



Provisional version

Committee on Legal Affairs and Human Rights

The case for drafting a European Convention on the profession of lawyer

Report*

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A. Draft recommendation

1. The Parliamentary Assembly concurs with the view of the European Court of Human Rights that the specific role of lawyers gives them a central position in the administration of justice as protagonists and intermediaries between the public and the courts. They play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. For members of 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.

2. The Parliamentary Assembly subscribes to the minimum standards set out in Committee of Ministers' Recommendation No. R(2000)21 to member States on the freedom of exercise of the profession of lawyer (Recommendation (2000)21). It recalls that these standards, although non-binding, are intended to elaborate upon and give practical effect to principles flowing from binding obligations, notably those of the European Convention on Human Rights.

3. It is therefore a matter of 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. These include, amongst other things, killings, which are sometimes inadequately investigated by the authorities; physical violence, including by public officials; threats, unjustified public criticism and identification of lawyers with their clients, including by leading politicians; abuse of criminal proceedings to punish lawyers or remove them from certain cases; violation of legal professional privilege through unlawful monitoring of clients' consultations with their lawyers, search and seizure, interrogation of lawyers as witnesses in their clients' criminal cases; abuse of disciplinary proceedings; and various structural and procedural failures to establish and implement effective guarantees of lawyers' independence.

4. The Parliamentary Assembly considers that this situation shows the need to reinforce the legal status of Recommendation (2000)21 by translating its provisions into a binding instrument in the form of a convention, with an effective control mechanism. Such a convention could also become a source of binding standards on the wider international level by allowing non-member States to accede to it.

5. Given the role of lawyers in the day-to-day protection of individual rights, including in on-going judicial proceedings, the Parliamentary Assembly considers that there is also a need for an early-warning mechanism to respond to immediate threats to their safety and independence and to their ability to perform their professional duties effectively. It recalls the Council of Europe's existing Platform to promote the protection of journalism and safety of journalists and considers that a similar mechanism would be of equal practical effectiveness, procedural efficiency and technical feasibility in the present context.

* Draft recommendation adopted unanimously by the committee on 12 December 2017.

6. The Parliamentary Assembly therefore calls upon member States of the Council of Europe to fully respect, protect and promote the freedom of exercise of the profession of lawyer, including by effective implementation of Committee of Ministers' Recommendation (2000)21.

7. The Parliamentary Assembly calls upon the Committee of Ministers to:

7.1. Draft and adopt a convention on the profession of lawyer, based on the standards set out in Recommendation (2000)21, and in doing so;

7.1.1. Take account also of other relevant instruments, including Charter of Core Principles of the European Legal Profession of the Council of Bars and Law Societies of Europe, the Turin Principles of Professional Conduct for the Legal Profession in the 21st Century of the Union Internationale des Avocats and the 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 Proceedings of the International Bar Association;

7.1.2. Ensure that guarantees in relation to fundamental issues such as access to a lawyer and lawyers' access to their clients, legal professional privilege and the confidentiality of lawyer-client communications are reinforced as necessary in order to respond to developments in the surrounding legal and regulatory context, including measures introduced to counter corruption, money-laundering and terrorism;

7.1.3. Include an effective control mechanism, giving particular consideration to the option of a committee of experts examining periodic reports submitted by States parties, with the possibility for civil society organisations including lawyers' associations to make submissions;

7.1.4. Consider opening the convention to accession by non-member States;

7.2. Establish an early-warning mechanism to respond to immediate threats to lawyers' safety and independence and to their ability to perform their professional duties effectively, modelled on the Platform to promote the protection of journalism and safety of journalists. In this connection, the Parliamentary Assembly reiterates the call made in its [Recommendation 2085 \(2016\)](#) to establish a platform for the protection of human rights defenders, which would include lawyers;

7.3. Set up activities, including bilateral cooperation activities, to enhance implementation of Committee of Ministers' Recommendation (2000)21 pending ratification of a new convention by member States;

7.4. Fully implement [Recommendation 2085 \(2016\)](#).

B. Explanatory memorandum by Ms Lahaye-Battheu, rapporteur

1. Introduction

1. The present report is based on a motion for a recommendation tabled by Mr Fabritius and others on 13 October 2016. The Committee on Legal Affairs and Human Rights appointed me as rapporteur at its meeting on 7 March 2017.

2. The motion underlines the essential contribution of lawyers to ensuring respect for the rule of law by defending individual freedoms, notably under Article 6 of the European Convention on Human Rights (the Convention), which protects the right to a fair trial. It observes that when the rule of law is under threat, the rights associated with exercise of the profession of lawyer are also often restricted.

3. The motion notes that certain international standards on rights relating to the exercise of the profession of lawyer already exist, including the Council of Europe Committee of Ministers' detailed Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer and the United Nations Basic Principles on the Role of Lawyers. These standards are set out in non-binding instruments, however; whilst Article 6(3)(c) of the Convention establishes rights to legal representation and legal aid in criminal proceedings, there are no binding international standards regulating the profession of lawyer, and domestic regulation varies between states.

4. To avoid any uncertainty, for the purposes of this report I will concentrate primarily on 'lawyers' in the sense of those who work in private practice or for firms of lawyers providing legal advice and representation to external, private clients, and whose professional activity is regulated by a lawyers' professional body, as opposed to e.g. government lawyers or academic lawyers. This corresponds to the definition applied in Committee of Ministers' Recommendation (2000)21. I will also address the situation of in-house counsel (i.e. lawyers who are employees of a firm primarily engaged in some other area of activity), as this has been brought to my attention subsequently.

