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# The principles and guarantees of advocates

**Report**[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Aleksandr BASHKIN, Russian Federation, Members not belonging to a Political Group

*Summary*

Lawyers play a central role in protecting human rights, in particular people's right to a fair trial, and implementing principles of the rule of law. The committee remains concerned by the numerous cases of violations of lawyers' rights, including attacks on their safety and independence, in recent years. Attacks against lawyers' personal safety and liberty often take place against a general background of lack of respect for the rule of law.

All Council of Europe member States are urged to ensure effective protection of the profession of lawyer, including by prohibiting State interference in the legal profession and clearly identifying the specific activities that amount to prohibited interference, and by establishing a domestic legislative framework guaranteeing efficiency, independence and safety of lawyers' work.

Furthermore, the Committee of Ministers is invited to draft and adopt a legally binding instrument as a priority, and reiterates the Assembly's earlier call to establish a platform for the protection of advocates as previously requested by the Parliamentary Assembly.

1. Reference to committee: Doc. 14376 , Reference 4329 of 13 October 2017.

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## A. Draft resolution[2]

1. The Parliamentary Assembly recalls its Recommendation 2121 (2018) on "The case for drafting a European convention on the profession of lawyer", in which it underlined the vital contribution of lawyers to the effective administration of justice. Lawyers play a central role in protecting human rights, in particular people's right to a fair trial, and implementing principles of the rule of law.

2. The Assembly remains concerned by the numerous cases of violations of lawyers' rights, including attacks on their safety and independence, in recent years. Lawyers continue to be targeted for their involvement in human rights-related cases, such as defending the rights of refugees, asylum seekers and migrants, women, members of national and linguistic minorities, and LGBTI persons. They have also been targeted for their work denouncing government unaccountability or corruption, or for representing particular individuals (such as terrorist suspects, opposition politicians, civil society activists and independent journalists). Lawyers have also been identified with their clients and by extension their clients' political affiliations or the offences of which they are accused.

3. Attacks against lawyers' personal safety and liberty often take place against a general background of lack of respect for the rule of law. Lawyers may face administrative and judicial harassment, including abusive interferences with their professional rights and privileges, such as intrusions into privileged lawyer-client communications, searches of their persons or their professional premises, seizures of case related documents, illegal audio and video surveillance, non-communication of essential case-related information, blacklisting or travel bans. Advocates have even been summoned as witnesses in cases against their clients. Advocates have experienced numerous restrictions while conducting their professional activities, including non-admission to the pretrial detention centre or place of detention where their client is being held, undermining the confidentiality of lawyer-client privilege, and failure to inform an advocate about the client's location. The authorities have also interfered in the work of independent Bar associations.

4. The Assembly recalls that Council of Europe member States have subscribed to the minimum standards currently laid out in the Recommendation No. R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer. It continues to encourage the effective and full implementation of these provisions, pending their translation into an international legally binding instrument.

5. The Assembly recalls the importance of the roles of the Assembly's General Rapporteur on the situation of human rights defenders, as well as of the Commissioner for Human Rights who can both engage in dialogue on the issues concerning lawyers. In addition, the Assembly continues to encourage improved implementation of standards through co-operation and training activities provided by the Council of Europe.

6. The Assembly urges all Council of Europe member States to ensure effective protection of the profession of lawyer, including by:

6.1. prohibiting State interference in the legal profession and clearly identifying the specific activities that amount to prohibited interference;

6.2. establishing a domestic legislative framework guaranteeing efficiency, independence and safety of lawyers' work, in particular by:

6.2.1. ensuring that national legislations and law enforcement practice improve the conditions and guarantees of lawyers' work in full compliance with the existing standards set out in the United Nations Basic Principles on the Role of Lawyers (1990), the Committee of Ministers' Recommendation No. R(2000)21 and Assembly Resolution 2154 (2017) "Securing access of detainees to lawyers";

6.2.2. ensuring appropriate national safeguards against abuses and unlawful interference with the lawyers' professional activities also in contexts which may justify some greater restrictions of lawyers' rights, such as the fight against terrorism, organised crime or money-laundering;

6.2.3. investigating and holding to account the perpetrators in all instances of unlawful intimidation, harassment or physical attacks and prosecuting any criminal offences committed against lawyers, regardless of the source of the threat.

