presented as the justification for declaring a state of emergency, when in fact it may not be, and very often is not.'[185]

Since 2001 states have increasingly resorted to the ground of national security to set out or implement exceptional measures in a way that fail the proportionality and necessity tests to derogate human rights.[186] This is of particular concern with the application of laws that purport to strengthen security and combat terrorism, features of which commonly allow, inter alia, for arrest and detention without warrant, or without publicly specifying the charges; detention for long periods without intent to prosecute or access to a lawyer; exceptional powers of surveillance, collection and processing of personal data and search and seizure; less stringent procedural guarantees; and limited powers of judicial review and opportunities for independent monitoring.[187]

In the absence of a definition in international law, one trend in domestic implementation of counterterrorism strategies is the emergence of overly broad and vague definitions of terrorism and terrorist activities.[188] This trend is seen also in legislation aimed at curbing 'violent extremism', 'extremism' or even 'extremification'.[189] The UN

184 UNHRC, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy' (Classifications of the situations addressed by the Special Rapporteur 1994–2006/The rule of law and states of emergency/Major developments in international justice) (2007) UN Doc A/HRC/4/25, para 52.

185 *Ibid*, para 53.

186 UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Role of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders' (2019) UN Doc A/HRC/40/52, paras 33–58.

187 UNGA, 'Report presented by the Special Representative on Human Rights Defenders, Hina Jilani' (2003) UN Doc A/58/380, paras 26–36.

188 On vaguely and broadly worded anti-terrorist laws, see in particular: UNHRC, Hicks, para 8; HRCttee 'Concluding observations on the initial report of Bangladesh' (2017) UN Doc CCPR/C/BGD/CO/1M, para 9; HRCttee, 'Concluding observations on the third periodic report of Kuwait' (2016) UN Doc CCPR/C/KWT/CO/3, para 41. See also UNHRC, 'Working Group on Arbitrary Detention – Opinion No 41/2017 concerning 10 individuals associated with the newspaper Cumhuriyet (Turkey)' (2017) UN Doc A/HRC/WGAD/2017/41, paras 98–99; UNHRC, 'Working Group on Arbitrary Detention – Opinion No 20/2017 concerning Musallam Mohamed Hamad al-Barrak (Kuwait)' (2017) UN Doc A/HRC/WGAD/2017/20, paras 50–52.

UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Role of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders' (2019) UN Doc A/HRC/40/52, para 35; see also ECOSOC, 'Promotion and Protection of Human Rights: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism – Martin Scheinin' (2005) UN Doc E/CN.4/2006/98, para 50:

> 'Terrorism is often appraised in domestic law as an aggravating circumstance of a crime already defined in national or international law. The intention is a key criteria of the crime, which is committed for the purpose of provoking "a state of terror, intimidating a population, or compelling a government or international organisation to do or abstain from doing any act."'

189 UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Role of Measures to Address Terrorism and Violent Extremism on Closing Civic Space and Violating the Rights of Civil Society Actors and Human Rights Defenders' (2019) UN Doc A/HRC/40/52, para 35.

Special Rapporteur on counter-terrorism and human rights, Fionnuala Ni Aoláin, noted that the core concept of 'extremism' is context-dependent and conceptually weaker than that of 'terrorism', which has an identifiable core, allowing the definition of 'extremism' to be easily challenged and manipulated, and likely to criminalise legitimate expression.[190]

Due to the inherent seriousness of terrorism, the IACtHR asserts a strict application of the principle of legality which must ensure a 'necessary distinction between such offenses and ordinary offenses, so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalised under one or the other offense'.[191]

States cannot derogate minimum criminal guarantees when acting under the objective to protect national security. In adopting anti-terrorist laws, states are obligated to respect the right to access to a lawyer and the confidentiality of the lawyer–client relationship, as well as the presumption of innocence, the *non-bis-in-idem* principle, the principle of legality and the precept that no one should be convicted of a criminal offence except on the basis of individual criminal responsibility.[192]

190 *Ibid.*

191 IACtHR, *Norín Catrimán et al v Chile*, Series C No 279, 29 May 2014, para 163.

192 IACmHR, 'Report on Terrorism and Human Rights' (2002) UN Doc OAS/Ser.L/V/II.116, Doc 5 rev 1 corr, para 222.

Box 3: The right to legal counsel in the context of threats to security

The right to legal counsel applies at all times, and does not suffer any derogation grounded on a threat to security. The UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, clearly state in its Guideline 17, paras 112:

> 'Where persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism are deprived of their liberty:
>
> (d) in the proceedings against them, they shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process.'

The right to legal counsel is also reaffirmed for cases of administrative detention (para 115 (b) of the same guidelines).

The OSCE Manual Countering Terrorism, Protecting Human Rights highlights that:

> 'it is less clear whether it is appropriate to limit fair-trial rights in cases involving national security and counter-terrorism in particular […] [I]t is in this type of situation that the right to a fair-trial is put under the most pressure. It then becomes incumbent upon the state to propose mechanisms that guarantee the fairness of a trial, while also preserving the state interest in protecting national security. It is up to the court to decide whether such proposed procedures are fair, and to either accept, reject or modify them'.[193]

Likewise, the SR on HRDs noted that:

> 'at these times of great risk to human rights, it is essential that there be some form of independent monitoring and accounting of the actions of the protagonists in the context of threats to security and emergencies. The Special Representative considers that it would be contrary to the spirit of international human rights standards to argue that at these same moments of greater risk the right to defend human rights can be legally stifled'.[194]
>
> 'Restrictions on the right to defend human rights must be held to a very high standard; in times of great peril, the need for a robust civil society and independent voices, for independent monitoring and accounting, is even greater.'[195]

Building on the recommendations of the SR on counter-terrorism and human rights,[196] the Working Group on Protecting Human Rights while Countering Terrorism has developed guidelines on the right to a fair trial and due process in the context of countering terrorism.[197] Guideline 8 specifically addresses the right to legal representation and provides that:

> 'All persons have the right to representation by competent and independent legal counsel of their choosing, or to self-representation. The right to representation by legal counsel applies to all stages of a criminal process, including the pre-trial phase. Any restrictions on the right to communicate privately and confidentially with legal counsel must be for legitimate purposes, must be proportional, and may never undermine the overall right to a fair hearing.'

193 OSCE, *Countering Terrorism, Protecting Human Rights: A Manual*, p 169.

194 UNGA, 'Report presented by the Special Representative on Human Rights Defenders, Hina Jilani' (2003) UN Doc A/58/380, para 66. See also,

195 UNGA, 'Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst' (2018) UN Doc A/73/215, para 24.

196 *Ibid.*

197 Counter-Terrorism Implementation Task Force (CTITF), Working Group on Protecting Human Rights while Countering Terrorism, *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism* (2014), pp 26–33.

The Special Rapporteur on counter-terrorism and human rights also clearly outlined that any delay or exclusions of legal representation on security ground: [198]

- must not be permanent;
- must not prejudice the ability of the person to answer the case; and,
- in the case of a person held in custody, must not create a situation where the detained person is held *in communicado*. Measures taken to monitor the conduct of consultations between legal counsel and client must be accompanied by strict procedures to ensure that there can be no deliberate or inadvertent passing on of information subject to legal professional privilege.

The SR on torture and other cruel, inhuman or degrading treatment or punishment has clarified that even in exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association.[199]

3. Bar associations' protection role

3.1 Definition: 'bar associations'

The 2011 IBA International Principles on Conduct for the Legal Profession ('IBA Principles') use the term 'bar associations' to refer to an:

'Officially recognised professional organisation consisting of members of the legal profession that is dedicated to serving its members in a representative capacity to maintain the practice of law as profession, and, in many countries possessing regulatory authority over the bar in its jurisdiction. Membership in the bar may be compulsory or voluntary.'[200]

3.2 Lawyer's Protection at the core of all bar associations' mandate

The Preamble to the Basic Principles and the IBA Standards highlight that professional associations of lawyers have a 'vital role to play in […] protecting their members from persecution and improper restrictions and infringements'. This was reaffirmed by the Human Rights Council.[201] Principle 25 of the Basic Principles further provides that those associations 'shall cooperate with Governments to ensure that [...] lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics'.

Paragraph 18 of the IBA Standards and Article 4 of CoE Recommendation No R(2000)21 provide that lawyers' associations shall 'defend the role of lawyers in society' and 'promote the welfare of members of the profession and assist them or their families if circumstances so require'.

Competences of bar associations range from direct regulation of the legal profession to no regulatory power and strictly representative functions.[202] Between these two extremes, a wide variety of models exist. Roughly one in every five countries has a bar association that holds some or all regulatory power over the legal profession. While lawyer's protection is a common priority across all bar associations, it is *a fortiori* so when the bar holds regulatory functions. In that case a bar association serves as direct guarantor of the independence of the legal profession through the supervision or monitoring of admission to the legal industry, adoption of ethical standards and application of disciplinary processes for the legal profession.

198 UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 45 (g). HRCttee, General Comment No 32, para 37.

199 CHR, 'Report of the Special Rapporteur on the question of torture, Theo van Boven' (2003) UN Doc E/CN.4/2003/68, para 26(g), available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3360.

200 IBA, International Principles on Conduct for the Legal Profession, p 33.

201 UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 15th preambular paragraph.

202 UNGA, A/HR/73/365, para 46.

3.3 Lawyers' protection by bar associations

Protection measures for lawyers at risk

The SRIJL highlights that 'the protection of the individual members of bar associations, particularly in situations where they may not be able to adequately defend themselves, should be at the core of the mandate of any bar association'.[203]

- **When a lawyer is arrested or detained, the bar association should be informed immediately of the reason and legal basis for the arrest or detention and have access to the lawyer arrested or detained;**[204]
- **Bar associations or other professional lawyers' associations should take any necessary action, including providing legal services to all in need of them**[205] **and defending lawyers' interests with the appropriate body in case of:**[206]
  - arrest or detention of a lawyer;
  - any decision to take proceedings calling into question the integrity of a lawyer;
  - any search of a lawyer's person or property;
  - any seizure of documents or materials in a lawyer's possession; and
  - publication of press reports that require action on behalf of lawyers.
- **No withdrawal of licences should take place without the prior consent of the relevant association, and any formal decision should be subject to judicial review;**[207] **and**
- **States should respect the role of bar associations and other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements.**[208]

Protection and promotion of the guarantees for lawyers' functioning

- **Bar associations should act as the guarantors of the lawyers' rights and privileges**
- **As a shared responsibility with the state, bar associations should foster a safe and enabling environment for lawyers by:**
  - raising people's awareness about human rights and lawyers' role in protecting their fundamental freedoms;[209]
  - providing continuing legal education and training to lawyers;[210] and
  - supporting the national legal aid system in providing legal services to poor and disadvantaged persons[211] and ensuring that everyone has effective and equal access to legal services.[212]

203 UNGA, A/HR/73/365, para 105. SRIJL, OL UKR 1/2019, p 2.
204 IBA Standards, para 20.
205 UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 15th Preambular paragraph.
206 CoE Recommendation No R(2000)21, Principle V.5.
207 UNGA, A/HR/73/365, para 112.
208 CoE Recommendation No R(2000)21, Principle V.3. UNGA, A/HR/73/365, para 106.
209 See n 81.
210 Basic Principles, Principles 9 and 25; AfCmHPR, Guidelines on the Right to a Fair Trial, Part H(h) and Part I (a); CoE Recommendation No R(2000)21, Principle V.4 (g); IBA Standards, para 18 (h).
211 Basic Principles, Principle 3; IBA Standards, para 18 (e).
212 Basic Principles, Principle 25; IBA Standards, para 18 (i).

Protection and promotion of lawyers' participation in public affairs and administration of justice

Bar associations should be consulted and allowed to participate in public debates concerning the adoption of legislation relating to access to justice or the organisation of the legal profession.[213]

Bar associations should play an important role in facilitating lawyers' intervention in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights.

Bar associations should represent the legal profession as a whole against threats to the proper administration of justice.[214] They should advocate for a strong and independent judiciary and legal profession and denounce any abuse of power by state authorities that prevents or limits access to justice.[215]

They should also ensure that the legislation enacted by the state conforms with international human rights law and responds to the country's current needs and realities.[216] In practice, some bar associations have established a human rights committee to monitor state compliance with its human rights obligations and participate in public discussion concerning legal reform, the administration of justice, and the protection and promotion of human rights.

The SRIJL has noted that:

> 'the role of bar associations is particularly fundamental in countries with weak or developing legal systems; in such circumstances, bar associations can play an essential role in transforming society. They can advocate for law reform to promote human rights and the rule of law and play an important role in constitutional review or constitution-making processes. Through law reform activities, bar associations can further advocate for laws giving effect to international human rights standards'.[217]

213 UNGA, A/HR/73/365, para 84, A/HRC/32/34/Add.1, para 121. See also, Basic Principles, Principle 23; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (k); CoE Recommendation No R(2000)21, Principle V.4 (d); IBA Standards, para 18 (g).

214 UNGA, A/HR/73/365, para 84.

215 *Ibid*.

216 *Ibid*.

217 *Ibid*, para 85.

PART II. STANDARDS AND INTERPRETATION

Part II constitutes a legal reference tool for exercising lawyers' right to protection in given circumstances that may address:

- the general principles underpinning the protection of lawyers' functions (Chapter A);
- the guarantees for the organisation of an independent and self-governing legal profession (Chapter B). This section covers the organisation of the legal profession as independent and self-governing, as well as its regulation, that is, the conditions to enter the legal profession, develop professional standards and set up disciplinary proceedings;
- the guarantees for lawyers' functioning (Chapter C), including the principle of non-identification of lawyers with their clients' causes, the principle of confidentiality in the lawyer–client relationship and lawyers' rights to access clients and information related to the case and adequate time and facilities to prepare a defence; and
- lawyers' individual freedoms (Chapter D), as necessary conditions for lawyers to fulfil their mission.

Each chapter provides the legal basis for the protection of lawyers and those exercising lawyers' functions through:

(1) a compilation of relevant UN and regional norms and standards;

(2) a summary of their interpretation by international human rights mechanisms; and

(3) a checklist highlighting the main legal issues attached to a right or guarantee.

Key:

	Africa
	Americas
	Arab Community
	Checklist
	Europe
	International professional standards
	UN instruments

A. General principles underpinning the protection of lawyers' functions

1. Rule of law

UN INSTRUMENTS

Preamble, UDHR: 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'

UNGA Resolution A/RES/69/123, 'The Rule of Law at the National and International Levels': Reaffirming that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the UN.

INTERPRETATION

The 1948 UDHR identifies the rule of law as necessary to protect rights and essential to avoid 'recourse, as a last resort, to rebellion against tyranny and oppression'.[218] The UN defines the rule of law as follows:

> **UN Secretary-General:** 'The "rule of law" is a concept at the very heart of the [UN's] mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[219]

The UN, OAS, AU and EU all accept the rule of law as a necessary foundation for rights-based and democratic governance and legal systems. When the law works for everyone, it defines and enforces the rights and obligations of all. This allows people to interact with one another in an atmosphere that is certain and predictable.[220]

In 2012, nearly two decades after the Vienna World Conference on Human Rights, states re-assessed their commitments to the rule of law at the UNHRC and the UNGA, in resolutions that extensively developed the implications following therefrom.[221] States thus reaffirmed that 'democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing'.[222] The independence, impartiality and integrity of the judicial system, and the right to equal access to justice for all[223] are referred to as 'essential prerequisites'[224] of the rule of law and the principle of non-discrimination in the administration of justice.[225] Other important aspects of the rule of law affirmed by the resolutions are security, governance, decision-making and accountability.

218 UDHR, Preamble.

219 UNSG, 'The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General' (2004) UN Doc S/2004/616, para 6, available at www.un.org/ruleoflaw/files/2004 report.pdf, and quoted on the UN webpage 'Rule of law and human rights', www.un.org/ruleoflaw/rule-of-law-and-human-rights. See also, European Commission for Democracy through Law, (Venice Commission), 'Report on the rule of law – adopted by the Venice Commission at its 86th plenary session' (Venice, 25–26 March 2011), available at http://www.concourt.am/armenian/news/doc/CDL-AD(2011)003rev-e.pdf.

220 See Commission on Legal Empowerment of the Poor-UNDP, 'Making the Law Work for Everyone' (2008) Vol 1, p 1, available at https://www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf.

221 UNGA, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (2012) UN Doc A/Res/67/1; UNHRC, 'Human Rights, Democracy and the Rule of Law' (2012) UN Doc A/HRC/Res/19/36; and UNGA, 'The Rule of Law at the National and International Levels' (2014) UN Doc A/RES/69/123.

222 UNGA, UN Doc A/Res/67/1, para 5; UNHRC, A/HRC/Res/19/36, preamble. See also, UNGA, UN Doc A/RES/69/123, preamble.

223 UNGA, UN Doc A/Res/67/1, para 14; UNHRC, UN Doc A/HRC/Res/19/36, paras 16(j) and 16 (k) (iii) and (vi). See also, UN Guidelines on Legal Aid, para 28.

224 UN Doc A/Res/67/1, paras 13. See also UN Doc A/HRC/Res/19/36, 16 (b).

225 UNGA, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (2012) UN Doc A/Res/67/1, para 13; UNHRC, 'Human Rights, Democracy and the Rule of Law' (2012) UN Doc A/HRC/Res/19/36, para 16 (j) (iv).

In 2015 political commitment materialised through the SDGs, in particular the SDG 16 to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. Specific targets are set up that call upon states to 'promote the rule of law at the national and international levels and ensure equal access to justice for all',[226] 'develop effective, accountable and transparent institutions at all levels'[227] and 'ensure responsive, inclusive, participatory and representative decision-making at all levels'.[228]

2. Independence of the judiciary

UN INSTRUMENTS

Article 10, UDHR: 'Everyone is entitled in full equality to a fair and public hearing by an independent and im27 partial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

Article 14, ICCPR: '(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. […]'

See also: CAT, Arts 7.3 and 13; CRC, Art 40.2(b) (iii); ICWM, Art 18.1; CPED, Arts 11.3 and 12.1.

Vienna Declaration on Human Rights:

> *'27. Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.'*

A/HRC/44/L.7 (reiterating A/HRC/RES/35/12), UNHRC Resolution A/HRC/35/12, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017), 5th preambular paragraph':

> *'Convinced that an independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly, and the integrity of the judicial system are prerequisites for the protection of human rights and the application of the rule of law and for ensuring fair trials and the administration of justice without any discrimination […]'*

UNGA Resolution, A/C.3/73/L.46, UNGA Resolution A/RES/73/177, 'Human Rights in the Administration of Justice' (2018), 13th preambular:

> *'Convinced that the independence and impartiality of the judiciary and the integrity of the judicial system as well as an independent legal profession are essential prerequisites for the protection of human rights, the rule of law, good governance and democracy and for ensuring that there is no discrimination in the administration of justice and should therefore be respected in all circumstances […]'*

See also: *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 6; Bangalore Principles of Judicial Conduct (2002);*[229] *ECOSOC, Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary (1989); Basic Principles on the Independence of the Judiciary (1985).*

226 UNGA, Sustainable Development Goals (2015), Target 16.3.

227 *Ibid*, Target 16.6.

228 *Ibid*, Target 16.7.

229 The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25–26 November 2002.

Africa

Article 7, AfCHPR: 1.'Every individual shall have the right to have his cause heard. This comprises: […]

(d). The right to be tried within a reasonable time by an impartial court or tribunal.'

Article 26, AfCHPR: 'State Parties to the present Charter shall have the duty to guarantee the independence of the Courts […].'

See also: *AfCmHPR, Guidelines on the Right to a Fair Trial, Part A.*

Americas

Article 8, AmCHR: '(1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'

Arab Community

Article 12, ArCHR: 'All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels.'

Article 13, ArCHR: '(1) Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.'

See also: ArCHR, Art 16.

Europe

Article 6, Right to a Fair Trial, ECHR: '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[…]'

Interpretation

Judicial independence is the concept that the judiciary should be separate and independent from the other branches of government and should not be subject to improper influence by the other branches of government or by any private or partisan interests. Without independence of the judiciary, there is no separation of powers, and without separation of powers, there can be no rule of law or fair trial.[230] The independence of the judiciary is as such considered 'integral to the protection of human rights and to the enforcement of the rule of law'[231] and an 'absolute right that is not subject to any exception'.[232]

230 *Ibid* 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul – Justice and the post-2015 development agenda' (2014) UN Doc A/69/294, para 75.

231 UN Doc A/Res/67/1.

232 HRCttee, General Comment No 32, para 19.

The relationship between judicial independence and the independence of lawyers has been described as 'one of mutual reliance and co-dependence'.[233] There is no independence of the legal profession if there is no independence of the judiciary.

> 'Judicial independence ensures that lawyers are able to carry out their duties in a free and secure environment, where they are able to ensure access to justice and provide their clients with intelligent, impartial and objective advice. An independent judiciary also acts as a check on the independence of lawyers, and vice versa.'[234]

All international human rights treaties refer to the right to access an independent and impartial tribunal.[235] Back in 1995, the then SRIJL noted that the guarantees of independence, impartiality and transparency of the judiciary are 'embodied to varying degrees in the legal systems of the world's countries in the form of constitutional and legal texts and case law'.[236] The then SRIJL recognised that 'the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law.'[237] It was then regularly reaffirmed by the successive mandate- holders that 'the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom in the sense of Article 38 (1) (b) of the Statute of the International Court of Justice'.[238]

3. Equal access to justice, equality before courts, equality of arms

UN INSTRUMENTS

For a general recognition of the principle of non-discrimination, see: UDHR, Art 2; ICCPR, Arts 2.1, 3, and 24; ICESCR, Arts 2.2 and 3; ICERD, Art 2; CEDAW, Art 2; CRC, Art 2; ICMW, Art 7; CRPD, Arts 3 (b) and 5.2.

Article 7, UDHR: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'

Article 14, ICCPR: '(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'

> […]
>
> '(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality […]'

Article 26, ICCPR:

> 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

233 IBA Task Force on the Independence of the Legal Profession, 'The Independence of the Legal Profession. Threats to the bastion of a free and democratic society' (2016), p 10. See IBA Standard, para 18 (d).

234 *Ibid*.

235 UDHR, Art 10; ICCPR, Art 14.1; CAT, Arts 7.3 and 13; CRC, Art 40.2 (b) (iii); ICMW, Art 18.1; CPED, Art 11.3; AfCHPR, Art 26; AmCHR, Art 8.1; ArCHR, Art 13.1; ECHR, Art 6.1. See also, AfCmHPR, Guidelines on the Right to a Fair Trial, Part A.4.

236 CHR, 'Report of the Special Rapporteur on the Independence and impartiality of the judiciary'(1995) UN Doc E/CN.4/1995/39), para 35.

237 *Ibid*, paras 32. See also para 34.

238 UNHRC, UN Doc A/71/348, para 15, quoting 1995 report (UN Doc E/CN.4/1995/39), para 35. See also, UN Doc A/69/294, para 75.

See also: ICERD, Art 5(a) (equal treatment before courts); CEDAW, Art 15 (equality before the law); ICMW, Art 18.1, (equality before courts and tribunal); CRPD, Art 5.1 (equality before the law), Art 12 (equality before the law), and Art 13.1 (equal access to justice).

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before a Court:

Principle 5. Non-discrimination:

'The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedy may be exercised by anyone regardless of race, colour, sex, property, birth, age, national, ethnic or social origin, language, religion, economic condition, political or other opinion, sexual orientation or gender identity, asylum-seeking and migration status, disability or any other status.'

Principle 12. Equality before the courts:

'37. The proceedings shall be fair and effective in practice and the parties to the proceedings in question shall be ensured the right to equal access, to present their full case and equality of arms and be treated without any discrimination before the courts.

38. This includes that every individual deprived of liberty shall be guaranteed the right to access to all the material related to the detention or presented to the court by State authorities, to preserve the equality of arms. The requirement that the same procedural rights be provided to all parties is subject only to distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.'

Basic Principles on the Role of Lawyers (1990)

'Access to lawyers and legal services

Principle 2. *Governments shall ensure that efficient procedures and responsive mechanisms for effective and*
equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion,
political or other opinion, national or social origin, property, birth, economic or other status.'

UNHRC Resolution A/HRC/35/12, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017), 7th preambular paragraph 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers':

'Emphasizing that the independence and impartiality of the judiciary and the independence of lawyers and the legal profession are necessary elements in the realization of Sustainable Development Goal 16 of the 2030 Agenda of Sustainable Development,[239] in which Member States committed, inter alia, to provide equal access to justice for all and build effective, accountable and inclusive institutions at all levels […]'

239 UNGA, 'Transforming our World: the 2030 Agenda for Sustainable Development' (2015) UN Doc A/RES/70/1.

UNGA Resolution A/RES/73/177: 'Emphasizing on the right to access to justice for all, which could include access to legal aid, forms an important basis for strengthening the rule of law through the administration of justice.'

See also: *UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principles 5, 6, 12 (para 19), 19 and 21, and Guideline 19 (para 101(b)); UN Guidelines on Legal Aid, Principles 6 and 10.*

Africa

Article 3, AfCHPR: '(1) Every individual shall be equal before the law.

(2) Every individual shall be entitled to equal protection of the law.'

See also: *AfCmHPR Guidelines on the Right to a Fair Trial, Part G(a), Part K (a), (c), (d) and Part N 6 (a).*

Americas

Article 24, Right to equal protection, AmCHR: 'All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.'

Arab community

Article 11, ArCHR: 'All persons are equal before the law and have the right to enjoy its protection without discrimination.'

Europe

Article 14. Prohibition of discrimination, ECHR: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

See also: EU Charter on Fundamental Rights,Title VI Justice Arts 47-48; *CoE Recommendation No R(2000)21, Principle II.1.*

Interpretation

Equal access to justice and equality before courts and tribunals are human rights that are essential aspects of the rule of law.[240] They are an integral part of the development process, as recognised by the 2030 Agenda for Sustainable Development.[241] The IACtHR states that 'the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on it and it permeates the whole juridical system'.[242] An independent and impartial judiciary and an independent legal profession are prerequisites to ensure 'fair trials and the administration of justice without any discrimination'.[243]

3.1. Equal access to justice

The UN defines access to justice as 'the ability of people to seek and obtain a remedy through formal or

240 UNGA, UN Doc A/69/294, para 28.

241 See SDG 16. UNGA, 'Human rights in the administration of justice' (2019) UN Doc A/Res/73/177, para 5.

242 IACtHR, *Yatama v Nicaragua*, Series C No 127, 23 June 2005, para 184.

243 UNHRC, 'Independence and impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, Preamble.

informalinstitutions of justice, and in conformity with human rights standards'.[244]

> 'Free and equal access to justice enables people to claim their rights, to testify to the crimes with which they have been confronted, and to extricate themselves from the vicious circle of impunity and exclusion. By providing an effective tool for breaking this vicious circle, access to justice allows for the empowerment of various segments of society on an equal basis. Empowering people to claim their rights is even more essential in contexts of widespread violations of human rights.'[245]

The independence of lawyers is recognised as necessary for equal access to justice.[246] Likewise states' obligation to provide legal aid has progressively gained traction and the right to legal aid formal recognition. States are committed 'to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, *including legal aid*' [emphasis author's own].[247] The 2012 UN Guidelines on Legal Aid provide comprehensive guidance to states to set up a legal aid system in criminal justice system and the right to legal aid, which is recognised as an autonomous right.[248] The Guidelines provide, in particular, that '(s)tates should ensure the provision of legal aid to all persons regardless of age, race, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status'.[249]

3.2. Equality before courts

The right to a fair trial implies, among other things, access to predetermined and impartial courts, the decisions of which are based on law, following proceedings that observe procedural guarantees.[250]

Interpreting Article 14.1 of the ICCPR, the HRCttee established that the right to equality before courts and tribunals ensures equal access and equality of arms, and that parties to the proceedings in question are treated without discrimination and that similar cases are dealt with in similar proceedings.[251]

3.3. Equality of arms

The principle of equality of arms means that 'the same procedural rights are to be provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'.[252] The right to equality of arms guarantees that everyone who is party to the proceedings must have a reasonable opportunity to present his/her case to the court under conditions that do not place him/her at a substantial disadvantage vis-à-vis their opponent.[253] It includes the ability to contest all arguments and evidence adduced by the other party.[254] It has been read into fair-trial rights and also refers to guarantee of adequate time and facilities to prepare a defence and the right to examine witnesses.

The notion of equality is referred to in this broader context within Article 14.1 of the ICCPR, and also within the specific context of criminal proceedings in the chapeaux to Article 14.3 of the ICCPR, in terms of the enjoyment of fair trial rights 'in full equality'. Although it is not expressly referred to within Article 6 of the ECHR, the principle of equality of arms is both an autonomous concept and inherent element of the overarching right to a fair hearing under the ECHR.[255] It has been expressly acknowledged by both the HRCttee and the ECtHR that the principle of

244 UNDP, 'Programming for Justice: Access for all – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice' (2005); UNGA, UN Doc A/69/294, para 47.

245 *Ibid,* para 59.

246 UNGA, 'Report of the Secretary General on Human Rights in the Administration of Justice' (2018) UN Doc A/73/210, paras 4 and 6.

247 UNGA, 'The Rule of Law at the National and International Levels' (2014) A/Res/69/123, para 14.

248 UN Guidelines on Legal Aid, para 13.

249 UN Guidelines on Legal Aid, Principle 6.

250 *Ibid*.

251 HRCttee, General Comment No 32, paras 7–14.

252 HRCttee, General Comment No 32, para 13.

253 OSCE, Legal Digest of International Fair Trial Rights, pp 110–114.

254 *Ibid*.

255 *Ibid*, fn 438 refering to: European Commission of Human Rights, *Ofner and Hopfinger v Austria* [1963], para 46; ECtHR, *Neumeister v Austria* [1968], para 22; ECtHR, *Delcourt v Belgium* [1970], para 28.

equality of arms is applicable to criminal and non-criminal proceedings alike.[256] However, in the context of criminal trials where the character of the proceedings already involves a fundamental inequality of the parties, the principle of equality of arms is even more important.

Equality of arms usually implies the right to legal assistance insofar as 'the availability or absence of legal assistance often determines whether or not a person can assess the relevant proceedings or participate in them meaningfully'.[257] The chronic inequality of arms faced by HRDs and other litigants in criminal and civil proceedings involving the state and/or corporate actors remains one of the biggest challenges, which legal aid still does not adequately address.

4 Non-discrimination in the administration of justi

UN INSTRUMENTS

Article 2.2, ICERD:

> '2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'

Article 11, CEDAW:

> '1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
>
> (a) The right to work as an inalienable right of all human beings;
>
> (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
>
> (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
>
> (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; […]'

See also: CEDAW, Arts 2, 7 and 10 and CRPD, Arts 5.2 and 5.3.

256 HRCttee, General Comment No 32, para 13; ECtHR, *Steel and Morris v the United Kingdom*, No 68416/01, 15 February 2005, para 59 (FINAL, 15 May 2005), para 59.

257 HRCttee, General Comment No 32, para 10.

Basic Principles on the Role of Lawyers (1990):

'Qualifications and training

Principle 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.

Principle 11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.'

Rule 22, UN Standard Minimum Rules for the Administration of Juvenile Justice (1985):

'2. Juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the juvenile justice system. Efforts shall be made to ensure the fair representation of women and minorities in juvenile justice agencies.'

See also: UN Guidelines on Legal Aid, Guideline 13 (para 65) (states should remove barriers to legal education) and (para 66) (wide access to legal profession, including women).

International professional standards

IBA, Standards for the Independence of the Legal Profession (1990):

'Entry into the legal profession and legal education

Para 2, *Legal education shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national or social origin, property, birth, status or physical disability.'*

Functions of the lawyers' associations

Para 18. *The functions of the appropriate lawyers' association in ensuring the independence of the legal profession shall be inter alia:*

i) to ensure that there is free access to the profession for all persons having the requisite professional competence, without discrimination of any kind, and to give assistance to new entrants into the profession;'

Interpretation

The principle of non-discrimination[258] informs the establishment and composition, as well as the functioning, of a judicial system that cannot be discriminatory or create discriminatory access to justice.

4.1. Non-discriminatory access to the legal profession and representation of the legal profession

As per Principle 10 of the Basic Principles, no discrimination in accessing the legal profession will be tolerated.

258 UNGA, 'Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels' (2012) UN Doc A/Res/67/1; UNGA, 'Human Rights, Democracy and the Rule of Law' (2012), UN Doc A/HRC/Res/19/36, paras 13 and 16 (j) (iv).

For instance, no one can be prevented from accessing the legal profession due to her/his beliefs or opinions. This principle is absolute. Furthermore, Basic Principle 11 requires positive measures to ensure that lawyers represent the population they serve. Representativeness is addressed as a guarantee to trust in the system.

In this respect, the importance of ensuring adequate representation of women in public offices has been recognised at the international level,[259] alongside the need to include gender representation as a criterion for the selection of judges[260] and increase the number of women in the defence counsel list before international courts.[261] Women, particularly those belonging to minorities or under-represented groups, should be adequately represented in the judiciary and the legal profession in order to ensure that the administration of justice is free from gender-based discrimination and stereotypes and that women's rights and specific needs are taken into consideration.[262]

In 2010 Navi Pillay, then High Commissioner for Human Rights, highlighted that:

> 'the only way to ensure women's perspectives in the administration of justice, including in judgments delivered by national tribunals is through women's life experience and therefore through the appointment of women judges who also represent the diversity of society and who are therefore able to tackle judicial issues with fitting sensitivity'.[263]

In order for women to access justice and legal aid, states should take applicable and appropriate measures, including ensuring that 'where possible, female lawyers are available to represent female defendants, accused and victims'.[264]

4.2. Non-discriminatory access to legal counsel and non-discrimination of lawyers on the basis of their clients

On the basis of equality of arms, everyone should be able to access legal assistance, [265] and lawyers in turn cannot be discriminated against on the basis of their clients. The Explanatory Memorandum on CoE Recommendation 21(2000), states that:

> 'every person or group of persons is entitled to call upon the assistance of a lawyer to defend or assert their rights and interests within the law and it is the duty of the lawyer to do so in the best possible way and with integrity and independence. As a consequence, it is implicit that lawyers should not be subjected to discrimination by the authorities on the basis of their clients (or their clients' cause)'.[266]

4.3. Principle of neutrality in lawyers' work

The principle of non-discrimination in accessing the legal profession and the principle of non- identification of lawyers with their client's cause rest on the principle of neutrality under which lawyers discharge their functions and act in a way that is dissociated from the cause(s) they may represent, their convictions or beliefs.

B. Guarantees for the organisation of an independent and self-governing legal profession

259 See, eg, CEDAW, Art 7 (b): 'to perform all public functions at all levels'. See also Beijing Declaration and Platform for Action, Strategic objective G.1, para 190 (a).

260 See, inter alia, Protocol on the Establishment of an African Court on Human and Peoples' Rights (1998), Art 14.3; ECtHR, Rules of Court (2019), Rule 14; UNSC, Rome Statute of the ICC (1998), Art 36.8 (a) (iii).

261 ICC, 'Calling African Female Lawyers,' available at http://femalecounsel.icc-cpi.info.

262 UNHRC, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul – Gender and the administration of justice' (2011) UN Doc A/HRC/17/30, para 49. A/HRC/RES/35/12, para 2. UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 14th and 20th Preambular paragraphes and paras 2 and 5.

263 See Statement by Ms Navanethem Pillay, UN High Commissioner for Human Rights, International Association of Women Judges, Jubilee Biennial Conference (2010), Seoul; UNHRC, UN Doc A/HRC/17/30, para 48.

264 UN Guidelines on Legal Aid, Guideline 9 (para 52(b)).

265 *Ibid*, Principle 6.

266 CoE Recommendation No R(2000)21, Explanatory Memorandum, para 40. See also Part II, Chapter C, Section 3 on the prinicple of non-identification of lawyers with their client's causes.

The independence of the legal profession is the bulwark of a free and democratic society aimed at the protection of the public.[267] This is recognised, in particular, in the Preamble to the Basic Principles, which states that 'the adequate protection of the human rights and fundamental freedoms […] requires that all persons have effective access to legal services provided by an independent legal profession'. Likewise, the UN Guidelines on Legal Aid call for administration and decision-making related to legal aid to be 'free from undue political or judicial interference'.[268]

The following sections address successively the different guarantees serving the independence of the legal profession, namely:

- an enabling legal and regulatory framework for the exercise of lawyers' functions (Section 1);
- the setting up of an independent and self-governing bar association as the 'best guarantee of the legal profession's independence'[269] (Section 2);
- the setting up of an independent legal aid system (Section 3); and
- guarantees concerning lawyer's admission to the bar (Section 4) as well as professional standards and ethics (Section 5) and discipline and professional supervision in general applicable to lawyers and those exercising lawyers' functions (Section 6).

These guarantees come under the states' general obligation to fulfil their international obligations as set out by human rights treaties.[270]

1. An enabling legal and regulatory framework

UN INSTRUMENTS

Article 2, ICCPR:

'1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'

See also: ICERD, Art 7; CEDAW, Arts 2 and 3; CAT, Art 2; CRC, Art 4 (and 32.2, 33, 34); CED, Art 4; CRPD, Art 4.1(b).

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)

Principle 1. Right to legal aid

Paragraph 14: *'Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.'*

267 See n 109.

268 UN Guidelines on Legal Aid, Guideline 11 (para 59(a)). See also Principle 12, and SRIJL, 'Serbia: Comment on legislation: Law on Free Legal Aid' (10 December 2018) UN Doc OL SRB 1/2018, p 6.

269 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 26.

270 See, eg, ICCPR, Art 2.

Paragraph 27, Vienna Declaration on Human Rights:

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

UNHRC Resolution 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers', (2017):

1. *'Calls upon all States to guarantee the independence of judges and lawyers and the objectivity and impartiality of prosecutors, and their ability to perform their functions accordingly, including by taking effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional functions without interference, harassment, threats or intimidation of any kind.'*

13. *'Underscores the importance for States of developing and implementing effective an effective and sustainable legal aid system that is consistent with their international human rights obligations and takes into account relevant commitments and good practices, so that legal aid is available and accessible at all stages of legal proceedings, subject to appropriate eligibility criteria.'*

15. *'Invite 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.'*

Article 2, UN Declaration on HRDs (1998):

'Paragraph 1: *Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.'*

Africa

Article 1, AfCHPR: 'The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'

AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)

'Part H . Legal aid and legal assistance

(h) […] States shall adopt legislation to grant appropriate recognition to para-legals.

(k) States that recognize the role of para-legals should ensure that they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence'.

Americas

Article 2. Domestic Legal Effects, AmCHR:

> 'Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.'

Europe

Article 1. Obligation to respect Human Rights, ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

Interpretation

1.1. Constitutional guarantees of judicial independence

As aforementioned, the independence of the judiciary and the independence of the legal profession are closely interrelated and interdependent.

Judicial independence is safeguarded by a number of international and regional instruments,[271] and is recognised in many jurisdictions as a constitutional guarantee and an essential component of the rule of law. In its General Comment No 32, the HRCttee provides that:

> 'states should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them'.[272]

1.2. Clear and coherent regulation of the legal profession: conditions and minimum provisions

As highlighted in the Vienna Declaration and the Basic Principles, the independence of the legal profession is a prerequisite for the protection of all human rights.[273] Under their general duty to protect, promote and fulfil human rights, states are to adopt legislation ensuring the independence of the legal profession.

The SRIJL has specified that the law regulating the role and activities of lawyers and the legal profession should:

- be adopted in accordance with international standards;[274]
- be elaborated with the meaningful participation of the legal profession at all relevant stages of the legislation process, ensuring that concerns raised by lawyers are effectively addressed; [275]

271 See n 235.

272 HRCttee, General Comment No 32, para 19. See also HRCttee, 'Concluding observations – Slovakia' (1997) UN Doc CCPR/C/79/Add.79, para 18.

273 Vienna Declaration on Human Rights, para 27; Basic Principles, Preamble; IBA Standards, Preamble.

274 SRIJL, 'Azerbaijan: Amendments to the Act on Bar of 27 January 2000 and other laws, which could undermine the right of access to justice and jeopardise the right of legal practitioners to carry out their legal activities' (12 January 2018) UN Doc OL AZE 1/2018, p 2.

275 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 31; UNHRC, A/HRC/32/34/Add.1, para 121; and A/HRC/29/26/Add.4, para 55; UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession / Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 105; SRIJL, 'Ukraine: Comment on legislation: Draft Law on The Bar and Practice of Law' (28 January 2019) UN Doc OL UKR 1/2019, p 3; SRIJL, OL AZE 1/2018, p 2.

- aim at enhancing the independence, self-regulation and integrity of the legal profession;[276]
- establish a professional association of lawyers with regulatory powers;[277] and
- include, at a minimum, provisions relating to:[278]

– the independence of such an association;

– its composition; and

– the definition of its functions.