5. During the preparation of this report, the Committee organised two hearings. The first took place in Strasbourg on 12 October 2017, with the participation of Mr Laurent Pettiti and Mr Piers Gardner of the Council of Bars and Law Societies of Europe (CCBE) and Ms Ayse Bingol Demir, a Turkish lawyer. The second took place in Paris on 13 November 2017 with the participation of Mr Khalid Baghirov, an Azerbaijani lawyer, Mr Milan Antonijevic of YUCOM, the Lawyers' Committee for Human Rights, Serbia, and Mr Florian Irminger of the Human Rights House Foundation. I also met representatives of various professional associations, including the Union Internationale des Avocats (UIA), the Law Society (which represents solicitors in England and Wales), the Association of Corporate Counsel (ACC) and the Institut voor bedrijfsjuristen (IBJ, the Belgian institute of corporate counsel), in Brussels on 14 November 2017.

2. The role of lawyers as actors of justice, protecting rights and upholding the rule of law

6. Lawyers play an important role throughout individuals' interaction with the authorities in relation to exercise and protection of their rights. This is particularly so within the judicial system. As the European Court of Human Rights has recognised, "[t]he specific situation of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. However, for members of 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. [...] Lawyers [...] are protagonists in the justice system, directly involved in its functioning and in the defence of a party."¹ Indeed, as well as assisting individuals in defending their rights, lawyers also contribute to the efficient functioning of the judicial system: in the United Kingdom, for example, the president of the Supreme Court argued that reductions in legal aid leading to an increase in unrepresented litigants would mean that "court hearings will last longer [and] the burden on court staff and judges will increase".²

7. The role played by lawyers in ensuring effective protection of individual rights extends beyond the judicial system. They provide legal advice prior to judicial proceedings and in alternative dispute resolution proceedings, when important issues may be resolved without recourse to often over-burdened domestic judicial systems; indeed, independent expert legal advice may discourage unrealistic clients from pursuing non-meritorious cases through the judicial system. It can also be recalled that the domestic remedy for alleged

¹ *Morice v. France*, 29369/10, Grand Chamber, 23 April 2015, paras. 132 & 148.

² "Lord Neuberger, UK's most senior judge, voices legal aid fears", BBC News, 5 March 2013.

violations of Convention rights required under Article 13 need not necessarily be judicial to be effective: legal advice and representation in administrative proceedings, including in such important areas as social security, employment or asylum, may thus also be important to ensure effective protection of Convention rights.

3. The situation of lawyers in Europe today

8. Given the importance of lawyers to ensuring respect for human rights and the rule of law, it is a matter of 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.

9. This phenomenon is not limited to Europe. In June 2017, the UN Human Rights Council adopted a resolution on the independent and impartiality of the judiciary, jurors and assessors, and the independence of lawyers.³ Having condemned “all acts of violence, intimidation or reprisal, from any quarter and for any reason, against judges, prosecutors and lawyers, and [reminded] States of their duty to uphold the integrity of judges, prosecutors and lawyers and to protect them, as well as their families and professional associates, against all forms of violence, threat, retaliation, intimidation and harassment, whether from State authorities or non-State actors, resulting from the discharging of their functions, and to condemn such acts and bring the perpetrators to justice”, the Human Rights Council expressed its “deep concern about the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession, and calls upon States to ensure that any attacks or interference of any sort against lawyers are promptly, thoroughly and impartially investigated and that perpetrators are held accountable”.

10. Although the present report is not intended to present an exhaustive review of the situation of lawyers in Council of Europe member states, certain national situations are of particular concern. Even though these are already broadly familiar to the Assembly, it is worth recalling them here in order to underline the urgency of enhancing protection of the profession of lawyer at European level.

11. In Azerbaijan, three successive lawyers were prevented from representing the well-known human rights defender Leyla Yunus: Javad Javadov, who was dismissed from her case on the basis of a supposed conflict of interests due to his having been made a witness in it;⁴ Alaif Gasanov, who was disbarred after being found guilty of defamation on account of comments concerning the behaviour of Ms Yunus’ cell-mate;⁵ and Khalid Baghirov, who was disbarred for having criticised the fairness of the trial of another of his clients, the leading opposition politician Ilgar Mammadov.⁶ Another well-known case is that of Intigam Aliyev, a human rights lawyer, head of the Legal Education Society and legal representative in 200 applications before the European Court of Human Rights, who in April 2015, was sentenced to seven and a half years’ detention for offences including tax evasion and illegal business activity (until the Supreme Court ordered his released in March 2016).⁷ Amnesty International declared him a prisoner of conscience⁸ and the International Bar Association and CCBE awarded him their human rights awards in 2015 and 2016 respectively. When Mr Aliyev was arrested, his house was searched and the files of over 100 clients whom he represented before the European Court of Human Rights were seized: the Court later found this to be a violation of Azerbaijan’s obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right of individual application to the Court.⁹ In September 2014, four of Mr Aliyev’s five lawyers were removed from his case on account of a supposed conflict of interest, after the prosecutor summoned them as witnesses. Other cases include those of Elchin Sadigov, who had represented his client’s allegations of torture by the police, and who along with his brother was subsequently threatened and harassed by the authorities,¹⁰ and Elchin Mammad, a lawyer, president of an association providing legal education and editor-in-chief of a newspaper reporting on human rights issues, who was detained and had his telephone and computer seized at the border on the strength of a travel ban that had in fact been suspended.¹¹

³ A/HRC/35/L.20, 19/06/2017.