2. Draft resolution adopted by the committee on 9 September 2020.

## B. Draft recommendation[3]

1. The Parliamentary Assembly recalls its Resolution ... (2020) “The principles and guarantees of advocates”.

2. The Assembly welcomes the Committee of Ministers’ constructive initial response to its call in Recommendation 2121 (2018) “The case for drafting a European convention on the profession of lawyer” and takes note of the ongoing work of the European Committee on Legal Co-operation on its feasibility.

3. The Assembly reiterates its call on the Committee of Ministers to proceed with the drafting and adoption of a legally-binding instrument as a priority and reiterates the call made in its Recommendation 2121 (2018) to establish a platform for the protection of advocates from any interference with the exercise of their professional activities.

4. The Assembly reminds the Committee of Ministers of the need for legislative provision of fair trial rights, by creating conditions of equality between prosecution and defence in adversarial proceedings, as well as guaranteeing the safety of advocates, along with other participants in judicial proceedings (including judges, investigators and prosecutors), in the exercise of their professional activities.

3. Draft recommendation adopted by the committee on 9 September 2020.

## C. Explanatory memorandum by Mr Bashkin, Rapporteur

### 1. Introduction

#### *1.1. Procedure*

1. On 13 October 2017, the motion for a resolution on "the principles and guarantees of advocates" (Doc. 14376) was referred to the Committee on Legal Affairs and Human Rights (the committee) for report. At its Paris meeting on 12 December 2017, the committee appointed Mr Georgyii Logvynskyi as the rapporteur. Owing to the resignation of Mr Logvynskiy, at its Berlin meeting on 15 November 2019 the Committee appointed me as the rapporteur. At its meeting on 30 January 2020, the committee then held a hearing with three experts – Mr Vakhtang Fedorov of the Moscow Bar Association, Mr Laurent Pettiti of the Council of Bars and Law Societies of Europe, and Ms Maria Ślązak of the European Association of Lawyers – immediately prior to which I presented a revised version of Mr Logvynskyi's introductory memorandum.

#### *1.2. Scope of the report*

2. The Council of Europe has consistently acknowledged the vital contribution of lawyers to the effective administration of justice. Lawyers play a central role in protecting human rights and defending victims of violations. To ensure adequate protection of the rights of individuals and public trust in the proper administration of justice, the legal systems of all Council of Europe member States are required by the European Convention on Human Rights (ETS No. 005, "the Convention"), as interpreted by the case law of the European Court of Human Rights (the Court), to respect and guarantee the free exercise of the profession of lawyer.

3. The motion notes the "numerous cases of violations of advocates' rights" in recent years. It recalls the United Nations Basic Principles on the Role of Lawyers (1990) (the UN Basic Principles) that define and promote those rights, as well as Assembly Resolution 2154 (2017) "Securing access of detainees to lawyers". The motion proposes that the Assembly call on "all competent bodies of the Council of Europe and the member States to take steps aimed at providing and protecting the principles and guarantees of advocacy."

4. In addition to the UN Basic principles, Council of Europe member States have subscribed to the minimum standards currently laid out in the Recommendation No. R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer (which itself 'has regard' to the UN Basic Principles). However, whilst substantively quite complete, these instruments are non-binding. Although international legal instruments clearly prohibit State interference in the legal profession, the specific activities that amount to prohibited 'interference' are not always clearly identified. Also, ensuring the protection of lawyers engages both a negative obligation not to interfere as well as a positive obligation to establish a domestic legislative framework guaranteeing efficiency of lawyers' work. In particular, this involves a commitment to investigate threats to lawyers' lives and to prosecute harmful actions carried out against lawyers, regardless of the source of the threat. Given increasing concern for the situation of lawyers in a number of member States, the Assembly in 2018 called on the Committee of Ministers to draft a legally binding instrument, in the form of a Council of Europe convention on the profession of lawyer, which would also include a much-needed control mechanism.

5. The definition used in preparing this report is that proposed in the Committee of Ministers' Recommendation No. R(2000)21 which describes a lawyer as a "person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters."

#### *1.3. Objectives of the report*

6. The report shall update the situation regarding lawyers' safety and independence in Council of Europe member States since the adoption of Assembly Recommendation 2121 (2018) in January 2018. Additionally, the report is intended to confirm the urgent need to draft and adopt a European convention on the profession of lawyer. The report and the recommendation based on it should call upon the Committee of Ministers to carry out this work as swiftly as possible. Another objective of the report is to call on the Council of Europe's member States pre-emptively to amend their national legislations in order to guarantee the working principles and basic rights of lawyers in advance of the adoption of the said convention on the profession of lawyer.