1.3. Clearly defined scope of permissible intervention from the executive branch

Treaty bodies and the SRIJL have published guidance about the extent to which governmental and legislative interference with the administration and conduct of the legal profession may be warranted.[279]

In the words of the SRIJL, 'it is the duty of state authorities to support the establishment and work of professional associations of lawyers without interfering in their activities'.[280] In that sense 'government controls, whether direct or indirect, is eliminated or minimized to the greatest extent possible in the regulation of the legal profession'.[281] At the same time, the SRIJL clearly states that the involvement of state authorities in the regulation of the legal profession does not per se jeopardise the independence of the profession.[282] A law regulating the legal profession is a state duty and does not constitute an interference, as long as, as mentioned above, it is in consultation with the bar association and in accordance with international standards. 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.[283]

In practice, in order to assess whether state control over the legal profession is excessive, the test of 'the actual impact' is outlined by the mandate.[284] This means that no assessment may be made solely on the basis of the legal and regulatory provisions in place, and the actual impact of the regulatory framework on the ability of lawyers or the bar association to carry out their duties in an independent and impartial manner must be examined.[285]

1.4. Necessary safeguards in case of state intervention

When certain regulatory functions are assigned to the judiciary or the executive branch, or 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, it is important that appropriate safeguards be adopted so that the independence and integrity of the legal profession are not undermined.[286]

1.5. Legal recognition of the right to protect human rights

The UN Declaration on HRDs provides that states should adopt the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy human rights and work

276 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 88; SRIJL, OL AZE 1/2018, p 2; SRIJL, OL UKR 1/2019, p 6.

277 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 103.

278 *Ibid*, paras 31 and 96.

279 *Ibid*, paras 23–25, 90 and 93.

280 *Ibid*, para 31; UNHRC, A/71/348, para 82; UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 21.

281 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 23.

282 *Ibid*, para 104.

283 *Ibid*, para 24.

284 *Ibid*, para 90.

285 *Ibid*.

286 *Ibid*, para 25.

towards their promotion and protection.[287]

In support of this, a model law has been developed by the NGO International Service for Human Rights for the protection of HRDs.[288]

Checklist

- ☐ Is judicial independence protected by the Constitution?
- ☐ Is the legal profession regulated by law? Was the law created with meaningful and non-discriminatory participation by the legal profession?
- ☐ Does the law set up a professional association tasked with the regulation of the legal profession? Does it include, at a minimum, provisions relating to the independence of the association, its composition and the definition of its functions?
- ☐ Does the state intervene in the regulation of lawyers (ie, admission or disciplinary process or development of a code of conduct and ethical standards)?
  - If so, are there guarantees in place to ensure that this does not impact the bar association's and lawyers' ability to work free from any interference?
- ☐ Is the right to protect human rights protected by law?

2. Independent and self-governing bar associations

UN INSTRUMENTS

Basic Principles on the Role of Lawyers (1990):

'Professional associations of lawyers

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.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.'

UNHRC Resolution A/HRC/32/12, 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers (2017)',

16th Preambular paragraph: 'Recognizing the importance of independent and self-governing bar associations and professional associations of judges and prosecutors, and of non-governmental organizations working in defence of the principle of the independence of judges and lawyers'

Paragraph 15: Invites 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.'

287 UN Declaration on HRDs, Art 2.

288 ISHR, 'A Model Law for the Recognition and Protection of Human Rights Defenders' (2017), available at www.ishr.ch/sites/default/files/documents/05_jan2017_english_model_law_all.pdf.

Africa

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'G. Access to lawyers and legal services:

[…]

c) States and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms.'

'H. Legal aid and legal assistance:

[…]

f) Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:

(i) when legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person or party to a civil case;

(ii) where legal assistance is not provided by the judicial body in important or serious human rights cases, they provide legal representation to the accused or party in a civil case, without any payment by him or her.'

'I. Independence of lawyers:

a) States, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

[…]

l) 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 association shall be elected by its members and shall exercise its functions without external interference.

m) 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.

[…]

o) Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or even before a judicial body, and shall be subject to an independent judicial review.'

'J. Cross border collaboration amongst legal professionals:

[…]

b) States shall encourage the establishment of agreements amongst states and professional legal associations in their region that permit cross-border collaboration amongst lawyers including legal representation, training and education, and exchange of information and expertise.'

Europe

CoE Recommendation No R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer:

'Principle V – Associations

1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.

2. Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.

3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to:

a. promote and uphold the cause of justice, without fear;

b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;

c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;

d. promote and support law reform and discussion on existing and proposed legislation;

e. promote the welfare of members of the profession and assist them or their families if circumstances so require;

f. co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;

g. promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.

5. Bar associations or other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:

a. arrest or detention of a lawyer;

b. any decision to take proceedings calling into question the integrity of a lawyer;

c. any search of lawyers themselves or their property;

d. any seizure of documents or materials in a lawyers' possession;

e. publication of press reports which require action on behalf of lawyers.'

INTERNATIONAL PROFESSIONAL STANDARDS

IBA Standards for the Independence of the Legal Profession (1990):

'Preamble

Professional associations of lawyers have a vital role to uphold professional standards and ethics, to protect their members from improper restrictions and infringements, to provide legal services to all in need of them, and to co-operate with governmental and other institutions in furthering the ends of justice.'

[…]

Lawyers' associations

17. 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.

Functions of the lawyers' associations

18. The functions of the appropriate lawyers' association in ensuring the independence of the legal profession shall be inter alia:

a) to promote and uphold the cause of justice, without fear or favour;

b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession; and to protect the intellectual and economic independence of the lawyer from his or her client;

c) to defend the role of lawyers in society and preserve the independence of the profession;

d) to protect and defend the dignity and independence of the judiciary;

e) to promote free and equal access of the public to the system of justice, including the provision of legal aid and advice;

f) to promote the right of everyone to a prompt, fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper and fair procedures in all matters;

g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;

h) to promote a high standard of legal education as a prerequisite for entry into the profession and the continuing education of lawyers and to educate the public regarding the role of a Lawyers' Association;

i) to ensure that there is free access to the profession for all persons having the requisite professional competence, without discrimination of any kind, and to give assistance to new entrants into the profession;

j) to promote the welfare of members of the profession and the rendering of assistance to members of their families in appropriate cases;

k) to affiliate with and participate in the activities of international organisations of lawyers.

19. Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the appropriate association of lawyers shall co-operate in assisting a foreign lawyer to obtain the necessary right of audience provided that he or she has the qualifications and fulfils the conditions required to obtain that right.

20. To enable the lawyers' association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention and place of detention of any lawyer; and the lawyers' association shall have access to the lawyer arrested or detained.

Disciplinary proceedings

21. Lawyers' associations shall adopt and enforce a code of professional conduct of lawyers.

22. There shall be established rules for the commencement and conduct of disciplinary proceedings that incorporate the rules of natural justice.

23. The appropriate lawyers' association will be responsible for or be entitled to participate in the conduct of disciplinary proceedings.

24. Disciplinary proceedings shall be conducted in the first instance before a disciplinary committee of the appropriate lawyers' association. The lawyer shall have the right to appeal from the disciplinary committee to an appropriate and independent appellate body.'

Interpretation

Self-regulation of the profession is seen as vital in ensuring the independence and integrity of the legal profession and its members.[289] International and regional instruments all refer to self-governing professional associations exercising regulatory functions without external interference.[290]

In practice, the regulation of the legal profession varies. A number of systems exist and are led either by a court, the government, a bar association or a mixed system. However the SRIJL has constantly highlighted that regulatory functions must be exercised by a bar association in an independent manner, free from any interference from the state.[291] 'The best guarantee of independence is a self-governing body, understood as an organization independent from the States or other national institutions'.[292] In particular, the founding of an independent and self-regulated association has been pointed out by both treaty bodies and the SRIJL[293] as one of the most significant steps in the case of political transition.

The SRIJL has emphasised that the underlying rationale for the creation of these associations is 'the need to provide a platform to allow the legal profession to carry out its legitimate activities without any external interference':[294]

> 'bar associations have a crucial role to play in a democratic society to enable the free and independent exercise of the legal profession and to ensure access to justice and the protection of human rights, in particular due process and fair trial guarantees. They protect individual members of the legal profession, particularly in

289 Basic Principles, Preamble. IBA Standards, Preamble.

290 Basic Principles, Principle 24; AfCmHPR Guidelines on the Right to a Fair Trial, Part, I.(l). CoE Recommendation No R(2000)21, Principle V.2.

291 UNGA, UN Doc A/71/348, paras 30–33 and 80–88; UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession / Brief review and assessment of six years of the mandate/ Major developments in international justice' (2009) UN Doc A/64/181, paras 19–27.

292 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 26. SRIJL, OL UKR 1/2019, p 3.

293 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 20; UNHRC, 'Implementation of General Assembly Res. 60/251 of 15 March 2006' (2006) UN Doc A/HRC/4/25/Add.2, paras 43 and 89.

294 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 87.

> situations where they are not able to adequately defend themselves; elaborate and implement requirements and procedures to gain access to the legal profession; develop codes of professional conduct; and handle disciplinary proceedings against lawyers'.[295]

Lawyers' membership of a liberal profession and the authority deriving from that membership helps them to act collectively. This collective action plays an important role in ensuring that lawyers can freely and independently practise law and protect human rights.

Interpreting the different international instruments addressing the role of lawyers, the SRIJL has outlined that in order to be independent, a bar association should, at a minimum:

- be recognised under law;[296]
- have an executive body composed of lawyers, elected by its members;[297]
- be able to set its own rules and regulations, and make its own decisions free from external influence;[298]
- receive a general mandate to protect the independence of the legal profession and the interests of its members,[299] through the power to develop and implement codes of professional conduct and set up bodies to oversee compliance with such regulations, as well as to admit, discipline and disbar;[300]
- be responsible for the protection of the legal profession as well as individual members;[301] and
- be able to sustain itself.[302]

The founding of an independent and self-regulated association also entails lawyers' right to join said association.[303]

2.1 Established by law

The IBA Standards expressly provide that in 'each jurisdiction one or more independent, self-governing association(s) of lawyers *recognized in law*' shall be established, 'without prejudice to [the lawyers'] right to form or join in addition other professional associations of lawyers and jurists' [emphasis author's own].[304]

In practice, bar associations with regulatory powers are generally established by law. They are recognised as public entities or private associations with public functions, and membership in the association is usually compulsory.[305] Conversely, bar associations with exclusively representative functions are generally established as private associations, and membership is voluntary.[306]

The SRIJL considers it preferable to establish one single professional organisation. The reason for this is that:

> 'when forces are consolidated in one main association, it is easier to ensure the integrity of the entire profession and the quality of legal services, allowing the membership to effectively take part in discussions regarding the enhancement of the legal and judicial system and to achieve a desirable impact on other actors in the justice system'.[307]

The SRIJL notes that 'this does not, however, preclude the establishment of regional and local professional

295 SRIL OL UKR 1/2019, p 2.
296 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, paras 88 and 96.
297 *Ibid*, para 100.
298 *Ibid*, paras 26, 88 and 89.
299 *Ibid*, paras 88 and 91.
300 *Ibid*, paras 26 and 91.
301 *Ibid*, paras 105–107. See n 69.
302 *Ibid*, paras 26 and 98.
303 *Ibid*, para 23. IBA, 'The Independence of the Legal Profession. Threats to the bastion of a free and democratic society' (2016), p 8.
304 IBA Standards, para 17.
305 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 33.
306 *Ibid*.
307 *Ibid*.

organizations working under one umbrella association'.[308]

2.2 An executive body composed of and appointed by lawyers

The Basic Principles provide that 'the executive body of the professional association shall be elected by its members' (Principle 24). The IBA Standards and the AfCmHPR Guidelines contain similar language.[309]

The SRIJL has highlighted that:

> 'the central role in the establishment, the work and appointment of executive bodies of the legal profession need to remain with the lawyers, and that the membership of the executive body of lawyers associations need to be pluralistic so that they do not become dependent upon one political party's interests'.[310]

The SRIJL has specifically mentioned that 'bar associations should not act as a part of a bureaucratic apparatus allowing for government control of the legal profession; they should operate as professional associations, working to protect the rights of their members'.[311] 'Situations where the state, in particular the executive branch, controls all or part of a bar association or its governing body, and where membership in such an organisation is compulsory, are clearly incompatible with the principle of independence of the legal profession'.[312]

2.3 Bar associations' regulatory powers to ensure the independence and integrity of the profession

For the legal profession to be self-governing, the bar association shall be entrusted with the regulatory functions aimed at ensuring the independence and integrity of the legal profession.

> **SRIJL:** '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.'[313]

Along these lines, the SRIJL considers that:

> 'limited participation of the national bar association in the development of the draft law on the legal profession and the alleged failure to address the legitimate concerns raised by the bar representatives on issues relating to access to the legal profession and disciplinary proceedings may in itself be regarded as a violation of the independence of the bar association'.[314]

Likewise the SRIJL has stressed on a number of occasions that 'the ethical codes should be drafted by associations of lawyers themselves and, where they are established by law, the legal profession should be duly consulted at all stages of the legislative process'.[315]

The IBA Standards and CoE Recommendation No R(2000)21 contain a detailed list of functions that bar associations

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308 *Ibid*.

309 IBA Standards, para 17; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I(l) .

310 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 38; UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, paras 26–27.

311 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 38; UNHRC, UN Doc A/71/348, para 86.

312 SRIJL, 'Kazakhstan: Draft Law on lawyers' activity and legal aid' (17 January 2018) UN Doc OL KAZ 1/2018, p 2.

313 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 26; SRIJL, OL UKR 1/2019, p 3.

314 SRIJL, OL UKR 1/2019, p 3.

315 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 53; SRIJL, OL UKR 1/2019, pp 6–7.

may carry out to promote and protect the independence and integrity of the legal profession and its members.

Among these are the regulatory functions, namely the elaboration of conditions to gain access to the legal profession; the development and implementation of minimum standards of professional behaviour; the provision of initial and continuing education to members of the legal profession; the handling of disciplinary proceedings against lawyers; and the enforcement of disciplinary decisions.[316]

As aforementioned bar associations may have regulatory powers or strictly representative functions, and a wide variety of models exist.

The SRIJL has emphasised that 'the mere existence of a national bar association with no or little regulatory powers or voluntary associations of a purely private nature serving the commercial or financial interest of lawyers is not sufficient to protect and promote the independence and integrity of lawyers'.[317]

Bar association may also be responsible for the regulation of the national legal aid system, which is considered in the Section 3 below.[318]

2.4 Bar associations' responsibilities in lawyers' protection

As highlighted by the SRIJL, 'the protection of the individual members of bar associations, particularly in situations where they may not be able to adequately defend themselves, should be at the core of the mandate of any bar association'.[319]

Bar associations' responsibilities in the protection of the legal profession and individual lawyers are addressed in Part I, Chapter C, Section 3. These responsibilities span over the protection of individual lawyers; the protection and promotion of the fundamental guarantees for lawyers' functioning; and the promotion of an active engagement of an appropriately trained legal profession in the law-making process of the country, especially addressing the administration of justice and human rights, including the legal aid system. Collective action serves as a shield for lawyers to serve as watchdogs of the democracy.

2.5 Bar associations' financial sustainability

To ensure true independence, the SRIJL has on a number of occasions highlighted that bar associations should be provided with adequate human and financial resources to perform their functions independently and autonomously.[320] The absence of financial sustainability can affect the operations and effectiveness of bar associations.

While it is appropriate for national legislation to determine in general terms the aims and objectives of bar associations, it is for the individual bar association as an independent institution to 'make its own decisions, following clear and transparent structures and procedures, to represent its members' interest and to sustain itself'[321] and to 'decide how to finance its activities'.[322] A government cannot decide to eliminate entrance fees, for example, as membership fees are an important means to ensure the effectiveness and the independence of a bar association.[323]

In cases where it is necessary to obtain funding from outside of the legal profession – for instance, from sponsors or

316 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 44.

317 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 34.

318 UNODC, Global Legal Aid Report (2018).

319 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 105.

320 *Ibid*.

321 A/71/348, para 85; SRIJL, OL KAZ 1/2018, p 3.

322 SRIJL, OL KAZ 1/2018, p 3.

323 *Ibid*.

donor organisations – bars should always ensure that external funding does not compromise its independence.[324] Bar associations should be particularly cautious of receiving government funding, as such support may be aimed at keeping the bar close and uncritical of the state machinery.[325]

Checklist

- ☐ Is there an independent and self-governing bar association regulating the legal profession?
  - Is the bar association established by law?
  - Has the law regulating the legal profession been created with meaningful and non-discriminatory participation by the legal profession?
  - Does the law include, at a minimum, provisions relating to the independence of such associations, their composition and the definition of their functions?
  - Is the executive body composed of, and appointed by, lawyers in the majority?
  - Are there guarantees in place to ensure that there is no discrimination in accessing the executive body of the legal profession?
  - Is the bar association financially sustainable?
  - Does the state intervene in lawyers' regulation? If so, are there guarantees in place to ensure that this does not impact the bar association's and lawyers' ability to work free from any interference?
- ☐ Can the bar association take individual protection measures?
  - Under domestic law, does the bar association need to be informed immediately of a lawyer's arrest?
  - Has the bar association set **up response mechanisms to ensure lawyers' protection?**
- ☐ Does the bar association actively promote human rights in legal practice?
  - Are the state and the bar association responsible for entry into the legal profession? Do they ensure continuing legal education?
  - Is the bar association systematically consulted in cases of law reform specifically addressing the administration of justice, in particular, on issues of access to justice, an enabling legal environment, and issues of discrimination and inclusion?
  - Is the bar association free to criticise the government's activities or programmes without fear of reprisal?

3. Independent legal aid system

3.1 Formal recognition of the right to legal aid

State responsibility to provide legal aid is affirmed by UN and regional instruments, jurisprudence and rulings.[326]

324 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, paras 27 and 98.

325 *Ibid*, para 27.

326 ICCPR, Art 14.3(d); CRC, Art 40.2 (b) (ii); ICMW Art 18.3 (d); ECHR, Art 6.3 (c); AmCHR, Art 8.2 (e); ArCHR, Art 16.4. See also, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9, para 13, Principle 21, para 42, Guideline 8, para 68, Guideline 18, para 100 (b) (Children), Guideline 20, para 106 (e) (persons with disabilities); Nelson Mandela Rules, Rule 61; UN Guidelines on Legal Aid, Principles 1–10; Basic Principles, Principles 2,3, 4 and 6; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17.2; UN Standards Minimum rules for the Administration of Juvenile Justice, Rule 15.1; AfCmHPR, Principles and Guidelines on Human and

All international human rights instruments and jurisprudence confirm that, in the absence of access to necessary legal representation by the poor and disadvantaged through publicly funded legal aid, there are no human rights, only privileges. Rights are illusory in the absence of the state adequately providing for the legal representation of indigent litigants in disputes involving the determination of rights.

In 2002, the UNGA passed a resolution affirming the responsibility of governments to adequately fund legal aid in order to promote and protect human rights. The resolution emphasised 'that right to access to justice as contained in applicable international human rights instruments forms an important basis for strengthening the rule of law through the administration of justice', and called on governments to 'allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice'.[327]

In 2012 the UNGA adopted Resolution 67/187 on the UN Guidelines on Legal Aid. The Resolution recognises that legal aid is 'an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law'.[328] Since then the UNHRC has reiterated more broadly that 'accessible and effective legal aid' is 'an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law'.[329]

The UN Guidelines recognise the right to legal aid, as autonomous and distinct from the right to legal counsel.[330] Even when a right to legal aid, either civil or criminal, is not specifically articulated in domestic law, the state duty to provide legal aid is a critical part of the duty to ensure equal and non-discriminatory enjoyment by all of protected rights, equality before the law, equal protection of the law and an effective remedy, by a competent tribunal, for human rights violations.

Access to legal aid is recognised as key in pursuing access to justice for all, as showcased in the UN 2030 SDGs. It is supported by a cost-benefit analysis that promotes both crime prevention[331] and the diversification of the paths to justice besides the national court system. One of the objectives is to move from litigation and the courts to timely intervention and preventive services.[332] The goal is a multi-dimensional, people-focused justice system.[333]

Echoing the UN Guidelines on Legal Aid, the 2019 IBA Guidelines on Legal Aid refer to the right to legal aid as 'an essential element in a fair, humane and efficient civil, administrative and family justice system that is based on the rule of law and focuses on access to legal aid in civil, administrative and family justice systems'. The two sets of guidelines complement each other and constitute the normative ground for the recommendations made to states presented below.

The two instruments retain the respective definitions of legal aid:

UN Guidelines on Legal Aid: the term 'legal aid' includes 'legal advice, assistance and representation for victims and for arrested, prosecuted and detained persons in the criminal justice process', as well as 'legal education, access to legal information and other services provided for persons

Peoples' Rights while Countering Terrorism in Africa, Part 3 (B) (iii); AfCmHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa ('Luanda Guidelines'), Guidelines 4 (d); AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (a)–(e). UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2020) UN Doc A/HRC/44/L.7, 20th preambular paragraph and para 13., 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 19th Preambular paragraph and para 13. See Lois Leslie, 'The Right to Legal Aid: A Guide to International Law Rights to Legal Aid' (Lawyers Rights Watch Canada 2014) available at www.lrwc.org/library/know-your-rights-index/right-to-legal-aid.

327 UNGA, 'Human Rights in the Administration of Justice' (2002) UN Doc A/RES/56/161.

328 UN Guidelines on Legal Aid, Principle 1 and Guideline 2.

329 UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2020) UN Doc A/HRC/44/L.7, 20th preambular paragraph., 'Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers' (2013) UN Doc A/HRC/23/L.9, para 7, available at http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G13/144/57/PDF/G1314457.pdf?OpenElement; A/HRC/RES/35/12, preamble.

330 UN Guidelines on Legal Aid, para 13.

331 UN Guidelines on Legal Aid, Guideline 11 (para 55 (f)).

332 IBA Guidelines on Legal Aid, Comment on Principle 1, p 22.

333 *Ibid.*

through alternative dispute resolution mechanisms and restorative justice processes'.[334]

IBA Guidelines on Legal Aid: 'legal aid' for the purpose of the document is defined as follows:

'• legal advice, assistance and representation;

- **for people or groups who cannot afford to pay privately for legal help;**
- **mainly provided by lawyers and paralegals;**
- **for specific legal problems;**
- **funded, in whole or in part, by the state; and**
- **including court fee waivers and other financial concessions'.**[335]

3.2 Comprehensive regulation setting up a legal aid system throughout the country, which is accessible to all, effective, sustainable, credible and independent

State margin of appreciation: principle and conditions

International standards recognise the liberty of each individual state to identify the legal aid model that is most appropriate in line with the specific characteristics of its justice system, and encourage them to diversify legal aid delivery schemes.[336] Legal aid schemes can thus be organised as state-run legal aid programmes, in public–private partnership with bar associations, or by non-governmental or community-based organisations, faith-based groups or academia. These may involve public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations, paralegals and others.[337]

However, these measures should never result in a miscarriage of justice,[338] or be inconsistent with the requirements set up in international and regional recommendations and jurisprudence.[339]

The SRIJL has recommended assessing national legal aid systems in light of the objective pursued to 'contribute to the elimination of obstacles and barriers that impair or restrict access to justice by providing assistance to people otherwise unable to afford legal representation and access to the court system'.[340]

A national legal aid system which is accessible to all, effective, sustainable, credible and independent

The UN Guidelines on Legal Aid provide that states should take adequate measures – including legislative, judicial, administrative, budgetary, educative and others – to ensure that a comprehensive legal aid system is in place throughout the country,[341] which is accessible to all, effective, sustainable, credible and independent.[342]

The right to legal aid has been mostly reaffirmed as applicable in the context of the criminal justice system for persons arrested or detained;[343] however, states are encouraged to extend legal aid to all criminal, family and

334 UN Guidelines on Legal Aid, para 8.

335 IBA Guidelines on Legal Aid, Section 3 'Definitions', p 12.

336 UN Guidelines on Legal Aid, paras 9 and 10, Guideline 16 (para 71).

337 *Ibid*.

338 OSCE, Legal Digest of International Fair Trial Rights, fn 672.

339 *Ibid*, fn 674.

340 SRIJL, OL SRB 1/2018, 4.

341 Basic Principles, Principle 3; UN Guidelines on Legal Aid, Principle 10 (para 33) and Guidelines 11–12; Luanda Guidelines, Guideline 8 (a); AfCmHPR Guidelines on the Right to a Fair Trial, Part G (a).

342 See in particular, UN Guidelines on Legal Aid, para 11, Principle 2 (paras 15–16). See also, A/RES/69/123, para 14; ECOSOC, 'International Cooperation for the improvement of access to legal aid in criminal justice systems, particularly in Africa' (2007) Res 2007/24. Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004).

343 ICCPR, Art 14.3 (d); CRC, Art 40.2 (b) (ii); ICMW Art 18.3 (d); ECHR, Art 6.3 (c); AmCHR, Art 8.2 (e); ArCHR, Art 16.4. See also, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9, para 13, Principle 21, para 42, Guideline 8, para 68, Guideline 18, para 100 (b) (Children), Guideline 20, para 106 (e) (persons with disabilities); Nelson Mandela Rules, Rule 61; UN Guidelines on Legal Aid, Principles 1–10; Basic Principles, Principles 2,3, 4 and 6; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17.2; UN Standards

administrative law and other civil matters in which people, including women, children, the elderly, minorities or indigenous peoples cannot afford to access courts and other bodies to seek protection of the rights to which they are legally entitled.[344]

Sustainable

The UN Guidelines on Legal Aid provide that states should make specific budget provisions for legal aid services commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.[345] The IBA Guidelines on Legal Aid highlight that the legal aid budget needs to be 'adequate to support the services the executive and legislature have agreed should be funded' and needs to be informed by evidence from the academic, professional and policy communities and the body administering legal aid.

Accessible

The UNHRC calls on states to ensure that legal aid is 'available and accessible at all stages of the legal proceedings, subject to appropriate eligibility criteria'.[346]

States should ensure that 'information on rights during the criminal justice system process and on legal aid services is made freely available and is accessible to the public'.[347] States should then take measures to ensure that police and judicial authorities do not arbitrarily restrict the right or access to legal aid, in particular in police stations.[348]

The UN Guidelines on Legal Aid provide that:

> 'states should ensure that legal aid is available to all individuals, regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status.'[349]

The SRIJL highlighted the prohibited discrimination on the grounds of 'nationality or statelessness, including asylum seekers, refugees and migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party'.[350]

States are recommended to adopt special measures, including gender-sensitive and age-appropriate measures, to ensure meaningful access to legal aid for women, children and groups with special needs.[351]

Independent

The system must also ensure independent access to legal aid. The condition of independence is considered in the next paragraph and in Part II Chapter C, Section 2.

3.3 An independent national legal aid authority

Minimum rules for the Administration of Juvenile Justice, Rule 15.1; African Commission on Human and Peoples' Rights (AfCmHPR), Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3 (B) (iii); AfCmHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa ('Luanda Guidelines'), Guidelines 4 (d); AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (a)–(e).

344 Basic Principles, Principles 2 and 3; UN Guidelines on Legal Aid, para 10; AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (a)- (b).

345 *Ibid*, Guideline 12, para 60. For further recommendations on the legal aid fund, see paras 61–62.

346 A/HRC/RES/35/12, para 13.

347 See in that respect, ICCRP, Art 14.3 (d); ICMW, Art 18.3(d); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 12), Principle 21 (para 42) (migrants); UN Guidelines on Legal Aid, Principle 8 (para 30), Guideline 2, Guideline 3 (para 43 (a)); Basic Principles, Principle 5; AfCmHPR, Resolution on Guidelines and Measures for the Prohibition, and Prevention of Torture, Cruel and Inhuman or Degrading Treatment or Punishment in Africa, para 20.d; AfCmHPR, Guidelines on the Right to a Fair Trial, Part M. 2 (b) and Part N.2(b).

348 *Ibid,* Guideline 4, para 44 (a).

349 *Ibid*, Principle 6.

350 SRIJL, A/HRC/23/43, para 43. SRIJL, OL SRB 1/2018, 7. Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa 2004, para 43.

351 UN Guidelines on Legal Aid, Principle 10 (paras 32–33) (see list of vulnerable groups). See also Principle 11 (para 35) (Children).

The independence of the legal aid system from the government is meant to prevent any bias in the provision of legal aid and, therefore, in access to justice.

The UN Guidelines on Legal Aid recommend states to establish a legal aid body or authority to provide, administer, coordinate and monitor legal aid services that should be:

> 'free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure'.[352]

This body should have the regulatory and oversight functions regarding legal aid providers. It should set criteria and accreditation of legal aid providers, including training requirements; establish the independent body to handle complaints against them in accordance with the applicable professional codes of conduct, [353] with appropriate sanctions for infractions; assess legal aid needs nationwide; and develop its own budget.[354] Working independently from the government, this authority would report periodically to a responsible authority.[355]

As to the independence of the legal aid system, the SRIJL has found that establishing law offices and legal aid services in local government units risks subjecting legal aid providers to intimidation or interference from the executive branch of power, and ultimately affects the independence of legal aid providers.[356]

In practice, the domestic bar association may be the authority in charge of administering legal aid or may be consulted as to the correct level of qualification and experience required from a legal aid provider.[357] In any case bar associations are to play an active role in the national legal aid system, as addressed in the next paragraphs.

A prolongation of the institutional independence of the legal aid system is the independence of legal aid providers (see Part II, Chapter C, Section 2.3).[358]

3.4 State's partnership with bar associations and professional associations of lawyers in the organisation and provision of legal services

International standards encourage states to establish partnerships with bar or legal associations, as well as universities, civil society and other groups and institutions, to ensure the provision of legal aid at all stages of the criminal justice process.[359] The Basic Principles require that professional organisations of lawyers shall cooperate 'in the organization and provision of legal services, facilities and other resources to the poor and, as necessary, to other disadvantaged persons'.[360]

States should thus take measures 'to encourage legal and bar associations to support the provision of legal aid by offering a range of services, including those that are free (pro bono) in line with their professional calling and ethical duty'.[361] They should also 'request bar or legal associations and other partnership institutions to establish a roster of lawyers and paralegals to support a comprehensive legal system for persons detained, arrested, suspected

352 *Ibid*, Guideline 11 (para 59(a)). See also, IBA Guidelines on Legal Aid, Principles 12 and 16–19.
353 UN Guidelines on Legal Aid, Principle 13 (para 38).
354 *Ibid*, Guideline 11 (para 59(b)) and Guideline 15.
355 *Ibid*, Guideline 11 (para 59(d)).
356 SRIJL, OL SRB 1/2018, p 6.
357 IBA Guidelines on Legal Aid, Principle 22.
358 UN Guidelines on Legal Aid, Principle 12.
359 *Ibid*, Principle 14, Guideline 11 (para 55 (d)).
360 Basic Principles, Principle 3. IBA Guidelines on Legal Aid, Principle 13.
361 UN Guidelines on Legal Aid, Guideline 11 (para 56 (a)). IBA Guidelines on Legal Aid, Principle 3. See also, IBA pro bono declaration (as of 16 October 2008), which urges governments to 'allocate sufficient resources to make legal aid available to meet the critical legal needs of the poor, underprivileged and marginalized and not to use pro bono legal service as an excuse for reducing publicly funded legal aid', para (g), available at www.internationalprobono.com/declarations. Pro bono legal service is defined in the IBA Guidelines on Legal Aid as 'work by a lawyer of a quality equal to that afforded to paying clients, without remuneration or expectation of remuneration, and principally to benefit poor, underprivileged or marginalised persons or communities or the organisations that assist them'.

or accused of, or charged with a criminal offense; in particular at police stations'.[362] Such support could also include, for example, appearing before the courts on fixed days[363] and visiting prisons to provide legal assistance at no cost to prisoners.[364]

4. Entry into the legal profession and training requirements

UN INSTRUMENTS

For a general recognition of the right to non-discrimination in education and training: ICERD, Art 5.e (v); CEDAW, Art 10; CPED, Art 23; CRPD, Art 24; ICMW, Art 43.

For requirement of persons working in the administration of justice or law enforcement officers in specific areas: CAT, Art 10; CPED, Art 23; ICRPD, 13.2.

UNHRC Resolution A/HRC/35/12, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/44/L.7 (reiterating A/HRC/RES/35/12):

'11: Calls upon States, in collaboration with relevant national entities, such as bar associations, associations of judges and prosecutors, and educational institutions to provide adequate training, including human rights training, for judges, prosecutors and lawyers, both on initial appointment and periodically throughout their careers, taking into account regional and international human rights law and, where applicable and relevant, the concluding observations and decisions of human rights mechanisms, such as treaty bodies and regional human rights courts.

12: Encourages States to take measures to combat discrimination in the administration of justice by, inter alia, providing for tailored and interdisciplinary human rights training, including anti-racist, multicultural, gender-sensitive and child rights training, to all judges, lawyers and prosecutors';

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012):

'Principle 13. Competence and accountability of legal aid providers

37. States should put in place mechanisms to ensure that all legal aid providers possess education training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs.

Guideline 13. Human resources

64. States should ensure that professionals working for the national legal aid system possess qualifications and training appropriate for the services they provide.

66. States should also encourage wide access to the legal profession, including affirmative action measures to ensure access for women, minorities and economically disadvantaged groups.'

362 UN Guidelines on Legal Aid, Guideline 4 (paras 44 (f) and 45 (e)).

363 *Ibid*, Guideline 5 (para 45 (e)).

364 *Ibid*, Guideline 6 (para 47 (b)).

UN Declaration on HRDs (1998):

Article 15. 'The State has the responsibility to promote and facilitate the teaching of human rights and fundamental freedoms at all levels of education and to ensure that all those responsible for training lawyers, law enforcement officers, the personnel of the armed forces and public officials include appropriate elements of human rights teaching in their training programme.'

Basic Principles on the Role of Lawyers (1990):

Qualifications and training

Principle 9: *'Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.'*

Principle 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.'*

Principle 11: *'In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.'*

See also: UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 8, para 71; UN Guidelines on Legal Aid, Guideline 11 (para 58 (c) and (d)) (special training on children's rights), Guideline 14 (para 68 (b)),Guideline 16 (para 71 (b)); Basic Principles, Principle 6; UN Standards Minimum rules for the Administration of Juvenile Justice, Rule 22; UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 10th , 11th and 17th Preambular paragraphs and para 5; UNGA, 'Human rights in the administration of justice' (2019) UN Doc A/Res/73/177, para 33.

Africa

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

H. Legal aid and legal assistance:

e) When legal assistance is provided by a judicial body, the lawyer appointed shall:

(i) be qualified to represent and defend the accused or a party to a civil case;

(ii) have the necessary training and experience corresponding to the nature and seriousness of the matter.

h) States should, in conjunction with the legal profession and non-governmental organizations, establish training, the qualification procedures and rules governing the activities and conduct of para-legals. States shall adopt legislation to grant appropriate recognition to para-legals.

I. Independence of lawyers:

a) States, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.'

See also : AfCmHPR, Guidelines on the Right to a Fair Trial, Part B (a-c) (judicial training), Part H (f) (i), Part H (j), Part O (c) (lawyers working with children are adequately trained), Part K (b) (lawyers trained on women's rights); AfCmHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, Guideline 8 (c) (qualified lawyers) and 8 (d) (vi) (lawyers with the requisite skills and training).

Europe

CoE Recommendation No R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer:

'Principle II – Legal education, training and entry into the legal profession

1. Legal education, entry into and continued exercise of the legal profession should not be denied in particular by reason of sex or sexual preference, race, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability.

2. All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers.

3. Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.'

'Principle V – Associations

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to:

[…]

g. *promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.'*

INTERNATIONAL PROFESSIONAL STANDARDS

IBA Standards for the Independence of the Legal Profession (1990):

'Entry into the legal professional and legal education

1. Every person having the necessary qualifications in law shall be entitled to become a lawyer and to continue in practice without discrimination.

2. Legal education shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national or social origin, property, birth, status or physical disability.

3. Legal education shall be designed to promote knowledge and understanding of the role and the skills required in practising as a lawyer, including awareness of the legal and ethical duties of a lawyer and of the human rights and fundamental freedoms recognised within the given jurisdiction and by international law.

4. Programmes of legal education shall have regard to the social responsibilities of the lawyer, including co-operation in providing legal services to the needy and the promotion and defence of legal rights of whatever nature whether economic, social, cultural, civil and political and specially rights of such nature in the process of development.'

[…]

Functions of the lawyers' associations

18. The functions of the appropriate lawyers' association in ensuring the independence of the legal profession shall be inter alia:

[…]

b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession; and to protect the intellectual and economic independence of the lawyer from his or her client;

[…]

h) to promote a high standard of legal education as a prerequisite for entry into the profession and the continuing education of lawyers and to educate the public regarding the role of a Lawyers' Association;

i) to ensure that there is free access to the profession for all persons having the requisite professional competence, without discrimination of any kind, and to give assistance to new entrants into the profession;'

'IBA International Principles on Conduct for the Legal Profession (2011):

'Principle 9. Competence

9.1 General principle

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

9.2 Explanatory note

As a member of the legal profession, a lawyer is presumed to be knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf or to procure that somebody else either in or outside the law firm will do it.

Competence is founded upon both ethical and legal principles. It involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied, and includes competent and effective client, file and practice-management strategies.

A lawyer must consider the client's suggestion to obtain other opinions in a complex matter or from a specialist, without deeming such requests to be a lack of trust.'

See also: IBA Guidelines on Legal Aid, Principle 21.

Interpretation

4.1 Non- discriminatory access to, and representativeness of, the legal profession

The Basic Principles still constitute today a breakthrough instrument in the recognition of the principle that the legal profession must not be a profession made up of the privileged few, but must, in the words of the SRIJL, 'reflect the population it serves'.[365]

Principle 10 of the Basic Principles prohibits any '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'. In line with Article 14 of the ECHR, CoE Recommendation R(2000)21 adds to the list of criteria 'sexual preference', 'membership of a national minority' and 'physical disability'. Both lists are non-exhaustive.

Exception is made to nationality. Principle 10 of the Basic Principles mentions that the requirement that a lawyer be a national of the country concerned 'shall not be considered discriminatory'. This was confirmed by the ECtHR, which recognises a margin of allowance to national authorities in laying down the conditions for admission to the bar, insofar as 'the practice of law is a service in the public interest, notwithstanding being an independent profession'.[366]

Moreover, Principle 11 of the Basic Principles puts on states positive obligations, 'where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination'. In those cases, '[g]overnments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups'.

The UN Guidelines on Legal Aid further call on states to 'remove financial barriers to legal education' in order to promote the growth of the legal profession.[367]

On the basis of the large understanding of who can be a legal aid provider retained by the UN Guidelines on Legal Aid, the SRIJL has also indicated that states cannot unduly restrain the pool of available legal aid providers or create an arbitrary or discriminatory system for inclusion in the registry of legal aid providers.[368]

365 See, in particular, UNHRC, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy' (2007) UN Doc A/62/207, paras 21 and 23.

366 ECtHR, *Bigaeva v Greece*, No 26713/05, 28 May 2009.

367 UN Guidelines on Legal Aid, Guideline 13 (para 65).

368 SRIJL, OL SRB 1/2018, p 6. UN Guidelines on Legal Aid, para 9.

The principles of non-discrimination in access to the legal profession and representativeness give a human face to the practice of law and human rights protection before courts. Representativeness of the legal profession is key to ensuring not only the public's trust in the system, but also openness to cultural and social diversity within its membership.

4.2 Independent, transparent, objective and fair admissions process

Independent admissions body

The CoE Recommendation No R(2000)21 establishes that all decisions concerning the authorisation to practise as a lawyer or to accede to this profession,[369] including admission to a professional body or to a register of lawyers or applications for a licence to practise as a lawyer,[370] should be taken by an independent body. The Explanatory Memorandum keeps the nature of the independent admission body open: it can be a professional body or a body composed of members of the judiciary, members of the general public or other members, in addition to a number of representatives of the legal profession, or another type of body.[371]

In the view of the SRIJL, the legal profession is best placed to determine admission requirements and procedures. It should thus be responsible for administering examinations and other requirements, issuing or renewing a licence to practise law, for the granting of professional certificates, and for developing appropriate procedures to ensure that, when necessary, admission decisions are reviewed by an independent court of law.[372]

Mandate holders and the Human Rights Council have thus often expressed concerns about situations where the entry into, or continued practice within, the legal profession is conditioned or controlled by the executive branch, with the legal profession having no role or a very limited role in licensing procedures.[373] In cases where candidates are formally admitted to the legal profession by a ministerial body or a qualification commission, appropriate measures should be adopted to ensure that admission to the bar is decided on the basis of recommendation by the bar association, and that the relevant authorities follow this process.[374] The ministry issuing licences must not retain the ultimate decision-making power.[375]

Fair, objective and transparent admissions process

CoE Recommendation No R(2000)21 requires that the criteria for admission are fair and objective and that the body that administers them does so in a fair and objective way.[376]

The SRIJL has thus recommended a strict and clear admissions procedure to the legal profession based on:

- fair, objective and clearly formulated criteria previously established by law or by the bar association;[377] and
- merit, having regard to the qualifications, skills and capacities of the candidates, as well as to their independence and integrity.[378]

369 CoE Recommendation No R(2000)21, Principle I(2).

370 CoE, Recommendation No R(2000)21, Explanatory Memorandum.

371 *Ibid*.

372 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 34. See also SRIJL, OL KAZ 1/2018, p 3.

373 UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 17th Preambular paragraph; UNGA, A/71/348, para 75, and UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 31. See A/HRC/4/25/Add.2, para. 42; E/CN.4/2006/52/Add.4, para 61; E/CN.4/2006/52/Add.3, para 57; E/CN.4/2003/65/Add.2, para 44. 33 See CCPR/C/79/Add.86, para 14.

374 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 111.

375 *Ibid*, para 57.