⁴ “Azerbaijan: Ongoing judicial harassments and deprivation of her lawyers against Mr Leyla Yunus”, FIDH, 6 November 2014.

⁵ “Human Rights Lawyers at Risk”, Human Rights House Foundation, 10 September 2015.

⁶ “Human Rights Lawyers at Risk”.

⁷ “Re: Concerns regarding Mr Intigam Aliyev, a human rights lawyer”, letter from the President of the CCBE to the President of Azerbaijan, 22 January 2015.

⁸ “Azerbaijan: Activist detained on trumped-up charges: Intigam Aliyev”, Amnesty International, 12 August 2014.

⁹ *Annagi Hajibeyli v. Azerbaijan*, App. no. 2204/11, judgment of 22 October 2015.

¹⁰ “Re: Concerns regarding the ongoing harassment of Mr Elchin Sadigov and his family”, letter from the President of the CCBE to the President of Azerbaijan, 17 November 2016.

¹¹ “Re: Concerns regarding Azerbaijani lawyer Elchin Mammad”, letter from the President of the CCBE to the President of Azerbaijan, 14 September 2016.

12. A further concern in relation to Azerbaijan is the recent reform of the legal profession. Azerbaijan is unusual in that since its independence, both bar association-registered lawyers and other legal practitioners have had rights of audience. According to information received from the “Group of Practicing Lawyers”, an informal network of independent, ‘non-Bar’ lawyers of Azerbaijan, there are fewer than 1,000 bar association-registered lawyers (most of whom are based in the capital, Baku), but around 8,000 ‘non-Bar’ practitioners. Azerbaijan has by far the lowest ratio of lawyers to head of population (10:100,000, compared to a European average of 147:100,000; the second lowest ratio is 37:100,000, in Bosnia and Herzegovina).¹² Recently adopted legislation will limit rights of audience to bar-registered lawyers, who currently enjoy a monopoly only in criminal cases.¹³ This risks severely restricting individuals’ choice of legal representative in court proceedings. Although the number of registered lawyers has been increasing, by 22% between 2010 and 2014, entry to the profession is regulated by the Collegium of Advocates’ (bar association) Qualification Commission. The International Bar Association (IBA) notes that the Qualifications Commission, a majority of whose members are appointed by the Ministry of Justice and the Supreme Court, is “widely seen to be strongly influenced by the government”. The IBA considers that the Collegium as a whole “is not an independent institution capable of protecting the interests of the legal profession in Azerbaijan. Instead, it is acting as an arm of government, frequently subjecting members involved in politically motivated trials to biased disciplinary proceedings resulting in disbarment”. The Collegium is also unusual by international standards in that it controls the allocation of cases to its members, including by removing them from cases, “sometimes... for reasons that observers believed were questionable”.¹⁴ The reforms therefore risk undermining public confidence in the ability of lawyers to provide effective representation, access to justice and hence public confidence in the judicial system as a whole, with detrimental consequences for the rule of law in Azerbaijan.¹⁵

13. Lawyers in the Russian Federation have also been subject to various forms of interference, intimidation and violence. In autumn 2014, Tatiana Akimtseva and Vitaliy Moiseyev, who both represented a witness in the trial of an organised crime boss, were killed one shortly before and the other immediately after the jury found him guilty. Vitaly Cherkasov was physically attacked by self-identified ‘Orthodox Church activists’ when representing an LGBTI rights activist; the police did not respond to his request for assistance and refused to investigate the attack.¹⁶ Arkady Chaplygin, head of a bar association specialising in cases relating to military conscription and engaged on cases challenging municipal electoral results, was physically assaulted by unknown assailants who forced their way into his office.¹⁷ Dmitry Egoshin was threatened by suspects during a police line-up at which his client, who had been physically assaulted by police and private security guards, was required to identify those responsible.¹⁸ Irinia Khrunova, the lawyer of imprisoned Pussy Riot member Nadezhda Tolokonnikova, was accused of plotting against the prison administration by one of the members of a delegation sent by the Presidential Human Rights Council to inspect her client’s detention conditions, and the prison governor lodged a criminal complaint of corruption against her for having ‘blackmailed’ him in order to obtain better conditions for her client.¹⁹ Murad Musayev, who represented a Chechen accused of killing a Russian army colonel, was himself accused of witness tampering and interference with the court’s work.²⁰ Yegor Mylnikov was twice suspended from his client’s case by being examined as a witness in it and was threatened with loss of his defence lawyer status following a disciplinary complaint; the courts later found his interrogation to have been illegal and intended only to remove him from his clients’ case, and all charges against him were dismissed.²¹ Georgy Antonov, who represented two senior interior ministry officials charged with corruption (both of whom had been in the process of investigating corruption themselves, and one of whom reportedly committed suicide during interrogation), was interrogated as a witness in his clients’ case and consequently removed from it, following which criminal proceedings were brought against him, his

¹² “Report on ‘European judicial systems – Edition 2016 (2014 data): efficiency and quality of justice”, CEPEJ.

¹³ According to information received from the “Group of Practicing Lawyers” in October 2017. It should be noted that the 2016 CEPEJ Report indicates that registered lawyers already enjoy a monopoly of legal representation also in civil cases.