7. It should be noted that, despite certain improvements since the previous discussion of the introductory memorandum, the overall situation regarding lawyers' safety and independence has not improved significantly.

## 2. Lawyers under threat – recent examples

8. In its Recommendation 2121 (2018), the Assembly expressed its "utmost concern that harassment, threats and attacks against lawyers continue to occur in many Council of Europe member States and are even increasing in some of them, where they have become widespread and systematic and are apparently the result of deliberate policy". The call for urgent action to enhance the protection of lawyers remains as necessary now as it was then.

9. In several countries lawyers continue to be targeted for their involvement in human rights-related cases, such as defending the rights of refugees, asylum seekers and migrants, women, members of national and linguistic minorities, and LGBTI persons. They have also been targeted for their work denouncing government unaccountability or corruption, or for representing particular individuals (terrorist suspects, opposition politicians, civil society activists, and independent journalists). There are reports that lawyers were identified with the causes advocated or crimes committed by the individuals they were defending.

10. Attacks against lawyers' personal safety and liberty often take place against a general background of lack of respect for the rule of law. Lawyers may face administrative and judicial harassment, including abusive interferences with their professional rights and privileges. This may be the result of misuse of national legal instruments on combating terrorism or money laundering which allow for interferences with lawyers' rights such as intrusions into privileged lawyer-client communications, blacklisting or travel bans.

11. Furthermore, it was reported that lawyers were involved by the prosecuting authorities as inciting agents ("agents provocateurs"): in such cases, lawyer-client confidence and confidentiality was broken *ab initio*, and the lawyers' reports were further used for prosecution. Needless to say that the above situations should be considered as particularly grave violations of the right to a fair trial.

12. We should agree with the proposal made by Mr Logvynskyi in the text of his introductory memorandum that the situations listed in the earlier report by Ms Lahaye-Battheu[4] may be modified and that it is not exhaustive. Consequently, I believe it is expedient to provide an updated list of negative examples.

13. At the hearing on 30 January 2020, Mr Federov identified seven categories of problems faced by advocates in different Council of Europe member States. The first was interventions by investigative authorities, entering offices, searching files and confiscating confidential, case-specific documents. This was a systemic problem in many countries. Second, interception of confidential telecommunications and eavesdropping on confidential conversations between lawyers and detainees. Third, threats and violence against lawyers, which was becoming systemic in some countries where lawyers were now themselves in need of protection when protecting their clients' rights. The fourth problem was advocates being summoned as witnesses in cases against their clients and required to explain why and how they were representing their clients. Fifth, identification of lawyers with the offences of which their clients were accused. Sixth, lawyers not being given information relevant to their clients' case, which violated equality of arms and made the trials unfair. The seventh problem was interference by the authorities in the work of Bar associations. All of these problems occurred frequently, and statistics showed that they were systemic in many countries.

14. Violations of lawyer–client privilege, are among the most typical examples. According to the materials of the Court's work the manifestations of this violation are classified as follows:

– violating lawyer–client privilege during criminal investigations,

– opening and studying lawyer–client correspondence when the client is remanded,

– searches in lawyers' offices.

15. Quite frequently, lawyers' freedom of expression in courthouses is violated. In some cases, lawyers face physical violence as well as verbal opposition from officials or representatives of the parties to the legal proceedings, or threats of such violence. One of the most common violations of lawyer rights is summoning lawyers for questioning by investigative bodies as witnesses on the cases in which they are providing legal assistance to their clients.

4. Doc. 14181.

16. The present report and the draft resolution and recommendation are not intended to incriminate or influence a particular State politically. The author of the report sees it as his principal objective to help various member States to gear their national legislations and law enforcement practices towards improving the conditions and guarantees of lawyers' work in full compliance with the European principles of the rule of law, respect for human rights, and people's right to an independent and fair trial.

17. The Court practice demonstrates that a significant share of complaints about the summoning of lawyers for questioning as witnesses in their clients' cases are related to the Russian Federation. There are known cases of Russian lawyers' complaints concerning wrongful attempts by law enforcement bodies to evaluate and regulate lawyers' fees followed by criminal prosecution.

18. It should be said that lawyers encounter problems of various degrees in fulfilling their professional duties in various European regions, including the West, the Balkans and the southern regions. Instances of searches in lawyers' offices have occurred, for instance, in France. The number of searches of lawyers and their offices in the French Republic is growing: 26 in 2016, 31 in 2017, 44 in 2018.