376 CoE, Recommendation No R(2000)21, Explanatory Memorandum.

377 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 109. SRIJL, OL AZE 1/2018, p 3.

378 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 109.

The SRIJL has noted that uniform competitive examinations conducted at least partly in a written and anonymous manner, in order to guarantee objectivity, can serve as an important tool in the selection process.[379] The written exam may be supplemented by an oral examination before an examining body primarily composed of lawyers appointed by the professional association.[380] The SRIJL has recommended that only candidates, with a law degree obtained following an average length of four years of study at university, as well as a mandatory internship of significant length, should be admitted to pass the bar exam.[381]

The SRIJL has repeatedly highlighted that 'the lack of clear conditions and criteria of admission to the legal profession and the absence of a compulsory uniform bar examination often result in significant disparities in competence among lawyers'.[382]

In *Hajibeyli and Aliyev v Azerbaijan*, in a case of refusal by the Presidium to admit the applicants to the Azerbaijan Bar Association, the ECtHR found that this decision 'was prompted by the views and criticisms that the applicants had publicly expressed in their professional capacity as lawyers',[383] rather than legal requirements. The ECtHR ultimately found a violation of the right to freedom of expression, as guaranteed by Article 10 of the ECHR.

While commenting on the draft law on 'The Bar and Practice of Law' to be adopted in Ukraine, the SRIJL held that limiting the relevant work experience to that which takes place in a law firm or court would in practice prevent candidates working as lecturers or professors in a law department of an academic institution, or as notaries or legal advisers in the legal department of a public organisation, an NGO or a private company, from obtaining the licence to practise law and becoming members of the bar association. This would result in an unreasonable limitation of the right of qualified candidates to have access to the legal profession.[384]

'While states are free to set quality standards and establish monitoring and evaluation mechanisms to ensure the quality of legal services providers, access to the legal profession must be open to everyone who meets the required criteria, and no discrimination regarding entry to the profession may take place on any grounds.'[385]

A sufficient number of lawyers available to provide legal services

Principle 2 of the Basic Principles providing equal access to lawyers implies that in any given country there should be a sufficient number of lawyers to provide legal services.[386] The UN Guidelines on Legal Aid recommend 'where there is a shortage of qualified lawyers' to promote the growth of the legal profession and include non-lawyers or paralegals in the provision of legal aid services.[387]

Safeguards in the case of mandatory membership to a bar association

The SRIJL has pointed at mandatory registration with a bar association as a guarantee of competence, independence and integrity of the legal profession,[388] when the following conditions are met:

- legal practitioners have equal and effective access to the bar on the basis of fair, objective and clearly formulated criteria. The SRIJL has highlighted the particular importance of strict and clear admission procedures to a bar association, in order to preserve the integrity of the legal profession and maintain credibility with the public

379 *Ibid.*

380 SRIJL, OL AZE 1/2018, p 3.

381 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession / Brief review and assessment of six years of the mandate / Major developments in international justice' (2009) UN Doc A/64/181, para 36.

382 *Ibid*, para 56.

383 ECtHR, Hajibeyli and *Aliyev v Azerbaijan*, Nos 6477/08 and 10414/08, 19 April 2018 (FINAL 19 July 2018), para 53.

384 SRIJL, UKR 1/2019, pp 3–4.

385 *Ibid*, p 4.

386 SRIJL, OL AZE 1/2018, p 4.

387 UN Guideline on Legal Aid, Guideline 13 (para 65).

388 UNGA 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 61; UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession / Brief review and assessment of six years of the mandate / Major developments in international justice' (2009) UN Doc A/64/181, para 35.

and the relevant branches of government;[389] and

- all persons within their territory and under the jurisdiction of the state concerned have effective access to legal services provided by an independent legal profession.[390]

Safeguards in the case of compulsory re-registration to practise law

In certain countries lawyers are required to reapply to the Ministry of Justice for re-registration or re-licensing after a certain period of time, which may vary from one to several years. This procedure significantly restricts the independent functioning of lawyers, a concern which the HRCttee has addressed in its concluding observations, as well as the SRIJL in several communications to Member States.[391]

The SRIJL has highlighted that no withdrawal of licences should take place without the prior consent of the relevant lawyers' association, and any formal decision should be subject to judicial review.[392]

4.3 Initial and continuing education requirements in law, ethics and human rights

States' partnership with bar associations

The Basic Principles, the SRIJL and the IBA Standards highlight the role of bar associations in providing legal education and training to lawyers throughout their career.[393] They encourage governments, professional associations of lawyers and educational institutions to work together,[394] what is often the case in practice.[395]

Adequate appropriate training

A number of international standards require that legal and judicial professionals be suitably qualified and experienced to act as court officers in charge of respecting, protecting and promoting the interests of both their clients and the justice system as a whole.[396] Special emphasis is explicitly placed on human rights and ethics in a number of them.[397] In light of the new nature of threats to human rights, lawyers' training should also encompass the study of relevant topics such as data protection, new technologies, artificial intelligence and any other topic that could affect rights and obligations or the legal profession in general.

389 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate / Major developments in international justice' (2009) UN Doc A/64/181, para 35.

390 SRIJL, OL AZE 1/2018, p 4.

391 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 38 and fns 37 and 38.

392 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 112.

393 Basic Principles, Principles 9 and 24; IBA Standards, para 18 (h); UNHRC, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul – Continuing education on human rights as a guarantee for the independence of judges and lawyers / Major developments in international justice' (2010) UN Doc A/HRC/14/26. UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 124.

394 Basic Principles, Principle 9.

395 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 82.

396 See for instance, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 8 (para 71); UN Guidelines on Legal Aid, Principle 13 (para 37), Guideline 13 (para 64), Guideline 14 (para 68(b)), Guideline 16 (para 71 (b)); Basic Principles, Principles 6 and 9; UN Standards Minimum rules for the Administration of Juvenile Justice, Rule 22; AfCmHPR, Guidelines on the Right to a Fair Trial, Part H(e)(i) and (ii), (f)(i), Part H (h) and (j), Part O (c) (Children), Part K (b) (women); AfCmHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, Guideline 8 (c) and 8 (d) (vi); CoE Recommendation R(2000)21, Principle II.2 and Principle V.4 (g); IBA Standards, paras 1-4 and 18 (h); IBA Principles, Principle 9; and IBA Guidelines on Legal Aid, Principle 21.

397 See for instance, CAT, Art 10; CPED, Art 23; ICRPD, 13.2; UN Guidelines on Legal Aid, Principle 13 (para 37), Guideline 11 (para 58 (d)); UN Declaration on HRDs, Art 15; Basic Principles, Principle 9; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (a); CoE Recommendation R(2000)21, Principle II.3; IBA Standards, para 3; IBA Principles, Principle 9. See also, UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, paras 11 and 12.

Both the HRCttee and the SRIJL have raised concerns about the fact that adequate representation cannot be provided by individuals who have not received the same level of education and training as professional lawyers and who do not have the depth of knowledge obtained through the regular practice of law. [398]

The SRIJL has repeatedly underscored the importance of legal education as a tool to strengthen the independence of the legal profession.[399] The SRIJL has thus recommended that education includes, in addition to technical competence:

- education on ethical standards inherent in the legal profession, as codes of professional standards would fail to serve their purpose if lawyers were not aware of them; and
- the study of international human rights law and fundamental freedoms,[400] including the Basic Principles,[401] so that lawyers can fulfill their 'duty and responsibility to uphold human rights and fundamental freedoms recognized by national and international law'[402] and citizens receive the independent, competent and effective assistance they are entitled to in criminal and civil cases, in accordance with the right to fair trial.[403]

4.4 Right to appeal examination results

CoE Recommendation No R(2000)21 states that decisions concerning the authorisation to practise as lawyers should be subject to review by an independent and impartial judicial authority.[404] The Explanatory Memorandum provides that decisions concerning the authorisation to practise as a lawyer or to accede to this profession, whether or not they are taken by an independent body, should be subject to review by an independent and impartial judicial authority. However, 'if the initial decision is taken by a court, there is no need to provide for another judicial control (principle of the "incorporated control")'.[405]

4.5 Incompatibilities

Reacting on the system of incompatibilities with the exercise of the legal profession drafted in Ukraine, the SRIJL warned against the adverse effects a rigid application of the law may have. The SRIJL highlighted that incompatibilities risk affecting access to legal services in a country and increase the cost of legal assistance, since several lawyers who do not exercise the legal profession on a full-time basis may be forced to renounce to their membership of the bar in favour of more stable employment, such as a legal adviser for a private enterprise:[406]

> 'while it is of the prerogative of States to decide whether and to what extent, some professional activities are incompatible with the exercise of the legal profession, [the SRILJ] considers that the incompatibilities do not take into account that all lawyers exercise the legal profession on a full-time basis. Some lawyers only exercise the legal profession when their services are requested, while others provide legal services outside a law firm, for example in a non-governmental organization or a private company'.[407]

398 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession / Brief review and assessment of six years of the mandate / Major developments in international justice' (2009) UN Doc A/64/181, para 28 and fn 29.

399 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 123.

400 UN SR Report A/71/348, para 91.

401 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession / Brief review and assessment of six years of the mandate / Major developments in international justice' (2009) UN Doc A/64/181, paras 29–30.

402 Basic Principles, Principe 14.

403 Basic Principles, Principle 9; CoE Recommendation No R(2000)21, Principle II; CoE, Recommendation No R(2000)21, Explanatory Memorandum.

404 See also, E/CN.4/2006/52/Add.4, para 93.

405 CoE, Recommendation No R(2000)21, Explanatory Memorandum.

406 SRIJL, OL UKR 1/2019, p 5.

407 *Ibid.*

Checklist

Independent, objective and clear admission process and training requirements:

- ☐ Is the principle of non-discrimination recognised in terms of access to the legal profession?
- ☐ Has the state adopted positive measures to ensure that vulnerable and marginalised groups may access the legal profession?
- ☐ Are there initial and continuing education requirements in place for the legal profession in order to practise law? Are ethics and human rights included?
- ☐ Is the admissions process set up and controlled by an independent body?
- ☐ Is the legal profession consulted and involved in the definition and organisation of the admissions process?
- ☐ Is the admissions process transparent, objective and fair?
- ☐ Is there a right to a judicial appeal against an admission decision?

5. Lawyers' code of ethics

UN INSTRUMENTS

Basic Principles on the Role of Lawyers (1990):

'Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. 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.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

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.

[…]

Professional associations of lawyers

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.

[…]

Disciplinary proceedings

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.'

Africa

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'I. Independence of lawyers

a) States, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

[…]

h) Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

i) 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.

j) Lawyers shall always loyally respect the interests of their clients.

[…]

m) 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.'

EUROPE

Recommendation No R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer:

'Principle III – Role and duty of lawyers

[…]

3. The duties of lawyers towards their clients should include:

a. advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;

b. endeavouring first and foremost to resolve a case amicably;

c. taking legal action to protect, respect and enforce the rights and interests of their clients;

d. avoiding conflicts of interest;

e. not taking up more work than they can reasonably manage.

4. Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.'

Principle V – Associations

1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.

[…]

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to:

[…]

g. promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.'

INTERNATIONAL PROFESSIONAL STANDARDS

IBA Standards for the Independence of the Legal Profession (1990):

'Rights and duties of lawyers

6. Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public.

Functions of the Lawyers' Associations

18. The functions of the appropriate lawyers' association in ensuring the independence of the legal profession shall be inter alia:

a) to promote and uphold the cause of justice, without fear or favour;

b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession; and to protect the intellectual and economic independence of the lawyer from his or her client;

[…]

Disciplinary proceedings

21. Lawyers' associations shall adopt and enforce a code of professional conduct of lawyers.

IBA International Principles on Conduct for the Legal Profession (2011):

1. 'Independence

A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.

2. Honesty, integrity and fairness

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

3. Conflicts of interest

A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

4. Confidentiality/professional secrecy

A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

5. Clients' interest

A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

6. Lawyers' undertaking

A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.

7. Clients' freedom

A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

8. Property of clients and third parties

A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.

9. Competence

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

10. Fees

Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.'

Interpretation

As per the Basic Principles and the UN Guidelines on Legal Aid, lawyers and legal aid providers, respectively, are protected insofar as they act freely and diligently 'in accordance with recognized professional duties, standards and ethics'.[408] The standards of conduct embody the ethics of the profession. Integrity is a lawyer's most precious asset to maintain their privileged position of power, influence and responsibility. The legal profession as a whole should ensure that professional practice is performed in the public interest. Acting honourably and with good character is also necessary to retain the public's trust. If lawyers behave poorly, there is a real likelihood that they will bring the legal profession and the administration of justice into disrepute.

5.1 Ethics' function

Professional standards serve disciplinary and/or educational functions. On the one hand, they aim at elevating the legal profession to a unified moral compass. On the other, they can be used to hold lawyers[409] and legal aid providers[410] to public account. The rationale is that a society, which has delegated responsibility to the legal profession, can also relieve lawyers of this responsibility if they do not live up to their public pronouncements.[411]

In practice, not all provisions in a professional code of ethics may serve a disciplinary function. The SRIJL has

408 Basic Principles, Principle 16; UN Guidelines on Legal Aid, Principle 12.

409 Basic Principles, Principles 26 and 29; IBA Standards, para 21.

410 UN Guidelines on Legal Aid, Guideline 15, para 69 (b).

411 Nancy J Moore, 'Lawyers Ethics Code Drafting in the Twenty-First Century' (2002) 30 Hofstra Law Review, 923, 924.

outlined that if the core function of lawyers' ethics is to ensure the interests of the clients and justice, a lawyer cannot face disciplinary measures for rules which, although in the code of ethics, would depart from this objective. The SRIJL has thus considered that the non-payment of the lawyer's annual contribution to the bar association cannot be construed as a disciplinary offence and give rise to a disciplinary liability of a lawyer.[412]

5.2 Legal profession's primary role in the drafting of professional standards

Principle 26 of the Basic Principles provides that 'codes of professional conduct for lawyers should be established by the legal profession or by legislation, in accordance with national law and custom and recognised international standards and norms'. Similar provisions can be found in regional standards.

In case these standards are established by law, the SRIJL has clarified that 'the legal profession should be duly consulted at all stages of the legislative process'.[413]

The CCBE Code of Conduct for European Lawyers states that 'rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilised societies. The failure of the lawyer to observe these rules may result in disciplinary sanctions.'[414]

5.3 Geographical scope of ethical standards

Lawyers are requested to follow the ethical regulations of their local bar association or some other professional organisation in their home state.

The SRIJL is of the view that the adoption of a unified code of ethics applicable to all lawyers country-wide constitutes good practice.[415] When different codes are established by separate associations, there is a risk that lawyers expelled from one association could join another, thus authorising them to continue practising despite possible breaches of ethical rules.

However, the CCBE Code of Conduct establishes that:

> 'the particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application. The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation.'[416]

Ethical standards applicable to lawyers practising in a foreign jurisdiction

Once lawyers leave their home state, they enter uncertain terrain, and the question of which ethical regulations apply – that is, those of their home state or those of the foreign state – becomes a challenge that they must try to navigate. Ethical rules and disciplinary proceedings for legal practice are inconsistent across the globe, and there is little guidance for lawyers who practise across borders on how to determine which rules apply. The IBA Principles state:

> 'differences in jurisdictional approach should be taken into account in cases of cross-border or multi-jurisdictional practice. Every lawyer is called upon to observe applicable rules of professional conduct in both home and host jurisdictions (Double Deontology) when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice. Every international law firm will have to examine

412 SRIJL, OL UKR 1/2019, p 5.

413 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, paras 53 and 113.

414 CCBE, Code of Conduct for European Lawyers, para 1.2.1.

415 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 114.

416 CCBE, Code of Conduct for European Lawyers, para 1.2.2.

whether its entire organisation is in conformity with such rules in every jurisdiction in which it is established or engaged in the provision of legal services. A universally accepted framework for determining proper conduct in the event of conflicting or incompatible rules has yet to be developed, although certain jurisdictions have adopted conflict of law principles to determine which rules of professional conduct apply in cross-border practice.'[417]

International code of ethics for lawyers appearing before international courts and tribunals

Legal representatives coming from diverse national jurisdictions to international courts are subject to different national ethical rules and customs, which may come into conflict. As a result, establishing systems to discipline lawyers appearing before international courts is complicated, and the systems currently in effect are seldom used.[418]

5.4 Ethics in lawyers' use of social medias

The 2014 IBA International Principles on Social Media Conduct for the Legal Profession ('IBA Principles on Social Medias') aim to assist bar associations and legal regulatory bodies around the world to promote social media conduct within the legal profession that conforms to relevant rules of professional responsibility as well as considerations of civility.

Social medias are defined as 'web-based and mobile technologies that turn text communication into active dialogue'.

It is acknowledged that social media can, on the one hand:

- be used to promote the administration of justice by engaging the public in legal practice and debate;
- allow access to a vast audience and resources, such as real-time legal updates, and the ability to discuss posted information with legal practitioners internationally;

while on the other:

- be misused, giving rise to conduct capable of eliciting disciplinary concerns or leading to exposure to discrimination, harassment and invasion of privacy claims, as well as exposure to claims for defamation, libel and other torts.

The IBA Principles on Social Medias adapt the requirements of independence, integrity, confidentiality and maintaining public confidence to online activities (see below Section 6.5.). It highlights lawyers' and law firms' respective responsibilities.

As general guidance, the principles recommend lawyers:

- not to do or say something online that they would not do or say in front of a crowd;
- to consider whether the sum total of their social media activity portrays a legal professional with whom clients can entrust their affairs; and
- to maintain responsible use of social media based on a full understanding of the implications (noting that information published on social media is not easily removable) and, at the same time, monitor and regularly review their use of and content on social media. If any mistakes arise, these should be immediately rectified. Legal professionals should be reminded that information on social media sites could be produced by either side in litigation.[419]

417 IBA Principles, pp 14–15.

418 In 2010, the International Law Association (ILA) Study Group on the Practice and Procedure of International Tribunals issued the 'Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals'. These principles are not intended as a comprehensive code. However, they represent a first step towards minimum and common ethical standards and principles for counsel and other representative of parties before international courts and tribunals.

419 IBA, International Principles on Social Media Conduct for the Legal Profession (2014), para 3.

The principles further recommend bar associations and regulatory bodies to:

- encourage law firms to consider how to develop clear and coherent policies and guidelines on social media use, with clear parameters on how employees are allowed to use social media on the firm's behalf or otherwise in a work-related capacity; and
- develop appropriate rules or commentary to inform and complement existing rules and help the legal profession comply with laws and regulations pertaining to them.

5.5 Main international professional standards of conduct (selection)

Variation in the codes and standards adopted by different jurisdictions constitutes a real issue considering cross-border practices are on the increase. The IBA, the CCBE and the CoE have produced compilations of standards with a view to harmonising the legal practice and development of codes of ethics.

Lawyers have an obligation to be professional with clients,[420] other parties and counsel,[421] the court,[422] court personnel and the public. This obligation includes civility, professional integrity, personal dignity, candour, diligence, respect, courtesy and cooperation, all of which are essential to the fair administration of justice and conflict resolution.[423]

Independence

As upheld by the IBA, 'professional independence is both a duty and a privilege'.[424] As per Principle 14 of the Basic Principles, and Principle III.1 of the Recommendation R(2000)21, lawyers have the duty to act independently, so as to enjoy the trust of third parties and the courts. This independence is necessary in non-contentious matters as well as in litigation.[425]

The IBA International Principles and the CCBE Charter state that a lawyer should 'act for the client in a professional capacity free from direction, control or interference',[426] 'such as may arise from his or her personal interests or

420 In relation to clients, lawyers are first of all required to advise their clients on 'their rights and obligations, as well as the likely outcomes and consequences of the case, including financial costs' (CoE Recommendation No R(2000)21, Principle III.3.a). In particular, it should be noted that part of the financial costs involved in a case may arise from lawyers' fees. Therefore, lawyers should inform their clients of the costs involved throughout the proceedings. The CCBE Charter lists a number of issues subject to professional standards, such as conflict of interest, *pactum de quota litis*, regulation of fees, payment on account, fee-sharing with non-lawyers, cost of litigation and availability of legal aid, client funds/property and professional indemnity insurance.

421 The CCBE Charter also includes among its professional standards governing relations among lawyers those referring to: the corporate spirit of the profession, to act fairly and courteously with each other, co-operation among lawyers in different Member States, correspondence between lawyers, referral fees, communication with opposing parties, responsibility for fees, and disputes among lawyers in different states.

422 The CoE Recommendation No R(2000)21 states 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 professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services' (Principle III, 4). Accordingly, lawyers should be mindful that while their duties are often carried out in an adversarial forum, lawyers should not treat the court, other lawyers or the public in a hostile manner. The Explanatory Memorandum of the Recommendation states that this 'should not prevent lawyers from raising objections, such as questions relating to the jurisdictional competence of a certain judge to decide on the particular case or to the judge's conduct of a hearing' (para 48). Furthermore, 'with a view to ensuring a proper performance of the hearing, judges should make use of any sanctions provided for in the national law (e.g. expulsion of lawyers from court rooms, fines on lawyers)' (para 49). A lawyer's duties in relation to the Court and the administration of justice are further developed under Part II, Chapter C, Section 5 on immunities and Chapter D, Section 2 on freedom of expression.

423 IBA Principles, p 16.

424 IBA, 'The Independence of the Legal Profession. Threats to the bastion of a free and democratic society' (2016), p 5. On the requirement of independence of the legal profession, see n 106.

425 CCBE Charter.

426 IBA Principles; CCBE Code of Conduct for European Lawyers, para 2.1.1.

external pressure', 'the state and other powerful interests', and 'must not allow his or her independence to be compromised by improper pressure from business associates'.[427]

Clients are entitled to expect independent, unbiased and candid advice, irrespective of whether or not the advice is to their liking.[428] Lawyers must be careful not to compromise their professional standards in order to please a client, the court or third parties.[429]

The IBA Principles on Social Medias highlight that:

> 'Social media creates a context in which lawyers may form visible links to clients, judges and other lawyers. Before entering into an online "relationship", lawyers should reflect upon the professional implications of being linked publicly. Comments and content posted online ought to project the same professional independence and the appearance of independence that is required in practice.'

Dignity and honour of the legal profession

Principle 12 of the Basic Principles states that lawyers 'shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice'. Justice should be seen as respectable at all times.

The Commentary of the CCBE Charter states that:

> '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'.[430]

The IBA Principles on Social Medias call upon lawyers to 'exercise restraint so that online conduct adheres to the same standard as it would offline in order to maintain a reputation demonstrating characteristics essential to a trusted lawyer, such as independence and integrity. Statements should be true and not misleading.'[431]

Fairness

Under the lawyer's duty of fairness, the Explanatory Memorandum of the CoE Recommendation No R(2000)21 includes the 'duty not to receive or defraud them, whether for the benefit of the lawyer or the client, as well as the duty to act fairly towards the victims of criminal behaviour for which their clients stand accused'.[432]

Diligence

CoE Recommendation No R(2000)21, Principle II.3 provides that 'lawyers should always act diligently and fearlessly within the law, in accordance with the wishes of clients and subject to the established professional and ethical standards'.[433]

427 CCBE Code of Conduct for European Lawyers, para 2.1.1.
428 IBA Principles, p 12.
429 CCBE Code of Conduct for European Lawyers, para 2.1.1.
430 *Ibid,* Commentary on Principle (d)– the dignity and honour of the legal profession and the integrity and good repute of the individual lawyer, p 8.
431 IBA International Principles on Social Media Conduct for the Legal Profession (2014), para 5.
432 CoE, Recommendation No R(2000)21, Explanatory Memorandum, para 41.
433 *Ibid*, para 44.

Furthermore, Principle III.3 states that: 'The duties of lawyers towards their clients should include: […] e. not taking up more work than they can reasonably manage.' As clarified in the Explanatory Memorandum, the evaluation of what lawyers can or cannot reasonably manage is left to their discretion and will depend on the specific circumstances of the case (eg, types of cases, size of courts, number and experience of lawyers in law firms). Moreover, clients are free to decide whether or not to seek the services of another lawyer.[434]

Personal integrity

The IBA Principles mention that a lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards their clients, the court, colleagues and all those with whom they come into professional contact (Principle 2.1.). 'A lawyer shall not knowingly make a false statement of fact or law in the course of representing a client or fail to correct a false statement of material fact or law previously made by the lawyer.'[435]

The CCBE Code mentions that lawyers' personal honour, honesty and integrity should be beyond doubt. 'For the lawyers, these traditional virtues are professional obligations.'[436]

The IBA Principles on Social Medias call on bar associations and regulatory bodies to encourage their members:

> 'to think about the impact social media could have on a lawyer's professional reputation. In addition, online activity is hard to control. For example, where something is posted that is damaging to a practitioner's reputation goes "viral" over the internet, it may be difficult to subsequently repair the harm to the practitioner's professional standing and reputation. Comments or content that are unprofessional or unethical could damage public confidence, even if they were originally made in a "private" context.'

Competence and continuing professional development

Principle 9 of the IBA Principles states that 'a lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.' This requirement goes along the training and skills lawyers are to receive to exercise their profession.[437]

The CCBE Code states that lawyers 'should maintain and develop their professional knowledge and skills taking proper account of the European dimension of their profession'.[438]

> 'As a member of the legal profession, a lawyer is presumed to be knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf or to procure that somebody else either in or outside the law firm will do it. Competence is founded upon both ethical and legal principles. It involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied, and includes competent and effective client, file and practice-management strategies.'[439]

Confidentiality/professional secrecy

Confidentiality in the lawyer–client relationship is one of the rights of defence guaranteed by international and regional instruments (see Part II, Chapter C, Section 8).

434 *Ibid*, para 47.
435 IBA Principles, para 2.2.
436 CCBE Charter, para 2.2.
437 See n 396 and 397.
438 *Ibid*, para 5.8.
439 *Ibid,* para 9.2.

The CCBE Code mentions that the lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state. Accordingly, 'a lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.'[440] The right and duty of a lawyer to keep confidential the information received from and advice given to clients is an indispensable feature of the rule of law and another element essential to public trust and confidence in the administration of justice and the independence of the legal profession.[441]

The lawyer's obligation of confidentiality and professional secrecy:

- applies to all information that becomes known to the lawyer in the course of his or her professional activity;[442]
- is not limited in time;[443] and
- requires his/her associates and staff, as well as anyone engaged by him/her and who work in the same law firm in whatever capacity, including interns, assistants and all employees in the course of providing professional services, to observe the same obligation of confidentiality.[444] This means that extraordinary measures must be adopted within the organisation if a lawyer is involved in a case that should be considered as strictly confidential even beyond the general standards of the professional secrecy principle.

The IBA Principles on Social Medias provide that:[445]

> 'It is important that lawyers can be trusted with private and confidential information, and that the public perceive this. Bar associations and regulatory bodies should remind lawyers that social media platforms are not appropriate for dealing with client data or other confidential information unless they are fully satisfied that they can protect such data in accordance with their professional, ethical and legal obligations.
>
> 'In addition, bar associations and regulatory bodies should encourage lawyers to consider client confidentiality more generally when using social media. For example, information that locates a lawyer geographically and temporally could be used to show professional involvement with a client who does not wish to publicise that he or she is seeking legal advice. Even the use of hypothetical questions or anonymous fact patterns may inadvertently reveal confidential information. More specifically, they should call attention to the relevant rules of professional conduct in their jurisdiction.'

The IBA has further developed guidelines on cybersecurity[446] to support lawyers' duty to ensure that confidentiality and professional secrecy are maintained in respect of electronic communications and data stored on computers. Standards are evolving in this sphere as technology itself evolves, and lawyers are under a duty to keep themselves informed of the required professional standards so as to maintain their professional obligations.

Derogations to the obligation of confidentiality are considered under the right to confidentiality in Part II, Chapter C, Section 8.

Amicable settlement

CoE Recommendation No R(2000)21 requires lawyers, as part of their duties, to endeavour to resolve the case

440 IBA International Principles), Principle 4 (pp 21–23); CoE Recommendation No R(2000)21, Principle III.2.
441 IBA International Principles; CCBE Charter.
442 CCBE Chapter, para 2.3.2.
443 CCBE Charter, para 2.2.3; IBA Principles, Principle 4, pp 21–23.
444 CCBE Charter, para 2.3.4; IBA Principles.
445 IBA International Principles on Social Medias, para 4.
446 IBA, Cyber Security Guidelines (2018).

amicably (Principle III.3.b) where it is practical to do so, and to avoid conflicts of interest.[447]

5.6 Ethics and human rights

Whether or not a code of ethics mentions the overarching mission of lawyers to uphold human rights, lawyers' competence falls under the ethics of the profession. Lawyers are to be competent to handle the cases and clients they represent, and human rights are part of the legal knowledge they are expected to have. In support of this, the HRCttee and the SRIJL have been clear on the recommendations to train lawyers in human rights as well as ethical standards.[448]

Furthermore, lawyers' responsibility in applying human rights law to their legal practice has been specifically emphasised in the UN Guiding Principles on Business and Human Rights,[449] for example, accessing judicial remedies and the responsibility of lawyers as businesses to respect human rights wherever they are engaged. On that issue, see above Part I, Chapter C, Section 1.2.

Checklist

- ☐ Is the legal profession governed by professional standards?
  - Have professional standards been developed by or with the active participation of the legal profession in all stages of the process?
  - Are professional standards in line with standards developed at international and regional levels?
- ☐ Is the legal profession regularly trained on ethical standards?
- ☐ Are relevant ethical standards available to legal practitioners counselling at regional and international levels?

6.Disciplinary proceedings

UN instruments

Article 14, ICCPR:

1. 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

447 CoE, Recommendation No R(2000)21, Explanatory Memorandum, para 46.

448 See also n 397 for international standards requiring specific training on human rights and ethics.

449 UNHRC, 'Guiding Principles on Business and Human Rights' (2011) UN Doc A/HRC/17/31.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

[…]

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

Basic Principles on the Role of Lawyers (1990):

'Guarantees for the functioning of lawyers

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.

[…]

Disciplinary proceedings

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.'

Africa

AfCHPR, Articles 7 and 25 (right to a fair trial)

AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

*'**I. Independence of lawyers:***

[…]

n) 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.

o) Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or even before a judicial body, and shall be subject to an independent judicial review.

p) All disciplinary proceedings shall be determined in accordance with the code of professional conduct, other recognized standards and ethics of the legal profession and international standards.'

Americas

AmCHR, Article 8 (right to a fair trial) **Europe**

ECHR, Article 6 – right to a fair trial

Recommendation No R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer

Principle VI – Disciplinary proceedings:

'1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3. Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4. The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.'

International professional standards

IBA Standards for the Independence of the Legal Profession (1990):

'Disciplinary proceedings

21. Lawyers' associations shall adopt and enforce a code of professional conduct of lawyers.

22. There shall be established rules for the commencement and conduct of disciplinary proceedings that incorporate the rules of natural justice.

23. The appropriate lawyers' association will be responsible for or be entitled to participate in the conduct of disciplinary proceedings.

24. Disciplinary proceedings shall be conducted in the first instance before a disciplinary committee of the appropriate lawyers' association. The lawyer shall have the right to appeal from the disciplinary committee to an appropriate and independent appellate body.'

IBA Guide for Establishing and Maintaining Complaints (2007) and Discipline Procedures:

'1. An enforceable local code of conduct, based on IBA principles should be devised ("Code of Conduct"). This is a fundamental statement of the principles against which a lawyer's conduct will be considered in the context of a complaint. Before the conduct complained of can lead to disciplinary consequences, it must amount to a breach of the adopted rules as set out in the Code of Conduct.

2. Legal services consumers should be made aware of the existence of the Code of Conduct, the process for making complaints against lawyers and the disciplinary procedures that may follow a substantiated complaint.

3. Information about the procedures by which complaints are handled should be publicly available and easily accessible. The information must clearly identify where, how and to whom complaints are to be directed ("Complaint Handling Body"). The information must also specify the period of time after the conduct within which complaints must be made.

4. Any person or entity is entitled to raise a complaint at no cost.

5. The Complaint Handling Body is to provide a complainant with acknowledgement of receipt of the complaint as well as an outline of the process by which the complaint is to be handled.

6. If the Complaint Handling Body accepts a complaint orally it must cause the substance of the complaint to be reduced to a written document.

7. The lawyer who is the subject of the complaint is to receive a copy of the written complaint document as soon as practicable.

8. The lawyer must be given a reasonable opportunity and time to respond to the complaint. The lawyer should be made aware of the lawyer's positive obligation to respond and that a failure to respond in a timely and appropriate manner can give rise to disciplinary consequences.

9. The Complaint Handling Body should be fair, impartial and independent. The Complaint Handling Body is to investigate the complaint in a timely manner and report to the complainant, the lawyer, and to the appropriate body.

10. If the Complaint Handling Body determines the complaint to be of a less serious nature, it may liaise between the lawyer and complainant with a view to resolving or mediating the complaint. If the Complaint Handling Body considers the complaint to be appropriately dealt with or mediated, it need not escalate the complaint to a hearing before the Disciplinary Tribunal, as described below.

11. The Complaint Handling Body may also dismiss a complaint if the complaint is misconceived (for example, it does not relate to conduct which breaches the Code of Conduct) or if insufficient information is provided about the conduct complained of.

12. The Complaint Handling Body must notify both the complainant and the lawyer of its decision to either dismiss the complaint or to refer the matter to the Disciplinary Tribunal. The complainant can appeal against the Complaint Handling Body's dismissal to the Disciplinary Tribunal.

13. If the Complaint Handling Body does not dismiss the complaint, it must refer the matter to the Disciplinary Tribunal.

14. At any time, a lawyer may admit to the misconduct and if compatible with the legal system of the jurisdiction, agree to the appropriate sanction which must be approved by the Disciplinary Tribunal.

15. A Disciplinary Tribunal and an Appeal Tribunal are to be established for the hearing of complaints about lawyers referred by the Complaint Handling Body. The Disciplinary Tribunal and the Appeal Tribunal are to be fair, impartial and independent. Typically, such Tribunals should comprise three persons, and may, but need not necessarily, contain a non-lawyer.

16. The Disciplinary Tribunal will be provided with the file relevant to the complaint. However in deciding the matter, the Disciplinary Tribunal may consider other materials it considers relevant.

17. The Disciplinary Tribunal must issue its reasoned decisions to the complainant and to the lawyer.

18. The Disciplinary Tribunal and the Appeal Tribunal shall observe due process of law. The procedures adopted by each Tribunal should give appropriate recognition to client confidentiality. The lawyer and the complainant (or a body legally obliged to act in the public's interest) each have a right to appeal against the decisions of the Disciplinary Tribunal, to the Appeal Tribunal.

19. 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.*

20. Any decision of the Disciplinary Tribunal or Appeal Tribunal that imposes a penalty against a lawyer should be made available to the public, subject to ensuring protection of client confidentiality.'

Interpretation

International and regional norms and standards establish three key requirements for disciplinary proceedings against lawyers and those exercising lawyers' functions:

1. an enforceable local code of conduct, which has been adopted by or with the legal profession, in line with international professional standards. A code of conduct consists of a fundamental statement of the principles against which the conduct of a lawyer or the person exercising lawyers' functions will be considered in the context of a complaint;
2. the disciplinary body must be independent; and
3. the lawyer's due process rights, including the right to a judicial appeal, should be recognised by law in line with regional and international human rights law.

The detailed IBA Guide for Establishing and Maintaining Complaints and Discipline Procedures for Lawyers has informed the current system of international criminal tribunals.

6.1 A breach of the code of conduct as ground for professional liability: conditions

As per Principle 29 of the Basic Principles, 'all disciplinary proceedings shall be determined in accordance with the code of conduct and other recognized standards and ethics of the legal profession and in the light of these principles.'

As aforementioned, not all provisions in a professional code of ethics serve a disciplinary function. The SRIJL has therefore outlined that if the core function of lawyers' ethics is to ensure the interests of clients and justice, a lawyer cannot face disciplinary measures for breaching any provision of the code.

The SRIJL has challenged procedures of disbarment initiated on the basis of misconduct and breach of the code of ethics, such as advising a client to conceal the truth and make false statements,[450] or to access an illegal area.[451] In

450 SRIJL, KOR/1/2015.

451 SRIJL, AL PHL 1/2015, 8 January 2015.

such cases, a disbarment procedure is often intrinsically linked or directly based on either administrative sanctions[452] or criminal proceedings initiated on grounds such as extortion[453] or propaganda to overthrow the government[454] or more fallacious grounds such as tarnishing the image of the country.[455] Concern is regularly expressed by the SRIJL that these lawyers are not guilty of any breaches of professional codes of conduct, but that they have been targeted for their political activities and advocacy work, their public denunciation of human rights violations by the government, their participation in a peaceful protest and/or for their activities as human rights lawyers and defenders,[456] or their involvement in the legal representation of clients in sensitive cases.[457] Concern is further expressed that the criminal conviction and ensuing disbarment of lawyers in these circumstances may be motivated by the purpose of silencing and punishing criticism of public policies, rather than maintaining public order.[458]

In its communications on abusive disciplinary proceedings, the SRIJL has reminded state about their obligations to:

- protect lawyers from any interference;[459]
- take adequate protection measures, where the security of lawyers is threatened as a result of discharging their functions;[460]
- refrain from identifying lawyers with their clients or their clients' causes as a result of discharging their functions;[461]
- protect anyone engaged in the protection of human rights;[462]
- respect the duty of lawyers to uphold human rights;[463] and
- respect and promote the right for anyone to provide 'professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms'.[464]

6.2 Independent disciplinary body

States should guarantee that disciplinary proceedings against lawyers are brought before an impartial disciplinary committee and may be initiated only by the appropriate lawyers' association.

In an egregious violation of the principle of the independence of the legal profession, it is not unusual for either the Ministry of Justice or a state-controlled qualification commission to be responsible for conducting disciplinary proceedings against lawyers.[465]

Impartial body

The Basic Principles and AfCmHPR Guidelines on the Right to a Fair Trial provide that disciplinary proceedings

452 HRCttee, *Gryb*.
453 SRIJL, KAZ/1/2013, 15 January 2013; KAZ/2/2013, 22 March 2015.
454 SRIJL, IRN/24/2010, 8 November 2012.
455 SRIJL, UA G/SO 214 (67-17) Assembly & Association (2010-1) G/SO 214 (107-9) G/SO 214 (3-3-16) SYR 12/2011, 18 August 2011.
456 SRIJL, KAZ/1/2013, 15 January 2013; KAZ 2/2013, 22 March 2013 (lawyer defending rights of prisoners); IRN/24/2010, 8 November 2012.
457 SRIJL, MMR/1/2012.
458 *Ibid*.
459 Basic Principles, Principle 16.
460 *Ibid*, Principle 17.
461 *Ibid*, Principle 18.
462 UN Declaration on HRDs, Art 12, paras 2–3.
463 Basic Principles, Principle 14.
464 UN Declaration on HRDs, Art 9.3©.
465 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 117.

against lawyers shall be brought 'before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court'.[466] The UN Guidelines on Legal Aid provide the same proceedings for legal aid providers.[467]

The CoE Recommendation No R(2000)21, the IBA Standards and the SRIJL outline the central role of the legal profession and provide that the appropriate lawyers' association should be responsible for or be entitled to participate in the conduct of disciplinary proceedings. The IBA Standards provide that the 'disciplinary proceedings shall be conducted *in the first instance* before a disciplinary committee of the *appropriate lawyers' association*' [emphasis author's own]. Likewise, the SRIJL provides that 'ideally, disciplinary bodies should be established by the legal profession itself'[468] and a self-regulated independent bar association should oversee the enforcement of disciplinary measures, including disbarment.[469] In addition, the SRIJL has highlighted that the presence of Government representatives in disciplinary commissions cannot guarantee that this body 'be free from anyinfluence or pressure from the legislative or executive branches of power or any other party'.[470] 'The presence of Government representatives in disciplinary commissions may have a chilling effects on lawyers, which may in turn have an adverse impact on the exercise of their professional functions'.[471]

Power to initiate the disciplinary proceedings

The SRIJL has also highlighted that the legal profession should be responsible for initiating disciplinary proceedings against a lawyer. The SRIJL has found that:

'enabling other parties to the case to bring disciplinary proceedings against the defendant's lawyer could constitute a breach of the principle of equality of arms, since it may be used by the prosecutor or the court to obtain the removal of a lawyer deemed to be "problematic" for whatever reason'.[472]

The prosecutor or the investigator, as well as the head of the pre-trial investigation body with regard to alleged disciplinary offences committed during the pre-trial investigation, can also initiate disciplinary proceedings against lawyers.

6.3 Lawyers' right to due process guarantees

As stated in Principle 27 of the Basic Principles, complaints against lawyers in their professional capacity 'shall be processed expeditiously and fairly under appropriate procedures and lawyers shall have the right to a fair hearing'. Lawyers submitted to disciplinary proceedings should be entitled to all procedural guarantees set out in Article 14 of the ICCPR, including the right to defend themselves in person or with the assistance of a legal counsel of their choice.[473]

466 Basic Principles, Principle 11; African Guidelines, Principle I(o); UN Declaration on HRDs, Arts 1–2 and 9, para 3(c). See SRIJL, JAL IRN 26/2014.

467 UN Guidelines on Legal Aid, Principle 13 (para 38) and Guideline 15 (para 69 (d)).

468 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate / Major developments in international justice' (2009) UN Doc A/64/181, para 56.