¹⁴ “Report to the [UN] Human Rights Committee, Azerbaijan Country Report Task Force, 11th Session, 7-31 March 2016”, International Bar Association’s Human Rights Institute.

¹⁵ In this connection, see also “Azerbaijan: new law ‘likely to harm’ profession of lawyer”, statement of Mr Schennach and Mr Preda, co-rapporteurs of the Parliamentary Assembly for the monitoring of Azerbaijan, 10 November 2017.

¹⁶ “Mid-term Report – Review of the implementation of recommendations with respect to the rule of law and the role of lawyers accepted by the Russian Federation during the UPR in 2013”, Lawyers for Lawyers, 15 May 2016.

¹⁷ “Human Rights Lawyers at Risk”.

¹⁸ “Re: Concerns regarding threats against lawyer Dmitry Egoshin”, letter from the President of the CCBE to the President of the Russian Federation, 24 February 2014.

¹⁹ “Re: Concerns regarding the defamation campaign against Irina Khrunova, a human rights lawyer”, letter from the President of the CCBE to the President of the Russian Federation, 14 October 2013.

²⁰ “Charges Dropped Against Lawyer Who Defended Murderers of Anna Politkovskaya”, Moscow Times, 18 February 2015.

²¹ “Russian Federation – Court: Interrogation of lawyer illegal”, Lawyers for Lawyers, 3 November 2014.

home was searched and legal documents in his possession were seized.²² In May 2016, Marina Moshko was interrogated as a witness in her client's case, with the result that she was removed from his case, and her offices were searched and files examined.²³

14. The situation in the North Caucasus is particularly alarming, as noted in Assembly [Resolution 2157](#) on 'human rights in the North Caucasus: what follow-up to [Resolution 1738 \(2010\)](#)?' which found that "lawyers defending victims of human rights violations have themselves become targets of aggression, intimidation and trumped-up criminal charges in reprisal for their work". A 2013 report by Amnesty International listed numerous cases, including the following. Sapiyat Magomedova was beaten by police in Dagestan after being denied access to her detained client: when she tried to have the officers responsible prosecuted, charges were brought against her; the Russian Supreme Court eventually decided that no investigation was possible, despite there being evidence to corroborate her case. Irina Kodzaeva was subject to a similar ordeal in North Ossetia. Ingushetian lawyer Batyr Akhilogov was subject to repeated attempts by judges to have disciplinary proceedings opened against him, although all were rejected by the bar association. In Ingushetia, Maryam Esmurzieva and her children were threatened by the head of the police station where her client had been tortured.²⁴ A 2015 report by Human Rights Watch on Dagestan mentions the cases of Magomed Guchuchaliev, who had represented insurgents, was killed outside his house, the second lawyer from his firm to be killed within 18 months; Murad Magamadov, attacked outside a court-house by assailants suspected of being associated with the victim of the murder with which his client was charged; the police decided not to launch a criminal case over the attack; and Sapiyat Magomedova (also mentioned in the Amnesty report), who has received repeated death threats and against whom the Ministry of Internal Affairs filed a defamation lawsuit for accusing police of torturing a client.²⁵ Magamed Abubakarov, a human rights lawyer in Kabardino-Balkaria, began receiving threats in 2007; in 2011, he was seriously injured in a suspicious car accident involving police; and in 2013, he received further threats by telephone and, following a complaint to the police, by anonymous letter.²⁶ Taisiya Baskayeva, who has represented many applicants before the European Court of Human Rights, was detained in Moscow, transferred to North Ossetia and charged by North Ossetian investigators with 42 counts of fraud relating to compensation awarded to her clients by the Court for having served in North Ossetia's state of emergency region.²⁷ The Grozny offices of the 'Joint Mobile Group' (JMG) of volunteer human rights lawyers investigating human rights abuses in Chechnya were set on fire in 2014 and attacked again by an organised mob in 2015; in 2016, a bus carrying JMG lawyers and journalists was blocked by cars driven by masked men, who proceeded to physically assault its occupants and then set the bus on fire, and shortly after a group of armed, masked men attacked the JMG office in Ingushetia.²⁸ The Supreme Court of the Chechen Republic accused Marina Dubrovina and Dokka Itslaev of 'defaming the honour and dignity of a lawyer' and recommended their disbarment after they raised their clients' allegations of torture by the police.²⁹ When Shamil Magomedov was in Moscow in October 2017, shortly after the acquittal of one of his clients, a law enforcement officer visited his home in Dagestan asking about his whereabouts and "why he complained so much to law enforcement authorities".³⁰

15. In Turkey, the situation of lawyers following the failed coup d'état of July 2016 and that of lawyers representing Kurdish clients, or otherwise associated with the Kurdish cause, have both given rise to grave concerns. According to the CCBE, by 13 September 2017, 1343 lawyers were subject to criminal prosecution and 524 had been arrested since the coup. These included eighteen lawyers who had been representing the university lecturer and teacher dismissed under the emergency decree-laws.³¹ Further mass arrests of lawyers accused of links with the Gülen movement include those of nineteen lawyers in Kahramanmaraş prov-

²² "Russian Federation: ICJ concerned at prosecution of lawyer Georgy Antonov", International Commission of Jurists, 22 July 2014.

²³ "Russian Federation: Improper interrogation of a lawyer", Lawyers for Lawyers, 20 May 2016.

²⁴ "The Circle of Injustice: Threats and Pressure Faced by Lawyers in the North Caucasus", Amnesty International, March 2013.