19. In the Netherlands, the murder of the lawyer who represented a key witness in the case against a local organised criminal group in September 2019 caused a wide response.[5] This was followed in August 2020 by a shooting incident at another law firm.[6] In connection with these incidents, the Dutch Bar Association indicated the specific danger that lawyers are exposed to in the performance of their duties,[7] and stressed the need to take additional measures to ensure their safety.[8]

20. Italy's justice system, known for its slowness, which has given rise to numerous findings of violations by the Court, makes it difficult for lawyers to provide effective assistance to their clients. Frequently, court proceedings in Italy take years. This afflicts not only the parties to the proceedings but also the lawyers.

21. The Serbian and Belgrade Bar Associations have expressed their concern at the risk of violence against lawyers. In July 2018, a Serbian lawyer was killed.[9]

22. In Greece, it has been reported that a number of lawyers were placed under investigation after monitoring possible push-backs of migrants in the Evros region. It is also claimed that lawyers representing applicants before the Court have been subjected to harassment by law enforcement authorities.[10]

23. The draft law on amendments and additions to the law "on measures to counter money laundering" submitted to the People's Assembly of the Republic of Bulgaria in February 2019 raised serious concerns amongst the Bulgarian legal community. A wave of protests by representatives of this profession against the obligation to transmit data about their clients to the State Agency for national security, which includes the financial intelligence unit responsible for receiving and analysing reports of suspicious transactions that may involve money laundering, received wide coverage in the national media.[11]

24. In 2019, nearly 40 national and international lawyers' associations issued a joint statement on the situation of lawyers in Turkey stating that since July 2016, 1 546 Turkish lawyers had been prosecuted and 594 lawyers had been arrested.[12] It can also be recalled that the Turkish Criminal Procedure Code and Law on the Execution of Sentences and Security Measures authorise the police to prevent lawyers from meeting with clients during the first 24 hours of their police custody.

25. A significantly greater number of cases of interference in lawyers' affairs or of pressure being exerted on them in the countries of Eastern Europe is cause for concern. Despite the growing number of professional lawyers in Azerbaijan, the country's ratio of lawyers per population, the lowest among member States,

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5. "Dutch gangster case: Shock at murder of lawyer Derk Wiersum", *BBC News*, 18 September 2019.
6. "Shots Fired at Amsterdam Attorney's Office", *NL Times*, 7 August 2020.
7. See www.advocatenorde.nl/nieuws/reactie-nova-beschieting-amsterdams-advocatenkantoor.
8. See www.advocatenorde.nl/nieuws/nctv-na-moord-wiersum-is-weerbaarheid-advocaten-van-groot-belang.
9. ICJ, "Serbia: killing of lawyer must be urgently investigated", 30 July 2018.
10. Council of Europe Commissioner for Human Rights, Round-Table on "Human rights defenders in the council of Europe area: current Challenges and Possible Solutions", Helsinki, 13-14 December 2018 (report CommDH(2019)10 of 29 March 2019).
11. See for example "Протест на адвокати заради нови правила за пране на пари", *BTV Novinite*, 22 February 2019; "Ралица Негенцова: Има опити за политизиране в адвокатурата" *Bulgarian National Radio*, 25 February 2019,**;** **"**Адвокати отново излязоха на протест", *Dark News*, 22 February 2019; "Адвокати поискаха оставката на Висшия адвокатски съвет", *Mediapool*, 24 February 2019.
12. See Avocats Barreau de Paris, Journée internationale de l'avocat en danger consacrée aux avocats en Turquie, 24 January 2019. See also Global Observatory for Defence Rights and Violations of Lawyers' Rights.

continues to be cause for concern.[13] There have been allegations regarding disciplinary charges against lawyers and detention of lawyers for alleged financial violations. The Court indicated to the government the relevant general measures it should undertake to protect lawyers.

26. In Ukraine, there are concerns regarding intimidation, harassment and physical attacks on lawyers, as well as the failure to investigate attacks.[14] And such matters are even increasing; they have become widespread and systematic.[15] They include killings of lawyers, which are sometimes inadequately investigated; abuse of criminal proceedings to punish lawyers or remove them from certain cases; unlawful monitoring of clients' consultations with their lawyers; and interrogation of lawyers as witnesses in their clients' criminal cases.

27. In February 2016, Poland's parliament amended the Police Act to grant public authorities the right to access Internet data, including the contents of communications. Under that Act, courts may now authorise secret surveillance for up to three months, which may be extended for a maximum of 18 months, on the basis of a broad list of suspected crimes and without the requirement to consider whether there is a need for the surveillance. These amendments also grant the police direct access to meta data without a court order. Confidentiality of information covered by advocates' privilege is also endangered. For instance, the amendments do not prohibit observing lawyer–client communications in criminal cases.