469 SRIJL, UA, MDV 5/2017, 20 September 2017, p 3.

470 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 55; SRIJL, OL KAZ 1/2018, pp 2–3. In the case of Kazakhstan, the new law provided that the disciplinary commission would be composed of six lawyers, three representatives of the Executive and two former judges.

471 SRIJL, OL KAZ 1/2018, p 3.

472 SRIJL, OL UKR 1/2019, p 6. In this case, with regard to alleged disciplinary offences committed during the pre-trial investigation, the prosecutor, the investigator and the head of the pre-trial investigation body could initiate disciplinary proceedings against lawyers.

473 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018)

(i) Transparency of complaints procedures against lawyers

In order to ensure transparency and strengthen public confidence in the legal profession, information on the procedures for handling complaints against lawyers should be available to the public and made easily accessible.[474]

(ii) Right to defend oneself and right to a lawyer of one's choice

Lawyers shall also have the right to defend themselves or appoint a lawyer of their choice.[475] As to access to a defence lawyer, the SRIJL has condemned a domestic legal provision allowing for the replacement of a defence lawyer in any case where the lawyer in charge of the case, duly informed in advance, is not able to appear in court within 24 hours. The SRIJL found that such legal provision 'may easily be used by the prosecution or the court as an additional tool to replace a problematic defence lawyer under conditions that can be easily fabricated'.[476]

(iii) Proportionality of sanctions with the interests protected

Sanctions should be proportionate to the misconduct. As provided in CoE Recommendation No R(2000)21, 'the principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers'.

Alarmed by the widespread use of disbarment as a measure to intimidate lawyers and prevent them from discharging their professional duties, the SRIJL has repeatedly recalled that 'disbarment should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process in front of an independent and impartial body granting all guarantees to the accused lawyer'.[477] International standards also provide that the immediate and temporary suspension of a lawyer from the bar must be reserved for exceptional cases, such as where the alleged misconduct is 'of such a nature as to seriously prejudice the interests of justice'.[478]

(iv) Right to judicial review and effective remedy

As per Principle 28 of the Basic Principles, a decision by the disciplinary body, regardless of its nature, should be reasoned and subject to an independent judicial review.[479]

In accordance with Article 2.3 (a) of the ICCPR, in a communication against Belarus, the HRCttee has held that a State Party is under the obligation to provide the lawyer with effective remedy, which should include the reissuance of the lawyer's licence, and reparation, including adequate compensation.[480] The State Party should also ensure that no similar violations occur in the future.

UN Doc A/73/365, para 119; UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 57.

474 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 118.

475 SRIJL, UA MDV 5/2017 (lawyers were not allowed to defend themselves).

476 SRIJL, OL UKR 1/2019, p 6.

477 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 115.

478 Article 39(8) of the Code of Professional Conduct for Counsel before the International Criminal Court.

479 See SRIJL, UA MDV 5/2017 (no avenue to appeal for suspended lawyers).

480 HRCttee, *Gryb*, para 15.

Checklist

- ☐ Is the disciplinary body independent from state authorities? In cases where the state intervenes in the disciplinary process, are there necessary safeguards in place to protect the independence of the disciplinary body and its processes?
- ☐ Is the disciplinary process against lawyers in accordance with applicable professional standards adopted by or with the oversight of the legal profession and international professional standards?
- ☐ Do the disciplinary proceedings comply with due process rights guaranteed in international and regional law?
- ☐ Are decisions from the disciplinary body subject to an independent judicial review?
- ☐ In cases of violation of a fair trial guarantee, are lawyers granted effective remedy

C. Guarantees for the functioning of lawyers and persons exercising lawyers' functions

International standards require that governments adopt all necessary measures to ensure that lawyers and those exercising lawyers' functions are able to perform all of their professional functions 'without intimidation, hindrance, harassment or improper interference'.[481]

In its General Comment No 32, the HRCttee highlights that the right to communicate with a counsel of one's choosing is an 'important element of the guarantee of a fair trial right and an application of the principle of equality of arms'.[482]

The right must be read together with key principles that cannot be derogated from, that is, the principle of independence of the legal profession, and the principle of non-identification of lawyers with their clients and/or their clients' causes.

In exceptional circumstances and in accordance with the conditions set up in international law the right to legal counsel may be restricted, but only when the restriction is provided by law and is necessary and proportionate to a legitimate aim pursued in a democratic society. Restrictions cannot jeopardise the person's rights to a defence, effective remedy, liberty and/or a fair trial. The threshold of protection set up in international jurisprudence is particularly high and the state's margin of appreciation is limited.

The following sections analyse the obligations put on states aimed at guaranteeing the functioning of lawyers and persons exercising lawyers' functions, in light of:

- the judicial benchmarks for a 'practical and effective right' to legal counsel (Section 1)
- the right to legal counsel (Section 2)
- the right for lawyers to practise free from intimidation, harassment, hindrance or improper interference (Section 3)
- the principle of non-identification of lawyers with their clients (Section 4)

481 See n 57.

482 HRCttee, General Comment No 32, para 32.

- lawyers' immunities (Section 5)
- the right to access one's clients (lawyer' s freedom of movement) (Section 6)
- the right to adequate time, facilities and access to all appropriate information to prepare the client's defence (Section 7)
- the right to confidentiality in the lawyer-client communication ('attorney-client privilege') (Section 8)

1. Judicial benchmarks for a 'practical and effective' right to legal assistance

The HRCttee and the ECtHR commonly use 'the practical and effective exercise of rights' as a benchmark to assess state compliance with human rights obligations:[483]

> **ECtHR:** 'The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial […] It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.' [484]

In ECtHR jurisprudence, the overall assessment of whether a hearing has been fair will ultimately depend 'on the full circumstances of the case and the proceedings as a whole, the gravity of the matter being determined by the court, as well as its consequences, and whether or not the irregularity caused actual prejudice to a party in the proceedings'.[485] The ECtHR and the AfCmHPR provide a list of respectively of 'relevant factors for the overall fairness assessment'[486] and 'essential elements of a fair hearing'.[487]

In order for the right to a fair trial to be 'practical and effective', international mechanisms give particular importance to the state respect of the right to effective legal assistance and legal representation as minimum criminal guarantees and as core elements serving the principle of equality of arms:[488]

> **ECtHR:** '[T]he Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" […], Article 6 para 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 […].'[489]
>
> 'Where there are no compelling reasons, the Court must apply very strict scrutiny to its fairness assessment. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the criminal proceedings was not irretrievably

483 *Ibid*, para 9; ECtHR, *Artico v Italy*, No 6694/74, 13 May 1980, para 33; ECtHR, *Steel and Morris*, para 59. See OSCE, Legal Digest of International Fair Trial Rights, p 109.

484 ECtHR, *Steel and Morris*, para 59. See also HRCttee, General Comment No 32, paras 32 and 34.

485 ECtHR, *Salduz*, paras 52. ECtHR, *Beuze*, para 120. OSCE, Legal Digest of International Fair Trial Rights, p 109.

486 ECtHR, *Beuze*, para 150.

487 AfCmHPR Guidelines on the Right to a Fair Trial, Part A.2.

488 HRCttee, General Comment No 32, para 32. In *Beuze*, the ECtHR clarifies a two-stage assessment of (1) the justification for a restriction on the right of access to a lawyer and (2) overall fairness of the proceedings, in order to find a violation of the right to legal counsel (Art 6.3(c) of the ECHR), see paras 137-150.

489 ECtHR, *Salduz*, para 55, confirmed in ECtHR, *Beuze*, para 137.

prejudiced by the restriction on access to a lawyer.'[490]

Accessing effective legal assistance and legal representation in turn require certain minimum guarantees enshrined in international instruments and reassessed by international mechanisms. Among these, states shall take the necessary steps to:

- inform the accused beforehand about his/her fair trial rights and the proceedings[491] against her/him, including the right to be defended by a legal counsel,[492] and the options that may be available for the appointment of legal counsel where the person cannot afford to pay for this;[493]

490 ECtHR, *Beuze*, para 165.

491 See, in particular, as to the right to receive notification of reasons for arrest: ICCPR, Art 9.2; ICRPD, Art 16.5; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 10; AfCmHPR, Luanda Guidelines, Guideline 8(d)(i); AfCmHPR, Guidelines on the Right to a Fair Trial in Africa, Part M2(a). As to the right to receive prompt notification of charges: ICCPR, Art 14.3 (a); CRC, Art 40.2(b) (ii); AmCHR, Art 7.4 and 8.2 (b); ArCHR, Art 16.1; ECHR, Art 6.3(a); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 7 and Guideline 5; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 10; AfCmHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3(B) (ii); AfCmHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part M2(a). On the right to receive notification of rights, see: ICCRP, Art 14.3(d); ICMW, Art 18.3(d); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 12), Principle 7, Principle 21 (para 42), Guideline 18 (para 100(d) (information for children), Guideline 20 (para 106(e)); UN Guidelines on Legal aid, Guideline 3, para 43(a); Basic Principles, Principles 5; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 13, 16.4, and 17; AfCmHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3(B)(i); AfCmHPR, Guidelines on the Right to a Fair Trial, Part M. 2 (b) and Part N.2 (b).

492 ICCRP, Art 14.3(d); ICMW, Art 18.3 (d); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 12), Principle 21 (para 42) (migrants); UN Guidelines on Legal Aid, Principle 8, Guideline 2, Guideline 3 (para 43(a)); Basic Principles, Principle 5; AfCmHPR, Resolution on Guidelines and Measures for the Prohibition, and Prevention of Torture, Cruel and Inhuman or Degrading Treatment or Punishment in Africa, para 20.d; AfCmHPR, Guidelines on the Right to a Fair Trial, Part M. 2 (b) and Part N.2 (b). See ECtHR, *Yoldaş v Turkey*, No 27503/04, 23 February 2010 (FINAL 23 May 2010), para 52 (in French only).

493 See in particular, UN Guidelines on Legal Aid, Principle 8 and Guideline 2; Basic Principles, Principle 5.

- ensure prompt[494] and continued[495] access to effective,[496] independent[497] and competent[498] legal assistance and legal representation during the criminal proceedings, and in particular at 'critical stages';[499]
- provide legal aid free of charge to individuals who are unable to pay[500] (see section 2.3 below);
- react adequately to any flagrant failure on the part of a lawyer to provide effective legal defence;
- ensure the lawyer's freedom to act, including his/her protection against possible unjustified sanctions[501] (see sections 3, 4 and 5 below);
- provide unhindered access to case files and adequate time and facilities for accused persons to prepare their defence at all stages of criminal proceedings, including during the pre-trial phase from the first interrogation of a suspect by the police502 (see section 7 below); and

494 CRC Art 37(d); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 12) ('right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension'), Principle 21 (para 42) ('prompt and effective provision of legal assistance' for migrants), Guideline 8 (paras 67 ('Access shall be provided without delay to legal counsel immediately after the moment of deprivation of liberty and at the latest prior to any questioning by an authority') and 68), and Guideline 18 (para 100 (h)) ('prompt and effective access to an independent and child-sensitive process' for children); Nelson Mandela Rules, Rule 61; UN Guidelines on Legal aid, Principle 7 (para 27) ('prompt' provision of legal aid); Guideline 3 (para 43 (b)) (no interview in the absence of a lawyer), (d) ('prompt' access to legal aid provider); Guideline 4 (para 44) ('prompt' access to legal aid); Basic Principles, Principle 7 ('prompt' access to a lawyer); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 15 (no delayed access to a lawyer for more than days) and 17.1; AfCmHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3(B) (iii) (from the moment of arrest or detention and prior to and during any questioning); AfCmHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, Guidelines 4(d) and 8(d)(i); AfCmHPR, Guidelines on the Right to a Fair Trial, Part M.2 (f) ('prompt access to a lawyer'); UNGA, 'Human rights in the administration of justice' (2019) UN Doc A/Res/73/177, para 9. ECtHR, Beuze, para 133.

495 See in particular, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (paras 12 and 13); UN Guidelines on Legal Aid, Principle 7 and Guideline 5 (para 45(d)); Basic Principles, Principle 1; UN Standard Minimum Rules for the Administration of Juvenile Justice, Rule 15.1; AfCmHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3(B)(iii); AfCmHPR, Luanda Guidelines, Guidelines 8(d)(i); AfCmHPR, Guidelines on the Right to a Fair Trial, Part N.2(c). HRCttee, *Chikunova v Uzbekistan*, 1043/2002, 16 March 2007, para 7.4; *Butovenko v Ukraine*, 1412/2005, 19 July 2011, para 7.8. ECtHR, *Beuze*, para 134.

496 For explicit reference to 'effective' legal assistance, see CRPD, Art 13.1 ('effective and equal access to justice'); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 12 (para 19) ('fair and effective' remedy), Principle 21 (para 42) ('prompt and effective provision of legal assistance'); UN Guidelines on Legal aid, para 6 (elements required for 'effective and sustainable' national legal aid system); Principle 7 (para 28) ('prompt and effective' provision of legal aid), Guideline 11 (para 55 (a)) ('effective legal aid'); AfCmHPR, Guidelines on the Right to a Fair Trial, Part G (a) ('effective and equal' access to lawyers), Part H (d) ('effective defense or representation'); IBA Standards, Preamble ('effective and prompt access to legal services'). HRCttee, General Comment No 32, paras 34 and 38; ECtHR, *S.W. v the United Kingdom*, No 20166/92, 22 November 1995, para 48; ECtHR, *Öcalan v Turkey [GC],* No 46221/99, 12 May 2005, para 133.

497 See n 109.

498 For reference to lawyers' appropriate training and competences, see n 389. For specific reference to training on ethics and human rights, see n 397.

499 UN Guidelines on Legal Aid, Guideline 5 (para 45(d)). 'Critical stages are all stages of a criminal proceeding at which the advice of a lawyer is necessary to ensure the right of the accused to a fair trial or at which the absence of counsel might impair the preparation or presentation of a defence'.

500 ICCPR, Art 14.3 (d); CRC, Art 40.2 (b) (ii); CMW Art 18.3 (d); ECHR, Art 6.3 (c); AmCHR, Art 8.2 (e); ArCHR, Art 16.4. See also, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 13), Principle 21 (para 42), Guideline 8 (para 68), Guideline 18 (para 100(b)) (Children), Guideline 20 (para 106 (e)) (persons with disabilities); UN Standard Minimum Rules for the Treatment of Prisoners, Rule 61; UN Guidelines on Legal Aid, Principles 1–10; Basic Principles, Principles 2, 3, 4 and 6; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17.2; UN Standards Minimum Rules for the Administration of Juvenile Justice, Rule 15.1; AfCmHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3(B)(iii); AfCmHPR, Luanda Guidelines, Guidelines 4(d); AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (a)–(e).

501 See n 59.

502 ICCPR, Art 14.3(b); CRC Art 40.2 (b) (ii); ICMW, Art 18.3 (b); CPED, Arts 20.1 and 20.2; AfCHPR, Art 7.1(c); AmCHR, Art 8.2 (b) and (c); ArCHR, Art 16.2; ECHR, Art 6.3 (b); UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 14), Principle 12 (para 20), Guideline 5 (para 56) and Guideline

- respect the confidentiality of communications between the lawyer and the client[503] (see section 8 below)

> ECtHR: '[A]n accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned […] Indeed, the fairness of the proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.'[504]

Prompt access

International standards explicitly require that access to a lawyer or legal aid should be granted without delay.[505] The Basic Principles therefore provide that 'governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention'.[506]

The right to a lawyer at the early stages of criminal proceedings is particularly important because adverse inferences may be drawn from an accused or suspected person's silence.[507] Special importance is then given to detention. At a minimum, suspects must be able to communicate with a lawyer immediately after the moment of deprivation of liberty and unequivocally before any questioning by authorities.[508] The police must be prohibited from interviewing

13; Nelson Mandela Rules, Rule 61; UN Guidelines on Legal Aid, Principles 7 and 12 and Guideline 4 (para 44 (g)); UN Declaration on Human Rights Defenders, Art 6 (a) and (b); Basic Principles, Principle 21; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 13, 16, 18.2 and 36.2; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (d), Part M.2 (e), N.1 (a) and (c); CoE Recommendation No R(2000)21, Principle I. 7; IBA Standards, para 13.

503 AmCHR, Art 8.2 (d); ArCHR, Art 16.3; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 15), Guideline 8 (para 69); Nelson Mandela Rules, Rule 61; UN Guidelines on Legal aid, Principles 7 (para 28) and 12, Guideline 3 (para 43 (d)) and Guideline 4 (para 44 (g)); Basic Principles, Principles 8 and 22; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18.3-5; AfCmHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3(B)(iii); AfCmHPR, Luanda Guidelines, Guidelines 8 (d) (ii), 14 (c) and 31 (c) (iii); AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (c); CoE Recommendation No R(2000)21, Principles I.5–6 and III.2; IBA Standards, para 12 and 13 (a); IBA Principles, Principle 4; UNHRC, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2017) UN Doc A/HRC/35/12, 21st Preambular paragraph. ECtHR, *Beuze, para* 133.

504 ECtHR, *Dayanan v Turkey*, No 7377/03, 13 October 2009, para 32. ECtHR, *Beuze*, para 136

505 See n 494. See HRCttee, 'Concluding Observations: United Kingdom' (2008) UN Doc CCPR/C/GBR/CO/6, para 19; UNHRC, 'WGAD: Report on Visit to Morocco' (2014) UN Doc A/HRC/27/48/Add.5, paras 77–78 and 83 (a); CAT, 'Concluding Observations: China' (2015) UN Doc CAT/C/CHN/CO/5, paras 12–13. AfCmHPR, *Zegveld and Ephrem v Eritrea*, para 55.

506 Basic Principles, Principle 7. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15.

507 ECtHR, *John Murray v The United Kingdom* [GC], No 18731/91, 8 February 1996, para 66. ECtHR, *Salduz*, paras 54–62. ECtHR, *Beuze*, paras 124–126.The Court has underlined the importance of the investigation stage for the preparation of criminal proceedings. During this phase, the accused often finds themselves in a particularly vulnerable position that can only be properly counter-balanced by the assistance of a lawyer, whose task it is to help ensure adherence with the right of an accused not to incriminate themselves, among other things.

508 See in particular, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 12), and Guideline 8 (para 67); UN Guidelines on Legal Aid, Guideline 3 (para 43 (b) and Guideline 10 (para 53 (b)); HRCttee, 'General Comment No 35, Art 9, Right to liberty and security of person' (2014) UN Doc CCPR/C/GC/35, paras 35 and 58; HRCttee, 'Compilation of General Comments and General Recommendations adopted by Human Rights bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol I), para 11; CRC, 'General Comment No 24 Children's rights in Child Justice System' (2019) UN Doc CRC/C/GC/24, para 52. See also, AfCmHPR, Guidelines on the Right to a Fair Trial, Part M.2 (f); AfCmHPR, Luanda Guidelines, Guidelines 4 (d), 8 (d) (i) and 31 (g). See HRCttee, 'Concluding Observations: Chad' (2014) UN Doc CCPR/C/TCD/CO/2, para 15; Finland (2013) UN Doc CCPR/C/FIN/CO/6, para 11; Kenya (2012) UN Doc CCPR/C/KEN/CO/3, para 19; ECtHR, *Selyun v Belarus* (2015) UN Doc CCPR/C/115/D/2289/2013, para 7.6; IACtHR, *Castillo Petruzzi v Peru*, Merits, Reparations, and Costs, Judgment, Series C No 52, 30 May 1999, para 146. ECtHR, *Murray*, para 63; ECtHR, *Yoldaş*, para 49. ECtHR, *Beuze*, para 124.

any individual in the absence of a lawyer or legal aid provider, unless the individual has made an informed and voluntary waiver of counsel.[509] In the 2008 case of *Salduz v Turkey*, the ECtHR reaffirmed that the right to a fair trial under Article 6 could not be considered 'practical and effective' (as opposed to theoretical or illusory) without access to a lawyer from the first interrogation.[510] The IACmHR requires states to ensure the right to communicate privately with their counsel 'from the time of their capture or arrest and necessarily before their first declaration before the competent authority'.[511]

It is now generally agreed that the limit of 48 hours to access a lawyer in case of detention will often be too long. The SR on torture recommends a limit of 24 hours.[512] The ECtHR has held that even a 24-hour delay in access to a lawyer may involve a violation of the right to a fair trial.[513]

Accordingly the SRIJL questioned states, where legal provisions recognised to the judiciary the power of restricting access to a lawyer for 24 hours for individuals accused of crimes falling within the scope of an 'Anti-Terror Law'[514] or up to a week, where the person was charged for crimes against national or foreign security, political and press crimes, as well as crimes punishable by the death sentence and life imprisonment.[515]

Effective representation by a lawyer

In accordance with the test of 'practical and effective exercise of the right to defence' mentioned previously, and as explicitly mentioned in a number of international standards,[516] the HRCttee requires that 'the accused must be effectively assisted by a lawyer at all stages of the proceedings',[517] and that he/she is informed of the lawyer's defence and has the opportunity to instruct him or her.[518] Likewise, the ECtHR and the IACmHR have emphasised that the right to legal counsel is much more than a right to the 'nomination' of legal counsel on behalf of an accused and that it must be 'practical and effective' in order to provide an adequate defence.[519] Thus, when a lawyer was unable to confer with his/her clients and receive confidential instructions from him/her without surveillance, the ECtHR recognises that 'assistance loses much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.'[520]

Competent legal assistance

509 UN Guidelines on Legal Aid, Guideline 3 (para 43(b)); AfCmHPR, Guidelines on the Right to a Fair Trial, Part M2(f). See HRCttee, *Lyashkevich v Uzbekistan*, No 1552/2007, 11 May 2010, para 9.4.

510 ECtHR, *Salduz*, paras 51. ECtHR, *Murray*, para 63; ECtHR, *Yoldaş*, para 49. For recent confirmation, ECtHR, *Beuze*, para 133.

511 OAS, 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas' (2008) Principle V. See IACtHR, *Cabrera García and Montiel Flores v Mexico*, Series C No 220, 26 November 2010, para 155. See also IACtHR, *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Series C No 114, 7 September 2004, paras 193–194. IACtHR, *Acosta Calderón v Ecuador,* Merits, Reparations and Costs, Series C No 129, 24 June 2005, para 124.

512 CHR, 'Report of the Special Rapporteur on the Question of Torture' (2002) UN Doc E/CN.4/2003/68, para 26(g), available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3360. UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/71/298, para 69.

513 ECtHR, *Averill v The United Kingdom*, No 3648/97, 6 June 2000, paras 55–62. OSCE, Countering Terrorism, Protecting Human Rights: A Manual, p 170.

514 SRIJL, 'Turkey: a number of law decrees adopted during the state of emergency, which could undermine the right of access to justice and jeopardise the right of legal practitioners to carry out their professional duties' (22 October 2018) UN Doc OL TUR 15/2018, p 4.

515 SRIJL, JAL IRN/10/2015, 30 July 2015.

516 See n 496.

517 HRCttee, *Chikunova v Uzbekistan*, No 1043/2002, 16 March 2007, para 7.4; *Butovenko v Ukraine*, No 1412/2005, 19 July 2011, para 7.8. On the requirement of continued access to a lawyer, see n 495.

518 HRCttee, *Campbell v Jamaica*, No 248/1987, 30 March 1992; *Sooklal v Trinidad and Tobago*, No 928/2000, 25 October 2001.

519 ECtHR, *Beuze*, para 131; ECtHR, *Artico*, para 33; ECtHR, *Imbrioscia v. Switzerland*, No 13972/88, 24 November 1993, para 38; and *Daud v. Portugal,* No 22600/93, 21 April 1998, para 38. ECtHR, *Aras v Turkey* (No 2), No 22600/93, 21 April 1998, para 40. IACtHR, *Cabrera García and Montiel Flores*, para 155. OSCE, Legal Digest of International Fair Trial Rights, p 142.

520 ECtHR, Öcalan, para 133.

International standards provide that states shall ensure that lawyers have the adequate training and qualifications to exercise their functions.[521]

In the case of a state-appointed lawyer, the state, and ultimately the judiciary, must ensure that the lawyer appointed is qualified to represent the accused and has the 'experience and competence commensurate with the nature of the offence'[522] and the rights and particular needs of the accused, including women, children and groups with special needs.[523] They must ensure that the lawyer is in a position to and is able to provide 'effective representation in the interests of justice'.[524] The interests of justice may require appointing professional lawyers rather than law advocates when serious and complex charges exist.[525] Additionally, the special nature of proceedings may justify appointing specialist lawyers.[526]

State's responsibility for lawyer's failure to ensure effective defence

The HRCttee has clarified that a state cannot be held responsible for the conduct of a privately retained lawyer.[527] Emphasis is therefore put on the lawyer's duty 'to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics',[528] including adequate competence.[529] However, the ECtHR holds very clearly that, while the conduct of the defence is essentially a matter between the defendant and his /her counsel, domestic courts should not remain passive vis-à-vis instances of lack of effective legal representation.[530] When circumstances require, the court should inquire into the manner in which a lawyer fulfils his/her responsibilities.[531]

In the case of state-appointed lawyers, the HRCttee and the ECtHR appear willing to impose an even higher duty of care on the part of the presiding judge. The state's responsibility can be upheld if it is 'manifest'[532] but also if

521 For a requirement of lawyers being appropriately trained and skilled, see n 396. For a specific requirement of lawyers' training on ethics and human rights, see n 390.

522 See in particular, Basic Principles, Principle 6. AfCmHPR, Guidelines on the Right to a Fair Trial, Part H.(e) (ii).

523 UN Guidelines on Legal Aid, Guideline 11, para 58(c) (children); Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before a Court, Principle 18 (para 35) and Guideline 18 (children), Principle 19 and Guideline 19 (women and girls), Principle 20 and Guideline 20 (persons with disabilities), Principle 21 and Guideline 21 (migrants, asylum seekers, refugees and stateless persons).

524 HRCttee, *Collins v Jamaica*, No 356/1989, 25 March 1993; *Borisenko v Hungary,* No 852/1999,14 October 2002; *Saidova v Tajikistan*, No 964/2001, 8 July 2004.

525 ECtHR, *Mayzit v Russia*, No 63378/00, 20 January 2005, paras 70–71. See FRA, Handbook on European Law, p 85.

526 UN Guidelines on Legal Aid, Principle 11 (para 35) (children). See ECtHR, *Meftfah and Others v France* [GC], Nos 32911/96, 35237/97 and 34595/97, 26 July 2002, para 47. FRA, Handbook on European Law, p 85.

527 HRCttee, General Comment No 32, para 38; HRCttee, *Henry v Jamaica*, 230/1987, 1 November 1991; HRCttee, *Rastorgueva v Poland*, 1517/2006, 28 March 2011.

528 HRCttee, General Comment No 32, para 34.

529 See UN Guidelines on Legal Aid, Principle 13; Basic Principles, Principle 6; AfCmHPR, Principles on the Right to Fair Trial in Africa, Part H(e) (ii) and (f) (i); AfCmHPR, Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa, Guideline 8 (d) (vi).

530 ECtHR, *Kamasinski v Austria*, No 9783/82, 19 December 1989, para 65:

> 'It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 para 3 (c) (art. 6-3-c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.'

The Court reproduces this standard in a series of later decisions. More recently, see ECtHR, *Sannino v Italy*, No 30961/03, 27 April 2006 (FINAL 13 September 2006), para 39; *Cuscani v The United Kingdom*, No 32771/96, 24 September 2002, para 39; ECtHR, *Faig Mammadov v Azerbaijan*, No 60802/09, 26 January 2017 (FINAL 26 April 2017), para 32.

531 ECtHR, *Daud*, para 42. On case law accepting that the state is responsible for the failure of the lawyer to ensure effective defence, see Krassimir Kanvev, 'International Standards on the Right to Legal Assistance and Legal Defence of Suspected and Accused Persons in Criminal Proceedings' (Bulgarian Helsinki Committee 2018), pp 39–40. OSCE, Legal Digest of International Fair Trial Rights, p 143.

532 HRCttee, General Comment No 32, para 32; HRCttee *Taylor v Jamaica*, No 707/1996, 18 July 1997, para 6.2; *Chan v Guyana*, No 913/2000, 31 October 2005, para 6.2; and *Hussain v Mauritius*, No 980/2001, 18 March 2002, para 6.3. See also ECtHR, *Artico*, para 36;

it is sufficiently brought to the attention of the judge in some other way[533] that the lawyer's behaviour or level of competence is 'incompatible with the interests of justice'.[534]

If appointed counsel is not effective, the court or other responsible authorities must ensure that either counsel performs their duties or is replaced. The responsibility of the state for blatant misbehaviour or incompetence of a state-appointed lawyer, in violation of Article 14.3 (d) of the ICCPR, was found in a case of withdrawal of an appeal without consulting with the convicted person in a death penalty case,[535] and absence during the hearing of a witness,[536] even where it was solely the fault of assigned counsel that she/he failed to attend the hearing.[537]

Independent

The Basic Principles provide that adequate protection of human rights and fundamental freedoms requires that 'all persons have effective access to legal services provided by an independent legal profession'.[538] States shall adopt all appropriate measures to ensure that private lawyers and state and non-state legal aid providers are able to carry out their work effectively, freely, autonomously and independently, and without any intimidation, harassment or improper interference.[539]

The HRCttee and the IACtHR state that the right to representation is not fulfilled when the prosecution represents the accused person, as the defence counsel and prosecution are 'naturally opposed forces'.[540]

2. Right to defence counsel

UN INSTRUMENTS

Article 14.3, ICCPR:

> 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> […]

Kamasinski, paras 33 and 65; *Daud*, para 38; and *Czekalla*, paras 60 and 62.

533 ECtHR, *Sannino*, paras 49–51; *Kamasinski*, para 65; *Daud*, para 38.

534 HRCttee, General Comment No 32, paras 32 and 38. See, eg, HRCttee, *Taylor*, para 6.2; *Chan*, para 6.2; and *Hussain*, para 6.3. Contrast HRCttee, *H C v Jamaica*, No 383/1989, 3 August 1992, para 6.3 (private counsel) with *Kelly v Jamaica*, No 253/1987, 10 April 1991, para 9.5; *Brown v Jamaica*, No 775/1997, 11 May 1999, para 6.6; and *Hendricks v Guyana*, No 838/1998, (1998), para 6.4. OSCE, Legal Digest of International Fair Trial Rights, p 143. See also ECtHR, *Artico*, para 36; ECtHR, *Kamasinski*, paras 33 and 65; ECtHR, *Daud*, para 38; and ECtHR, *Czekalla v Portugal*, No 38830/97, 10 October 2002, paras 60 and 62.

535 See, eg, HRCttee, *Kelly*, para 9.5.

536 See, eg, HRCttee, *Hendricks v Guyana*, No 838/1998, 28 October 2002, para 6.4; and *Christopher Brown v Jamaica*, No 775/1997, 11 May 1999, para 6.6.

537 HRCttee, *Borisenko*, para 7.5.

538 Basic Principles, Preamble and Principle 16. On the requirement of independent legal aid, see UN Guidelines on Legal Aid, Principle 12. On the requirement of independence of the legal profession in general, see n 109.

539 See n 57. HRCttee, General Comment No 32, para 34.

540 IACtHR, *Barreto Leiva v Venezuela*, Merits, Reparations and Costs, Series C No 206, 31 November 2009, para 63. See also HRCttee, *Y B v Russian Federation*, UN Doc CCPR C/110/D/1983/2010, 25 March 2014 (where a state-appointed lawyer supported the position of the Prosecution rather than the position of the Complainant).

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

[…]

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it […]'.

Article 17.2, CPED:

'Without prejudice to other international obligations of the State Party with regard to the deprivation of, liberty, each State Party shall, in its legislation:

[…]

(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law'.

Article 37, CRC:

'States Parties shall ensure that:

[…]

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'

Article 40.2, CRC:

'To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

[…]

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence'

See also: ICMW Art 18.3 (b) and (d).

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)

Principle 1. Right to legal aid

14. Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.

Principle 3. Legal aid for persons suspected of or charged with a criminal offence

20. States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.

21. Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty.

22. Children should have access to legal aid under the same conditions as or more lenient conditions than adults.

23. It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.

Principle 4. Legal aid for victims of crime

24. Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.

Principle 5. Legal aid for witnesses

25. Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to witnesses of crime.

Principle 7. Prompt and effective provision of legal aid

27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

28. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

See also: Principles 2 ('Responsibilities of the State'), Principle 6 ('Non discrimination'), Principle 9 ('Remedies and safeguards') and Principle 10 ('Equity in access to legal aid')

UN Declaration on Human Rights Defenders (1998)

Article 9

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

3. To the same end, 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.

Basic Principles on the Role of Lawyers (1990)

'Access to lawyers and legal services

Principle 1. All persons are entitled to call upon the assistance of lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

Principle 2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

Principle 3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor, and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

Special safeguards in criminal justice matters

Principle 5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offense.

Principle 6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

Principle 7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

Principle 8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.'

See also: UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 11.1, 17.1 and 18.1, UN Standards Minimum Rules for the Administration of Juvenile Justice, Rule 15.1; and UN Human Rights Council Resolution 31/31 on safeguards to prevent torture during police custody, 2016, A/HRC/RES/31/31, para 12 (d).

Europe

Article 6.3, ECHR:

'Everyone charged with a criminal offence has the following minimum rights

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

CoE Recommendation No R(2000)21, Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer

Principle IV – Access for all persons to lawyers

1. *All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.*

2. *Lawyers should be encouraged to provide legal services to persons in an economically weak position.*

3. *Governments of member States should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.*

4. *Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from by public fund.*

Principle V – Associations

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to:

a. promote and uphold the cause of justice, without fear;

b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;

c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;

Africa

Article 7, AfCHPR:

'1. Every individual shall have the right to have his cause heard. This comprises:

[…]

c) the right to defence, including the right to be defended by counsel of his choice'.

AfCmHPR Guidelines on the Right to a Fair Trial:

'H. LEGAL AID AND LEGAL ASSISTANCE:

(a) *The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.*

(b) The interests of justice should be determined by considering:

(i). in criminal matters:

(1) the seriousness of the offence;

(2) the severity of the sentence.

(ii). in civil cases:

(1) the complexity of the case and the ability of the party to adequately represent himself or herself;

(2) the rights that are affected;

(3) the likely impact of the outcome of the case on the wider community.

(c) The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

(d) An accused person or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer.

(e) When legal assistance is provided by a judicial body, the lawyer appointed shall:

(i). be qualified to represent and defend the accused or a party to a civil case;

(ii). have the necessary training and experience corresponding to the nature and seriousness of the matter;

(iii). be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;

(iv). advocate in favour of the accused or party to a civil case;

(v). be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.

(g) Given the fact that in many States the number of qualified lawyers is low, States should recognize the role that para-legals could play in the provision of legal assistance and establish the legal framework to enable them to provide basic legal assistance.

(i) Para-legals could provide essential legal assistance to indigent persons, especially in rural communities and would be the link with the legal profession.

See also: Part G, Part M 2 (e) and (f)

AfCmHPR Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa (2014):

'4. The following rights shall be afforded to all persons under arrest:

(d). The right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions.

[…]

8 (d). All persons detained in police custody enjoy the following rights in relation to legal assistance:

(i) Access without delay to lawyers and other legal service providers, at the latest prior to and during any questioning by an authority, and thereafter throughout the criminal justice process

[…]

(v) Access to lawyers or other legal service providers should not be unlawfully or unreasonably restricted. If access to legal services is delayed or denied, or detained persons are not adequately informed of their right to access providers of legal services in a timely manner, then States shall ensure that a range of remedies are available, in accordance with the principles set out in Part 8 of these Guidelines.'

See also: Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and the Lilongwe Plan of Action for the Implementation of the Declaration; Robben Island Guidelines, Guidelines 20 (c) and 31.

Americas

Article 8, AmCHR:

'2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[…]

c. adequate time and means for the preparation of his defence;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law'.

International professional standards

IBA Standards for the Independence of the Legal Profession (1990):

Functions of the lawyers' associations

Para 18. The functions of the appropriate lawyers' association in ensuring the independence of the legal profession shall be inter alia:

e) to promote free and equal access of the public to the system of justice, including the provision of legal aid and advice;

Interpretation

The right to defence is protected in international and national law through the right to self-defence, the right to a lawyer of one's choosing and the right to free legal aid when the person has insufficient means and/or when the interest of justice so requires. [541]

The rights to self-defence and representation by counsel are not mutually exclusive.[542] However, the right to self-representation is not absolute and in some situations, in the interests of justice, a lawyer may be assigned against the wishes of the accused. This is also the case regarding the right to a lawyer of one's own choosing. The rationale behind such limitations, as highlighted by the HRCttee, is that 'the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way'.[543]

Special importance is given by international human rights mechanisms to detention, where access to legal counsel is an important safeguard:

- to challenge the legality of detention and prevent unlawful, arbitrary and *in communicado* detention, as prohibited under the right to liberty and security.[544] The chances of arbitrariness are higher when the detainee has no counsel to assess the legality and/or reasonableness of his/her detention;
- to ensure the right of the person to prepare one's defence and to a fair trial;
- against torture and other ill-treatment;[545]
- for the right of an accused not to incriminate her/himself; and
- for the right of an individual to receive adequate legal assistance and access to remedy,[546] where violations of human rights and fundamental freedoms have occurred in detention.

2.1 Right to defend oneself and waiver of counsel

Scope and content of the right

Individuals who are suspected or accused of a criminal offence may decide not to be represented by a lawyer

541 UNODC, Access to Legal Aid in Criminal Justice Systems in Africa (2011), Annex 1: The right to legal aid in the constitutions of African countries, p 44; Association for the Prevention of Torture, 'Right of Access to a Lawyer' (Safeguards to Prevent Torture in Police Custody in Latin America) (2018).

542 HRCttee, General Comment No 32, para 37: 'Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf, therefore exercising some degree of self-representation while defended by legal counsel.'

543 HRCttee, General Comment No 32, para 10.

544 See below Part II, Chapter D, Section 1. AfCtHPR, *Zegveld and Ephrem*, para 55.

545 See below Part II, Chapter D, Section 1.

546 On the recognition of the right to remedy, see n 73.

during questioning or the investigation.[547] The right to self-representation, as set out in Article 14 (3) (d) of the ICCPR and other international instruments[548] means that, in principle, a person cannot be forced to hire a lawyer or accept state-appointed counsel.[549] The AfCHPR Guidelines on the Right to a Fair Trial mentions explicitly that 'an accused person or a party to a civil case may contest the choice of his or her court-appointed lawyer'.[550]

However, 'in the interests of justice', states may restrain the scope of this right, and a lawyer may therefore be assigned to the individual (see below). It is thus in the interests of justice that free legal assistance may be required for persons considered vulnerable, such as children, persons with mental health problems and refugees, insofar as they do not have the capacity to defend themselves.[551] In cases such as those, states are obliged to provide effective legal assistance, inter alia, by appointing a counsel of experience and competence commensurate with the nature of the offence.[552] States must also take additional steps to protect the rights of vulnerable suspects or accused persons, for example, by arranging for third parties to support these individuals.[553] If an accused is recognised as having the capacity to waive their right to legal assistance, there should be judicial oversight.[554]

h. **State obligations**

- **States should ensure that the person: (1) is informed of the right to legal assistance provided by either a lawyer of one's choice or by appointed counsel; and (2) can appreciate, as far as possible, the consequences of a waiver**

The ICCPR and a number of instruments expressly mentions the importance of information on defence rights, focusing on the right to a lawyer and the right to legal aid.[555] Notice of the right to counsel should be provided immediately upon arrest or detention, in a language and manner the person understands, so possibly requiring interpretation and translation. A person who appears before a court to represent her/himself should be asked whether or not she/he understands the entitlement to legal assistance of one's choosing and the fact that, should the person have insufficient means to pay for legal assistance, there may also be an entitlement to legal aid.[556]

> **The ECtHR:** 'In the light of the nature of the privilege against self-incrimination and the right to remain silent, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a

547 For information about self-representation during trial, see ICJ, 'Trial Observation Manual for Criminal Proceedings' Practitioners Guide No 5 (2009), Chapter vi (5); Amnesty International, Fair Trial Manual (2nd edition, 2014), Chapter 20.2.

548 ICCPR, Art 14.3 (d); ICMW, Art 18.3 (d); ECHR, Art 6.3 (c); AmCHR, Art 8.2 (d); ArCHR, Art 16.3; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 18 (para 100 (e)); UN Guidelines on Legal Aid, Guideline 3 (para 43 (i)); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11.1; AfCmHPR, Guidelines on the Right to a Fair Trial, Part M 2 (f) and N.2(a).

549 CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism (2014), para 64.

550 AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (d).

551 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 18 (para 100 (b)) (children); UN Guidelines on Legal Aid, Principle 3 (para 22) and Guideline 1 (para 41 (c)), Guideline 6 (para 46) and Guideline 10 (para 53 (b)); CRC, General Comment No 24, para 51; ECtHR, *Quaranta v Switzerland*, No 12744/87, 24 May 1991, paras 32–36. IBA Guidelines on Legal Aid, Principle 8.

552 See in particular, Basic Principles, Principle 6; CRC, Art 40.2.b (ii); UN Guidelines on Legal Aid, Principle 11; Beijing Rules, Principle 15; HRCttee, General Comment No 32, para 42; CRC, General Comment No 24, para 51.

553 ECtHR, *Panovits v Cyprus,* No 4268/04, 11 December 2008, paras 67–68. See further reference in FRA, Handbook on European Law, fn 299.