²⁵ "Invisible War: Russia's Abusive Response to the Dagestan Insurgency", Human Rights Watch, June 2015.

²⁶ "Re: Concerns regarding the situation of lawyer, Mr Magamed Abubakarov", letter from the President of the CCBE to the Minister of Internal Affairs of the Kabardino-Balkaria Republic, 19 February 2013.

²⁷ "Russian Federation: ICJ concerned at arrest of lawyer Taisiya Baskayeva", International Commission of Jurists, 7 March 2014.

²⁸ "Mid-term Report".

²⁹ "Stop the Harassment of Human Rights Lawyers", Civil Rights Defenders, 21 October 2016.

³⁰ "Russian Federation: authorities must repudiate intimidation of lawyer", International Commission of Jurists, 27 October 2017.

³¹ "Re: Concerns regarding 18 lawyers taken into custody in Ankara, Istanbul and Diyarbakir", letter from the President of the CCBE to the President of Turkey, 13 September 2017.

ince, eleven lawyers in Denizli province, arrest warrants for 62 members of the Istanbul Bar Association,³² 22 lawyers in Izmir (including Taner Kilic, chair of Amnesty International Turkey),³³ four lawyers and members of the Human Rights Association (IHD) in Mardin province;³⁴ 22 lawyers in Antalya³⁵ and 50 lawyers in Istanbul.³⁶ On 9 May 2017, Mustafa Özben, a lawyer and academic at a university shut down by the Turkish government on account of alleged links to the Gülen movement, was abducted in Ankara, following which his wife filed a complaint with the Turkish Constitutional Court alleging that he was kidnapped by the Turkish intelligence services.³⁷ In July 2017, 3 lawyers were imprisoned for up to 12 years on charges relating to links to the Gülen movement.³⁸ The CCBE has referred to a statement by the Adana Bar Association expressing its members' "fear" and "concern" about possible reprisals against lawyers..., the decision made by some not to provide legal assistance to people detained in relation to the failed coup, and the negative treatment they faced from the police and prosecutors if they represented the detainees." There have also been mass arrests of lawyers associated with the Kurdish community: recent examples include nine lawyers arrested along with 210 other members of the HDP party,³⁹ the arrest and physical abuse of a lawyer as one of 568 persons detained as part of an investigation into the HDP,⁴⁰ and the arrest of nine members of the Libertarian Lawyers' Association who were representing the 46 lawyers already on trial for participating in the defence of Abdullah Ocalan.⁴¹ Even more disturbing was the 2015 killing of Tahir Elci, head of the Diyarbakir Bar Association and a leading Kurdish lawyer, who was shot dead at a press conference by unidentified gunmen, a few weeks after a criminal investigation for 'terrorist propaganda' had been opened against him.⁴²

16. More generally, the decree laws introduced under Turkey's state of emergency reduced the rights of the defence: as noted in the explanatory report to Assembly Resolution 2156 (2017) on the functioning of democratic institutions in Turkey, "access by detainees to a lawyer could be restricted for up to five days, and there were also restrictions on the right to a lawyer of their own choice or their right to confidential conversations with their lawyers. In addition to these legal hurdles, [...] lawyers also face a series of practical obstacles when visiting their clients, such as restricted visiting hours, or the obligation to make an appointment with their client. While it is obvious that the scale of the arrests and detentions have put an extra burden on the police and the justice system which have limited logistical capacities, this should not be at the expense of the most basic rights of the defence, such as access to a lawyer." (It should be noted that the restriction on access to a lawyer during the first five days of detention was lifted on 23 January 2017.)

17. There have been numerous cases of interference, intimidation and attacks against lawyers also in Ukraine. On 14 March 2016, Viktor Loiko was found dead in his apartment in Kharkiv; although there were no apparent injuries on his body, the door had been broken down and his apartment ransacked; independent observers consider that he was killed. Later that same month, Yury Grabovsky, who had been representing a Russian accused of terrorism offences as a military intelligence agent in Luhansk, was found shot dead and buried in an abandoned orchard south of Kyiv. The same day, Oksana Sokolovskaya, who had worked with Mr Grabovsky on the case, asked for and was granted official protection. Two other lawyers, Oleksandr Gruzkov of Kharkiv and Yury Ignatenko, were killed the year before.⁴³ A report by the Ukrainian National Bar Association covering the period 2013-2016 includes numerous examples of physical attacks on lawyers, often by police and other public officials; threats against lawyers in relation to their professional activities, again often by public officials; criminal prosecution of lawyers, often involving procedural improprieties; questioning of lawyers by investigators as witnesses in their clients' cases, thereby undermining legal professional privi-

³² "Re: Concerns regarding the ongoing persecution of lawyers in Turkey", letter from the President of the CCBE to the President of Turkey, 6 April 2017.

³³ "Re: Concerns regarding the arrest of 23 lawyers", letter from the President of the CCBE to the President of Turkey, 13 June 2017.

³⁴ "Re: Concerns regarding the arrest and detention of lawyers Ziya Bagi, Seher Acay, Fevzi Adsiz, and Mahmut Bingul", letter from the President of the CCBE to the President of Turkey, 8 December 2016.

³⁵ "Re: Concerns regarding the situation of Turkish lawyers, including Munip Ermis, Vice president of the Progressive Lawyers Association", letter from the President of the CCBE to the President of Turkey, 12 September 2016.