## 3. Principles and standards applicable to lawyers and the legal profession

28. Assembly Recommendation 2121 (2018) called for the drafting of a Convention on the profession of lawyer that would be based on the existing standards set out in Committee of Ministers' Recommendation No. R(2000)21. The latter recommendation sets out six "principles", each followed by detailed guidance on their implementation in practice. The 'principles' are described as follows:

– General principles on the freedom of the exercise of the profession of lawyer;

– Legal education, training and entry into the legal profession;

– Role and duty of lawyers;

– Access for all persons to lawyers;

– Associations;

– Disciplinary proceedings.

### *3.1. Principle I: General principles on the freedom of exercise of the profession of lawyer*

29. The first 'principle' in Recommendation No. R(2000)21 sets out a series of 'general principles', notably the following.

#### *3.1.1. Freedom of exercise of the profession of lawyer*

30. This can be seen as the fundamental principle underlying the entire recommendation: "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." States should strive to create an efficient, balanced system of taxation, pension provision and other social benefits for lawyers on the basis of their belonging to the profession of lawyer.

#### *3.1.2. Authorisation to practice as a lawyer*

31. Decisions on authorisation to practice as a lawyer or accede to the profession should be taken by an independent body and in any case, should be subject to review by an independent and impartial judicial authority.

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13. In 2016, before the increase, it stood at 9 lawyers for every 100 000 head of population; the second lowest ratio was 46:100 000, in Bosnia and Herzegovina: "European Judicial systems – Edition 2018 (2016 data): efficiency and quality of justice", European Commission for the Efficiency of Justice (CEPEJ).

14. ICJ, "Ukraine: criminal proceedings against lawyer Andriy Domanskyi raise concerns", 12 April 2019; ICJ, "Ukraine: ICJ stresses the need for security of lawyers and an independent legal profession", 12 March 2019.

15. See Ukrainian National Bar Association (UNBA), "Violations of Attorneys", 2013-2018; See also, UNBA, "Defenseless Defenders",13 May 2019.

*3.1.3. Freedom of belief, expression, movement, association and assembly*

32. These freedoms are important for lawyers who, in particular, "should have the right to take part in public discussions on matters concerning the law and the administration of justice and suggest legislative reforms."

*3.1.4. Freedom from sanctions or pressure*

33. Lawyers should not be subjected to sanctions or pressure, or threats thereof, when acting in accordance with professional standards. To enable the legal profession effectively to perform its proper role in the defence of the rights of individuals, lawyers should be able to counsel and represent their clients in accordance with the internal law of the State concerned, as well as with established professional standards, without any restrictions, influence, pressure, threats or undue interference from any quarter. Lawyers shall not be identified with their clients.

34. This also means that a lawyer should not be interrogated as a witness in a criminal case against his or her client at any stage of the proceeding.

35. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately protected by the authorities.

*3.1.5. Lawyers' access to their clients*

36. Lawyers should have access to their clients especially to persons deprived of their liberty. Lawyers (a) should be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) should be able to travel and to consult with their clients freely both within their own country and abroad. Access of lawyers to detainees is particularly important as a safeguard against torture and other unlawful mistreatment.[16]

*3.1.6. Confidentiality of lawyer-client relationships*

37. The confidentiality of the lawyer-client relationship must be respected.[17] In this regard, the United Nations Basic Principles require State authorities to recognise and respect that all contacts between lawyers and their clients within their professional relationship are confidential (Principle 22). Regrettably, lawyers defending political prisoners or people accused of terrorism are frequently subject to harassment and illegal searches, and often have their documents, cell phones and other electronic devices scrutinized.[18]

38. This right has been enshrined in the practice of the Court, notably under Article 8 of the Convention (right to respect for private and family life, home and correspondence). Exceptions allowing for interference with the right must be narrowly defined in accordance with the law and strictly necessary in a democratic society in the interests of, for example, national security, the prevention of disorder or crime or protection of the rights and freedoms of others.

39. In *Laurent v. France*[19], for example, the Court held that the actions by a police officer who intercepted papers that a lawyer had handed over to his clients under police escort, had not responded to a pressing social need and had therefore not been necessary in a democratic society within the meaning of Article 8. In *Pruteanu v. Romania*[20], the case concerned the interception of the telephone conversations of a lawyer and his inability to challenge the lawfulness of the measure and to request that the recordings be destroyed. The Court held that there had been a violation of Article 8 of the Convention, finding that the interference complained of had been disproportionate to the legitimate aim pursued – namely to establish truth in connection with criminal proceedings.