554 For more information on denying the right to waive, see Draft European Commission Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings (2013), Art 6; and European Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, para 11, providing that, children and vulnerable persons respectively may not waive their right to a lawyer. Compare with the right to waive for children recognised in CRC, General Comment No 24, para 51.

555 See n 492 (right to receive notification of rights) and n 493 (right to receive notification of the right to legal assistance in particular).

556 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 5 (para 58); UN Guidelines on Legal Aid, Principle 8 (para 29). See also ECtHR, *Yoldaş*, para 52.

> lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and the privilege against self-incrimination takes on particular importance'.[557]

- **States should ensure that the person's decision to waive his/her right is established in an unequivocal manner and is attended by minimum safeguards commensurate to its importance**

A person's decision to waive the right to legal representation during questioning or pretrial should be established in 'an unequivocal manner and be attended by minimum safeguards commensurate to its importance'.[558] States should therefore put in place 'means of verification' that a person 'has actually been informed'[559] and understands his/her right to counsel, including appointed counsel, and that he/she is aware of the risks of waiving his/her right to counsel.[560] This implies that before an accused can be said to have implicitly, through her/his conduct, waived the right to be defended by counsel, it must be shown that she/he could have reasonably foreseen the consequences of this conduct.[561] The mere fact that an accused person has answered questions from the police without speaking to a lawyer must not, in itself, be interpreted as a waiver.[562] The AfCHPR Guidelines on the Right to a Fair Trial request that the waiver be in writing.[563]

> **ECtHR:** 'The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard […] However, the Court strongly indicates that additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.'[564]

The requirement for 'additional safeguards' has prompted the ECtHR to make a careful assessment of all subjective and objective factors that may have influenced the suspected or accused person's choice to waive their right to counsel.[565]

A waiver of counsel must be revocable at any time.[566]

i. **Restrictions on the right to defend oneself**

- **State restriction to the right to defend oneself is permissible only if required by the interests of justice and in accordance with the principles of legitimacy, proportionality and necessity**[567]

557 ECtHR, *Beuze*, para 130.

558 See ECtHR, *Salduz*, para 59; ECtHR, *Ananyev and Others v Russia,* Nos 42525/07 and 60800/08, 10 January 2012, para 38; ECtHR, *Poitrimol v France* [1993] ECHR 62, para 31; ECtHR, *Yoldaş*, paras 51–52. ECtHR, *Sejdovic v Italy*, para 86; ECtHR, *Pishchalnikov v Russia,* No 7025/04, 24 September 2009 (FINAL 24 December 2009), para 77; ECtHR, *Makarenko v Russia*, No 5962/03, 22 December 2009, para 135; ECtHR, *Kononov v Russia*, para 33; ECtHR, *Şaman v Turkey,* No 35292/05, 5 April 2011, para 32; ECtHR, *Damir Sibgatullin v Russia*, No 1413/05, 24 April 2012, para 48.

559 UN Guidelines on Legal Aid, Guideline 2 (para 42(f)).

560 Ibid, Guideline 3 (para 43 (b) and (i)). See also ECtHR, *Ananyev*, para 39; *Sejdovic*, para 87; ECtHR, *Panovits v Cyprus*, No 4268/04, 11 December 2008, para 68. FRA, Handbook on European Law, p 88.

561 ECtHR, *Ananyev*, para 39; ECtHR, *Sejdovic*, para 87.

562 ECtHR, *Pishchalnikov*, para 79. For further analysis of the ECtHR jurisprudence on waivers, see Krassimir Kanvev, 'International Standards on the Right to Legal Assistance and Legal Defence of Suspected and Accused Persons in Criminal Proceedings' (Bulgarian Helsinki Committee 2018), pp 27–28.

563 AfCmHPR, Guidelines on the Right to a Fair Trial, Part M.2(f).

564 ECtHR, *Pishchalnikov*, para 78. For more recent case law, see ECtHR, *Şaman*, para 33; ECtHR, *Dvorski v Croatia*, No 25703/11 [GC], 20 October 2015, para 10; ECtHR, *Saranchov v Ukraine*, No 2308/06, 9 June 2016, para 44; ECtHR, *Skitnevskiy and Chaykovskiy v Ukraine*, Nos 48016/06 and 7817/07, 10 November 2016, para 63.

565 Krassimir Kanvev, 'International Standards on the Right to Legal Assistance and Legal Defence of Suspected and Accused Persons in Criminal Proceedings' (Bulgarian Helsinki Committee 2018), p 27.

566 In that sense, see Directive 2013/48/EU, Art 9.3.

567 ECtHR, *Croissant v Germany*, No 13611/88, 25 September 1992, para 29; FRA, Handbook on European Law, p 90.

The HRCttee recognises the right to conduct one's own defence as 'a cornerstone of justice'.[568] However, the right to defence without a lawyer is not absolute: in some situations a lawyer may be assigned against the wishes of the accused. In such situations, restrictions should be 'imposed with care' and be:

(1) justified by an objective and sufficiently serious purpose;

(2) necessary to uphold the interests of justice; and

(3) exercised with proportionality; and

(4) Never amount to an absolute bar against the right to defend oneself

> **HRCttee:** 'The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.'[569]

The overarching objective to protect the 'interests of justice' is usually assessed through objective criteria such as the nature of the case, the severity of the offence, the risk of intimidation of witnesses, alongside the 'individual's capacity' when the applicants' background and level of emotional involvement demonstrate that the individual would not be able to present his/her case properly and satisfactorily without the assistance of a lawyer.[570]

The HRCttee has been particularly protective of the subjective interests of the defendant. The Committee recognises that the appointment of a lawyer whom the defendant does not trust is unacceptable and potentially detrimental to the interest of the defendant.[571]

- **States should ensure the individual has access to appointed legal assistance when non-derogable rights are at stak**e

International mechanisms outline assistance by legal counsel as mandatory in cases where people face the death penalty[572] or deprivation of liberty,[573] and in cases of deportation or expulsion.[574]

2.2 Right to a lawyer of one's own choosing

Scope and content of the right

The right to a lawyer of one's own choosing applies in civil and criminal proceedings, at all times. [575] In European

568 HRCttee, *Correia de Matos v Portugal*, No 1123/200228, 28 March 2006, para 7.3.

569 HRCttee, General Comment No 32, para 37; HRCttee, *Correia de Matos*, para 7.4.

570 ECtHR, *McVicar v The United Kingdom*, No 46311/99, 7 May 2002, para 48.

571 HRCttee, *Correia de Matos*, para 7.3. The HRCttee decided contrary to the ECtHR's decision, No 48188/99, 15 November 2001.

572 HRCttee, General Comment No 32, para 38; AfCmHPR, Guidelines on the Right to a Fair Trial, Principle H (c); HRCttee, *Robinson v Jamaica*, No 223/1987, 30 March 1989, para 10.4, reiterated in a number of cases, and more recently in *Larrañaga v the Philippines*, No 1421/2005, 24 July 2006, para 7.6. See also Siracusa Principles, Part II (E), para 70 (g); OSCE, Legal Digest of International Fair Trial Rights, fn 618.

573 OSCE, Countering Terrorism, Protecting Human Rights: A Manual, p 185; AfCmHPR, *Liesbeth Zegveld and Mussie Ephrem v Eritrea* Comm, No 250/2002 (2003), para 55; ECtHR, *Benham v The United Kingdom* [GC], No 19380/92, 10 June 1996, para 61; IACtHR, *Vélez Loor v Panama*, Preliminary Objections, Merits, Reparations, and Costs, Series C No 132, 23 November 2010, para 146.

574 FRA, Handbook on European Law, p 74.

575 ICCPR 14.3(b) and (d); ICMW Art 18.3 (b) and (d); CPED, Art 17.2 (d); AfCHPR, Art 7.1(c); AmCHR, Art 8.2(d); ArCHR, Art 16.3; ECHR, Art 6.3(c). See also, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 12); Nelson Mandela Rules, Rule 61; UN Guidelines on Legal Aid, Guideline 3 (para 43(a)); Basic Principles, Principle 1; UN Body of Principles for the Protection of All Persons under Any Form of Detention or

countries, the defender is most often a lawyer, although other persons may also play this role.

The right to legal counsel by a defender of one's own choice, as per Article 6.3 (c) of the ECHR, requires that the accused 'who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it [for] free when the interests of justice so require'.[576]

Criminal proceedings

The right to access to legal counsel of one's own choosing is among the minimum procedural guarantees due to every person charged with a criminal offence, as enshrined in various international human rights instruments.[577] A person suspected or accused of having committed a criminal offence has the right to avail her/himself of the services of legal counsel to protect and establish her/his rights and to defend her/him at all stages of the criminal proceedings, for the preparation of her/his defence[578] and the conduct of that defence at trial.[579]

Civil proceedings

As per the principle of equality of arms, a similar right to a lawyer of one's own choosing exists in civil proceedings, when to do otherwise would create an inequality in the ability of the parties to present their case.[580]

State obligations

- **States should ensure that the person is informed of the right to legal assistance provided by either a lawyer of one's own choice or by appointed counsel as well as the consequences of a waiver**[581]
- **States should ensure that anyone suspected or charged with a crime has the right to a lawyer of one's choice who is able to provide prompt, effective, competent and independent legal assistance at all stages of the criminal proceedings regardless of the allegations against the defendant**[582]

The SRIJL has clarified that the UDHR and the ICCPR include the 'right to a lawyer of the defendant's choice at all stages of criminal proceedings *regardless of allegations against the defendant*' [emphasis author's own].[583] Accordingly, a state cannot justify on the ground of specific crimes against national security limiting the right to a lawyer to either a list or roster of lawyers pre-approved by the Head of the Judiciary, during the investigative phase.[584]

- **States should guarantee the right of the lawyer to appear before any court or administrative**

Imprisonment, Principle 17.2; AfCmHPR, Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3 (B) (iii); AfCmHPR, Luanda Guidelines, Guidelines 4 (d); AfCmHPR, Guidelines on the Right to a Fair Trial, Part G (b) and Part H (d), Part N.2 (a) and (d). See also Directive 2013/48/EU 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, Arts 1 and 2. CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para 66.

576 ECtHR, *Pakelli v Germany*, No 8398/78, 25 April 1983, para 31.

577 See n 3. HRCttee, *Selyun v Belarus*, No 2289/2013, 6 November 2015, HRCttee, *Bondar v Uzbekistan*, No 1769/2008, 28 April 2011; AfCtHPR, *Zegveld and Ephrem*, para 55; OSCE, Concluding Document of the Third Follow-up Meeting, Vienna (1989), para 13.9.

578 ICCPR, Art 14.3 (b); ECtHR, *Campbell and Fell v The United Kingdom*, Nos 7819/77 and 7878/77, 28 June 1984, para 98; OSCE, Legal Digest of International Fair Trial Rights, p 119.

579 ICCPR, Art 14.3 (d); ECHR Art 6.3 (c).

580 Basic Principles, Principle 2 and 3. OSCE, Legal Digest of International Fair Trial Rights, p 119. See ECtHR Steel and Morris, paras 59–72.

581 See n 481 (notification of the right to legal assistance) and n 547 (verification of the person's understanding of his/her rights).

582 See Part II, Chapter C, Section 1: *Judicial benchmarks for a 'practical and effective' right to legal assistance*. HRCttee, General Comment No 32, para 34; OSCE, Legal Digest of International Fair Trial Rights, pp 142–43; CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para 72.

583 SRIJL, IRN 10/2015, 30 July 2015.

584 *Ibid*. SRIJL, 'Turkey: a number of law decrees adopted during the state of emergency, which could undermine the right of access to justice and jeopardise the right of legal practitioners to carry out their professional duties' (22 October 2018) UN Doc OL TUR 15/2018.

authority before whom the right to counsel is recognised for his/her client, unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles[585]

- **States shall ensure unhindered access to lawyers to access to and communication with international bodies**[586]
- **States must ensure effective and adequate remedies for those who are not informed of their right to counsel in a timely manner, or whose access to legal assistance has been denied or unduly delayed**[587]

Restrictions

The right to choose one's own counsel as a minimum criminal guarantee is recognised as a high protection by international human rights mechanisms. The AfCmHPR Guidelines on the Right to a Fair Trial recognize that '[…] A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.'[588]

The right can only be restrained on a reasonable and objective basis capable of being challenged by judicial review.[589] As per international standards,[590] any delay or exclusion of counsel, including in cases justified by national security matters, such as terrorism, must not:

- be permanent;
- prejudice the ability of the person to answer the case;
- in the case of a person held in custody, must not create a situation where the detained person is effectively held *in communicado* or interrogated without the presence of counsel.[591]
- **States restrictions should not undermine the essence of the right to counsel**[592]

Any state restriction on the right to representation of one's own choice must not unduly or irreversibly prejudice the ability of the person to receive effective and independent legal assistance in order to answer the case.[593] International mechanisms find violation of the right to a fair trial under circumstances where: laws systematically prevent persons charged with a criminal offence from accessing legal assistance in police custody;[594] incriminating statements made during police interrogation without access to a lawyer are used for a conviction;[595] or the lawyer had no opportunity to intervene to ensure respect for the accused or suspected person's right.[596]

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585 CPED, Art 17.2(f); Basic Principles, Principle 19; UN Guidelines on Legal Aid, Guideline 14, para 68(g); Recommendation R 2000(21), Principle I.7.

586 UN Declaration on HRDs, Art 9.4.

587 On the right to a remedy for lack of legal assistance: UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 8 (para 70); UN Guidelines on Legal Aid, Principle 9. See n 73.

588 AfCmHPR, Guidelines on the Right to a Fair Trial, Part N.2 (d).

589 HRCttee, General Comment No 32, para 37, and its corresponding views in *Correia de Matos*, paras 7.4–7.5. UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 40; CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para 67.

590 UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 40; CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para 67.

591 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15.

592 See n 170

593 UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 40; ECtHR, *Beuze*, para 137; ECtHR, *Salduz*, para 55.

594 ECtHR, *Dayanan*, para 33.

595 ECtHR, *Salduz*, para 55.

596 ECtHR, *Aras*, para 40.

- **State restrictions must be justified by compelling reasons given the particular circumstances of the case, and necessary and proportionate to a legitimate aim**

The ECtHR states that: 'Article 6 para 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right'.[597]

In *Beuze*, the ECtHR clarified that:

> **ECtHR:** *'The criterion of "compelling reasons" is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the suspect's first police interview, restrictions on access to a lawyer are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see Salduz, cited above, §§ 54 in fine and 55, and Ibrahim and Others, cited above, § 258). A finding of compelling reasons cannot stem from the mere existence of legislation precluding the presence of a lawyer. The fact that there is a general and mandatory restriction on the right of access to a lawyer, having a statutory basis, does not remove the need for the national authorities to ascertain, through an individual and case-specific assessment, whether there are any compelling reasons.'*[598]

The Court also explained that 'where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to a compelling reason to restrict access to legal advice for the purposes of Article 6 of the Convention'.[599]

States should ensure that restrictions can be challenged by judicial review.[600]

- **State-appointed counsel in place of counsel of one's own choosing**

HRCttee case law includes a series of cases in which state-appointed lawyers have been forced upon accused persons who had the means of hiring their own, both at the court of first instance and during the appeal. In such cases, the Committee as a rule finds a violation of Article 14.3 (d) of the Covenant.[601]

Likewise the SRIJL has raised concerns about an emergency decree law providing blanket authorisation that the prosecution request the replacement of a defence lawyer chosen by a client, upon their arrest or detention or when charged with a criminal offence, with a lawyer appointed by the bar association.[602]

Likewise, the SRIJL has found that the creation of a list or roster of counsels pre-approved by state authorities limiting the person's right to counsel of one's own choosing presents serious risks that the person may not be able to access independent and effective assistance and thus jeopardise the ability of that person to answer the case.[603]

Conversely, cases of replacement lawyers have been found admissible, even if a person is paying privately, as a result of the fact that the state is entitled to regulate the appearance of counsel before courts and their obligation to respect certain principles of professional conduct.[604] For instance, it may occur because the lawyer is incompetentor not independent.[605] In *Ensslin and Others v Germany*, the ECtHR admitted that the exclusion of certain lawyers from the defence, 'because they were strongly suspected of supporting the criminal association of the accused',

597 ECtHR, *Salduz*, para 55.

598 ECtHR, Beuze, para 142.

599 ECtHR, Beuze, para 143 referring to *Ibrahim and Others*, para 259, and *Simeonovi*, para 117.

600 UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 40.

601 HRCttee, *Pinto v Trinidad and Tobago*, No 232/1987, 18 July 1989; HRCttee, *Domukovsky et al v Georgia*, Nos 23/1995, 6 April 1998, para 18.9.

602 SRIJL, OL TUR 15/2018, p 2.

603 UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 40; SRIJL, IRN/10/2015.

604 See above, Part II, Chapter B, Section 5.

605 HRCttee, General Comment No 32, para 38.

did not violate Article 6 of the ECHR.[606]

The focus on legal assistance means that the defender should possess sufficient legal knowledge to effectively participate in the specific proceedings. It is therefore legitimate to prevent a person without the appropriate legal qualifications from taking part in the proceedings when that person is the only choice of defender for the accused.[607]

States may also appoint 'special advocates'. Appointment of a special legal counsel may arise where the disclosure of information redacted for security reasons would be insufficient to guarantee a fair trial and allow the person concerned to answer the case.

Delay or denial in access to a lawyer

Access to a lawyer should be possible immediately after arrest and delayed access to a lawyer is only permissible up to 24 hours after the arrest, and for compelling reasons.[608] As aforementioned, the ECtHR has also found that a 24-hour delay in access to a lawyer can involve a violation of the right to a fair trial.[609]

In cases where 'safety interviews' held upon detention and during which access to a lawyer was denied for a period of four to eight hours after arrest, the ECtHR accepted that those interviews had a specific purpose, that is. to prevent potential serious consequences for the life and the physical integrity of other persons through an urgent attempt to collect information about planned attacks, as well as about the identity of the persons involved in the conspiracy.[610] The Court gave weight to the fact that the restrictive measures were clearly prescribed by national legislation.

2.3 Right to legal aid

Principle 6 of the Basic Principles states that:

> 'any such persons who do not have a lawyer shall, in all cases *in which the interests of justice so require*, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services' [emphasis author's own].[611]

The same language is used in a number of international instruments.[612]

The UN Guidelines on Legal Aid expand on the right to legal aid. Distinct from the right to legal assistance, the right to legal aid[613] ensures effective access to justice for those who have insufficient financial resources to cover the costs of court cases, such as court fees or cost of legal representation, which are then covered in whole or in part by the state. The SRIJL has observed that the right to legal aid can be construed as both a right and an essential procedural guarantee for the effective exercise of other human rights, including the right to an effective remedy, the right to liberty and security of person, the right to equality before courts and tribunals, the right to counsel and the right to a fair trial.[614]

States' obligations when establishing a nationwide legal aid system have been analysed above.[615] The following section focuses on states' obligations in the individual provision of legal aid.

606 ECtHR, Ensslin, *Baader & Raspe v Germany*, Nos 7572/76, 7586/76 and 7587/76, 8 July 1978, available at http://echr.ketse.com/doc/7572.76-en-19780708/view.

607 ECtHR, Mayzit, para 68.

608 UNHRC, 'UN Special Rapporteur on Torture' (1989) UN Doc E/CN.4/1990/17, para 272 (c); UNHRC, 'Special Rapporteur on torture' (1995) UN Doc E/CN.4/1995/34, para 926 (d); UNGA, 'Question of torture and other cruel, inhuman or degrading treatment or punishment' (2001) UN Doc A/56/156, para 39 (f).

609 ECtHR, *Averill,* paras 55–62.

610 ECtHR, *Ibrahim Gürkan v Turkey*, No 10987/10, 3 July 2012, paras 276–77.

611 See OSCE, Legal Digest of International Fair Trial Rights, p 140.

612 See n 500.

613 See UN Guidelines on Legal Aid, para 13. See also EU Charter of Fundamental Rights, Art 47.

614 SRIJL, OL SRB 1/2018, p 5.

615 See Part II, Chapter B, Section 3.

'Right to legal aid': definition

On the basis of the UN Guidelines on Legal Aid and the IBA Guidelines on Legal Aid, the right to legal aid can be defined as the right to access essential public legal services,[616] which are provided at no cost for those without sufficient means or when the interests of justice so require, and which are funded, in whole or in part, by the state.[617] International instruments outline that legal aid should primarily cover the services of legal advice, assistance and representation, but also legal education, legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.[618] States are free to decide how to meet their legal obligations and legal aid may consist of free representation or assistance by a lawyer and/or dispensation from paying the costs of proceedings, including court fees.[619] At the core of the concept of legal aid is the objective to remove barriers to access to justice.[620]

Scope

Scope of legal aid refers to the type of problem or case for which legal aid is available. While the right is recognised first and foremost in criminal justice, the right has also been recognised in civil proceedings as one aspect of the notion of a fair trial.[621] International recommendations therefore encourage states to recognise, guarantee and promote the right to legal aid in both criminal and non-criminal cases, in any judicial or extrajudicial procedure aimed at determining rights and obligations.[622]

Eligibility criteria are criteria that qualify an individual for the receipt of legal aid. In both civil and criminal proceedings, the main eligibility criteria encompass:

- a person's means to pay for legal assistance; and
- the 'interests of justice'.

In practice, in international case law and domestic legislation greater weight is given to the 'interests of justice' than to the material status of the person concerned. If the interests of justice require that the person has a lawyer, then his/her material status is irrelevant. The ECtHR and HRCttee have found legal aid mandatory in the interests of justice, regardless of the material status of the suspected or the accused, when the case is particularly urgent or complex, or the penalty the persons faces is very severe.[623]

Eligibility criteria in criminal proceedings

The Basic Principles provide that any person who does not have a lawyer is entitled, in all cases in which the interests of justice so require, to have a lawyer assigned to him or her, 'without [any] payment if they lack sufficient means to pay for such services'.[624] A number of international and regional standards recognise the right to legal aid for persons arrested, detained, suspected of or charged with a criminal offence.[625] Legal aid must be provided

616 IBA Guidelines on Legal Aid, Principle 1, comment, pp 21–22. In response to the IBA questionnaire, legal professionals proposed the reference to 'essential public legal services' as a useful basis and lens for determining the services that publicly funded legal aid should cover.

617 UN Guidelines on Legal Aid, para 8; IBA Guidelines on Legal Aid.

618 UN Guidelines on Legal Aid, para 8.

619 FRA, *Handbook on European Law*, p 58. On court fees waiver, the IBA Guidelines on Legal Aid recommend that 'where legal aid is granted, all court fees should be automatically waived without the need to complete an additional application process' (Principle 5).

620 SRIJL, OL SRB 1/2018.

621 Basic Principles, Principles 2 and 3; AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (a)- (b); IBA Principles on Legal Aid. UNHRC, UN Doc A/HRC/23/43, para 27; ECtHR, *Quaranta*, para 27; ECtHR, *Artico*, para 32.

622 A/HRC/23/43, paras 27–28; SRIJL, OL SRB 1/2018, pp 4–5. HRCttee, General Comment No 32.

623 SRIJL, OL SRB 1/2018, p 7.

624 Basic Principles, Principle 6.

625 UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17(2) (persons in detention); Nelson Mandela Rules, Rule 119 (2) (persons in detention); UN Guidelines on Legal Aid, Principle 3, para 20 and Guidelines 4 and 11, para 55 (a) (persons arrested, detained, suspected of or charged with a criminal offence); ECHR, Art 6.3 (c); AfCmHPR, Guidelines on the Right to a Fair Trial, Principle H (a) (persons accused); Luanda Guidelines, Guidelines 4 (d) (arrested persons) and 8 (iii) (persons detained in police custody); HRCttee, General Comment No 32, paras 10 and 38.

at all stages of the criminal justice process.

Interests of justice

The interests of justice may require that the person be assigned a legal counsel, in light of the:

- gravity of the offence and of the possible sanction;[626]
- capacity of the defendant to represent her/himself;[627] and
- complexity of the case.[628]

Any of these three criteria can justify the granting of legal aid.[629]

The capacity of the defendant, also referred as the 'personal situation of the accused' is an important criterion in granting free legal aid.

> **ECtHR: '[…] a qualified lawyer would undoubtedly have been in a position to plead the case with greater clarity and to counter more effectively the arguments raised by the prosecution […]. The fact that the applicant, as an educated man, might have been able to understand the proceedings does not alter the fact that without the services of a legal practitioner he was almost certainly unable to defend himself effectively […].'**[630]

The urgency or complexity of the case or the severity of the potential penalty can justify the requirement that legal aid be provided regardless of the persons' means.[631] Accordingly, legal aid should be accessible to anyone in contact with the criminal justice system, and free legal aid is required when an individual is not represented by counsel of choice, in cases where:

- a person may be deported, expelled or deprived of liberty;[632]
- a person faces the death penalty – in this case the right to appointed counsel is applicable throughout the proceedings, including pre-trial, trial, appeal, clemency proceedings or pardon, petitions seeking commutation of a sentence and any constitutional challenges;[633]
- a vulnerable person is concerned, such as a child, a person with mental health problems or a refugee;[634] or
- substantial issues arise in appeal hearings.[635]

Likewise, the AfCmHPR Guidelines on the Right to a Fair Trial provide that, in criminal matters: 'the interests of justice should be determined by considering: 1) the seriousness of the offence; and 2) the severity of the sentence'.[636] However, the position of the AfCmHPR is more protective here: it has repeatedly called for free legal assistance to individuals charged with any crime who cannot afford to pay the cost of being represented by

626 AfCmHPR, Guidelines on the Right to a Fair Trial, Part H.b (i) 1) and 2); ECtHR, *Quaranta*, para 33.

627 AfCmHPR, Guidelines on the Right to a Fair Trial, Part H.b (ii) 2); ECtHR, *Pakelli*, paras 37–38; ECtHR, *Pham Hoang v France*, No 13191/87, 25 September 1992, para 40.

628 AfCmHPR, Guidelines on the Right to a Fair Trial, Part H.b(ii)2); ECtHR, *Granger v The United Kingdom*, No 11932/86, 28 March 1990, para 47; ECtHR, *Quaranta*, para 34.

629 FRA, Handbook on European Law, p 69.

630 ECtHR, *Zdravko Stanev v Bulgaria*, No 32238/04, 6 November 2012, para 40.

631 UN Guidelines on Legal Aid, Principle 3 (para 21), Guideline 1 (para 41 (e)). AfCmHPR, Guidelines on the Right to a Fair Trial, Part H.b (ii)1).

632 OSCE, Countering Terrorism, Protecting Human Rights: A Manual, p 185; ECtHR, Benham, No 7/1995/513/597, 24 May 1996, para 61; IACtHR, *Vélez Loor*, para 146.

633 OSCE, Legal Digest of International Fair Trial Rights, fn 670; HRCttee, *Robinson*; AfCmHPR, Guidelines on the Right to a Fair Trial, Part H(c).

634 See in particular, UN Guidelines on Legal Aid, Principle 3 (para 22), Guideline 1 (para 41(c)), Guideline 6 (para 46), Guideline 10 (para 53 (b)); CRC, General Comment No 24, para 51; ECtHR, *Quaranta*, paras 32–36; IBA Guidelines, Principle 8: 'Financial means is a relevant criterion when assessing eligibility for legal aid. Vulnerability, including lack of knowledge or ability to enforce legal rights without expert help, is also a relevant factor.'

635 ECtHR, *Pakelli*, paras 36–38.

636 AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (b) (i).

alawyer.[637] Along the same lines, the SR on torture has raised concern about the legal aid system in The Gambia, which limits legal aid to people charged with serious offences, and leaves the vast majority of people suspected or accused of criminal offences unrepresented. The SR has recommended that authorities invest resources into the national legal aid agency to ensure it has capacity to operate independently and that there are a sufficient number of qualified lawyers to provide legal representation to individuals charged with any offence from the moment of their apprehension and through all stages of criminal proceedings, including interrogation, arrest and incarceration, to ensure compliance with the rule of law and to demand improvements as necessary.[638]

Means test

If a financial means test is applied to determine eligibility for legal aid, preliminary legal aid should be granted to individuals urgently requiring legal assistance pending the outcome of the means test.[639]

The ECtHR states that the burden of proof of insufficient means should be on the applicant. In reality, however, in the proceedings before the Convention, both the Commission and the Court adopt a relatively low standard of proof. It does not entail proof 'beyond all doubt'. It is sufficient for them to have 'some indications' or even 'absence of clear indications to the contrary'.[640]

Children are always exempt from the means test.[641]

Merits test

General Comment No 32, as well as the case law of the HRCttee, allows the use of merits tests for the provision of free legal aid. In General Comment No 32, the HRCttee notes that the 'objective chance of success at the appeals stage' should be considered in deciding whether the accused should be appointed a lawyer in the interests of justice.[642] In its case law on individual applications, the HRCttee allows free legal assistance to be refused due to absence of objective chances of success on appeal, even with regard to harsh criminal sentences. However, this does not apply to crimes for which the death penalty may be imposed – here the accused should be guaranteed the participation of counsel, including through the provision of free legal aid at all stages of the proceedings, regardless of the chances of success at the appeals stage.[643]

Eligibility criteria in civil proceedings

The right to legal aid also applies in civil, administrative and family justice systems. [644] While the ECHR does not expressly mention it, the ECtHR has held that the 'interests of justice' may also require free legal assistance in civil cases.[645]

The ECtHR, alongside the AfCmHPR Guidelines on the Right to a Fair Trial, requires states to provide free legal aid in civil matters, on the basis of (i) the complexity of the case; (ii) the ability of the party to adequately represent himself or herself; and (iii) the rights that are affected.[646] At the European level, the key test is whether anindividual'would be able to present his case properly and satisfactorily without the assistance of a lawyer'.[647] The AfCmHPR Guidelines on the Right to a Fair Trial also recommend considering the likely impact of the outcome

637 AfCmHPR, 'Concluding Observations: Botswana' (2010), paras 41 and 62; AfCmHPR, 'Concluding Observations: Sudan' (2012), para 79.
638 UNHRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez – Mission to Gambia' (2015) UN Doc A/HRC/C/28/68/Add.4, paras 41–44, 108 (b)–(d).
639 UN Guidelines on Legal Aid, Guideline 1, para 41 (c).
640 ECtHR, *Pakelli*, para 34. See also ECtHR, *Twalib v Greece*, No. 24294/94, 9 June 1998, para 51; ECtHR, *Tsonyo Tsonev v. Bulgaria* (No. 2), No. 2376/03, 14 January 2010, para 39.
641 UN Guidelines on Legal Aid, Guideline 1, para 41 (c).
642 HRCttee, General Comment No 32, para 38.
643 See n 117.
644 AfCmHPR, Guidelines on the Right to a Fair Trial, Principle H (b) (ii); IBA Guidelines on Legal Aid.
645 ECtHR, *Airey v Ireland*, No 6289/73, 9 October 1979, para 26.
646 AfCmHPR, Guidelines on the Right to a Fair Trial, Principle H (b) (ii); ECtHR, *Airey*, para 26.
647 ECtHR, *McVicar*, para 52.

of the case on the wider community.[648] The main test is whether legal assistance is indispensable for securing effective access to court and effective remedy.[649]

Furthermore, in case of mandatory legal representation, the IBA Guidelines on Legal Aid provide that 'the state has a duty to ensure that individuals without the financial means to pay for a lawyer themselves are represented by competent lawyers'.[650]

State obligations

- **States should ensure clear, transparent and published criteria on scope and eligibility for legal aid so that persons are aware of the possibility and conditions to acquire free legal assistance**[651]
- **States should ensure that the person is informed of their right to legal aid**

'States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards, as well as the potential consequences of voluntarily waiving those rights'.[652] States should ensure that 'police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned and detained [should] inform unrepresented persons of their right to legal aid and of other procedural guarantees'.[653] States should also ensure that '[m]eans of verification that a person has actually been informed are put in place'.[654]

- **Prosecutors, judges and police officers are responsible for providing persons suspected or charged with a criminal offence with access to legal aid**

The UN Guidelines on Legal Aid provide that 'it is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable, are provided access to legal aid'.[655]

- **Persons eligible for legal aid should receive prompt, effective, competent and independent legal assistance by a state-appointed legal aid provider**[656]

States should set out criteria for the accreditation of legal aid providers, quality standards, appropriate oversight[657] and monitoring and evaluation mechanisms to ensure the quality of legal aid services.[658] They should also establish standard legal aid training programmes[659] to ensure that professionals working for the national legal aid system possess the qualifications and training appropriate for the services they provide.[660]

- **States should adopt specific measures to ensure effective access to legal aid, taking into account the special needs of persons in situation of vulnerability and the gender and age of the persons concerned**[661]

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648 AfCmHPR, Guidelines on the Right to a Fair Trial, Part H (b) (ii).

649 ECtHR, *Airey*, para 26.

650 IBA Guidelines on Legal Aid, Principle 6.

651 UN Guidelines on Legal Aid, Principle 2 (paras 17 and 18).

652 UN Guidelines on Legal Aid, Principle 8 (para 29). See also Guideline 2 (para 42), Guideline 5 (para 45 (g)); AfCtHPR, *Onyango Nganyi and Nine Others v United Republic of Tanzania* No 006/2013 (2016), para 163; AfCtHPR, *Thomas v Tanzania*, No 005/2013 (2015), paras 86–90, 114–115. See n 481 on the right to receive notification of the right to legal assistance.

653 UN Guidelines on Legal Aid, Guideline 2 (para 42(c)).

654 *Ibid*, para 42 (f).

655 *Ibid*, Principle 3 (para 23) and Guideline 3 (para 43 (h)).

656 Basic Principles, Principle 6; UN Guidelines on Legal Aid, Principle 7, Guideline 3 (para 43 (d)), Guideline 4 (para 44); IBA Guidelines on Legal Aid, Principles 21–22 and 26.

657 UN Guidelines on Legal Aid, Guideline 15.

658 *Ibid*, Guideline 11 (para 58) (vetting of legal aid provided to children), Guideline 14 (para 68 (a–d)) (paralegals), Guideline 16, para 71 (non-state legal aid providers). Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa 2004, para 6.

659 *Ibid*, Guideline 11 (para 58 (d)).

660 *Ibid*, Guideline 13 (para 64).

661 *Ibid*, Principle 10 (para 32). Regarding children, see Principle 11 (para 35), Guideline 10 and Guideline 11 (para 58).

- **State should ensure that decisions rejecting the request for free legal aid are always reasoned and subject to judicial review**

The SRIJL has found a breach of international standards when the authority to decide on the appeal is vested with the executive branch of power and not the judiciary.[662]

- **States should ensure a right to remedy in cases of breach of the right to legal aid**

'States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.'[663]

The accused or suspected person bears the burden of proving insufficient means.[664] All the evidence must be considered, including evidence of the applicant's status (eg, time spent in custody, information provided by the individual and any evidence contradicting the applicant).[665]

The person does not need to demonstrate that the absence of legal aid caused 'actual damage' to their defence; they must only prove that it appears 'plausible in the particular circumstances' that a lawyer would be of assistance.[666]

- **States should ensure a satisfactory remuneration for state-appointed counsel**

A core element of the right to work as protected by international instruments is that 'everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'. [667] Legal aid providers should not be required to work under time and financial conditions or pressure that would ultimately jeopardise either their right to livelihood, or their client's right to an effective defence. Notwithstanding the legal aid scheme adopted, the necessary conditions should be in place for lawyers and other legal aid providers to defend their clients in an effective, competent and independent manner.

The UN Guidelines on Legal Aid recommend states take measures to identify incentives for lawyers to work in economically and socially disadvantaged areas (eg, through tax exemption, fellowships, and travel and subsistence allowances).[668]

The IBA Guidelines on Legal Aid provide that if the legal aid budget is a political decision, it needs to be 'adequate to support the services the executive and legislature have agreed should be funded and needs to provide fair remuneration for those who do the work'.[669] Thus, 'governments cannot rely on [pro bono legal services] to cover services which should properly be funded by legal aid'.[670] 'Those providing exclusively or mainly legal aid services should be paid according to industry norms so as to attract high quality providers and to allow for the development of expertise in the sector and therefore create value for money, whether in a salaried service or through private practice.'[671]

Restrictions

- **State regulation of legal aid should never result in an unreasonable limitation of the right of access to court, the right to legal counsel of one's own choosing and the right of lawyers to offer their services on a pro bono basis**

Restrictions to legal aid must not constitute 'a disproportionate and intolerable interference on the right itself':

SRIJL: 'While States are free to set quality standards and establish monitoring and evaluation mechanisms to

662 SRIJL, OL SRB 1/2018, p 8.
663 UN Guidelines on Legal Aid, Principle 9 (para 31) and Guideline 2 (para 42(e)). See n 71.
664 ECtHR, *Croissant*, para 37.
665 ECtHR, *Pakelli*, para 34; FRA, Handbook on European Law, p 68.
666 FRA, Handbook on European Law, p 70.
667 See UDHR, Art 23.1. See also UDHR, Art 23.2–4; ICESCR, Arts 6–7; ICMW, Art 25; and CRPD, Art 27.
668 UN Guidelines on Legal Aid, Guideline 11 (para 56 (b)).
669 IBA Guidelines on Legal Aid, Principle 2 (a).
670 *Ibid*, Principle 3.
671 *Ibid*, Principle 27.

ensure the quality of legal aid services by non-State legal aid service providers, these measures should never result in an unreasonable limitation of the right to have access to a legal counsel of one's choosing and the right of lawyers to offer their services on a pro bono basis.'[672]

The ECtHR has held that there will be no violation of Article 6 (1) of ECHR if an applicant falls outside of the legal aid scheme because his/her income exceeds the financial criteria, provided the essence of the right of access to a court is not impaired.[673]

- **Right to waive legal aid**

Legal aid beneficiaries, regardless of their procedural capacity, may waive this right under certain conditions related to a fair trial. In its decision in the 2009 case of *Raykov v Bulgaria*, the ECtHR underlined that, as in the case of the right to access to a lawyer, 'neither the letter, nor the spirit of the article 6 of the Convention may prevent the person to waive, explicitly or tacitly, his right to court-appointed counsel'. [674] The Court added, however, that such waiver is admissible only if unequivocal and if not contradicting some significant public interest.[675] States should establish mechanisms for verifying the voluntary consent to waive a lawyer's presence.[676] States should also ensure that the exercise of these rights by a person is not prejudicial to his/her case.[677]

Today, all European jurisdictions accept that in certain situations, the interest of justice requires legal defence even if the accused has waived his/her right to such, for example, when the charges are severe, or when the person belongs to a vulnerable group (minor, foreigner, suffering from mental or physical disability, does not know the language of the proceedings, etc). In the 2006 decision in *Padalov v Bulgaria*, the ECtHR stated that given the severe penalty that threatened the applicant, the interests of justice required that for the purpose of fair trial he be granted free legal assistance in the criminal proceedings against him.[678]

- **Right to contest an appointed lawyer**

The right to counsel of choice may be limited where legal aid counsel is appointed.[679] However, the ECtHR concedes that authorities may have regard to an accused's wishes, but these wishes can be overridden when there are relevant and sufficient grounds for holding that this is necessary.[680]

Furthermore, a person can contest the lawyer appointed, as explicitly recognised in the AfCmHPR Guidelines on the Right to a Fair trial.[681] An individual who requests a change of legal aid lawyer must present evidence that the lawyer failed to perform satisfactorily.[682]

672 SRIJL, OL SRB 1/2018, p 4.

673 ECtHR, *Glaser v The United Kingdom*, No 32346/96, 19 September 2000, para 99; ECtHR, *Santambrogio v Italy*, No 61945/00, 21 September 2004, para 58.

674 ECtHR, *Raykov v Bulgaria*, No 35185/03, 22 October 2009 (FINAL. 22 January 2010), para 63.

675 *Ibid*. See also ECtHR, *Padalov v Bulgaria*, No 54784/00, 10 August 2006, para 47.

676 UN Guidelines on Legal Aid, Guideline 3 (para 43 (b)).

677 *Ibid*, para 43 (k).

678 ECtHR, *Padalov*, para 55.

679 ECtHR, *Lagerblom v Sweden*, No 26891/95, 14 January 2003, para 54; HRCttee, *Teesdale v Trinidad and Tobago*, No 677/1996, 1 April 2002, para 9.6.

680 ECtHR, *Lagerblom*; HRCttee, *Ricketts v Jamaica,* No 667/1995, 4 April 2002; OSCE, Legal Digest of International Fair Trial Rights, p 144.

681 AfCmHPR, Guidelines on the Right to a Fair Trial, Part H(d).

682 ECtHR, *Lagerblom*, para 60.

Checklist

- ☐ Has the person been informed about, and understood, his/her right to legal representation? What options might be available for the appointment of legal counsel where the person cannot afford to pay for this?
- ☐ Has the person been informed of the potential consequences of waiving his/her rights?

Right to self-representation

- ☐ In case the person waives his/her right to a lawyer of his/her own choosing, were there mechanisms in place for verifying the voluntary nature of the person's consent?[683] Was the exercise of this right prejudicial to his/her case?[684]
- ☐ Was the person's right to self-representation denied or restricted?
- ☐ Was the restriction (state-appointed counsel) justified by the interests of justice?
- ☐ If not, was the person informed of his/her right to remedy for violation of his/her right to self- representation?