³⁶ "Re: Concerns regarding the situation of Turkish lawyers following the 15 July coup attempt", letter from the President of the CCBE to the President of Turkey, 19 August 2016.

³⁷ "Wife Accuses Turkey's Intel Of Abducting Her Husband, Files A Complaint With Top Court", Stockholm Center for Freedom, 21 July 2017.

³⁸ "13 lawyers given prison sentences of up to 12 years due to Gülen links", *turkishminute.com*, 18 July 2017.

³⁹ "Re: Arrest of nine Turkish lawyers", letter from the President of the CCBE to the President of Turkey, 13 January 2017.

⁴⁰ "Re: Concerns regarding the arrest and beating of Turkish human rights lawyer Tugay Bek", letter from the President of the CCBE to the President of Turkey, 21 December 2016.

⁴¹ "Re: Concerns regarding the arrest of members of the Libertarian Lawyers' Association", letter from the President of the CCBE to the President of Turkey, 10 May 2016.

⁴² "Turkish human rights lawyer shot dead during press conference", *The Guardian*, 29 November 2015.

⁴³ "2017: Ces avocats assassinés, emprisonnés, persécutés dans le monde", Institut des Droits de l'homme des Avocats Européens; "Ukraine: violent death of a lawyer is an attack on the legal profession", International Commission of Jurists, 29 March 2016.

lege; destruction of lawyers' property, including several instances of cars being burned; searches of lawyers' premises, often leading to unlawful seizure of material covered by legal professional privilege; and covert surveillance of lawyers.⁴⁴ Representatives of the Ukrainian National Bar Association told me that the difficulties faced by its members have grown since 2016, as a result of reform of the investigation and prosecution authorities and procedures combined with increased political pressure to obtain convictions in high-profile cases. As a result, investigators try to force lawyers to withdraw or be removed from certain cases, so that they are replaced by state-appointed lawyers who are under-paid and unmotivated, or more amenable in other ways. The Ukrainian National Bar Association is also very concerned by the fact that a new law on advocacy and advocates is being prepared without any consultation of the profession.

18. Incidents in the above-mentioned states may be particularly widespread and in some cases, apparently the systematic result of deliberate policy, but that does not mean that there have been no problems elsewhere in recent years. A lawyer in France received death threats in connection with her work on behalf of migrants.⁴⁵ In Georgia, Giorgi Mdinardze was physically attacked by the chief of a police station after giving advice to his client and was subsequently accused by the Ministry of Justice of having 'provoked' the police chief; the lawyer representing Mr Mdinardze was himself detained on administrative grounds, according to the Georgian Bar Association because of his defence of Mr Mdinardze.⁴⁶ A lawyer representing Syrian refugees in Greece was served with a court summons in relation to criminal proceedings against her clients and her apartment was broken into by individuals later identified as police officers.⁴⁷ In Italy, a lawyer was publicly criticised for representing a certain client by a party political leader and Member of the European Parliament, resulting in insults and threats, including death threats, being made against the lawyer.⁴⁸ In the United Kingdom, the Prime Minister had encouraged the Solicitors' Regulatory Authority (SRA) to bring disciplinary proceedings against a particular firm of solicitors; during the course of those proceedings, there was lengthy correspondence between a government ministry and the Solicitors' Regulation Authority, in which both the disciplinary proceedings and the reform of regulation of legal services then being considered by the government were discussed. A former Solicitor General condemned such "pressure" as "wholly inappropriate and designed and perceived to subject the SRA to pressure", "an action which undermined the rule of law".⁴⁹ The CCBE has submitted information on a variety of problems in other countries including Albania, Armenia, Bosnia and Herzegovina, Estonia, the Republic of Moldova, Lithuania, Serbia and 'the former Yugoslav Republic of Macedonia'.

4. Existing international standards

19. As one would expect, the right to a fair trial, being a fundamental pillar of human rights protection in a state governed by the rule of law, is enshrined in numerous international and regional human rights treaties. As noted above, Article 6 of the European Convention on Human Rights protects the right to a fair trial. This directly addresses several issues of relevance to the exercise of the profession of lawyer. In criminal proceedings, these include the right to have adequate time and facilities for the preparation of the defence, and the right to legal assistance of the individual's own choosing or, if s/he has not sufficient means to pay for it, to free legal assistance when the interests of justice so require. These provisions have been elaborated upon in the Court's case-law, which covers issues such as the right to assistance and support by a lawyer throughout criminal proceedings from the moment of being taken into police custody, the right to legal representation during trial in absentia, legal aid, the procedural requirements of adversarial proceedings, access to evidence and consultation with a lawyer. Although Article 6 does not contain specific detailed provisions in relation to civil proceedings, the Court's case-law has found, for example, that there may be a need in certain circumstances for the State to provide legal aid, and certain principles must be respected in order to ensure equality of arms between the parties.

20. The UN International Covenant on Civil and Political Rights (ICCPR), Article 14 also protects the right to a fair trial. The relevant provisions of Article 14 are essentially similar to those of Article 6 of the Convention. The UN Human Rights Committee has elaborated on the scope and content of Article 14 ICCPR in its

⁴⁴ "Violation of Attorneys' Professional Rights and Guarantees in Ukraine", Ukrainian National Bar Association, February 2016.

⁴⁵ "Une avocate du Barreau de Nice, assurant la défense de migrants, menacée à mort", Communiqué du Conseil national des barreaux, 3 July 2017.