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16. See in particular, Assembly Resolution 2154 (2017) and in particular, paragraph 7 of the Report (Doc. 14267) on securing access of detainees to lawyers; See also, *Rasul Jafarov v. Azerbaijan*, No. 69981/14, 17 March 2016; United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), Rules 119-120, 2015.
17. The legal professional privilege and right to secrecy between counsels and their clients in all circumstances is protected by Article 8 (right to private life) of the Convention, and is inherently linked to the right of accused persons not to incriminate themselves under Article 6 (right to a fair trial) of the Convention. See also Resolution 2154 (2017); UN Basic Principles, paragraph 22.
18. Letter by the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 22 October 2018.
19. *Laurent v. France,* App. No. 28798/13, 24 May 2018 [French only].
20. *Pruteanu v. Romania,* App. No. 30181/05, 3 February 2015 [French only].

40. The Court recalled in particular that the interception of conversations between the lawyer and his or her client undoubtedly breached professional secrecy, which is the basis of the relationship of trust existing between a lawyer and his or her client. Respecting the confidentiality of information received by the lawyer from his client (professional secrecy) is of utmost importance. According to the Convention, there shall be no interference by a public authority with the exercise of the right protected by article 8 “except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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”.

41. It should be noted that the development of state-of-the-art digital technologies and audiovisual control technologies poses new challenges to the confidentiality of lawyer-client relations and requires improvement of the relevant legal regulations.

42. Searches and seizures at a lawyer’s office indubitably interfere with the professional privilege at the heart of the relationship of confidence which exists between the lawyer and his/her client and is the corollary of the lawyer’s client’s right not to incriminate himself. That being so, if domestic law could provide for the possibility of legitimate searches of lawyers’ premises, they should imperatively go together with special guarantees to prevent any arbitrariness or abuse of their professional privilege as well as right to respect for their private and family life.[21]

43. The Court has consistently held that the Contracting States may consider it necessary to resort to search and seizure to obtain physical evidence of certain offences. However, the reasons offered to justify such measures must be “relevant” and “sufficient” and the proportionality principle must be respected. The relevant legislation and practice must afford individuals adequate and effective safeguards against abuse. The search warrants must specify what objects or documents are expected to be found and how they would be relevant to the investigation, they must also specify and substantiate the reasons which led an investigator to the conclusion that the evidence could be found in a lawyer’s office.[22]

44. Another important safeguard is the presence and effective participation of an independent observer in the course of the search of a lawyer’s office to ensure that material subject to legal professional privilege is not removed, or false evidence planted. Such an observer should have requisite legal qualifications in order to effectively participate in the procedure.[23] Moreover, the observer should also be bound by the lawyer-client privilege to guarantee the protection of the privileged material and the rights of third persons. Lastly, the observer should be vested with requisite powers to be able to prevent, in the course of the procedure, any possible violation.[24] The lawyer’s personal presence during a search and seizure should also be guaranteed; and the search should be supervised by an investigative judge.[25]

#### *3.1.7. Access to a court*

45. 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 representing their clients.

46. 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. It also includes the possibility of unhampered access to the buildings of public authorities and institutions in connection with exercise by lawyers of their professional activity upon presentation of a lawyer ID.

#### *3.1.8. Equal respect by the court*

47. Parties to the same court proceedings should be accorded equal respect by the court. This manifests the principle of equality of arms, which is a key requirement of the right to a fair trial (Article 6 of the Convention). It is particularly important in criminal cases, which pit a citizen against the State, with the former

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21. *Andre & Another v. France*, App. No. 18603/03, 24 July 2008.
22. *Golovan v. Ukraine*, App. No. 41716/06, 5 July 2012; *Iliya Stefanov v. Bulgaria*, App. No. 65755/01, 22 May 2008; *Smirnov v. Russia*, App. No. 71362/01, 7 June 2007; *Van Rossem v. Belgium*, App. No. 41872/98, 9 December 2004 [French only].
23. *Kolesnichenko v. Russia,* App. No. 19856/04, 9 April 2009; *Aleksanyan v. Russia,* App. No. 46468/06, 22 December 2008; *Iliya Stefanov v. Bulgaria,* App. No. 65755/01, 22 May 2008.
24. *Golovan v. Ukraine*, App. No. 41716/06, 5 July 2012.
25. *Sérvulo & Associados - Sociedade de Advogados, RL & Others v. Portugal,* App. No. 27013/10, 3 September 2015 [French only].

potentially at risk of a severe sanction, such as imprisonment. The court must not favour prosecutors over defence lawyers. Very frequently, lawyers need additional guarantees for the implementation of the adversarial principle.