Right to a lawyer of one's own choosing

- ☐ Was the person able to access prompt, effective, competent and independent legal counsel?
- ☐ Was the person's right to a lawyer of his/her choosing denied or restricted?
- ☐ Was the restriction justified by reasonable and objective grounds? If it was, did it still jeopardise the person's capacity to prepare and answer the case effectively?
- ☐ Was the decision to restrict amenable to judicial review?
- ☐ Was the person informed of his/her right to remedy for violation of his/her right to a lawyer of his/her choosing?

Right to legal aid

- ☐ Did the person who was denied legal aid on the basis of the means test have the right to judicial review?[685]
- ☐ Did it appear 'plausible in the particular circumstances' that a lawyer would have been of assistance?
- ☐ Was the legal aid provider present at all critical stages of the proceedings?[686] Was the legal assistance prompt, independent, effective and competent?
- ☐ Did the person have a right to remedy in case access to legal aid was undermined, delayed or denied, or if the person was not adequately informed of his/her right to legal aid?

683 UN Guidelines on Legal Aid, Guideline 3 (para 43 (b)).

684 *Ibid*, para 43 (k).

685 *Ibid*, Guideline 1 (para 41 (d)).

686 *Ibid*, Guideline 5 (para 45 (d)): 'Critical stages are all stages of a criminal proceeding at which the advice of a lawyer is necessary to ensure the right of the accused to a fair trial or which the absence of counsel might impair the preparation or presentation of a defence.'

3. Right to practise as a lawyer without intimidation, harassment, hindrance or improper interference

UN INSTRUMENTS

General recognition of the right to work: UDHR, Art 23; ICESCR, Arts 6, 7; ICERD, Art 5.e(i); CEDAW Arts 10 and 11; CMW, Arts 25, 55 and 70; ICRPD, Art 27; AfCHPR, Art 15; ArCHR, Art 34

Article 18.2, CPED

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)

Principle 12. Independence and protection of legal aid providers

36. States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

UN Declaration on Human Rights Defenders (1998)

Article 9

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

[…]

3. To the same end, everyone has the right, individually and in association with others, inter alia:

[…]

(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.

Article 10

No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.

Article 11

Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and

fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.

Article 12

1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.

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.

See also, Art 9.4 and 9.5.

Basic Principles on the Role of Lawyers (1990):

Preamble

'[…] adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession'.

Guarantees for the functioning of lawyers

Principle 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.'

Principle 17. *Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.*

Principle 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.*

Principle 25. *Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.*

Vienna Declaration on Human Rights:

> *'27. Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.'*

A/HRC/44/L.7 (reiterating A/HRC/RES/35/12), 'Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers':

> *'Recalling that every State should provide an effective framework of remedies to redress human rights grievances or violations and that the administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession consistent with applicable standards contained in relevant international instruments is essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development, […]*
>
> *1. Calls upon all States to guarantee the independence of judges and lawyers and the objectivity and impartiality of prosecutors, as well as their ability to perform their functions accordingly, including by taking effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional functions without interference, harassment, threats or intimidation of any kind;'*

See also: UN Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principle 9 (para 15).

Africa

Article 15, AfCHPR: *'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.'*

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'Part H. Legal aid and legal assistance

(e) When legal assistance is provided by a judicial body, the lawyer appointed shall:

3. be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body

[…]

5. be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.

(k) States that recognize the role of para-legals should ensure that they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence.

Part I. Independence of lawyers

(b) States shall ensure that lawyers:

(i) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;

[…]

(iii) 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.

(e) 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 judicial body or other legal or administrative authority.

(f) Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

Europe

CoE Recommendation No R(2000)21, Committee of Ministers on the Freedom of Exercise of the Profession of Lawyer:

Preamble

'For the purpose of this recommendation, 'lawyer' means 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 or represent his or her clients in legal matters.

Principle I – General principles on the freedom of exercise of the profession of lawyer

'1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

[…]

4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

[…]

7. Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.

8. All lawyers acting in the same case should be accorded equal respect by the court.'

Principle V – Associations:

'3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, inter alia, to: (b) [...} defend the role of lawyers in society, and in particular maintain their honour, dignity and integrity;

5. Bar associations and other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:

a. arrest or detention of a lawyer;

b. any decision to take proceedings calling into question the integrity of a lawyer;

c. any search of lawyers themselves or their property;

d. any seizure of documents or materials in a lawyers' possession;

e. publication of press reports which require action on behalf of lawyers.'

International professional standards

IBA Standards for the Independence of the Legal Profession (1990):

Rights and duties of lawyers

para 6. Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public.

para 8. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause.

para 12. The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free, fair and confidential legal assistance, including the lawyer's right of access to such persons. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.

para 18: The functions of the appropriate lawyers' associations in ensuring the independence of the legal profession shall be inter alia:

c) to defend the role of lawyers in society and preserve the independence of the profession.

Para 20. To enable the lawyers' association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention and place of detention of any lawyer; and the lawyers' association shall have access to the lawyer arrested or detained.

IBA International Principles on Conduct for the Legal Profession (2011)

Principle 10: Fees

Principle 10.1: General principle. 'Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.'

Interpretation

International and regional standards apply to lawyers, legal aid providers and HRDs a specific protection to carry

out their work independently and free from fear of prosecution, and of governmental or societal pressure.[687] The UN Declaration on HRDs also explicitly protects the right to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms[688] as well as the right, individually and in association with others, to the lawful exercise of one's occupation or profession.[689] The latter reinforces the right to safe and healthy working conditions protected in international law.[690]

- **States should take all necessary measures to ensure that lawyers and other legal aid providers are able to perform their functions without intimidation, hindrance, harassment or improper interference**

As per the Basic Principles, and as reaffirmed by the HRCttee,[691] the state shall adopt 'all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference'.[692] The UN Guidelines on Legal Aid and the UN Declaration on HRDs expand the protection to cover all legal aid providers and HRDs.[693]

The UN Declaration on HRDs also requires states to 'adopt such legislative, administrative, and other steps as may be necessary to ensure that the rights and freedoms referred to in the Declaration are effectively guaranteed'[694] and 'foster an environment that is supportive of the human rights that are fundamental to the activities and safety of defenders', such as the freedoms of association, assembly and expression.[695] National legislative standards should be in compliance with the international human rights obligations of the state.[696]

States shall therefore respect lawyers' independence and adopt an adequate sanctions regime to protect lawyers from any interference with their work. For instance, the SRIJL has raised concerns about the implications of media pressure and campaigns against lawyers, such as television broadcasts on state television stigmatising a lawyer in his/her role as a human rights lawyer.[697]

- **States should respect lawyers' immunities and the principle of non-identification of lawyers with their clients or their clients' causes**

Authorities, including the courts, must ensure that lawyers:

- are not identified with their clients or their clients' causes as a result of discharging their professional functions (see below Part II, Chapter C, Section 4); and
- enjoy immunity for statements made in good faith in written and oral pleadings and in appearances before courts and other authorities (see below Part II Chapter C, Section 5).

- **States should take protection measures in case of real and imminent threats**

The Basic Principles provide that 'where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities'.[698] Under the UN Declaration on HRDs, states should 'take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any […] pressure or any other arbitrary action as a consequence of his or

687 Basic Principles, Principle 16; UN Guidelines on Legal Aid, Principle 12; UN Declaration on HRDs, Art 12. For lawyers working on cases of enforced disappearance, see also UNHRC Res 7/12 and UNGA Res 47/133, adopting the UN Declaration on the Protection of all Persons from Enforced Disappearance, 1992.

688 UN Declaration on HRDs, Art 9 (c).

689 *Ibid*, Art 11.

690 UDHR, Art 23; ICESCR, Arts 6, 7; ICERD, Art 5.e (i); CEDAW, Arts 10 and 11; ICMW, Arts 25, 55 and 70; CRPD, Art 27; AfCHPR, Art 15; and ArCHR, Art 34.

691 HRCttee, General Comment No 32, para 34.

692 Basic Principles, Principle 16.

693 UN Guidelines on Legal Aid, Principle 12; SRIJL, OL SRB 1/2018, 4; UN Declaration on HRDs, Art 12.

694 UN Declaration on HRDs, Art 2 (2).

695 UNGA, 'Situation of human rights defenders' (2017) UN Doc A/72/170, para 34.

696 UN Declaration on HRDs, Arts 3 and 17.

697 SRIJL, JAL RUS 4/2014, 31 March 2014.

698 Basic Principles, Principle 17. See also, AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (f). See n 70.

her legitimate exercise of the rights referred to in the present Declaration'.[699]

The IACtHR and the ECtHR recognise that states have a duty to defend HRDs against *real* and *imminent* threats and to prevent appropriately any act of aggression or harassment, or attacks against them. However, when the at-risk situation is caused by a non-state actor, given that the state cannot fully control them, the state duty to protect is limited to situations where: (i) the risk is real and imminent; (ii) the state *knew* or *should have known* of that real and imminent risk; and (iii) there were reasonable possibilities of preventing or avoiding that danger:[700]

> **ECtHR:** 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk [...]'.[701]

The IACmHR has clarified that simply providing security arrangements for at-risk defenders, without investigating the origin of the threats, would not constitute an integral response aimed at protecting their rights. 'Merely initiating an investigation into threats [...] does not provide sufficient protection for the defender in question when there is no assessment of the risk to which he or she is exposed.' [702]

Along the same lines, the IACmHR has issued several precautionary measures benefiting HRDs, including lawyers, whose life and personal integrity are at risk.[703]

- **States should investigate with due diligence any violence perpetrated against lawyers, and punish and provide adequate remedies to lawyers**

Because impunity has a chilling effect on the legal profession, states should investigate with due diligence any violations perpetrated against defenders, thereby combating impunity. Any attacks or interference of any sort against lawyers should be diligently and independently investigated and perpetrators should be prosecuted and sanctioned.[704]

The ECtHR has defined criteria for the appreciation of 'effective' investigation (see Part II.D.I).[705] The IACmHR has developed the concept of 'integral protection'. The IACHR considers that:

> 'integral protection is not provided if, on the one hand, States decide to undertake an investigation of the acts of violence against a defender, while, on the other, authorities foster an atmosphere intended to discredit and belittle the defender [...] the failure to craft an integral protection policy [...] establishes a state of defenselessness detrimental to the work of human rights defenders'.[706]

699 UN Declaration on HRDs, Art 12(2).

700 See Part I, Chapter C, Section 1.2. See n 70.

701 See ECtHR, *Kiliç*, para 63. See also, ECtHR, *Osman*, para 116.

702 IACmHR, 'Towards Effective Integral Protection Policies for Human Rights Defenders' (2017) UN Doc OEA/Ser.L/V/II.Doc.207, para 116.

703 See, eg, the precautionary measures granted by the Inter-American Commission to protect Francisco Javier Barraza Gomez (Mexico, 2017), Juan Carlos Gutiérrez and Ana Leonor Acosta (Venezuela, 2016), María Dolores López Godoy, Nelly Lizeth Martínez Martínez and families (Honduras, 2016), Ramón Cadena Rámila and family (Guatemala, 2016), Thelma Esperanza Aldana Hernández and family (Guatemala, 2016), Members of Center for Legal Information 'Cubalex' (Cuba, 2015), Mario Joseph (Haiti, 2012), Members of the Human Rights Lawyers Group (Bufete Jurídico en Derechos Humanos) (Guatemala, 2012) and Leonel Casco Gutiérrez (Honduras, 2011).

704 UNHRC, UN Doc A/71/348, para 100, A/HRC/RES/15/3, 29 September 2010, A/HRC/RES/23/6, 13 June 2013.

705 See below, Part II, Chapter D.

706 IACmHR, 'Towards Effective Integral Protection Policies for Human Rights Defenders' (2017) UN Doc OEA/Ser.L/V/II.Doc.207, para 116.

States should also prove adequate remedies.[707] The Cotonou Declaration on strengthening and expanding the protection of all Human Rights Defenders in Africa (2017) provides that states should 'address the harm suffered by the activists'.

- **States should ensure lawyers' freedom of choice in representation, including freedom from fear of prosecution in controversial cases**

To deny the freedom of choice in the context of legal representation poses a threat not only to the independence of the legal profession but also to the human rights of those who are represented. It goes against core principles of the rule of law, such as the principle of equality before the law and the protection of human rights.

The right to legal representation is protected in the UN Declaration on HRDs, which provides that 'everyone has the right, individually and in association with others, to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms'.[708] Accordingly, any lawyer should be free or even obliged to help uphold the legal rights of any given person, no matter what they are charged with or what ideology they have.[709]

About the situation in Turkey, the SRIJL raised concern about lawyers banned for two years from representing clients in terrorism-related cases, due to criminal investigations they would face on the grounds of membership or creation of a criminal organised or armed group.[710] This violates lawyers' right to exercise their work without threat of prosecution or administrative sanction, and consecutively the right of arrested or detained persons to be assisted by a lawyer of their own choice.

Freedom of choice in representation also includes that lawyers may refuse or withdraw from a case on the basis of lack of competence or strong moral objection. In theory, lawyers should be able to conduct a vigorous defence on behalf of anyone due to their training. In practice though, lawyers have different specialties, but also personalities and ideologies. For that reason, the draft International Code of Ethics prescribes that 'lawyers shall at any time be free to refuse to handle a case, unless it is assigned by a competent body'.[711]

- **States should respect lawyers' role in upholding the rule of law in situations of heightened national security concern**

Sweeping anti-terrorism or surveillance legislation has generated increasingly undue governmental infringements on lawyers' ability to carry out their legitimate duties in line with due process. This happens despite international instruments on counterterrorism containing provisions limiting the negative effect of domestic anti-terrorism legislation, usually through provisions that impose a duty on States Parties to comply with international human rights law.[712]

The OSCE and SPs have reiterated the need to strike a balance between the protection of national security interests and a suspect's basic human rights.[713]

- **States should in all circumstances respect lawyers' right to a remuneration commensurate with their work**

As aforementioned, with respect to state-appointed counsel, lawyers and persons exercising lawyers' functions have a general right to receive remuneration commensurate with their work. In that sense, the IBA Principles

707 See n 71.

708 UN Declaration on HRDs, Art 9.3(c). See SRIJL, KAZ 2/2013.

709 JPW Temminck Tuinstra, 'Defending the Defenders. The Role of Defence Counsel in International Criminal Trials' (2010) 8 Journal of International Criminal Justice, p 474.

710 SRIJL, OL TUR 15/2018, p 4.

711 ILA Study Group on the Practice and Procedure of International Tribunals, The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (2010).

712 CoE, Convention on the Prevention of Terrorism, 2005, Art 12 (freedom of expression); OAS, Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 1971, Art 4 (due process); CIS, Treaty on Cooperation of among the State Members of the Commonwealth of Independent States in Combating Terrorism, 1999, Art 7 (3) (due process); ASEAN, Convention on Counter Terrorism, 2004, Art VIII (due process).

713 OSCE, Countering Terrorism, Protecting Human Rights: A Manual.

recognise that 'lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work'.[714] Lawyers and persons exercising lawyers' functions have the legal and moral obligation to provide legal assistance to those who need it. However, this obligation cannot take place at the expense of their own right to livelihood.

4. Principle of non-identification of lawyers with their client's cause

UN INSTRUMENTS

Basic Principles on the Role of Lawyers (1990):

'18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.'

AFRICA

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'I. Independence of lawyers

[…]

g) Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.'

EUROPE

CoE Recommendation No R (2000)21, Committee of Ministers to member States on the freedom of exercise of the profession of lawyer:

'Principle I – General principles on the freedom of exercise of the profession of lawyer

[…]

4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.'

INTERNATIONAL PROFESSIONAL STANDARDS

IBA Standards for the Independence of the Legal Profession (1990):

'Rights and duties of lawyers

7. The lawyer is not to be identified by the authorities or the public with the client or the client's cause, however popular or unpopular it may be.'

INTERPRETATION

The principle of non-identification means it cannot be presumed that a lawyer identifies or sympathises with his/her client's goals. *A fortiori*, the principle precludes the possibility of extending the client's charges to the lawyer, who would then become addressed as a co-defendant unable to discharge his/her mission as an officer of the court.[715] The Explanatory Memorandum of the CoE Recommendation No R(2000)21 indicates that the right not to

714 IBA Principles, Principle 10.

715 SRIL, OL TUR 15/2018, pp 4–5.

be identified with one's client's cause is implicit in the CoE Recommendation.[716]

As per the principle of neutrality, lawyers are forbidden from relying upon moral objections to a client's projects, and are obliged to assist the client in their full capacity.

The principle of non-identification and the principle of neutrality in lawyers' functions create a legal barrier between the client's charges and the lawyer's work. They contribute to the effective realisation of the right to defence and underpin the principle of independence of the legal profession, aimed at enabling lawyers to perform their professional duties freely, independently and without fear of reprisal.

- **States should respect lawyers' freedom of representation**

The SRIJL notes that attacks on lawyers are frequently the direct consequence of identification of lawyers, by state bodies and sometimes the general public, with the interests, activities of and accusations against their clients. Such attacks constitute or encourage undue interference with lawyers' professional functions and/or violations of their human rights.[717] Cases brought to the attention of the SRIJL show that lawyers have suffered disbarment, attacks on their physical integrity and reputation, arbitrary detention, prosecution and other sanctions as a result of being identified with the charges against or the causes or interests of their client.

Furthermore, the fact that lawyers may be subject to detention and criminal investigation for having received messages from clients suspected or convicted of terrorist activities creates 'a chilling climate in which lawyers may eventually refuse to represent clients connected to politically sensitive issues out of fear of becoming the target of judicial harassment or criminal charges themselves, thus severely compromising the universal right to legal representation'.[718] As a result, 'the identification of a lawyer with his or her client could prevent or limit access to counsel for individuals accused of particularly heinous crimes'.[719]

- **States should take proactive measures to prevent the identification of lawyers with their clients**

The SRIJL has recommended that states should be proactive in taking measures aimed at preventing the occurrence of such identification.[720]

Checklist

- ☐ Has the lawyer been identified with his/her client's cause, for example, faced detention and criminal investigation for representing persons suspected or accused of sensitive crimes? If so, was the state or a non-state actor responsible?
- ☐ Is there a situation where lawyers face systematic harassment for working on specific cases, which is likely to create a chilling effect within the legal profession as a whole?
  - If perpetrated by a non-state actor, has the state taken appropriate measures to prevent the lawyer(s) being identified with their clients' cause?
  - If perpetrated by the state, is there a procedure in place at the level of the bar association to take reactive or pro-active measures?

716 CoE, Recommendation No R(2000)21, Explanatory Memorandum, para 40.

717 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 12.

718 UNGA, UN Doc A/71/348, para 44. See also, ECtHR, *Elçi and Others*.

719 UNGA, UN Doc A/71/348, para 41.

720 *Ibid*, para 104.

5. Lawyers' immunity

UN INSTRUMENTS

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)

'Principle 12. Protection and independence of legal aid providers

36. States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.'

'Basic Principles on the Role of Lawyers (1990):

'Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers … (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.

[…]

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.'

AFRICA

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'I. Independence of lawyers

[…]

(b) States shall ensure that lawyers:

[…]

3. 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.

[…]

e) 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 judicial body or other legal or administrative authority.'

Europe

CoE Recommendation No R (2000)21, Committee of Ministers to member States on the freedom of exercise of the profession of lawyer:

> ***'Principle I – General principles on the freedom of exercise of the profession of lawyer***
>
> *[…]*
>
> *4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.'*

International professional standards

IBA Standards for the Independence of the Legal Profession (1990):

> *'8. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause.*
>
> *10. A lawyer shall have the right to raise an objection for good cause to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.*
>
> *11. Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his or her professional appearances before a court, tribunal or other legal or administrative authority.'*

Interpretation

In his 2009 Annual Report, the then SRIJL stated that it was far from uncommon for an investigation to be initiated against lawyers on grounds of an alleged link to or the provision of support for their clients' alleged criminal activities, or for said lawyers eventually to be charged with defamation solely for representing and defending their clients. Therefore the SRIJL emphasised another important safeguard for lawyers: civil and penal immunity, which is outlined in Principle 20 of the Basic Principles.[721]

In her 2016 report, the successive SRIJL observed that the immunity guaranteed by the Basic Principles is required because freedom of expression and association have specific importance for persons involved in the administration of justice. They constitute essential requirements for the proper and independent functioning of the legal profession, since lawyers use written and oral communication as a fundamental professional tool. She observed that other activities not directly related to the defence of clients or clients' causes, such as academic research and participation in legislative drafting processes, should likewise be protected from undue limitations or censorship.[722]

States should respect lawyers' 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

Basic Principle 20, corroborated by other international and regional standards, sets out a requirement that lawyers be protected at the domestic level for decisions made in the course of their official duties.

The law in force in various jurisdictions protects lawyers from liability for statements made in judicial proceedings. Under English law, participants in these proceedings, including lawyers, enjoy immunity from defamation proceedings for written or oral statements made during the course of judicial proceedings.[723] Legal protections for

721 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 65.

722 UNHRC, UN Doc A/71/348, para 55.

723 England and Wales, *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, 451; England and

lawyers of this nature are present in other common law jurisdictions.[724] In the criminal legislation of some civil law jurisdictions, written and oral statements by lawyers before courts are exempt from criminal liability provided that they meet a test of relevance.[725]

Checklist

- ☐ Has the lawyer been subjected to any civil or criminal sanction as a result of action taken in legitimate representation of his/her client?
- ☐ Has the lawyer been subjected to any civil or criminal sanction as a result of statements made in good faith in written or oral pleadings or in his/her professional appearances before a court, tribunal or other legal or administrative authority?

6. Right to access one's clients (lawyer's freedom of movement)

UN INSTRUMENTS

General recognition of freedom of movement: UDHR, Art 13; ICCPR, Art 12; ICRPD, Art 18; AfCHPR, Art 13; AmCHR, Art 22; ArCHR, Arts 26 and 27

Article 14(3), ICCPR:

> 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> […]
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; […]
>
> […]
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;'

Article 17.2 CPED:

> '(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law'

Wales, *Munster v Lamb* [1883] 11 QBD. 588.

724 TL Anenson, 'Absolute Immunity for Civil Liability: Lessons for Litigation Lawyers', 31(4) Pepperdine Law Review, 915; The Malaysian Bar, 'Opinion: Privilege from defamation', available at www.malaysianbar.org.my/members_opinions_and_comments/opinion_privilege_from_defamation.html.

725 Italian Penal Code, Article 598, available at www.venice.coe.int/webforms/documents/?opinion=715&year=all; Criminal Code of Belgium, Article 452, available at www.legislationline.org/download/action/download/id/6365/file/Belgium_CC_1867_am2016_fr.pdf.

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court (2015)

'Principle 9. Assistance by legal counsel and access to legal aid

13. Assistance by legal counsel in the proceedings shall be at no cost for a detained person, without adequate means, or for the individual bringing proceedings before a court on the detainee's behalf. In such cases, effective legal aid shall be provided promptly at all stages of the deprivation of liberty; this includes, but is not limited to, the detainee's unhindered access to legal counsel provided by the legal aid regime.'

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)

'Principle 7. Prompt and effective provision of legal aid

27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

28. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

Guideline 3. Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence

43: States should introduce measures:

(d) To ensure that persons meet with a lawyer or a legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed;

(h) To make available in police stations and places of detention the means to contact legal aid providers; […]

Guideline 14. Paralegals

68.

(f) To ensure access for accredited paralegals who are assigned to provide legal aid to police stations and prisons, facilities of detention or pretrial detention centres, and so forth;

(g) To allow, in accordance with national law and regulations, court-accredited and duly trained paralegals to participate in court proceedings and advise the accused when there are no lawyers available to do so.'

Basic Principles on the Role of Lawyers (1990):

'Special safeguards in criminal justice matters

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers […] (b) are able to travel and to consult with their clients freely both within their own country and abroad;'

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1998)

'Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 18

Para 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.'

See also: CRC, Arts 37 (d) and 40.2 (b) (ii); ICMW, Art 18.3 (b); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 36.2; UN Declaration on HRDs, Principle 9.3 (c)

Africa

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'I. Independence of lawyers

[…]

b) States shall ensure that lawyers:

[…]

(ii) are able to travel and to consult with their clients freely both within their own country and abroad.

Part M. Provisions applicable to arrest and detention

2. Rights upon arrest

(e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization.'

Europe

CoE Recommendation No R(2000)21, Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer:

> ***'Principle I – General principles on the freedom of exercise of the profession of lawyer***
>
> *[…]*
>
> *5. Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards.'*

International professional standards

IBA, Standards for the Independence of the Legal Profession (1990):

> *'13. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including: […]*
>
> *b) the right to travel and to consult with their clients freely both within their own country and abroad;*

Interpretation

In order for the right to legal assistance and representation to be effective, states should ensure that lawyers have unhindered access to their clients. Freedom of movement, as recognised in international standards,[726] plays a pivotal role in guaranteeing a lawyer's access to their clients. Undue interference with a lawyer's freedom of movement can adversely impact their ability to consult their clients, appear before courts and travel to meetings and events, thus hindering the effective discharge of their professional functions. In some countries travel bans – sometimes followed by detention – make it practically impossible for lawyers to carry out their work.

6.1. Scope of the right

The right protects lawyers' freedom of movement to provide legal assistance and legal representation within and outside the country and access his/her clients in detention.

6.2. State obligations

- **States should ensure lawyers' unhindered access to clients in detention**

Access to clients is particularly important in the context of detained clients, since their freedom of movement is confined to within state-controlled facilities. International standards require state authorities to exercise control over detention centres in a manner that enables lawyers to access their clients without delay or unnecessary burden, and to guarantee physical spaces that allow for privacy and confidentiality.[727]

- **States should ensure lawyers' right to defend a client outside of their own country**

The Basic Principles, the AfCmHPR Guidelines on the Right to a Fair Trial and IBA Standards explicitly require that guarantees for lawyers' functioning apply to lawyers both inside and outside of their own country.[728] Even if they

726 UDHR, Art 13; ICCPR, Art 12; ICRPD, Art 18; AfCHPR, Art 13; AmCHR, Art 22; ArCHR, Arts 26 and 27..

727 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 9 (para 13); UN Guidelines on Legal Aid, Principle 7 (para 28), Guideline 3 (para 43), and Guideline 14 (para 68); Basic Principles, Principles 7–8; CoE Recommendation No R(2000)21, Principle I (5). See also AfCmHPR, Guidelines on the Right to a Fair Trial, Part M.2 (e).

728 Basic Principles, Principle 16; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (b) (ii); IBA Standards for the Independence of the Legal Profession, para 13.

are not members of the national bar association, lawyers engaging in such representation should be awarded the same guarantees and protections as those afforded to lawyers litigating in local tribunals.

In that respect, the SRIJL has expressed concern in a case where the continued denial of travel documents to a lawyer was reportedly due to his human rights activities and aimed at inhibiting his legitimate work as a lawyer in the defence of human rights of victims of enforced disappearances.[729]

- **States should ensure lawyers' right to defend a client before international and regional courts and bodies**

The SRIJL has noted that the principle of access to one's clients includes instances where lawyers may represent clients before international and regional human rights courts and bodies. This is in line with the UN Declaration on HRDs, which outlines the requirement for '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'.[730]

The ECtHR considers that the right to individual petition before the ECtHR[731] has been breached if:

- an applicant has been unable to discuss issues concerning an application before the ECtHR with his representative without their being separated by a glass partition;[732]
- an applicant had been unable to communicate with his representative before the ECtHR during his treatment in hospital;[733]
- an applicant's contact with his representative before the ECtHR has been restricted on the ground that the representative was not a professional advocate and did not belong to any bar association;[734] and/or
- a lawyer, even if they have been disbarred, is prevented from visiting a client in prison, in circumstances where he/she is representing the client before the ECtHR.[735]

> **ECtHR: 'the Court notes that the suspension of Mr Bagirov's licence, which under domestic law prevented him from representing applicants in domestic criminal proceedings, could not be interpreted as a measure limiting his rights in the representation of applicants before the Court. Given that permission to represent an applicant may be granted to a non-advocate under Rule 36 para 4 (a) of the Rules of Court, Contracting States must ensure that non-advocate representatives are allowed to visit detainees who have lodged or intend to lodge an application with the Court under the same conditions as advocates'.**[736]

6.3. Restrictions on access to one's clients

The ECtHR accepts that compliance by a representative with certain formal requirements might be necessary before obtaining access to a detainee, for instance, for security reasons or in order to prevent collusion or some action aimed to pervert the course of the investigation or justice.[737] This is the case where domestic formalities are easy to comply with.[738] Conversely, excessive formalities in such matters, such as those that could de facto prevent a prospective applicant from effectively enjoying his/her right of individual petition, have been found to be unacceptable.

The HRCttee has established that it is not permissible for a state to refuse access to a lawyer on the basis that the

729 SRIJL, IND 12/2015, 9 October 2015.
730 UN Declaration on HRDs, Art 9 (4).
731 ECHR, Art 34.
732 ECtHR, *Cebotari v Moldova*, No. 35615/06, 13 November 2007, paras 58–68.
733 ECtHR, *Shtukaturov v Russia*, No 44009/05, 27 March 2008, para 140.
734 ECtHR, *Zakharkin v Russia*, No 1555/04, 10 June 2010, paras 152–60.
735 ECtHR, *Rasul Jafarov v Azerbaijan*, No 69981/14, 17 March 2016, para 183.
736 *Ibid.*
737 ECtHR, *Melnikov v Russia*, No 23610/03, 14 January 2010, para 96.
738 ECtHR, *Lebedev v Russia*, No 4493/04, 25 October 2007, para 119.

lawyer does not have security clearance in circumstances where the state has failed to provide reasons for denying security clearance.[739]

Checklist

- ☐ Has the lawyer been refused access to his/her client at any stage of the judicial process?
- ☐ Has the lawyer's access to his/her client been restricted? Was the restriction – as provided by law – necessary and proportionate to the aim pursued?
  - If so, did it nonetheless jeopardise the ability of the person to present and answer the case effectively?
- ☐ Have measures been put in place that have had the effect of denying or unreasonably restricting a lawyer's access to his/her client?
- ☐ Are there measures in place to complain about interference in lawyers' functions before the bar association or a state authority?

7. Right to adequate time, facilities and access to all appropriate information to prepare the client's defence

UN INSTRUMENTS

Article 14, ICCPR: '3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: […] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;'

Article 20, CPED

1. 'Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.'

See also: CRC, Art 40.2(b)(ii); ICMW, Art 18.3 (b)

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court (2015)

'Principle 9 – Assistance by legal counsel and access to legal aid

739 HRCttee, *Dzhakishev v Kazakhstan*, No 2304/2013, 9 December 2015.

14: Persons deprived of their liberty shall be accorded adequate time and facilities to prepare their case, including through disclosure of information in accordance with the present Basic Principles and Guidelines, and to freely communicate with legal counsel of their choice.

Principle 12. Equality before the courts

20. Every individual deprived of liberty shall be guaranteed the right to have access to all material related to the detention or presented to the court by State authorities, to preserve the equality of arms. The requirement that the same procedural rights be provided to all parties is subject only to distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.

Guideline 13. Disclosure of information

78. The detaining authority shall provide all relevant information to the judge, the detainee and/or his or her lawyer. Disclosure must include exculpatory information, which includes not only information that establishes an accused person's innocence, but also other information that could assist the detainee, for example, in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply.

79. Sanctions, including criminal penalties, shall be imposed on officials who withhold or refuse to disclose information relevant to the proceedings or who otherwise delay or obstruct proceedings.

80. The disclosure of information may be restricted only if the court concludes that: (a) a restriction of disclosure is demonstrated to be necessary to pursue a legitimate aim such as protecting national security; respecting the rights or reputation of another individual; or protecting public order, health or morals, as long as such restrictions are non-discriminatory and consistent with relevant standards of international law; and (b) it has been demonstrated that less restrictive measures would be unable to achieve the same purpose, such as providing redacted summaries of information that clearly point to the factual basis for the detention.

81. Any proposed restriction on the disclosure of information must be proportionate. An assessment of proportionality requires a balance between how well the non-disclosure protects the legitimate aims being pursued and the negative impact this will have on the ability of the person to respond to the case or to pursue a challenge to the arbitrariness and lawfulness of detention. If a less restrictive measure can achieve the legitimate aim, then the more restrictive measure must be refused.

82. If the authorities refuse to make the disclosure, and the court does not have the authority to compel such disclosure, then the court must order the release of the person detained.'

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)

'Principle 7. Prompt and effective provision of legal aid

27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

28. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

Principle 12. Independence and protection of legal aid providers

36. States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions

without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.'

UN Declaration on HRDS (1998)

Article 6

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;

Basic Principles on the Role of Lawyers (1990):

> *'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.'*

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)

Principle 16

> *'Para 4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.'*

See also: UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 5, para 56; UN Guidelines on Legal Aid, Guideline 4, para 44(g); Nelson Mandela Rules, Rule 61; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 13, 18.2 and 36.2.

Europe

Article 6 (3), ECHR: 'Everyone charged with a criminal offence has the following minimum rights: […] (b) to have adequate time and facilities for the preparation of his defence;'

Recommendation No R(2000)21, Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer:

Principle I – General principles on the freedom of exercise of the profession of lawyer

> *[…]*
>
> *'7. Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.'*

Africa

Article 7, AfCHPR:

1. 'Every individual shall have the right to have his cause heard. This comprises:

[…]

c) the right to defence, including the right to be defended by counsel of his choice.'

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'part I. Independence of lawyers

(d) 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.

part M. Provisions applicable to arrest and detention

2. Rights upon arrest

(e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization.

N. Provisions applicable to proceedings relating to criminal charges

1. Notification of charges

(a) Any person charged with a criminal offence shall be informed promptly, as soon as a charge is first made by a competent authority, in detail, and in a language, which he or she understands, of the nature and cause of the charge against him or her.

(c) The accused must be informed in a manner that would allow him or her to prepare a defence and to take immediate steps to secure his or her release.'

Americas

Article 8, AmCHR:

'2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[…]

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defence;'

Arab Community

Arts 16: Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:

2. The right to have adequate time and facilities for the preparation of his defence and to be allowed to communicate with his family.

International professional standards

IBA Standards for the Independence of the Legal Profession (1990):

'Rights and duties of lawyers

13. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, includ ing:

a) confidentiality of the lawyer-client relationship, including protection of the lawyer's files and documents from seizure or inspection and protection from interception of the lawyer's electronic communications;

b) the right to travel and to consult with their clients freely both within their own country and abroad;

c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work.'

Interpretation

The HRCttee observes that the requirement that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with their counsel, protected by Article 14 (3) (b) of the ICCPR, is 'an important element of the guarantee of a fair trial and an application of the principle of equality of arms'.[740] The Basic Principles require competent authorities to adopt all appropriate measures to ensure that lawyers have '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.'[741]

The right to adequate time, facilities and access to all appropriate information to prepare the client's defence is closely related to the right to adversarial proceedings, and both require: the right to have knowledge of, and comment on, all evidence filed to influence the court's decision; the right to have sufficient time to familiarise oneself with the evidence before the court; and the right to produce evidence.[742]

7.1. Scope of the right

As a manifestation of the principle of equality of arms, the right to adequate time, facilities and access to all appropriate information to prepare the client's defence applies to criminal and civil proceedings.[743]

7.2. State obligations

- **States should ensure timely notification of the reasons of the arrest[744] and nature and cause of the**

740 HRCttee, General Comment No 32, para 10. HRCttee, *Zhirnov v Russian Federation*, No 1795/2008, 5 November 2013, para 10.3.

741 Basic Principles, Principle 21. See OSCE, Legal Digest of International Fair Trial Rights, paras 6.3.5–6, pp 122–23.

742 FRA, Handbook on European Law, p 43.

743 ECtHR, *Lobo Machado v Portugal*, No 15764/89, 20 February 1996. OSCE, Legal Digest of International Fair Trial Rights, pp 122-123.

744 See n 491.

accusation,[745] **dates of the hearing**[746] **and state-arrangement, when the state appoints a lawyer.**

- **States should ensure that the person has adequate time and means to prepare his/her defence**

Adequate time

Determination of what constitutes 'adequate time' to prepare one's case requires an assessment of the individual circumstances of each case, including the nature and the complexity of the case, the seriousness of the sanction[747] and the stage that the proceedings have reached.[748]

In practice, the right to adequate time to prepare one's defence is balanced against the right to trial within a reasonable time.[749] For jurisprudence on adequate time fund violation, see the OSCE Legal Digest.[750]

Access to facilities and information

In its General Comment No 32, the HRCttee interprets the right of the accused person 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing', enshrined in Article 14 (3) (b) of the ICCPR, as including:

- 'access to documents and other evidence';
- access to 'all materials that the prosecution plans to offer in court against the accused or that are exculpatory', and that the accused requires to prepare his/her case. Prosecuting and investigating authorities must disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating him/herself or in obtaining a reduction in sentence;[751]
- opportunity to engage and communicate with counsel.[752] The accused person may then request to be acquainted with the criminal files together with his/her lawyer.

Clear violations of the right to prepare one's defence include defence lawyers being denied copies of the case file;[753] defence lawyers having access to the criminal indictment only after the judgment or first hearing[754] and for a very brief time;[755] or the state refusing defence lawyers the ability to cross-examine the government agents who conducted the investigation.[756]

7.3. Restrictions

- **State restriction on disclosure of information must pursue a legitimate aim, be necessary and proportionate to that aim and be sufficiently counterbalanced to ensure the person is able to respond to the case and that the trial is fair overall**[757]

In the counterterrorism context, the principle of full disclosure to ensure a fair trial is at odds with intelligenceservices' practice of non-disclosure unless absolutely necessary.[758] States have been urged to ensure that any measures

745 *Ibid.* HRCttee, *Ndong Bee and MicAbogo v Equatoria Guinea*, 31 October 2005, 1152/2003 and 1190/2003.

746 HRCttee, *Simmonds v Jamaica*, No 338/1988, 23 October 1192; *Osiuk v Belarus*, No 1311/2004, 30 July 2009.

747 HRCttee, *Zhirnov v Russia*, No 1795/2008, 5 November 2013, para 10.4.

748 HRCttee, *Williams v Jamaica*, No 561/1993, 8 April 1997, para 9.3; HRCttee, *Hibbert v Jamaica*, No 293/1988, 27 July 1992, para 7.4; ECtHR, *Albert and Le Compte v Belgium*, Nos 7299/75 and 7496/76, 28 January 1983, para 41. For further jurisprudence on adequate time, see HRCttee, *Musaeva v Uzbekistan*, 1914, 1915 and 1916/2009, 6 June 2012; IACtHR, *Castillo Petruzzi,* para 138.

749 OSCE, Legal Digest of International Fair Trial Rights, p 121.

750 *Ibid.*

751 HRCttee, General Comment No 32, para 33; ECtHR, *Jespers v Belgium*, No 8403/78, 15 October 1980, para 58; ECtHR, *Rowe and Davies v The United Kingdom* [GC], No 28901/95, 16 February 2000, para 60.

752 HRCttee, General Comment No 32, para 33; CESCR 'General Comment No 13, Art 13, Right to education' (1999), para 9.

753 HRCttee, *Gunan v Kyrgyzstan*, No. 1545/2007, 25 July 2011; HRCttee, *Kulov v Kyrgyzstan* No. 1369/2005, 19 October 2010, para 8.7.

754 SRIJL, ARE 1/2013, 16 April 2013.

755 SRIJL, OL TUR 15/2018.

756 IACtHR, Castillo *Petruzzi*, para 138.

757 OSCE, Legal Digest of International Fair Trial Rights, pp 122–23.

758 CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial

taken to protect sensitive information are compatible with the right to a fair hearing.[759]

Legitimate aim

Legitimate aims for restricted disclosure include: (1) protecting national security;[760] (2) preserving the fundamental rights of another individual, such as the protection of witnesses who are at risk of reprisals;[761] or (3) safeguarding an important public interest, such as allowing police to keep secret their methods of investigating crimes.[762]

Necessary and proportional

In any situation where non-disclosure occurs, the trial court, or other competent judiciary authorities, must assess whether or not this is necessary and proportional.[763] An assessment of proportionality requires a balance to be struck between how well the non-disclosure protects the legitimate aims being pursued and the negative impact this has on the ability of the accused to respond to the case.[764] This means that if a less restrictive measure can achieve the legitimate aim (such as providing redacted summaries of evidence, for example) then that measure should be applied.[765]

Sufficiently counterbalanced

Any difficulty caused to the accused party must be 'sufficiently counterbalanced' by the judicial authorities in order to ensure that the trial is fair overall and that the person is provided with sufficient information so as to be adequately prepared for the case[766] and able to respond to the case.[767] This might involve, for example, an ex parte evaluation by the trial judge of whether all or part of the information should be withheld and whether a redacted summary of the information should be provided.

Counterbalances to non-disclosure have been deemed sufficient for the respondent to effectively respond to the case, in the following examples:

- in a case concerning a security certificate issued against the accused (a certificate issued by the executive branch stating that the accused was deemed to pose a threat to national security), the person was provided with a redacted summary of the information and steps were taken by the court to ensure that the applicant was aware of, and was able to respond to, the case made against him and that he was also able to, and did, present his own case and cross-examine witnesses;[768]
- special advocates' (legal counsel with security clearance)[769] could fully discharge their functions in a case where:

and Due Process in the Context of Countering Terrorism, para 76.