⁴⁶ Letter from the President of the CCBE to the President of Georgia, 26 April 2017.

⁴⁷ "Re: Concerns regarding the harassment of Mrs Electra Koutra, a human rights lawyer", letter from the President of the CCBE to the Greek Minister of the Interior, 14 December 2016.

⁴⁸ "Re: Concerns regarding threats against Mr Nicola Canestrini, a lawyer", letter from the President of the CCBE to the Italian prime minister, 12 March 2015.

⁴⁹ "Harman demands answers on MoD influence on Leigh Day case", The Law Society Gazette, 13 July 2017.

General Comment No. 32, which covers issues, not all explicitly mentioned in Article 14, such as equality of arms, the right to communicate with counsel of one's choosing (including private meetings and confidential communications), and the right of lawyers to advise and represent criminal defendants, in accordance with generally recognised professional ethics, without restrictions, influence, pressure of undue interference from any quarter.

21. Beyond these binding, treaty-based standards, a large number of international and regional instruments address fair-trial issues relevant to the profession of lawyer. As noted in the motion, these most relevantly include Committee of Ministers' Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer and the United Nations Basic Principles on the Role of Lawyers. Recommendation No. R(2000)21, for example, covers a range of issues: general principles on the freedom of exercise of the profession of lawyer, which take as their starting point that "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"; legal education, training and entry into the legal profession; role and duty of lawyers; access for all persons to lawyers, [lawyers'] associations; and disciplinary proceedings. The Venice Commission's 'Rule of Law Checklist' includes a section on the independence and impartiality of the Bar, noting that "The Bar plays a fundamental role in assisting the judicial system".

22. Lawyers' associations have also been active in promoting standards in this area. The IBA, for example, has issued 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 Proceedings. The CCBE has adopted a Charter of Core Principles of the European Legal Profession. The UIA has produced the Turin Principles of Professional Conduct for the Legal Profession in the 21st Century. Most of these instruments were adopted after Committee of Ministers' Recommendation (2000)21.

5. The need for a convention on the profession of lawyer

23. Whilst certain core issues relevant to fair trial are contained in binding instruments, notably the Convention and the ICCPR, a wide range of other issues of fundamental importance to the profession of lawyer are to be found only in non-binding instruments. The most obvious added value of a convention on the profession of lawyer, therefore, would be its binding nature.

24. As noted in Section 3, the situation of lawyers in many Council of Europe member States is a matter of concern, given their role in protecting human rights and the rule of law and the frequent improper pressure, even to such extremes as physical assault, enforced disappearance and murder, to which they are subject. Transforming existing non-binding standards into a binding instrument would send an important political message concerning the importance of the legal profession and the need for the authorities in member States to take more effective action to guarantee its safety and independence.

25. A further advantage of undertaking inter-governmental work on a draft convention would be the opportunity to update the standards of the now 17-year old Committee of Ministers' recommendation in the light of the numerous texts that have been elaborated in the intervening period, including developments in the case-law of the Court.

26. A convention could include a follow-up mechanism, such as a Committee of the Parties or some other, more developed mechanism, as has been the common practice with Council of Europe conventions in recent years.⁵⁰ This would help ensure that the binding standards were respected by parties to the convention and give lasting, practical effect to political recognition at Council of Europe level of the need for action in this area.

27. A convention could also be opened to ratification by non-member States, as has almost systematically been the case with recent Council of Europe conventions, including the three mentioned in footnote 50. This would allow states outside the European region to subscribe to the binding standards of the convention, making it a model on the wider international level.

28. Consideration could also be given to the creation, alongside a convention, of a platform to promote the protection of lawyers, taking inspiration from the platform to promote the protection of journalism and safety

⁵⁰See e.g. the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210, Chapter IX; the 2015 Council of Europe Convention against Trafficking in Human Organs, CETS No. 216, Chapter VI; or the 2017 Council of Europe Convention on Offences relating to Cultural Property, CETS No. 221, Chapter V.

of journalists that was created in 2014.⁵¹ This latter platform is intended as “a public space to facilitate the compilation, processing and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe member States” and aims to “improve the protection of journalists, better address threats and violence against media professionals and foster early warning mechanisms and response capacity within the Council of Europe.”

6. Possible scope and content of a Convention on the profession of lawyer

29. All of those bodies consulted during the preparation of this report agreed that a convention should be based mainly on the principles already included in Committee of Ministers' Recommendation (2000) 21. Drafting should also take account of other instruments adopted since 2000, including those mentioned in paragraph 22 above, as well as of the subsequent case-law of the European Court of Human Rights.

30. The CCBE, UIA and IBJ also agreed that when translating these principles into a convention, certain issues deserved particular attention: its scope, notably in the sense of how the term 'lawyer' should be defined; the scope and protection of legal professional privilege; the role of professional bodies (i.e. bar associations in the sense of mandated regulatory bodies); and the need to emphasise the obligations on national authorities to respect and protect the profession of lawyer and promote its role in ensuring the effectiveness of the judicial system and protecting human rights and the rule of law. These issues are, in fact, closely inter-linked, as will be illustrated in the following reflections.