### *3.2. Principle II: Legal education, training and entry into the legal profession*

48. This emphasises the prohibition on discrimination mentioned in Principle I. It states that 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. It may well be that in 2020, 20 years after Recommendation No. R(2000)21 was drafted, the list of prohibited grounds for discrimination needs to be expanded.

49. Entry to the profession should require a "high standard of legal training and morality", and provision should be made for continuing education. Both basic and continuing education should address legal skills and 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.

### *3.3. Principle III: Role and duty of lawyers*

50. The role and duty of lawyers should be established through professional standards and codes of conduct which should be drawn up by Bar or other lawyers' professional associations. Such standards and codes should *inter alia* ensure that lawyers act independently, diligently and fairly and respect professional secrecy, the violation of which, without the client's consent, should be subject to appropriate sanctions. When providing legal assistance in a court and other settings, lawyers are bound by the requirements of the law and ethical norms, which are laid down in the respective rules and regulations. Lawyers should respect the judiciary and their conduct in court should comply with applicable rules and standards.

### *3.4. Principle IV: Access for all persons to lawyers*

51. An extension of Article 6 of the Convention, which protects the right to legal assistance in criminal proceedings, this Principle calls for "all necessary measures" to ensure the access of everyone, including those in an "economically weak position", to the services of independent lawyers. Lawyers' duties and diligence towards their clients should not depend on whether they are paid privately or from public funds.

### *3.5. Principle V: Associations*

52. Membership of professional associations, intended to strengthen professional standards and safeguard the independence and interests of lawyers, is encouraged. Such associations should be self-governing and independent and their roles should be respected. Amongst other things, professional associations should be encouraged to "promote and support law reform and discussion on existing and proposed legislation" and "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."

53. In many States, bar associations are professional lawyer communities and, as civil society institutions, they are not part of the public authorities or local self-governance bodies. At the same time, in some states, bar associations are not represented on the qualification commissions of the judicial community. This situation needs to be rectified, especially since, conversely, members of the judicial community take an active part in the work of the qualification commissions of bar associations.

### *3.6. Principle VI: Disciplinary proceedings*

54. This Principle notes that "Where lawyers do not act in accordance with their professional standards…, appropriate measures should be taken, including disciplinary proceedings", for which Bar associations or other lawyers' professional associations should be responsible. Such proceedings should respect procedural guarantees set out in the Convention. Any sanctions should respect the principle of proportionality.

### *3.7. Summary of principles established under international instruments*

55. At the hearing on 30 January 2020, Ms Ślązak helpfully summarised the essential principles of the key international instruments, namely the 1990 UN Basic Principles on the Role of Lawyers and the Committee of Ministers' Recommendation R(2000)21 on the freedom of exercise of the profession of lawyer as follows: the authorities should not apply sanctions, pressure or threats against lawyers for exercising their professional duties correctly; the authorities should not improperly interfere in lawyers' work; the authorities should respect lawyer-client confidentiality; admission of candidates to the profession should be decided by an independent body; there should be full respect for lawyers' freedoms of belief, association and expression, including to express their views on matters relating to justice and legal reforms; lawyers should have free access to their clients, especially when detained, and free access to the courts and case-files; and everyone should have access to a lawyer, including persons in difficult economic conditions.

### *3.8. Specific situations*

56. Certain contexts may justify greater restrictions of lawyers' rights. The Guidelines of the Committee of Ministers on human rights and the fight against terrorism (2002), for example, recognise that "the imperatives of the fight against terrorism may justify certain restrictions to the right of defence," notably arrangements for access to and contacts with counsel and arrangements for access to the case file (Guideline IX.3.) They may also justify interception of communications between lawyers and their clients (Guideline XI.2.) These restrictions are potentially open to abuse, given the lack of a universally recognised definition of terrorism. National authorities are obliged to take all necessary action to prevent and protect against terrorism. It is, however, unacceptable to unlawfully instrumentalise lawyers and interfere with their professional activities to this end.