759 HRC, 'Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism' (2012) UN Doc A/HRC/22/26, paras 36–38; HRC, 'Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism' (2010) UN Doc A/HRC/16/50), paras 34–35; HRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (2006) UN Doc A/HRC/4/26/Add.3 (Country report on Australia), para 39. See also the Global Principles on National Security and the Right to Information (Tshwane Principles) (2013), Background and Rationale, p 6.

760 ECtHR, *Mirilashvili v Russia*, No 6293/04, 11 December 2008 (FINAL 5 June 2009), para 202; ECtHR, *Dowsett v The United Kingdom*, No 39482/98, 24 June 2003 (FINAL, 24 September 2003), para 42.

761 ECtHR, *Doorson v the Netherlands*, No 20524/92, 26 March 1996, para 70; ECtHR, *Kovač v Croatia*, No 503/05, 12 July 2007 (FINAL 12 October 2007), para 27.

762 ECtHR, *Rowe and Davis*, para 61; ECtHR, *Lüdi v Switzerland*, No 12433/86, 15 June 1992, para 49; ECtHR, *Van Mechelen and Others*, para 57.

763 CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para 77 and fn 185.

764 *Ibid*.

765 ECtHR, *Van Mechelen and Others*, para 58; ECtHR, *Rowe and Davis*, para 61.

766 ECtHR, *Doorson*, para 70; ECtHR, *Rowe and Davis*, para 61.

767 ECtHR, *Edwards and Lewis v the United Kingdom* [2003] ECHR 381, para 30.

768 HRCttee, *Ahani v Canada,* No 1051/2002, 15 June 2004, para 10.5.

769 'Special advocates' are used in criminal and non-criminal proceedings involving the use of classified information, as a means of attempting to provide sufficient counterbalances to difficulties faced by a party as a result of the non-disclosure of classified information. The role

- evidence was to a large extent disclosed and formed the predominant basis of the trial court's decision;[770] or
- it was possible for the person to provide his/her representatives and the special advocate with sufficient instructions, notwithstanding that most or all of the underlying evidence remained undisclosed. Allegations contained in the open material were sufficiently specific so that, even without knowing the detail or sources of the evidence that formed the basis of the allegations, the thrust of the case was effectively conveyed through the open information.[771]

The use of special advocates raises significant issues and has to be decided on a case-by-case basis in order to secure protection of the accused's right to a fair trial.[772]

Restrictions do not deprive the accused of a fair trial and the capacity to answer the case

Restricted disclosure should not deprive the accused person of a fair trial, when considering the entirety of the proceedings.[773]

- **State should duly justify the reasons for refusing security clearance to secret documents**

The HRCttee finds violation of Article 14.3 (b) if a state fails to justify the reasons for refusing security clearance to a lawyer when security clearance is required to access 'state secrets'.[774]

of the special advocate is to take full instructions from the person who is the subject of the proceedings, following which the advocate has the opportunity to view the entire un-redacted file. Generally speaking, the special advocate may then: (a) challenge the admissibility of, and/or weight to be given to, the non-disclosed classified evidence; (b) challenge the non-disclosure itself, on the basis that the non-disclosure is either unnecessary or disproportionate; and/or (c) advocate on behalf of the person in a closed hearing. These functions are undertaken in addition to any legal representation held by the person who is the subject of the proceedings, since the special advocate does not 'act' for the person. CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, sections 8.6 and 9.5.

770 CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para 80.

771 *Ibid*.

772 HRC, 'Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism' (2012) UN Doc A/HRC/22/26, para 36. The High Commissioner for Human Rights has emphasised the problematic nature of limitations on the ability of special advocates to fully discharge their functions and obtain post-disclosure instructions. Special advocates are not permitted to communicate with non-security cleared persons after the disclosure of evidence. Additionally, a lack of adequate resources can result in ineffective action by special advocates.

773 CTITF, Working Group on Protecting Human Rights while Countering Terrorism, Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para 78. See also, A/HRC/22/26, para 38.

774 HRCttee, *Dzhakishev.* For information related to non-access to documents classified as 'secret', see SRIJL, KAZ 2/2013.

Checklist

Right to confidentiality in the lawyer–client communication:

- ☐ Has the lawyer adequate time to prepare his/her client's defence given the nature and complexity of the case and the stage that the proceedings have reached?
- ☐ Has the lawyer been deprived of relevant information, inhibiting his/her ability to represent his/her client?
- ☐ Was the non-disclosure of relevant information in compliance with the principle of legality?
  - If so, was the non-disclosure necessary and proportionate in the circumstances?
  - Did a less intrusive measure exist?
- ☐ Were there safeguards put in place by the state to counterbalance the interference in the non-disclosure of documents so that the person could effectively and in practice exercise the right to defend oneself?

8. Right to confidentiality in the lawyer–client communication ('attorney–client privilege')

UN INSTRUMENTS

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court (2015)

'Principle 9. Assistance by legal counsel and access to legal aid

15: *Legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisals, interference, intimidation, hindrance or harassment. Authorities shall respect the privacy and confidentiality of legal counsel detainee communications.*

Guideline 8. Assistance by legal counsel and access to legal aid

69: *Respect for the confidentiality of communications, including meetings, correspondence, telephone calls and other forms of communications with legal counsel must be ensured. Such communications may be held in the sight of officials, providing that they are conducted out of their hearing. In the event that this confidentiality is broken, any information obtained shall be inadmissible as evidence;'*

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012):

> ***'Guideline 3. Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence***
>
> ***Para 43.*** *States should introduce measures:*
>
> *(d). To ensure that persons meet with a lawyer or legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed;'*

Basic Principles on the Role of Lawyers (1990):

'Guarantees for the functioning of lawyers

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)

'Principle 18

3.The right of a detained or imprisoned person to be visited by and to consult and communicate

without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.'

See also: Basic Principles, Principle 8; UN Guidelines on Legal Aid, Principles 7 (para 28) and 12 and Guideline 4, para 44(g); Nelson Mandela Rules, Rule 61.

Africa

(Interpreted in relation with AfCHPR, Article 7.1 (c)):

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'I. Independence of lawyers

[…]

c) States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

See also: AfCmHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 3 (B) (iii); AfCmHPR, Luanda Guidelines, Guidelines 8 (d) (ii), 14 (c) and 31 (c) (iii).

Americas

Article 8, AmCHR:

'2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[…]

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel'..

Europe

(Interpreted in relation with Article 6(3)b, ECHR):

CoE Recommendation No R(2000)21, Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer:

'Principle I – General principles on the freedom of exercise of the profession of lawyer

5. Lawyers should have access to their clients, including in particular to persons deprived or their liberty, to enable them to counsel in private and to represent their clients according to established professional standards;

6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law.'

Principle III – Role and duty of lawyers

2. Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions.'

See also: European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights, Article 3(2)c.

International professional standards

IBA Standards for the Independence of the Legal Profession (1990):

'Duties and responsibilities

13. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including:

a) confidentiality of the lawyer-client relationship, including protection of the lawyer's files and documents from seizure or inspection and protection from interception of the lawyer's electronic communications.'

See also: IBA Standards, para 12; IBA International Principles on Conduct for the Legal Profession , Principle 4.

Interpretation

Although not expressly stated within Article 14 of the ICCPR, the HRCttee observes that in the context of criminal proceedings, '[c]ounsel should be able to meet their clients in private and to communicate with the accused in

conditions that fully respect the confidentiality of their communications'.[775]

Similarly, the ECtHR considers the principle of confidentiality to be implicit within the fair trial rights contained in Article 6 of the ECHR and to be necessary if the right to legal assistance is to be practical and effective.[776]

The international standards listed above recognise explicitly both the state's duty to preserve and protect confidentiality in the lawyers–client relationship, and the lawyers' 'duty to keep their clients' affairs secret' as mentioned in Principle III.2 of the CoE Recommendation No R(2000)21 (see above Part II, Chapter B, Section 5.5).

8.1. Scope of the right

The privilege applies to telephone calls, written and electronic correspondence, face-to-face meetings and all other forms of communication.[777]

8.2. State obligations

- **States should respect and protect the privileged nature of the lawyer–client relationship.**

States should respect and protect the confidentiality of all documents, communications, messages and other information concerning clients, as well as all the devices and places where such information can be found, including protection from illegal searches and seizures.[778]

Most jurisdictions respect and protect such confidentiality obligations, for example, by exempting the lawyer from the duty to testify before courts and other public authorities as to the information the lawyer has gathered from clients, and/or by affording lawyer–client communications special protection.

- **States should ensure special safeguards in case of search of lawyer's home or office**

> **ECHR: 'The Court considers that searches and seizures at the premises of a lawyer undoubtedly breach professional secrecy, which is the basis of the relationship of trust existing between a lawyer and his client. Furthermore, the safeguarding of professional secrecy is in particular the corollary of the right of a lawyer's client not to incriminate himself, which presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged"'**[779]

'Accordingly, although domestic law may make provision for searches of the practices of lawyers, it is essential that such searches are accompanied by particular safeguards. Likewise, the Convention does not prohibit the imposition on lawyers of certain obligations likely to concern their relationships with their clients. This is the case in particular where credible evidence is found of the participation of a lawyer in an offence […] or in connection with efforts to combat certain practices […]. On that account, however, it is vital to provide a strict framework for such measures, since lawyers occupy a vital position in the administration of justice and can, by virtue of their role intermediary between litigants and the courts, be described as officers of the law.'[780]

Safeguards include the presence of a representative of the legal profession during the search.[781] Furthermore lawyers cannot be asked to hand over their client's belonging without the client's consent or a court order.[782]

775 HRCttee, General Comment No 32, para 34.

776 ECtHR, *S v Switzerland*, Nos 12629/87 and 13965/88, 28 November 1991, para 48; ECtHR, *Öcalan*, para 133. See the Explanatory memorandum of the CoE Recommendation No R(2000)21 mentioning confidentiality as 'one of the rights of the defence guaranteed by the ECHR'.

777 See, eg, UN Principles and Guidelines on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court, Guideline 8, para 88; Luanda Guidelines, Guideline 8 (d) (ii).

778 UNHRC, UN Doc A/71/348, para 105.

779 ECtHR, *André and another v France*, No 18603/03, 24 July 2008 (FINAL, 24 October 2008), para 41.

780 *Ibid*, para 42.

781 *Ibid*, para 43.

782 IBA Principles, Principle 8 'Protection of property of clients and third parties', pp 29–30.

The SRIJL has further stated in one case that the attorney–client privilege prohibited the seizure of documents or computer drives at the lawyer's office or home.[783]

When the search takes place at the client's home, lawyers may request an inventory list for any items removed from their client's home.[784]

- **States should ensure that all police stations and detention centres throughout the country, including in rural areas, have adequate facilities for individuals to communicate privately (including by telephone) and to meet in private with their lawyers**

Facilities for the communication between lawyer and client must be organised to ensure the confidentiality of oral and written communications between individuals and their lawyers.[785]

In the context of detention or imprisonment, the need for confidentiality is even more justified. Taking security needs into consideration, authorities 'must ensure that people deprived of their liberty can consult with their legal counsel without delay, interception or censorship'.[786]

Confidentiality of detainee–lawyer communications must be guaranteed from the outset of any deprivation of liberty, regardless of whether the state intends to use at trial any information obtained in breach of the confidentiality.[787] This means that interviews between legal counsel and a detained person may be within sight, but not within hearing, of a law enforcement official.[788]

In addition, an arrested or detained individual should be permitted to keep documents related to the case in his or her possession. The confidentiality of such documents should be respected.[789]

8.3. Restrictions

- **State restriction must be required by law, pursue a legitimate aim, be necessary and legitimate to that end and not deprive the accused person of a fair trial**

Required by law

Restrictions may be allowed or required by law and/or applicable rules of professional conduct.[790] Lawyers may request that officials provide a valid search warrant.[791]

In *Kopp v Switzerland*,[792] where a law firm's telephone line was monitored on the orders of the federal public prosecutor, the ECtHR considered limitations on the right to privacy under Article 8 (2).

The Court reiterated that:

> 'In the context of secret measures of surveillance or interception of communications by public authorities,

783 SRIJL, KGZ 2/2015, 3–4.

784 SRIJL, ZWE 2/2013, 21 March 2013.

785 CAT, 'Concluding Observations: Jordan' (2010) UN Doc CAT/C/JOR/CO/2, para 12.

786 Basic Principles, Principle 8.

787 UN Body of Principles, Principle 18 (4); Basic Principles, Principles 8 and 22; HRCttee, 'Concluding Observations: Fifth periodic report of Spain' (2008) UN Doc CCPR/C/ESP/CO/5, para 14; HRCttee, 'Concluding Observations: Fourth periodic report of Austria' (2007) UN Doc CCPR/C/AUT/CO/4, para 16. See further the Basic Human Rights Reference Guide on Detention in the Context of Countering Terrorism, Guideline 3.

788 UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 9 (para 69); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18.4. See, eg, HRCttee, *Arutyuniantz v Uzbekistan*, No 971/2001, UN Doc CCPR/C/83/D/971/2001 (2005), para 6.3; UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 39; ECtHR, *Brennan v The United Kingdom*, No 39846/98, 16 October 2001, paras 59–63.

789 Nelson Mandela Rules, Rule 53; UN Guidelines on Legal Aid, Principle 7 (para 28).

790 IBA, International Principles, Principle 4 (21–23). SRIJL, THA 6/2015, 7 July 2015.

791 SRIJL, ZWE 2/2013, 21 March 2013.

792 *ECtHR*, *Kopp v Switzerland*, No 23224/94, 25 March 1998.

> because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures'.[793]

In that specific case, the Court identified a contradiction between the clear text of legislation that protects legal professional privilege when a lawyer is being monitored as a third party and the practice followed in the case at hand. The Court concluded that Mr Kopp did not enjoy the minimum degree of protection for a lawyer required by the rule of law in a democratic society, as 'the law does not clearly state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel'.[794]

Legitimate aim

Legal exceptions usually refer to criminal acts and fraud, as well as statutory exceptions giving powers to tax authorities.[795] Therefore, lawyers should not benefit from the secrets confided to them by their clients and cannot claim the protection of confidentiality when assisting and abetting the unlawful conduct of their clients, *a fortiori* when acting as an accomplice to a crime. States have thus taken measures to monitor communications between legal counsel and persons suspected of involvement in terrorist acts, justifying such steps to be for the purpose of preventing information being passed from the accused person to counsel and in turn from counsel to suspects still at large.

However the ECtHR has highlighted that the legitimate aims mentioned in the ECHR must be narrowly interpreted:

> **ECtHR:** 'The Court has repeatedly held that persecution and harassment of members of the legal profession strikes at the very heart of the Convention system. Therefore the searching of lawyers' premises should be subject to especially strict scrutiny.'[796]
>
> 'With that in mind the Court reiterates that the exceptions to the individual's right to respect for his or her private and family life, his or her home and his or her correspondence listed in Article 8 § 2 must be narrowly interpreted. The enumeration of the exceptions as listed in Article 8 § 2 is exhaustive and their definition is restrictive. For it to be compatible with the Convention, a limitation of this right must, in particular, pursue an aim that can be linked to one of those listed in this provision' (para 182) [797]

Necessary and proportionate

Some jurisdictions allow or require a lawyer to reveal information relating to the representation of the client to the extent the lawyer reasonably believes it necessary to prevent reasonably certain crimes from taking place, for example death or substantial bodily harm, or to prevent the client from committing such a crime in furtherance of which the client has used or is using the lawyer's services.[798]

Recent legislation imposing special duties upon lawyers to assist in the prevention of criminal phenomena such as terrorism, money laundering or organised crime has led to further erosion of the protection of the lawyer's duty of confidentiality.[799] Many national bar associations are opposed in principle to the scope of this legislation. Any encroachment on the lawyer's duty should be strictly limited to information that is absolutely indispensable to the prevention of imminent terrorist acts and protect all other information protected by the lawyer–client privilege.[800]

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793 *Ibid.*
794 *Ibid*, para 73.
795 CoE, Recommendation No R(2000)21, Explanatory Memorandum.
796 ECtHR, *Aliyev v. Azerbaijan*, Nos 68762/14 and 71200/14, 20 September 2018, paras 181.
797 *Ibid*, para 182.
798 IBA Principles, Principle 4. Confidentiality, Section 4.2, p 22.
799 *Ibid*.
800 *Ibid*. SRIJL, JAL TUN 1/2015, 24 July 2015.

The aim must be to enable lawyers to comply with their legal obligations and to prevent lawyers from being unknowingly abused by criminals in order 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.

Necessary safeguards regarding the restricted retention and dissemination of legally privileged material

The ECtHR also requires particular safeguards to protect the interests of persons subject to a search[801] or affected by covert surveillance of legal consultations, including the use, retention and dissemination of legally privileged material.[802]

> **SR CT:** 'Where measures are taken to monitor the conduct of consultations between legal counsel and client, strict procedures must be established to ensure that there can be no deliberate or inadvertent use of information subject to legal professional privilege. Due to the importance of the role of counsel in a fair hearing, and of the chilling effect upon the solicitor-client relationship that could follow the monitoring of conversations, such monitoring should be used rarely and only when exceptional circumstances justify this in a specific case.'[803]

Client's waiver of their right to confidentiality

The extent to which clients may waive their right to confidentiality is subject to differing rules in different jurisdictions.[804] In some jurisdictions, clients may waive the lawyer's obligation of confidentiality and professional secrecy, but this is not the case elsewhere. Jurisdictions differ on the scope of protection and its geographical extension.

Restrictions on waivers are of paramount importance to protect against a court or governmental authority putting inappropriate pressure on a client to waive his or her right to confidentiality.[805] Rules limiting the ability to waive argue that frequently clients are not able to properly assess the disadvantages of issuing such a waiver. In some jurisdictions, the obligation of confidentiality can be broken for self-defence purposes in judicial proceedings.

Checklist

- ☐ Has there been an interference with the principle of confidentiality?
  - Was the interference provided by law?
  - If so, was such interference necessary and proportionate?
- ☐ Were there sufficient safeguards adopted as to the retention or dissemination of legally privileged material?

801 ECtHR, *André and another v France*, No 18603/03, 24 July 2008 (FINAL 24 October 2008), para 42.

802 ECtHR, *RE v The United Kingdom*, No 62498/11, 27 October 2015. The following conditions would have been required in the case: limiting the number of persons to whom the material is made available and restricting the extent to which it is disclosed and copied; imposing a broad duty on those involved in interception to keep everything in the intercepted material secret; prohibiting disclosure to persons who do not hold the necessary security clearance and to persons who do not 'need to know' about the material; criminalising the disclosure of intercept material with an offence punishable by up to five years' imprisonment; requiring intercepted material to be stored securely; and requiring that intercepted material be securely destroyed as soon as it is no longer required for any of the authorised purposes.

803 UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin' (2008) UN Doc A/63/223, para 39.

804 IBA Principles, Principle 4. ('Confidentiality') Section 4.2, p 23.

805 *Ibid*.

D. Lawyer's individual rights

The right to defend one's client may engage a lawyer's right to life and security, their human dignity and the integrity of their person. Arbitrary detention is the most commonly reported type of attack upon lawyers, and the SRIJL has regularly taken action in cases where lawyers have been killed or subjected to death threats as a consequence of their work. The SRIJL has also received numerous communications alleging physical attacks, and intimidation and threats from both state and non-state actors, which amount to prohibited treatment. Such attacks, which often extend to a lawyer's family and/or those associated with them, aim to prevent or deter them from fulfilling their professional functions. Such attacks are commonly used as a reprisal for the discharge of a lawyer's professional duties.

Where attacks on the liberty of lawyers are frequent or systematic, they may have a chilling effect on the legal profession as a whole.

The following sections address the individual freedoms most at threat in the discharge of lawyers' functions, as evidenced in practice, and provides succinct guidance for the protection of lawyers':

- right to life, right to liberty and security, and prohibition of torture and degrading or inhuman treatment or punishment (Section 1);
- freedom of expression (Section 2);
- freedom of association and assembly (Section 3); and
- right to property (Section 4).

1. Right to life, liberty, security and prohibition of torture and degrading or inhuman treatment or punishment

UN INSTRUMENTS

UDHR:

Article 3: 'Everyone has the right to life, liberty and security of person.'

Article 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

Article 9: 'No one shall be subjected to arbitrary arrest, detention or exile.'

ICCPR:

Article 6: '1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

Article 7: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

Article 9:

'1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.'

CAT:

Article 1:

'1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering,

whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

Article 2:

'1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

Basic Principles on the Role of Lawyers (1990):

'Guarantees for the functioning of lawyers

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.

[…]

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.'

UN Declaration on HRDs (1998):

Article 2

'1. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.

2. Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed.'

Article 12

'1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.

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.'

Europe

ECHR

Article 2. Right to life

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

Article 3. Prohibition of torture: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Article 5. Right to liberty and security

'1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

CoE Recommendation No R(2000)21, Committee of Ministers on the freedom of exercise of the profession of lawyer:

'For the purpose of this recommendation, 'lawyer' means 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 advice or represent his or her clients in legal matters.'

Principle I – General principles on the freedom of exercise of the profession of lawyer

'1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

[…]

4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.

[…]

7. Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant files when defending the rights and interests of their clients in accordance with their professional standards.

8. All lawyers acting in the same case should be accorded equal respect by the court.'

Principle V – Associations

'3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.

[…]

5. Bar associations and other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:

a. arrest or detention of a lawyer;

b. any decision to take proceedings calling into question the integrity of a lawyer;

c. any search of lawyers themselves or their property;

d. any seizure of documents or materials in a lawyers' possession;

e. publication of press reports which require action on behalf of lawyers.'

Americas

American Declaration on the Rights and Duties of Man:

Article I: 'Every human being has the right to life, liberty and the security of his person.'

Article XVIII: 'Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.'

Article XXV:

'No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.'

AmCHR:

Article 1: Obligation to Respect Rights:

'1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.'

Article 4. Right to Life '1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.'

Article 5. Right to Humane Treatment:

'1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.'

Article 7. Right to Personal Liberty:

'1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established

beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

[…]

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.'

Africa

AfCHPR:

Article 4: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

Article 5: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

Article 6: 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

'I Independence of lawyers

[…]

b) States shall ensure that lawyers:

(i) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;

[…]

(iii) 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.

[…]

e) 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 judicial body or other legal or administrative authority.

f) Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.'

Interpretation

The rights to life, physical integrity, liberty and security are enshrined in core international human rights treaties. Several instruments explicitly put on states the obligation to protect lawyers from any threats, violence or intimidation they may suffer as a consequence of their work. In several resolutions the UNHRC calls 'upon States to protect judges, lawyers and prosecutors and their families against physical violence, threats, retaliation and harassment as a result of discharging their functions'[806] and condemns 'all acts of violence, intimidation and reprisal against judges, prosecutors and lawyers'. The UNHRC reminds 'States of their duty to uphold the integrity of judges, prosecutors and lawyers and their families and professional associates against all forms of violence,

806 UNGA, 'Elimination of Discrimination against Women' (2010) UN Doc A/HRC/RES/15/3.

threat, retaliation, intimidation and harassment [...] and to prosecute such acts and to bring the perpetrators to justice'.[807]

The rights to life, liberty and security are absolute and do not suffer any derogation other than those specifically provided in international law. The prohibition of torture and inhuman and degrading treatment or punishment is absolute at all times and can never be derogated from.

1.1 Right to life

The right to life is absolute and non-derogable even in times of war or public emergency. Exceptions provided for in international law include the use of the death penalty[808] and the order to kill lawfully under international humanitarian law (the law of war). However, the systematic and widespread killing of civilians is a crime against humanity under international criminal law.

State obligations

- **States should refrain from action that will lead to the loss of life**
- **States should take protection measures in case a lawyer's life is under a real and imminent risk (see Part I, chapter C, Section 1.2)**
- **States should conduct effective investigations in case of a lawyer's injury, death or enforced disappearance**[809]

The ECtHR has set out the below test for ensuring that an investigation is effective:[810]

1. the person responsible for conducting the investigation must be independent, this 'means not only a lack of hierarchical or institutional connection but also a practical independence';
2. the investigation must be capable of identifying if the use of force was not justified, and to identify and punish those responsible. The authorities must take reasonable steps to secure evidence. 'Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard';
3. '[a] requirement of promptness and reasonable expedition is implicit in this context […] a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'; and
4. a sufficient public scrutiny element of the investigation and outcome is necessary to 'secure accountability in practice as well as in theory […] In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.'

On the issue of enforced disappearances, the IACmHR and IACtHR have led the jurisprudence. The Court held that 'the practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life'.[811]

807 UNGA, 'Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers' (2013) UN Doc A/HRC/RES/23/6.

808 ICCPR, Protocols 6 and 13; ECHR, Protocol 2.

809 ECOSOC, Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989.

810 ECtHR, *Hugh Jordan v UK*, No 24746/94, 4 May 2001 (FINAL 04 August 2001), paras 106–109.

811 IACtHR, Velásquez, para 157.

The Court also recognised clear links between the right to life, the prohibition of torture and the right to liberty, which all effect the security of an individual:

> 'The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest […] investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity.'[812]

At the same time the anguish placed on family members has been found to amount to prohibited treatment.[813]

The issue of disappearances will trigger the positive obligation under the right to life for an effective investigation to be conducted to determine the fate of the missing person.[814] The Court set out the obligation of states to investigate every case that involves a violation of the right to life: '[the] State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'.[815]

Restrictions

- **States should ensure that lethal force is only used in compliance with the principles of necessity and proportionally where there is an imminent threat**

Unlawful killings by state agents or authorities are also referred to as extra-judicial killings or executions. Instances that are unlawful may not always be clear. Article 2 of the ECHR begins by setting out in what circumstances a killing may be lawful: (1) in defence of any person from unlawful violence; (2) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (3) in action lawfully taken for the purpose of quelling a riot or insurrection.

The key principles to be considered are necessity and proportionality.

In addition, the 1990 UN Basic Principles on the Use of Force and Firearms provide some guidance under Principle 9, including the requirement that there exists an imminent threat before potentially lethal force is used:[816]

> 'Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.'

812 *Ibid*, paras 155–156.

813 ECtHR, *Varnava and Others v Turkey*, Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, para 100.

814 See CPED, Art 12; Inter-American Convention on the Forced Disappearance of Persons, Art VI; HRCttee, General Comment No 36, Art 6 Right to Life' (General Comment No 6) (2018) UN Doc CCPR/C/GC/36, para 27.

815 IACtHR, Velásquez, para 174. See also paras 175–188.

816 *HRCttee*, *Guerrero v Colombia*, No 45/1979, 31 March 1982; ECtHR, *McCann and Others v The United Kingdom*, No 18984/91, 27 September 1995; ECtHR, *Nachova and Others v Bulgaria* [GC], Nos 43577/98 and 43579/98, 6 July 2005; IACtHR, *Montero-Aranguren and Others (Detention Centre of Catia) v Venezuela*, Series C No 150, 5 July 2006, paras 69 –73.

1.2 Torture prohibition

The prohibition of torture is absolute, non-derogable even in times of war or public emergency, and a rule of *jus cogens*.[817] A number of soft law instruments deal with prohibited treatment, which may also amount to a crime against humanity under international criminal law.

Scope and definition: 'torture'

The definition of torture is set out in Article 1 of the CAT and consists of three elements:

1. severe pain and suffering including both mental and physical;
2. inflicted for one of the specific purposes set out in Article 1; and
3. inflicted or instigated by, or with the consent or acquiescence of, a public official.

Article 16 of the CAT prohibits any cruel, inhuman or degrading treatment or punishment that falls below the severity threshold of torture.[818] Threats of torture and death may be sufficient to be classified as a violation of the prohibition. Threats must be credible,[819] or there must be substantial grounds for believing that the individual would be in danger of being subjected to torture.[820]

The international and regional courts, commissions and committees have held a range of treatments and detention conditions as meeting the severity threshold of torture, while others have been found to fall below the threshold. Any treatment or punishment that does not meet the threshold is dealt with under the right to physical integrity, which flows from the right to a private life.

State obligations

- **States have the obligation to refrain from using prohibited treatment**

In its General Comment No 20, the HRCttee states that the prohibition of torture and ill-treatment must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime.[821] UNHRC Resolution 8/8 reminds governments that 'corporal punishment […] can amount to cruel, inhuman or degrading punishment or even to torture'.[822]

In particular, solitary confinement has a severe impact on both the mental and physical wellbeing of an individual, who is isolated in conditions that have been found to meet the severity threshold of prohibited treatment. The Nelson Mandela Rules define solitary confinement as detainees being confined for 22 hours or more than a day without meaningful human contact. They also define and prohibit prolonged solitary confinement as exceeding 5 consecutive days.[823]

- **States have the obligation to provide remedies**[824]
- **States have the obligation to punish perpetrators of prohibited treatment**

817 CAT, 'General Comment No 2 , Art 2' (2008) UN Doc CAT/C/GC/2, para 1. HRCttee, General Comment No 29; ECtHR, *Chahal v The United Kingdom*, No 22414/93, 15 November 1996; IACtHR, *Caesar v Trinidad and Tobago*, Series C No 23, 11 March 2005.

818 ECtHR, *Selmouni v France* [GC], No 25803/94, 28 July 1999, paras 100 – 105.

819 IACtHR, *Maritza Urrutia v Guatemala*, Series C No 103, 27 November 2003, para 92.

820 CAT, Art 3 (2).

821 HRCttee, 'General Comment No 20, Art 7, Prohibition of torture or cruel, inhuman or degrading treatment or punishment' ('General Comment No 20') (1992) UN Doc HRI/GEN/1/Rev.9, para 5. See SRIJL, JUA IRN/24/2012.

822 UNHRC, 'Torture and other cruel, inhuman or degrading treatment or punishment' (2008) UN Doc A/HRC/RES/8/8, Para 7a.

823 Nelson Mandela Rules, Rule 44. The Nelson Mandela Rules are reviewed in the 'Interim report of the Special Rapporteur on Torture' (2013) UN Doc A/68/295.

824 See n 73.

This positive obligation is similar to the obligation to investigate and punish (this falls within the sphere of criminal law and under universal jurisdiction) as set out under the right to life above. It addresses the threat that emanates from private actors with or without the acquiescence of state officials. Where there are grounds to believe that torture has occurred, the state is under an obligation to conduct an investigation capable of identifying perpetrators and sustaining a prosecution.

- **States have the obligation not to send an individual to a country where there is a real risk of them being subjected to prohibited treatment**[825]

1.3 Right to liberty

International human rights law establishes that everyone has the right to liberty and security;[826] that any deprivation of liberty should be lawful;[827] and that no one should be subject to arbitrary arrest or detention.[828] At the core of the right to liberty and security is the prohibition of arbitrary detention, which is the type of attack against lawyers most commonly reported to the SRIJL.[829]

Arbitrary detention creates risk of torture and ill-treatment, and several of the procedural guarantees for persons in detention serve to reduce the likelihood of such risk.[830] Several safeguards that are essential for the prevention of torture are also necessary for the protection of persons in any form of detention against arbitrary detention or infringement of personal security.[831]

Scope and definitions

Arbitrary detention

Both the HRCttee and the ECtHR consider that arbitrary arrest and detention can take a range of forms. The HRCttee has stated that the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due processof law, as well as elements of reasonableness, necessity and proportionality.[832] Similarly, the ECtHR has held that the notion of 'arbitrariness' extends beyond lack of conformity with national law.[833] The ECtHR has indicated that arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the execution of the detention did not genuinely conform to the purpose of the restrictions

825 ECtHR, *Saadi v Italy* [GC], No 37201/06, 28 February 2008.

826 UDHR, Arts 3 and 9; ICCPR, Art 9; ICERD, Art 5 (b); ICMW Art 16; CRPD, Art 14; CPED Art 17.1; CRC Art 37 (b); ECHR, Art 5; AmCHR, Art 7; AfCHPR, Art 6; ArCHR, Art 14. See also, UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 1; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 2 and 32; AfCmHPR, Resolution on Guidelines and Measures for the Prohibition, and Prevention of Torture, Cruel and Inhuman or Degrading Treatment or Punishment in Africa, para 26; AfCmHPR, Guidelines on the Right to a Fair Trial, Part M.

827 See for instance, ICCPR, Art 9 (1); ECHR, Art 5 (1); ADHR, Art XXV; AmCHR, Art 7 (2); AfCHPR, Art 6.

828 UDHR, Art 9; ICCPR, Art 9 (1); AmCHR, Art 7 (3); AfCHPR, Art 6. See also CRC, Art 37 (b); ICMW, Art 16.1; CRPD, Art 14; CPED, Art 17.1; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before a Court, Principle 1; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 2 and 32; AfCmHPR, Resolution on Guidelines and Measures for the Prohibition, and Prevention of Torture, Cruel and Inhuman or Degrading Treatment or Punishment in Africa, para 26; AfCmHPR Guidelines on the Right to a Fair Trial, Part M.1.

829 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 60.

830 HRCttee, General Comment No 35, para 56.

831 HRCttee, General Comment No 20, para 11; CAT, General Comment No 2, para 13; HRCttee, General Comment No 35, para 58.

832 HRCttee, General Comment No 35, para 12.

833 ECtHR, *Creangă v Romania* [GC], No 29226/03, 23 February 2012; *A and Others v The United Kingdom* [GC], No 3455/05, 19 February 2009, para 164.

permitted by the relevant sub-paragraph of Article 5 (1); where there was no connection between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and where there was no relationship of proportionality between the ground of detention relied on and the detention in question.[834]

State obligations under the right to liberty

- **States should not carry out any unlawful deprivation of liberty, or subject anyone to arbitrary arrest or detention**

Lawful

Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied.

The ECtHR has found that the requirement that deprivation of liberty should be lawful is not satisfied merely by compliance with the relevant domestic law; domestic law must itself be in conformity with the ECHR, including the general principles expressed or implied in it, particularly the principle of the rule of law.[835]

It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set out by the ECHR. This standard requires that all law be sufficiently precise to allow a person – with the necessary, appropriate advice – to foresee to a degree that is reasonable in the circumstances the consequences that a given action may entail.[836] Factors relevant to this assessment of the 'quality of law' include the existence of clear legal provisions for ordering detention, for extending detention and for setting time-limits for detention, as well as the existence of an effective remedy by which the applicant can contest the 'lawfulness' and 'length' of his or her continuing detention.[837]

Legitimate aim

Arrest or detention as punishment for the legitimate exercise of other rights such as freedom of opinion and expression is arbitrary.[838]

- **States should ensure that any person deprived of liberty enjoys minimum criminal procedural guarantees**

Persons arrested or held in detention are protected by procedural guarantees:

- the right to be informed at the time of arrest of the reasons for the arrest and to be informed promptly of any charges against him/her;[839]
- upon arrest or detention, the right to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful;[840]

834 ECtHR, *James, Wells and Lee v The United Kingdom*, Nos 25119/09, 57715/09, 57877/09, 18 September 2012, paras 191–95; ECtHR, *Saadi v The United Kingdom*, No 13229/03, 29 January 2008, paras 68–74.

835 ECtHR, *Plesó v Hungary*, No 41242/08, 2 October 2012 (FINAL, 2 January 2013), para 59.

836 ECtHR, *Khlaifia and Others v Italy*, No 16483/1215 December 2016, para 92; *Del Río Prada v Spain* [GC], No 42750/09, 21 October 2013, para 125; *Creangă; Medvedyev and Others v France* [GC], No 3394/03, 29 March 2010 (see JOINT PARTLY DISSENTING OPINION OF JUDGES COSTA, CASADEVALL, BÎRSAN, GARLICKI, HAJIYEV, ŠIKUTA AND NICOLAOU); HRCttee, General Comment No 35, para 22.

837 ECtHR, *JN v The United Kingdom*, No 37289/12, 19 May 2016, para 77.

838 HRCttee, General Comment No 35, paras 17 and 22.

839 See n 491.

840 See n 73.

- the right to prompt access to a lawyer.[841] Nowhere in the right to liberty is there an express mention of the need to have access to a lawyer on being detained. However, without immediate access to a lawyer, the right can be rendered meaningless. Therefore, under the doctrine that human rights must be 'practical and effective', this right of access to a lawyer has been read into the right to liberty as well as the right to a fair trial;[842]
- upon arrest or detention on a criminal charge, the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power and the right to be entitled to trial within a reasonable time or to release;[843] and
- the right to compensation in case of unlawful arrest or detention.[844]
- **States should take appropriate measures to protect the right to liberty of persons against deprivation by third parties**

The HRCttee and the ECtHR assert that states have a duty to take appropriate measures to protect the right to liberty of persons against deprivation by third parties.[845] States are therefore obliged to take measures to provide the effective protection of persons at risk, including reasonable steps to prevent a deprivation of liberty of whichthe authorities have or ought to have knowledge.[846]

Restrictions

The right to liberty and security of person is not included in the list of non-derogable rights in the ICCPR,[847] the ECHR[848] or the AmCHR.[849] However, derogating from normal procedures required by this right in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.[850] Derogating measures must also be consistent with a State Party's other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty and non-discrimination.[851] Also, the fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations allowing a derogation cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.[852]

841 See n 2.

842 ECtHR, *Murray*, paras 62–63:

> 'The Court observes that it has not been disputed by the Government that Article 6 applies even at the stage of the preliminary investigation into an offence by the police. In this respect it recalls [that] the manner in which Article 6-3-c is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing'.
>
> See more generally paras 59–70.

843 ICCPR, Art 9 (3); ECHR, Art 5 (3); AmCHR, Art 7 (5).

844 ICCPR, Art 9 (5); ECHR, Art 5 (5).

845 HRCttee, General Comment No 35, para 7; ECtHR, *El-Masri v the former Yugoslav Republic of Macedonia* [GC], No 39630/09, 13 December 2012, para 239.

846 ECtHR, *Storck v Germany*, No 61603/00, 16 June 2005 (FINAL 16 September 2005), para 102.

847 ICCPR, Art 4 (2).

848 ECHR, Art 15 (2).

849 AmCHR, Art 27 (2).

850 HRCttee, General Comment No 35, para 65.

851 *Ibid.*

852 *Ibid*, para 66.

Checklist

Right to life

- ☐ Is the individual dead or missing under suspicious circumstances?
- ☐ Has an effective investigation been conducted?

Prohibition against torture

- ☐ Does the treatment or punishment fall within the definition of torture set out in the CAT?
- ☐ Has the individual been subjected to treatment or punishment that meets the severity thresholds as defined by international human rights mechanisms?
- ☐ Has an investigation been conducted and does it meet the test of 'effectiveness' test developed by international human rights mechanisms?

Right to liberty

- ☐ Has the individual been arrested or detained?
- ☐ Was the arrested person informed at the time of arrest of the reasons for the arrest and any charges?
- ☐ Has he/she been brought promptly before a judge or other authorised officer in order for the lawfulness of his/her detention to be determined?
- ☐ Is his/her detention arbitrary (see test above)?

2. Freedom of expression (and right to participate in public affairs)

UN INSTRUMENTS

Article 19, UDHR: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

Article 19, ICCPR:

'1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.'

See also: **CRPD, Article 21.**

Basic Principles:

'Freedom of expression and association

***Principle 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.'*

UN Declaration on HRDs (1998)

Article 6:

'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.'

***Article 7:** '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.'*

Article 8:

'1. Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.

2. This includes, inter alia, 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.'

Africa

Article 9 (2), AfCHPR: 'Every individual shall have the right to express and disseminate his opinions within the law.'

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) ,

I. Independence of lawyers

(k). '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 the 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.'

AfCmHPR, Declaration of Principles on Freedom of Expression in Africa (2002), Principle II:

'1. No one shall be subject to arbitrary interference with his or her freedom of expression.

2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.'

Americas

AmCHR:

Article 13. Freedom of thought and expression

'1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.'

American Declaration of the Rights and Duties of Man:

Article IV. Right to freedom of investigation, opinion, expression and dissemination: *'Every person has the right to freedom of investigation, or opinion, and of the expression and dissemination of ideas, by any medium whatsoever.'*

IACmHR, Inter-American Declaration of Principles on Freedom of Expression:

Principle 10:

'Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.'

Americas

AmCHR:

Article 13. Freedom of thought and expression

'1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

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Principle 11

'Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws", restrict freedom of expression and the right to information.'

Europe

Article 10, ECHR:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

CoE Recommendation No R(2000)21 on the Freedom of Exercise of the Profession of Lawyer

Principle I. General principles on the freedom of exercise of the profession of lawyer

3. 'Lawyers should enjoy freedom of belief, expression, movement, association and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and to suggest legislative reforms.'

International professional standards

IBA Standards for the Independence of the Legal Profession (1990)

'Rights and duties of lawyers

10. A lawyer shall have the right to raise an objection for good cause to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

14. Lawyers shall not by reason of exercising their profession be denied freedom of belief, expression, association and assembly; and in particular they shall have the right to:

a) take part in public discussion of matters concerning the law and the administration of justice;

b) join or form freely local, national and international organisations;

c) propose and recommend well considered law reforms in the public interest and inform the public about such matters.'