31. In some countries, legal advice and representation is provided by legal practitioners who are not registered with a bar association. As noted above, this is particularly problematic in Azerbaijan, where recent reforms will abolish such legal practitioners' rights of audience, despite a severe shortage of registered lawyers. YUCOM informed me that in Serbia, civil society organisations are significant providers of legal advice and representation, especially in human rights cases. This is partly because of a lack of specialisation in this area amongst registered lawyers but also because Serbia still has no law on legal aid, and so many people are unable to afford the services of registered lawyers. The common concern in relation to both Azerbaijan and Serbia is the relative inaccessibility of legal advice and representation. Whilst there is nothing in principle to prevent national authorities from giving exclusive rights of audience to registered lawyers, this must be done whilst fully respecting individuals' legal rights, as summarised in paragraph 19 above. States are required to take all necessary measures to ensure that all persons have effective access to legal services provided by independent lawyers, as reflected in Principle IV of Recommendation (2000) 21. This implies that a genuinely independent bar association, in the sense of a mandated regulatory body, must be established controlling entry to the profession in such a way as to ensure a sufficient number of properly qualified and trained lawyers; legal aid must be made available in accordance with legal obligations guaranteeing access to justice; but where there are as yet insufficient registered lawyers available or legal aid provision is insufficient to ensure legal representation by registered lawyers in all cases, it may be necessary to extend rights of audience to other suitably qualified and regulated independent legal practitioners.

32. A further issue that has been drawn to my attention is the situation of in-house or corporate counsel, who are neither covered by Committee of Ministers' Recommendation No. R(2000)21 nor mentioned in the motion. A key issue is that legal professional privilege is not available to protect internal communications between company management and in-house counsel from discovery and disclosure in proceedings; this includes proceedings under EU competition law, on the basis that the requirement of independence for legal professional privilege to apply is not fulfilled where the lawyer in question is in a relationship of employment with their client.⁵² This complex issue merits a more thorough examination, possibly in a separate report.

33. When drafting the convention, careful account should also be taken of developments in the surrounding legal context since the Committee of Ministers adopted its recommendation in 2000. This should include, in particular, laws and regulations intended to counter corruption, money-laundering and terrorism. These have often had privacy implications, for instance in relation to surveillance and disclosure requirements, that may require consequential reinforcement of standards on legal professional privilege and confidentiality of lawyer-client communications.

34. In its written contribution to the preparation of this report, the CCBE suggested that not all of the provisions of Recommendation (2000)21 should be translated into a convention, since some of them manifested standards already made binding by the European Convention on Human Rights. In this connection, the CCBE proposed a more limited set of codified principles, building on certain provisions of the Committee of

⁵¹ <http://www.coe.int/en/web/media-freedom>.

⁵² *Akzo Nobel Chemicals Ltd & Akros Chemicals Ltd v. European Commission*, Case C-550/07P.

Ministers' Recommendation and based also on its own Charter of Core Principles of the European legal profession of 2006. The idea that a convention should take a selective approach to inclusion of provisions of the recommendation implies a degree of technical reflection more suited to the drafting stage, and is therefore beyond the scope of the present report.

35. As regards the control mechanism, the CCBE has suggested a two-fold approach: using the possibility of petitioning the Assembly under Rule 67 of the Assembly's Rules of Procedure; and a committee of experts appointed to examine periodic reports on implementation submitted by States parties to the Convention. I have some reservations about the first idea. The Assembly's petitions procedure is very little used and is subject to a series of restrictive conditions, excluding issues that call for "redress of a particular wrong" (which may exclude individual complaints), are under judicial examination at national level (which may exclude complaints relating to ongoing court proceedings) or for which either domestic remedies or recourse to the European Court of Human Rights are available. These restrictions may prevent examination of a number of otherwise relevant situations. The procedure is also dependent on referral of the petition by the Bureau of the Assembly to a committee for substantive examination. Even where a petition is referred to a committee, the outcome would normally be a report whose presentation to the Bureau would necessarily take some time, following which a further Bureau decision on follow-up would be required. I consider that a Platform similar to that already established for journalists, as mentioned in paragraph 29 above, would serve much the same purpose and do so more efficiently. In this connection, I recall that in [Recommendation 2085 \(2016\)](#) on strengthening the protection and role of human rights defenders in Council of Europe member States, the Assembly had called for the creation of a platform for the protection of human rights defenders (including lawyers). I note that the Committee of Ministers has not yet given a final response to this proposal.

36. A mechanism based on periodic reporting to a committee of experts would seem to correspond more closely to existing Council of Europe practice in relation to convention control mechanisms. Such a mechanism would be made more transparent and effective by allowing civil society organisations, including lawyers' associations, to make submissions. This proposal should certainly be taken into consideration when drafting a convention on the profession of lawyer.

7. Conclusions and recommendations

37. A properly established and regulated independent profession of lawyer is of fundamental importance to respect for the rule of law and protection of human rights. This is reflected in a number of international instruments, with key standards incorporated into the European Convention on Human Rights and elaborated in the caselaw of the European Court of Human Rights. Further detailed provisions are set out in non-binding instruments of both international organisations, including the Council of Europe and the United Nations, and international associations of lawyers.

38. These wider standards do not, however, have binding status, and the fact that lawyers are under increasing pressure in several Council of Europe member States and are not always properly protected in many others shows the need for a binding instrument in this field, in the form of a convention. Such a convention should be based on the existing Committee of Ministers' Recommendation (2000)²¹ and take account of subsequent standards and developments in the surrounding legal context. It should include an effective control mechanism and be open to accession by non-member States. Furthermore, a convention should be supplemented by a more rapid and flexible early-warning mechanism, modelled on the Platform to promote the protection of journalism and the safety of journalists, which could address the situation of human rights defenders generally.