## 4. Defending lawyers and the legal profession: the role of the Council of Europe

57. Although international legal instruments clearly prohibit undue interference in the legal profession, the specific activities that amount to prohibited "interference" cannot be exhaustively identified. Depending on the situation, the authorities may be justified in "interfering" with some rights of lawyers. The question is whether or not that "interference" amounts to a violation, which will often depend on whether or not it is proportionate. It is necessary to create a reliable mechanism for early warning and prevention of immediate threats to the security and independence of professional lawyers.

58. The promotion of the full enjoyment of lawyers' rights and their protection as human rights defenders is also a priority for the office of the Commissioner for Human Rights, through third party interventions before the Court, consultations with human rights defenders, co-operation with other international partners and in the framework of dialogue with member States.[26]

59. Professional assistance to lawyers and professional associations has been provided by the Council of Europe. The Committee of Ministers agreed with the Assembly that the implementation of Recommendation No. R(2000)21 could be improved through training programmes in the framework of the organisation's cooperation activities and has encouraged all departments to step up their efforts in this area. Co-operation activities concerning lawyers, their professional associations and their training aim to bring national laws and regulations into line with European standards. More generally, the European Programme for Human Rights Education for Legal Professionals (HELP) supports member States in implementing the Convention at the national level by enhancing the capacity of judges, lawyers and prosecutors to apply the Convention in their daily work.[27] At the video conference held on 8 July 2020 under the auspices of HELP, the following statistics on the growth of the number of users of the electronic platform of this program were announced (as of June 2020): France – 10 426, Turkey – 5 322, Spain – 5 228, Ukraine – 4 069, Italy – 3 942, Russia – 3 716, United Kingdom – 3 060, Greece – 2 875.

26. Reply by the Committee of Ministers to Recommendation 2085 (2016), Doc.14285, 10 April 2017.
27. For further information, see www.coe.int/en/web/help/home?desktop=true.

## 5. A possible Council of Europe convention on the profession of lawyer

60. As noted above, the Committee of Ministers has now replied to Assembly Recommendation 2121 (2018) and has instructed the European Committee on Legal Co-operation (CDCJ) to prepare a feasibility study covering the following points:

*a.* identifying the possible added value of drafting a convention, taking account of the protection provided by other Council of Europe instruments, in particular the European Convention on Human Rights and the case-law of the European Court of Human Rights;

*b.* identifying and assessing the possible alternatives to drafting a convention, including, for instance a new recommendation or guidelines;

*c.* defining, if appropriate and depending on the conclusions under items a and b, a tentative outline of the personal and material scope of a convention;

*d.* drawing up, if appropriate and depending on the conclusions under items a and b, a tentative outline of draft terms of reference for a committee of experts responsible for drafting the convention, and advising on appropriate working methods.

61. Recommendation 2121 (2018) also suggested that work on a new convention should be based on Committee of Ministers' Recommendation No. R(2000)21, whilst also taking account of other relevant texts, including the Council of Bars and Law Societies of Europe's Charter of Core Principles of the European Legal Profession, the International Association of Lawyers' Turin Principles of Professional Conduct for the Legal Profession in the 21st Century and the International Bar Association's Standards for the Independence of the Legal Profession, International Principles on Conduct for the Legal Profession and Guide for Establishing and Maintaining Complaints and Discipline Procedures. It goes without saying that work on a future convention would take account of the case law of the Court, the "Rule of Law Checklist" of the European Commission for Democracy through Law (Venice Commission) and findings of Special Procedures of the Human Rights Council such as the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders. It is now almost 20 years since the Committee of Ministers' recommendation was drafted and, as noted in Recommendation 2121 (2018), there may be areas in which it could be further developed and updated.

## 6. Conclusions

62. Continuing reports of lawyers being threatened, disbarred, restricted in their rights and worse are a matter of serious concern, both in themselves and from the wider perspective of the protection of human rights and the rule of law. While the Council of Europe is studying the feasibility of a European convention on the profession of lawyer, it is essential for the Assembly to remain informed of and respond to such threats. The purpose of this report, therefore, was to examine recent developments across the member States, with a view to making helpful recommendations to member States, support the work of other Council of Europe bodies and mechanisms and continue to encourage the Committee of Ministers' to proceed towards adoption of a new convention.

63. Moreover, it is important that the Council of Europe bodies make it clear that any unlawful interference with a lawyer's work, and especially threats against and prosecutions of lawyers for their professional activities, when a lawyer is identified with his/her client and as such is considered to assist a crime, can be considered as grave violations of the right to a fair trial and should be prevented, with appropriate sanctions where necessary.