Interpretation

Enshrined in all core general human rights instruments,[853] freedom of opinion and freedom of expression are recognised as 'indispensable conditions for the full development of the person', 'essential for any society' as the 'foundation stone for every free and democratic society'.[854]

The right is closely interrelated with the right to take part in the conduct of public affairs.[855] This is particularly true for lawyers, and both rights are therefore specifically protected as integral to lawyers' function.[856] Lawyers are protected from professional restrictions 'by reason of their lawful action',[857] as they are from civil and criminal sanctions for relevant statements made while fulfilling their functions.[858]

The UN Declaration on HRDs complements lawyers' protection through the right 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'.[859] It also protects 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'.[860]

853 UDHR, Art 19; ICCPR Art 19; ICERD, Art 5.d (viii); ICMW, Art 13; CRPD Art 21; AmCHR, Art 13; AfCHPR, Art 9; ArCHR, Art 32; ECHR, Art 10; Basic Principles, Principle 23. See also AfCmHPR Guidelines on the Right to a Fair Trial, Part I(k)

854 HRCttee, General Comment No 34, para 2; ECtHR, *Skałka v Poland*, No 43425/98, 27 May 2003 (FINAL 27 August 2003), para 32; ECtHR, *Perna v Italy*, No 48898/99, 6 May 2003, para 39; ECtHR, *Nilsen and Johnsen v Norway* [GC], No 23118/93, 25 November 1999, para 49; ECtHR, *Janowski v Poland*, No 25716/94, 21 January 1999, para 30; IACtHR, 'Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) Advisory Opinion' (1985) UN Doc OC-05/85, para 70.

855 UDHR, Art 21; ICCPR Art 25; CEDAW Art 7; ICMW, Art 41; CRPD, Art 29; AfCHPR, Art 13; AmCHR, Art 23; ArCHR, Art 24.

856 Basic Principles, Principle 23; AfCmHPR, Guidelines on the Right to a Fair Trial, Part I (k); CoE Recommendation No R(2000)21, Principle I(3) and V.4(d); IBA Standards, para 18 (g).

857 Basic Principles, Principle 23.

858 See n 59.

859 UN Declaration on HRDs, Art 6 (c).

860 *Ibid*, Art 8.2.

2.1. Scope of the right

Freedom of expression encompasses a broad range of forms and meanings.[861] Article 19 (2) of the ICCPR provides that everyone's right to freedom of expression 'includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.

The right to hold opinions is protected, alongside the right to express them. The ECtHR has interpreted Article 10 of the ECHR as protecting not only the substance of the ideas and information expressed but also the form in which they are conveyed.[862]

This protection covers not only the expression of information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population.[863]

2.2. State obligations

- **States should protect lawyers' freedom of expression under law**

The SRIJL has stated that the freedoms of association and expression of lawyers are essential for the exercise of the profession and must be established and guaranteed by law.[864] Although these freedoms are enjoyed by all persons, they carry specific importance in the case of persons involved in the administration of justice,[865] and authorities have a particularly narrow margin of appreciation to restrain this right.[866] The high level of protection of lawyers' freedom of expression underpins the fair administration of justice.

- **States should respect lawyers' immunity regarding statements made in good faith in written or oral pleadings or in their professional appearances**

As per Principle 20 of the Basic Principles, alongside regional standards,[867] lawyers 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.

However, Principle 20 is very rarely referred to in international jurisprudence. This is notably the case of the ECtHR, notwithstanding its significant jurisprudence regarding lawyers' freedom of expression.[868] In determining whether there has been a violation of Article 10 of the ECHR, the ECtHR does not assess whether the statements of the lawyer at issue were made 'in good faith' as per Basic Principle 20 – therefore justifying civil and criminal impunity

861 HRCttee, General Comment No 34, paras 11 and 12; AmCHR, Art 13(1); IACtHR, OC-05/85, para 31; Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights (4th ed, Oxford University Press 2018), p 594.

862 ECtHR, *Amihalachioaie*, para 28.

863 ECtHR, *Handyside v The United Kingdom*, No 5493/72, 7 December 1976, para 49; IACtHR, *Herrera Ulloa v Costa Rica*, Series C No 107, 2 July 2004, para 113; HRCttee, General Comment No 34, para 11; ECtHR, *Morice v France* [GC], No 29369/10, 23 April 2015, para 161.

864 CHR, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (2003) UN Doc E/CN.4/2004/60, para 46. UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 50.

865 UNGA, 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy – Independence of lawyers and the legal profession/Brief review and assessment of six years of the mandate/Major developments in international justice' (2009) UN Doc A/64/181, para 50. IACtHR, *Tristán Donoso v Panama*, Series C No 193, 27 January 2009, para 114.

866 ECtHR, *Morice*, para 125; ECtHR, *Roland Dumas v France*, No 34875/07, 15 July 2010 (FINAL 15 October 2010), para 43; ECtHR, *Gouveia Gomes Fernandes and Freitas e Costa v Portugal*, No 1529/08, 29 March 2011 (FINAL 29 June 2011), para 47.

867 See n 59.

868 For a reference by the ECtHR to Principle 20 of the Basic Principles, see ECtHR, *Kyprianou v Cyprus*, No 73797/01, 15 December 2005, para 58; *Nikula v Finland*, No 31611/96, 21 March 2002 (FINAL 21 June 2002), para 27; *Elçi and Others*, para 564.

– but rather whether state sanctions were proportionate to the legitimate aim pursued.[869]

Where interference with freedom of expression takes place in the context of judicial proceedings, the ECtHR has held that domestic authorities have a 'margin of appreciation' [870] but it is relatively narrow.[871] The ECtHR has thus given a high level of protection to statements made in the context of judicial proceedings and expanded the protection of expression in the courtroom to expression elsewhere, in particular in the media, when related to judicial proceedings.[872]

In the courtroom, insofar as a lawyer's freedom of expression raises a question as to his or her client's right to a fair trial, the ECtHR considers that the principle of fairness allows a free and even forceful exchange of argument between parties.[873] Lawyers have the duty to 'defend their clients' interests zealously'.[874]

> 'It is evident that lawyers, while defending their clients in court, particularly in the context of adversarial criminal trials, can find themselves in the delicate situation where they have to decide whether or not they should object to or complain about the conduct of the court, keeping in mind their client's best interests.'[875]

It has been held that a degree of hostility[876] and the potential seriousness of certain remarks[877] do not obviate the right to a high level of protection, given the existence of a matter of public interest.[878]

With regard to remarks made outside the courtroom, the ECtHR reiterates that the defence of a client may be pursued by means of an appearance on broadcast or radio news programmes or in a statement to the press.[879] Lawyer's freedom of expression is protected as relating to judicial proceedings also in those instances.

- **States shall respect lawyers' freedom to take part in public discussion of matters concerning the law, the administration of justice, and the promotion and protection of human rights**

The Basic Principles and the AfCmHPR Guidelines on the Right to a Fair Trial protect lawyers' right to take part in public discussion of matters concerning the law, the administration of justice, and the promotion and protection of human rights. The ECtHR has repeatedly stated that 'questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest'.[880] It is the essence of a free and democratic society that its citizens must be allowed to inform themselves about alternatives to the political system/ parties in power, and that they may criticise or openly and publicly evaluate their Governments without fear of interference or punishment'.[881]

Lawyers have a special status, placing them in a 'central position in the administration of justice as intermediaries between the public and the courts'.[882] As such, their views on the justice system are of public interest. This justifies the high level of protection granted to lawyers' freedom of expression, as well as the ethical standards they have

869 ECtHR, *Kyprianou*, paras 176–83; Nikula, paras 47–56.
870 ECtHR, *Schöpfer*, para 33.
871 *Ibid*; ECtHR, *Morice*, para 125; *Nikula*, para 46.
872 ECtHR, *Morice*, paras 135–38; *Peruzzi v Italy*, No 39294/09, 30 June 2015, paras 62–63.
873 ECtHR, *Morice*, para 137.
874 *Ibid*.
875 ECtHR, *Kyprianou*, para 175.
876 ECtHR, *E K v Turkey*, No 28496/95, 7 February 2002 (FINAL 7 May 2002), paras 79–80.
877 ECtHR, *Thoma v Luxembourg*, No 38432/97, 29 March 2001 (FINAL 29 June 2001), paras 57-65; *Morice*, para 126.
878 ECtHR, *Paturel v France*, No 54968/00, 22 December 2005 (FINAL 22 March 2006), para 42; *Morice*, para 125.
879 ECtHR, *Morice*, para 138.
880 *Ibid*, para 128.
881 HRCttee, General Comment No 34, para 2.
882 ECtHR, *Amihalachioaie*, para 27.

to respect in relation to their work.[883] Lawyers are therefore entitled to comment publicly on the administration of justice, provided that their criticism does not overstep certain boundaries.[884]

The UN Declaration on HRDs explicitly protects the right 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.'[885]

2.3. Restrictions

The ICCPR, ACHPR, AmCHR and ECHR all imply that law may set limits regarding the exercise of the right to freedom of expression.[886] Under Article 19.3 of the ICCPR, such limitations must be provided by law and necessary for respect of the rights or reputations of others, or for the protection of national security or of public order (*ordre public*), public health or morals. Save on rare occasions, the ECtHR has systematically protected lawyers' freedom of expression, retaining that restrictions on political speech or 'democratic society' must be construed strictly, and thus only in exceptional cases.[887] In order to be in accordance with international human rights law, the interference must be provided by law, 'correspond to a pressing social need', be proportionate to the legitimate aim pursued, and reasons adduced by the national authorities to justify it must be 'relevant and sufficient'.[888]

- **Principle of legality**

As mentioned in Part I, there must be a law in the first instance that provides for interference with the exercise of lawyers' functions and, consecutively, lawyer's freedom of expression. Ordinarily this is statute law,[889] but common law rules may also meet the standard for law in this context.[890]

The range of possible types of interference with the exercise of the right to freedom of expression is not subject to pre-established limits, and may include criminal sanctions, civil and disciplinary liability and/or prohibition of publication and regulation of mass media. Most often, any charges invoked concern offences of contempt of court and/or defamation.

Legitimate aim

In the case of freedom of expression, Article 19 (3) of the ICCPR lists the following grounds for restriction, namely 'respect of the rights or reputations of others, protection of national security, public order, public health or morals'. Article 10 (2) of the ECHR provides more specifically:

> 'the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

883 Ibid; ECtHR, *Casado Coca*, para 54.
884 ECtHR, *Amihalachioaie*, para 28.
885 UN Declaration on HRDs, Art 8.2.
886 See for instance, ICCPR, Art 19 (3); AfCHPR, Art 9 (2); AmCHR, Art 13 (2); ECHR, Art 10 (2).
887 ECtHR, *Morice*, para 125.
888 ECtHR, *Sunday Times v UK* (No 2), No 50/1990/241/312, 24 October 1991, para 50; ECtHR, *Nikula*, para 44; ECtHR, *Amihalachioaie*, para 30.
889 ECtHR, *Stoll v Switzerland* [GC], No 69698/01, 10 December 2007, para 49; *Skałka*, para 30.
890 ECtHR, *Sunday Times* (No 1), paras 46–53.

Other international human rights instruments provide for the restriction of freedom of expression to attain similar sets of social goals.[891]

Principle 23 of the Basic Principles refers as benchmark for lawyer's misconduct to the 'law and the recognised standards and ethics of the legal profession'. As previously addressed, the ethics of the profession unfolds the multiple interests lawyers are to protect in their work.

The ECtHR constitutes the main source of jurisprudence on the issue. The Court requires a correct balance to be struck between the various interests involved. These cover the public's right to receive information about questions arising from judicial decisions; the requirements of the proper administration of justice; the dignity of the legal profession; the protection of the authority of the judiciary; and the protection of lawyers' freedom of expression.[892]

Maintaining the authority of the judiciary as a legitimate aim to restrain freedom of expression

In practice, most often charges against lawyers involve civil or criminal sanctions for contempt of court or defamation, grounded in the overarching legitimate aim of maintaining the authority of the judiciary.

In this circumstance, the ECtHR's role is to ascertain whether on the facts of the case a fair balance was struck between, on the one hand, the need to protect the authority of the judiciary and, on the other, the protection of the applicant's freedom of expression in his/her capacity as a lawyer.

The ECtHR has interpreted the phrase 'authority of the judiciary' as including, in particular, the notion that the courts are – and are accepted by the public at large as being – the proper forum for the resolution of legal disputes and for the determination of a person's guilt or innocence on a criminal charge, and further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.[893] As the guarantor of justice, which is a fundamental value in a legally governed state, the judiciary must enjoy public confidence if it is to be successful in carrying out its duties.[894]

Lawyers' attacks against judges

Both lawyers and judges contribute to the administration of justice within their particular remits. When acting in their official capacity, judges, as part of a fundamental institution of the state, may be subject to wider limits of acceptable criticism than ordinary citizens.[895] The possibility for lawyers to openly criticise judges has been justified by the fact that they, unlike judges, speak in their own name and on behalf of their clients.[896] Conversely, judges' speech is received as the expression of an objective assessment, which commits not only the person expressing him/herself, but also the entire justice system.[897]

At the same time, the proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the various stakeholders in the justice system, at the forefront of which are judges and lawyers.[898] It may therefore prove necessary to protect public confidence in the justice system against gravely damaging attacks, including individual attacks against judges that are essentially unfounded, especially in

891 AfCHPR, Art 27(2); AmCHR, Art 13(2).

892 ECtHR, *Amihalachioaie*, para 28; *Nikula*, para 46; *Schöpfer*, para 33.

893 ECtHR, *Worm v Austria*, No 83/1996/702/894, 29 August 1997, paras 39-41; ECtHR, *Prager and Oberschlick v Austria*, No 15974/90, 26 April 1995, para 34; *Morice*, para 129.

894 ECtHR, *Prager and Oberschlick*, para 34.

895 ECtHR, July and SARL *Libération v France*, No 20893/03, 14 February 2008 (FINAL 14 May 2008), para 74; ECtHR, *Morice*, para 131.

896 ECtHR, Morice, para 168.

897 *Ibid.*

898 *Ibid*, para 170.

view of the fact that judges who have been criticised are subject to a duty of discretion which precludes them from replying.[899]

Lawyers' statements related to judicial proceedings

As aforementioned, the ECtHR recognises a high level of protection regarding statements made in relation with judicial proceedings.

Lawyers' statement on the public affairs and the administration of justice

A great number of communications received by the SRIJL addresses lawyers persecuted on the ground of sedition or tarnishing the image of the country for expressing views and analysis on the government or the situation of human rights in the country. The SRILJ has repeatedly reminded states of their obligations to respect lawyers' freedom of expression, both under the protection as lawyer and as human rights defenders.

- **Necessary in a democratic society**

The ECtHR has stated that the adjective 'necessary', within the meaning of Article 10, paragraph 2 of the ECHR, implies the existence of a 'pressing social need'.[900] Contracting states have a certain margin of appreciation in assessing whether such a need exists, but it goes hand-in-hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected under Article 10 of the ECHR.[901] The Court tends to consider each situation in light of competing considerations such as protection of the judiciary from unfounded and gratuitous attacks[902] and the client's right to a fair trial.[903]

Distinction between fact and value judgements

The ECtHR draws a distinction between statements of fact and value judgements.[904] In the case of value judgements, the proportionality of an interference may depend on whether the impugned statement lacks sufficient 'factual basis' and will therefore qualify as excessive.[905]

In order to distinguish between a factual allegation and a value judgement, the ECtHR has held that it is necessary to take account of the circumstances of the case and the general tone of the remarks,[906] bearing in mind that assertions about matters of public interest may, on this basis, constitute value judgements rather than statements of fact.[907]

Protection of the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion, cannot have the effect of prohibiting individuals from expressing their views on matters of public interest related to the functioning of the justice system through value judgements with a sufficient factual basis, or of banning any criticism of the justice system.[908]

In *Peruzzi v Italy,* the ECtHR found the restriction on lawyers' expression to be justified, and these criteria were used

899 ECtHR, *Morice*, paras 128 and 168; ECtHR, *Prager and Oberschlick*, para 34; ECtHR, *Karpetas v Greece*, No 6086/10, 30 October 2012 (FINAL, 30 January 2013), para 68; ECtHR, *Di Giovanni v Italy*, No 51160/06, 9 July 2013, para 71.

900 ECtHR, *Sunday Times* (No 2), para 50.

901 ECtHR, *Stoll*, para 101. Morice, para 124.

902 ECtHR, *Morice*, para 134.

903 *Ibid*, para 137.

904 *Ibid*, para 126 (citing ECtHR, *Lingens v Austria*, No 9815/82, 8 July 1986, para 46); ECtHR, *Prager and Oberschlick*, para 63.

905 *Ibid* (citing ECtHR, *De Haes and Gijsels v Belgium*, No 7/1996/626/809, 24 February 1997, para 42; ECtHR, *Prager and Oberschlick*, para 33; ECtHR, *Brasilier v France*, No 71343/01, 11 April 2006, para 36; ECtHR, *Lindon Otchakovsky-Laurens and July v France* [GC], Nos 21279/02 and 36448/02, 22 October 2007, para 55).

906 *Ibid* (citing *Brasilier*, para 37).

907 *Ibid* (citing *Paturel*, para 37).

908 *Ibid*, para 168.

to conclude that the interference was necessary and proportionate under Article 10, paragraph 2 of the ECHR.[909] The applicant in that case was practising law at the time he sent a letter in which he complained about the conduct of Judge X.[910] The lawyer subsequently transmitted its contents by means of a 'circular letter' to a number of judges at X's court.[911] He was convicted of defamation and proffering insults.[912] Following an appeal, his conviction for proffering insults was overturned and the sentence of imprisonment imposed was reduced to a fine. The fine was declared to be fully discharged and he was ordered to pay damages and court costs.[913] The applicant criticised Judge X (a) for taking unfair and arbitrary decisions and (b) for being a 'biased' judge and for having 'wilfully made mistakes, by malicious intent, serious misconduct or negligence'.[914]

The ECtHR considered (a) to be a value judgement which was not susceptible of proof[915] and not excessive.[916] On the other hand, as to (b), the ECtHR observed that the applicant never sought to prove the veracity of the conduct attributed to Judge X and adduced no evidence to show any malicious intent in the decisions that he contested.[917]

The ECtHR noted that the applicant's criticisms were not made at the hearing or in the course of the judicial proceedings[918] and it commented that the distribution of the 'circular letter' to a small community such as that of a local court would inevitably harm the reputation and professional image of the judge concerned.[919] The ECtHR found the conviction and sanction imposed not to be disproportionate[920] and concluded that there was no violation of Article 10 of the ECHR.[921]

- **Proportionality test**

The HRCttee held that:

> '14. […] restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected […] 15. The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law'.[922]

When assessing the proportionality of the interference, the ECtHR established that the following factors are to be taken into account:

- the fairness of the proceedings and the procedural guarantees afforded;
- the nature and severity of the sanction;[923] and
- the possible chilling effect of the sanctions imposed.[924]

909 ECtHR, *Peruzzi*, para 6.
910 ECtHR, *Peruzzi*, para 6.
911 *Ibid*.
912 *Ibid*, para 14.
913 *Ibid*, paras 22 and 64.
914 *Ibid*, para 57.
915 *Ibid*, para 58.
916 *Ibid*, para 59.
917 *Ibid*, para 60.
918 *Ibid*, para 62.
919 *Ibid*, para 63.
920 *Ibid*, para 66.
921 *Ibid*, para 67.
922 HRCttee, General Comment No 27, paras 14 and 15. Regional human rights bodies have taken positions similar to the HRCttee; IACtHR, OC-05/85, para 46; AfCtHPR, *Lohé Issa Konaté v Burkina Faso*, No 004/2013 (2014), paras 132–71; ECtHR, *Mouvement Raëlien Suisse v Switzerland* [GC], No 16354/06, 13 July 2012, para 75; ECtHR, *Morice*, para 124. See also: ECtHR, *Zana v Turkey*, No 18954/91, 25 November 1997, para 51.
923 ECtHR, *Ceylan v Turkey*, No 23556/94, 8 July 1999, para 37; ECtHR, *Tammer v Estonia*, No 41205/98, 6 February 2001 (FINAL 4 April 2001), para 69; ECtHR, *Skałka*, paras 41–42; ECtHR, *Lešník v Slovakia*, No 35640/97, 11 March 2003 (FINAL 11 June 2003), paras 63–64; ECtHR, *Kyprianou*, para 171.
924 ECtHR, *Morice*, para 127.

Criminal sanctions (fines and custodial sentences)

The ECtHR found that 'generally speaking, while it is legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings'.[925]

Regarding fines, the ECtHR found that 'the relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression, this being all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients'.[926]

A fortiori, 'the imposition of a custodial sentence, would inevitably, by its very nature, have a "chilling effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole'.[927] They may, for instance, feel constrained in their choice of pleadings, procedural motions and the like during proceedings before the courts, to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. The imposition of a prison sentence on defence counsel can in certain circumstances have implications not only for the lawyer's rights under Article 10 of the ECHR but also for the fair trial rights of the client under Article 6 of the Convention.[928] It follows that any 'chilling effect' is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.[929]

Checklist

- ☐ Has there been an interference with the lawyer's right to freedom of expression?
- ☐ Has there been any violation of the lawyer's other human rights, such as the right to security of person or the right to property, which appears to be linked with his/her exercise of the right of freedom of expression?
- ☐ Did the interference with the lawyer's right to freedom of expression take the form of one or more of the following:
  - criminal liability;
  - civil liability; and/or
  - some other type of interference?
- ☐ Did the interference purport to take place pursuant to legal authority?

  If so, was it:
  - written statutory law;
  - unwritten case law in a common law system; or
  - some other purported legal authority?

925 *Ibid*. See also ECtHR, *Castells v Spain*, No 11798/85, 23 April 1992, para 46; ECtHR, *Incal v Turkey*, No 41/1997/825/1031 (9 June 1998), para 54; ECtHR, *Lehideux and Isorni v France*, No 55/1997/839/1045, 23 September 1998, para 57; ECtHR, *Öztürk v Turkey* [GC], No 22479/93, 28 September 1999, para 66; ECtHR, *Otegi Mondragon v Spain*, No 2034/07, 15 March 2011 (FINAL, 15 September 2011), para 58.

926 ECtHR, Morice, para 127.

927 ECtHR, *Kyprianou*, para 17. See also, ECtHR, Nikula, para 54; ECtHR, *Steur v the Netherlands*, No 39657/98, 28 October 2003, para 44.

928 ECtHR, *Kyprianou*, para 175; ECtHR, Nikula, para 49; ECtHR, Steur, para 37.

929 ECtHR, *Kyprianou*, para 175.

☐ If the purported legal authority for the interference is written statutory law or unwritten case law in a common law system, does the interference follow from it?

Was the purported legal authority:

- accessible to the public; and
- formulated with sufficient precision to enable a lawyer to regulate his or her conduct accordingly**?**

☐ Was the interference pursued for one or more recognised national or social objectives, such as respect for the rights or reputations of others, protection of national security, public order, public health or morals?

☐ Was the exercise of freedom of expression by the lawyer (henceforth 'the lawyer's statement') made in the course of judicial proceedings?

If so:

- did only those participating in the proceedings have access to the lawyer's statement?
- was the lawyer's statement made through the media?

☐ Does the lawyer's statement relate only to a specific case in which the lawyer has some professional involvement?

- If not, does it relate to a broader matter of public policy?

☐ Was the lawyer's statement directed at a judge or judges?

- If not, was it directed at other participants in judicial proceedings?

☐ Were the parts of the lawyer's statement that led to the interference value judgements and/or factual statements?

- With regard to the value judgements, did they have an adequate factual basis?
- With regard to the factual statements, did the lawyer provide evidence of their truth? Was the lawyer permitted to provide evidence of their truth in judicial proceedings?

☐ Could the objective or objectives have been attained through an alternative means that would have resulted in less interference with the right to freedom of expression?

☐ In light of all the circumstances, was the interference proportionate to the objective pursued?

3. Freedom of assembly and association

UN INSTRUMENTS

UDHR:

Article 21:

'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'

Article 22

'1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public)*, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.'

Article 8, ICESCR:

'1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.'

Basic Principles on the Role of Lawyers (1990):

'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.'

Article 5, UN Declaration on HRDs (1998):

'For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

(a) To meet or assemble peacefully;

(b) To form, join and participate in non-governmental organizations, associations or groups;

(c) To communicate with non-governmental or intergovernmental organizations.'

Africa

AfCHPR:

Article 10: 'Every individual shall have the right to free association provided that he abides by the law. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.'

Article 11: 'Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.'

Americas

AmCHR:

Article 15. Right of Assembly

'The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.'

Article 16. Freedom of Association

'1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.'

Europe

ECHR:

Article 11. Freedom of assembly and association

'1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

Part I, European Social Charter (Revised): '5. All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.'

Interpretation

The freedoms of assembly and association are often considered together, since they involve interrelated issues. While the elements of the rights differ, the restrictions placed on interference with both rights are often identical. In addition to Articles 21 and 22 of the ICCPR, the freedoms of association and assembly are set out in a number of other international instruments.[930]

3.1 Freedom of assembly

Scope

Freedom of assembly covers both private and public meetings, static meetings and public processions (assemblies in motion).

State obligations

Freedom to assemble is predicated on the understanding that the assembly is peaceful. With that in mind, states also bear the responsibility for ensuring that an assembly remains peaceful[931] and that should conflict arise, their response, including any use of force, is proportionate. Authorities should facilitate not only pre-organised assemblies, but also spontaneous ones. Authorities may put in place a mechanism for notification of planned assemblies, but this mechanism must be in accordance with the law.[932] UNHRC Resolution 15/21, in particular operative paragraph 1, states that:

'[c]alls upon States to respect and fully protect the rights of all individuals to assemble peacefully and associate freely […] including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful

930 UDHR, Art 20; ICCPR, Arts 21 and 22; ICESCR, Art 8; ICERD, Arts 4 and 5.d (ix); CEDAW, Art 7 (c); CRC, Art 15; ICMW, Arts 26 and 40; CPED, Art 24 (7); CRPD, Art 29; AfCHPR, Arts 10 and 11; AmCHR, Arts 15 and 16; ArCHR, Art 24; ECHR, Art 11; Basic Principles, Principles 23 and 24. See also: ICMW, Art 26; ILO, Convention No 87 on Freedom of Association and Protection of the Right to Organise, 1948; ILO, Convention No 98 on the Right to Organise and Collective Bargaining, 1949; ILO, Convention No 135 on Workers' Representatives, 1971; UN Declaration on HRDs, Art 5.

931 See ECtHR, *Ärzte für das Leben v Austria*, No 10126/82, 21 June 2011, para 34; ECtHR, *Djavit v Turkey*, No 20652/92, 20 February 2003 (FINAL 9 July 2003).

932 ECtHR, *Vyerentsov v Ukraine*, No 20372/11, 11 April 2013 (FINAL 11 July 2013), paras 51–56.

assembly and of association are in accordance with their obligations under international human rights law'.[933]

Restrictions

The second sentence of Article 21 of the ICCPR requires that no restrictions be placed on the exercise of the right to peaceful assembly other than those that are imposed in conformity with the law and that are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals, or the protection of rights and freedoms of others.

In *Gryb v Belarus*, the HRCttee held that from the moment the state had not adduced any explanation on how the non-issuance of the author's lawyer's licence was justified and necessary, for purposes of Article 19.3, and/or the second sentence of Article 21 ICCPR, the author's rights were violated.[934]

The freedom may be restricted only in accordance with the law, where necessary for an exhaustive list of legitimate aims, for example, in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Closely related to freedom of assembly, the Explanatory Memorandum of the CoE Recommendation No R(2000)21, has addressed lawyer's right to strike:

> 'in some member States, strikes of lawyers have become more and more frequent, thereby causing damage in particular to persons needing their services. For this reason, the Recommendation (Principle III.4.), accepting the legitimate right of lawyers to strike, requires these strikes to be limited in time and not to damage the interests of the clients or persons needing their services'.[935]

3.2 Freedom of association

Scope

Freedom of association is exercised as an individual right, and also as a collective right.

The collective right of lawyers to form associations is dealt with in Part II, Chapter B, Section 2. Suffice to recall here that the freedom of association provides individuals with the right to act collectively in pursuit of common interests either for members, themselves or the public. States have the obligation to protect the independence of the professional association, and in turn the independence of the legal profession. The UN Declaration on HRDs provides that for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right to form, join and participate in NGOs, associations or groups, and to communicate with NGOs or IGOs.[936]

As established in the IBA Standards, this collective right can be exercised by lawyers 'without prejudice to their right to form or join in addition other professional associations of lawyers and jurists'. Lawyers' individual freedom of association extends beyond professional associations and includes political groups, trade unions and human rights associations. Lawyers may engage in associations that are related to their legal practice to a greater or lesser extent.

With respect to lawyers' engagement in human rights, the UN Declaration on HRDs recognises the rights and responsibilities of everyone 'individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels'.[937]

The OSCE Guidelines on Freedom of Association highlight the importance of these associations, which:

> 'often play an important and positive role in achieving goals that are in the public interest, as has been recognized in international jurisprudence and in general comments and recommendations made by the UN

933 SRIJL, JUA IRN/24/2012.

934 HRCttee, *Gryb*, para 13.4

935 CoE, Recommendation No R(2000)21, Explanatory Memorandum, para 50.

936 UN Declaration on HRDs, Art 5(b)–(c).

937 *Ibid,* Art 1.

treaty bodies, as well as in resolutions of the Human Rights Council and other international and regional documents.' [938]

This non-exhaustive list is important because it emphasises the crucial role that not only associations play, but also the role of individual members who are often lawyers.

State obligations

- **States should respect lawyers' lawful actions and membership of a lawful organisation**

Lawyers cannot be targeted due to their association membership. Basic Principle 23 mentions that lawyers should exercise their right, 'without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization'.

Formal and informal associations

It is important to note that the freedom should be respected in relation to both formal and informal organisations, which means that official registration with an association is not necessary for lawyers to benefit from the association's legal protections.[939] At the same time, states should provide the possibility for the creation of a legal entity so that an organisation can act collectively to pursue its objectives.[940]

- **States should not identify a lawyer with the organisation she/he defends**

Lawyers may also act in their professional capacity on behalf of an association and in this instance should not be associated with their client. The principle of non-identification of lawyers with their client's cause applies in cases where lawyers act as independent counsel for civil society organisations that may be targeted by a government.

Restrictions

Individuals' freedom of association is not absolute and thus can be interfered with in certain circumstances. For instance, in accordance with the general conditions of legality, proportionality and necessity in a democratic society, Article 22 of the ICCPR states that 'the right can be restricted in accordance with the law and where necessary for the fulfilment of a legitimate aim'. This aim must fall within the exhaustive list set out in the Article, which include: in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. Similar criteria appear in both the AmCHR and ECHR.

4. Right to property

Checklist

Freedom of assembly

- ☐ Has there been an interference with freedom of assembly?
- ☐ Was the interference in accordance with the law, in pursuit of a legitimate aim and proportionate?
- ☐ If the assembly was not permitted, were reasons provided by the authorities?
- ☐ Was use of force employed by the authorities? Was it proportionate?

938 OSCE, *Guidelines on Freedom of Association* (2015), para 9, available at www.osce.org/odihr/132371?download=true.

939 The principle of freedom of informal association is set out in the CoE, Fundamental Principles on the Status of Non-Governmental Organizations in Europe (2002) and provides that 'NGOs can be either informal bodies, or organizations which have legal personality' (para 5).

940 ECtHR, *Sidiropoulos and Others v Greece*, No 26695/95, 10 July 1998; ECtHR, *Gorzelik and Others v Poland* [GC], No 44158/98, 17 February 2004.

Freedom of association

- ☐ Has there been an interference with the freedom of association?
- ☐ Was the interference in accordance with the law, in pursuit of a legitimate aim and proportionate?
- ☐ Was the interference with a collective right or an individual right?
- ☐ Was the collective right related to a professional association such as a law society or bar association?
  - How was the right interfered with and what reasons were given?
- ☐ Was the individual right interfered with because of the lawyer's membership of an association?
  - How was the right interfered with and what reasons were given?
- ☐ Were this and other rights of the lawyer interfered with because of the lawyer's representation of an association as a client?

UN INSTRUMENTS

UDHR:

Article 17:

'(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.'

Basic Principles:

'Guarantees for the functioning of lawyers

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.

(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

[…]

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

EUROPE

Protocol 1, ECHR:

Article 1. Protection of property

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

CoE Recommendation No R(2000)21, Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer:

Principle I – General principles on the freedom of exercise of the profession of lawyer

'4. Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.'

Africa

AfCHPR:

Article 14: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

AfCmHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003):

I. *Independence of lawyers:*

'b) States shall ensure that lawyers:

(i) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;

[…]

(iii) 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.

c) States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.'

Americas

AmCHR:

Article 21. Right to Property

'1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.'

International professional standards

IBA Standards for the Independence of the Legal Profession (1990):

'Rights and duties of lawyers

6. Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public.

[…]

8. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause.'

Interpretation

The right to property is protected by Article 17 of the UDHR, and regionally by Article 21 of the AmCHR, Article 1 of the Additional Protocol 1 to the ECHR, and Article 14 of the AfCHPR. The right to property does not appear in either of the International Covenants, however it has been read into a number of other rights, as it is deemed necessary for the realization of other rights. As set out in Article 1(1) of Additional Protocol 1 to the ECHR, the right to property does not only apply to natural persons, but also legal persons such as a law firm or organisation.[941]

4.1 Scope and definition

Property

The word 'property' takes on an autonomous meaning under the human rights treaties. In addition to movable and immovable property, over the years a range of things, including assets and licences, have been held to fall within the definition of 'property'.[942]

A lawyer's papers, briefcase, electronic devices (eg, mobile, computer), home and office will fall within the definition of property. It is not only the property of a lawyer which is protected, but also the property of any legal person, such as a law firm.

Once it has been identified that the 'item' is property, the next step is to ascertain whether interference with the 'property' equates to a deprivation. A deprivation has occurred where the legal rights of the owner have been extinguished. This includes de facto deprivation without formal expropriation.[943]

4.2. State obligations

The state obligations relating to a lawyer's right to property is closely interrelated to the rights to privacy and to work safely and freely without any interference and harassment. The following examples show how interference with a lawyer's right to property will effect a range of other rights belonging to not only the lawyer, but also their clients and family.

- **States should respect the principle of confidentiality in the case of a lawyer's home or office being searched**

941 There are many cases that have been brought before the ECtHR by legal persons. See, eg, ECtHR, *Air Canada v the United Kingdom*, No 18465/91, 5 May 1995, which concerned the confiscation of an aeroplane.

942 ECtHR, *Gasus Dosier- und Fördertechnik GmbH v Netherlands*, No 15375/89, 23 February 1995, paras 51-53.

943 ECtHR, *Sporrong and Lönnroth v Sweden*, No 7151/75 (A/52), 23 September 1982, para 63.

The ECtHR has held that an unwarranted raid on a lawyer's place of work or home amounts to a breach of Article 8 ('right to privacy') of the ECHR.[944] The Court held that 'the term "home" appearing in Article 8 of the ECHR protecting the right to privacy may extend to the offices of a member of a profession, for instance a lawyer'.[945] Together with privacy rights, a lawyer's right to property is of significant importance, not only because an interference with the right occurs, but since the lawyer's office, home, briefcase, correspondence and other assets may hold confidential and privileged information relating to a legal case. Additionally, possession of such information exposes lawyers to risk of raids and seizure of their property.

The ECtHR places an obligation on states to ensure that the lawyer–client privilege is protected when searches and seizures are conducted.[946] As such, any raid on a lawyer's property that results in the seizure of information and/or unwarranted disclosure of such information related to a case is a violation of the lawyer–client privilege and potentially violates his or her client's fair trial rights. [947]

The search and seizure of a lawyer's office has also been held by the ECtHR as a violation of the right for effective exercise of the right to petition before the Court under Article 34 of the ECHR.

- **States should ensure that lawyers can work safely and freely without any interference or harassment**

In addition to interference with the lawyer–client privilege, the protection of a lawyer's right to property can be interfered with on both a professional and personal level. This often occurs when a lawyer is associated with the acts of their clients by virtue of acting as their legal representative. As such, the lawyer becomes a target him/herself. Interference with a lawyer's property rights may also occur as an attempt to intimidate, harass or interfere with the lawyer's professional performance.

In the case of Azerbaijan where human rights activists were charged with tax avoidance, illegal entrepreneurship and abuse of power, international mechanisms found the court order to freeze the accounts of a number of NGO and NGO directors, as well as a police search at the home and office of an eminent human rights lawyer, to be a violation of the lawyers' right to work safely and freely without interference or harassment.[948]

This risk also threatens a lawyer's personal security. For example, raids of a lawyer's home or office may lead to the use of physical force against the lawyers. Raids of this nature also lead to arbitrary arrest and detention in many cases. Sometimes the threat is not confined only to the lawyer, but also effects the security of the lawyer's family, clients or colleagues. For example, in Egypt, the personal assets of lawyers were frozen, in addition to the assets of their organisations.[949]

4.3. Restrictions

- **State restrictions to lawyers' property should be necessary and proportionate to a legitimate aim and accompanied with safeguards**

944 ECtHR, *André and another v France*, No 18603/03, 24 July 2008 (FINAL 24 October 2008); ECtHR, *Niemietz v Germany*, No 13710/88, 16 December 1992, paras 27-38; ECtHR, *Petri Sallinen and others v Finland*, No 50882/99, 27 September 2005 (FINAL 27 December 2005), paras 68–95.

945 ECtHR, *André and another v France*, No 18603/03, 24 July 2008 (FINAL 24 October 2008), para 38. ECtHR, *Niemietz*, para 30.

946 ECtHR, *Annagi Hajibeyli v Azerbaijan,* No 2204/11, 22 October 2015 (FINAL 22 January 2016), para 69.

947 ECtHR, *Niemietz*, para 37.

948 Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and Special Rapporteur on the Situation of Human Rights Defenders, AZE 5/2014, 15 August 2014. See also, ECtHR, *Aliyev v Azerbaijan*, Nos 68762/14 and 71200/14, 20 September 2018.

949 SRIJL et al, JAL EGY 5/2012, 24 February 2012.

Lawful

Any deprivation of property must be in accordance with the law. The existence of a law is not enough. An assessment of the law must be conducted, including whether it respects the rule of law and general principles of international law, such as being precise and protecting against arbitrary expropriations.[950]

Furthermore, a number of countries only permit the search of lawyers' workplaces, homes or vehicles in the presence of a member of the bar association or its authorised representative.[951]

Accordingly, the SRIJL has raised serious concerns regarding Article 3 of the Turkish Emergency Law Decree No 668 (codified by Law No 6755), which grants prosecutors the authority to order searches of private premises and offices (including lawyers' offices), as well as inspection of computers, databases and software in urgent cases and without the order of a judge.

Legitimate aim

Under the heading of public or general interest, states can deprive persons of their property. A reason must be given, and this can include counterterrorism measures. Counterterrorism is directly linked to national security, which, on the face of it, is a valid justification for interference with property. For example, the freezing of assets in Egypt took place because according to the state, the organisation, law firm or individual had received foreign funding to act against the interests of the state.[952] The key argument against such reasoning is when patterns arise that can be linked to interference with the provision of effective legal representation or to the work of the lawyer.

Therefore, if a valid deprivation of property may be included in a state's national laws on proceeds of crime, anti-money laundering or counterterrorism, it is the application of this law in practice that may raise issues. This is especially true where confiscation occurs without a conviction or following an acquittal, which the ECtHR has found to be a violation.[953]

Proportionate

In addition to pursuing a legitimate aim, any deprivation must also be proportionate, striking the correct balance between public interest and the individual's right.

For instance, the ECtHR has held that temporary or provisional deprivation does not constitute deprivation of property. This includes temporary or provisional seizures in criminal proceedings.[954]

Conversely, in a case of an unwarranted search of a lawyer's home without safeguards, as well as the lengthy retention of a lawyer's computer, which was attached as evidence in a criminal case, the Court held that there was a violation and stated that:

> **ECtHR: 'Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate**

950 ECtHR, *James and ors v UK*, No 8793/85, 21 February 1986.

951 UNGA, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán – Bar associations' (2018) UN Doc A/73/365, para 52, fn 27 mentioning Lithuania, Serbia and Slovenia.

952 SRIJL et al, EGY 5/2012, 24 February 2012.

953 ECtHR, *Geerings*. In this case the confiscation of assets occurred after the applicant was acquitted, which the Court held was a determination of guilt in the absence of a court decision to that effect. See also the following cases: ECtHR, *Phillips v The United Kingdom* (2001) App No 41087/98; ECtHR, *Walsh v United Kingdom*, No 43384/05, 21 November 2006.

954 ECtHR, *Raimondo v Italy*, No 12954/87, 22 February 1994.

> **to whatever legitimate aim was pursed. The Court reiterates in this connection that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention'**[955]

Checklist

- ☐ Was any 'property' interfered with?
- ☐ Was there a deprivation of property?
- ☐ Was the deprivation in accordance with the law?
- ☐ Was the deprivation in the public interest?
- ☐ Was the search of the property conducted in accordance with the law, in pursuit of a legitimate aim and proportionate?
- ☐ Was the search conducted with a warrant?
- ☐ Was the search warrant issued in accordance with the law?
- ☐ Was the warrant issued by a court?
  - If not, is the reason for no court involvement in pursuit of a legitimate aim and necessary in the circumstances?
- ☐ Was the examination and seizure of any property conducted in accordance with the law, in pursuit of a legitimate aim and proportionate?
- ☐ Was the interference related to any other right, such as the right to privacy, or did it respect the principle of lawyer–client privilege?
- ☐ Was the main aim of the search and seizure to intimidate, harass or interfere with the lawyer's performance of their professional role?
- ☐ Was any confiscation of property in accordance with the right to property?

955 ECtHR, *Smirnov v Russia*, No 71362/01, 7 June 2007 (FINAL 12 November 2007), para 48 (citing *Niemietz*, pp 35–36, para 37).

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