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Committee on Legal Affairs and Human Rights

The principles and guarantees of advocates

Introductory memorandum

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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. I was appointed rapporteur by the Committee at its meeting in Paris on 12 December 2017. Presentation of this introductory memorandum was deferred until after the Committee of Ministers had replied to the related Assembly [Recommendation 2121 \(2018\)](#) on “the case for drafting a European convention on the profession of lawyer”. The Committee took note of the Committee of Ministers’ [reply](#) at its meeting in Paris on 4 March 2019.

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 guarantee public trust in the proper application of the rule of law, the legal systems of all Council of Europe member States are required by the European Convention on Human Rights (the Convention), as interpreted by the caselaw of the European Court of Human Rights (the Court), to respect 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 \(2017\)](#) on ‘securing access of detainees to lawyers’, which underlined the significance of several of those rights. The motion then 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. Furthermore, although international legal instruments clearly prohibit interference in the legal profession, the specific activities that amount to prohibited ‘interference’ are not always clearly identified. Since not all state interaction with the legal profession is prohibited it can be difficult to determine which actions constitute interference and which are acceptable. Also, ensuring the protection of lawyers engages both a negative obligation not to interfere as well

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as a positive obligation to establish a domestic legislative framework that creates an environment where the legal profession can flourish. Specifically, states have a positive obligation to investigate threats made to lawyers' lives and to prosecute harmful actions carried out on lawyers, regardless of the source of the threat or attack.¹ Given increasing concern for the situation of lawyers in 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. For the purposes of this report, I intend to use the definition 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 will 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. It will recall the minimum legal and policy framework of standards developed to protect lawyers and any practical steps or mechanisms that can guarantee their effective implementation. It will also examine the roles played in protecting the profession of lawyer and the rights of lawyers by different Council of Europe instruments and mechanisms.

2. Lawyers under threat – recent examples

7. In [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 rapporteur, Ms Sabien Lahaye-Battheu (Belgium, ALDE), drew an alarming picture which appears certainly no better today. The call for urgent action to enhance the protection of lawyers remains as necessary now as it was then.

8. Lawyers continue to be and in some countries are increasingly targeted for their involvement in human rights-related cases, such as defending the rights of refugees, asylum seekers and migrants, women, LGBTI persons, Roma and other minority groups. 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 etc.).² Threats of criminal, administrative, economic or other sanctions have taken place in situations where actions were taken in accordance with recognised professional duties, standards and ethics. There are reports that lawyers were allegedly identified with the causes advocated or crimes committed by the individuals they were defending. In the most extreme cases the prosecuting authorities qualified the legal assistance provided by lawyers as aiding and abetting the client's crime.

9. 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 regulations or laws – such as anti-terrorism or anti-money laundering measures – which allow for interferences with lawyers' rights such as intrusions into privileged lawyer-client communications, blacklisting or travel bans.

10. The Rapporteur notes with concern that he was informed about instances where interrogations of lawyers as witnesses in a criminal case against their clients took place; not only breaching confidentiality but also serving as a pretext for the subsequent removal of the lawyer from the proceedings in question.

11. Furthermore, it was reported that lawyers were involved by the prosecuting authorities as inciting agents ("agents provocateurs"): in such cases, loyalty and lawyer-client 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.

¹ "The Protection of Lawyers in Conflict & Crisis", The Lawyers, Conflict and Transition project, December 2016.

² Office of the Council of Europe Commissioner for Human Rights (The Commissioner's Office), 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); See also [ProtectDefenders.eu](#), [Index of attacks and threats against Human Rights Defenders](#).

12. I would like to highlight some these situations as they stand since Ms Lahaye-Battheu presented her [report](#), on the understanding that this list may be developed and refined and is not intended to be exhaustive.

2.1. Azerbaijan

13. The situation of human rights lawyers in Azerbaijan is still of particular concern. A legislative reform in October 2017, which came into force in 2018, deprived ‘unregistered’ lawyers of rights of audience, with the result that members of the Bar Association have an almost complete monopoly on court representation. The number of lawyers registered with the Bar Association has reportedly increased by one third, following a series of qualification examinations in 2018 and 2019.³ Despite this increase, Azerbaijan still has the lowest ratio of lawyers to head of population amongst member States.⁴ This situation is a matter of concern since the Bar Association, including its Disciplinary Commission, is widely considered to lack independence and in practice has denied admission to lawyers working on human rights or with an NGO background.⁵ Moreover, the wording of the new Code of conduct for lawyers, adopted in December 2017, is said to have introduced a broad justification for interferences with lawyers’ freedoms.⁶

14. In the past two years, there have been allegations regarding the existence of a pattern of disciplinary charges against lawyers who worked on politically or otherwise sensitive cases. Since the end of 2017, several human rights lawyers such as Yalchin Imanov, Irada Javadova, Nemat Karimli, Fekhraddin Mehdiyev, Asabali Mustafayev have been suspended or disbarred from legal practice, leaving only a handful of lawyers willing to accept sensitive cases.⁷ Lawyers working on sensitive cases have reported the use of false accusations and smear campaigns against them.⁸ For example, human rights lawyer Fuad Aghayev described to the European Parliament how he had been reprimanded by the Presidium of the Bar Association for allegedly insulting the head of the prison and putting pressure on officers during a visit to his client, Ilgar Mammadov. He described how, in accordance with his professional rights, he had protested against the prison staff’s request to review the material he had brought with him during the visit, but had nevertheless been obliged to allow the prison staff to take his documents.

15. In the case of *Aliyev v. Azerbaijan*,⁹ a lawyer was arrested and detained for alleged financial irregularities. His home and office were searched; documents and various objects were seized, including case files on applications to the Court; and he was subsequently disbarred. Having noted a “troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law”, the Court indicated to the government the relevant general measures it should undertake to protect critics of the government, civil society activists and human rights defenders (such as lawyers) from arbitrary arrest and detention. Given the circumstances, the Court also found that the restrictions on Mr Aliyev had actually been aimed at silencing and punishing him, rather than provided for a legitimate purpose in line with the Convention. The Court also ordered the restoration of his professional activities.

2.2. The Russian Federation

16. Lawyers in the Russian Federation continue to operate in a hostile environment marked by instances of physical violence in addition to persistent attacks through statements by officials, smear campaigns and open threats. The situation in the North Caucasus, where human rights defenders in general are exposed to particularly serious risks, is especially acute.¹⁰

³ International Commission of Jurists (ICJ), Recommendations to the Azerbaijan Bar Association on the Role and Independence of Lawyers, 08 May 2019.

⁴ 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-Herzegovina: [“European Judicial systems – Edition 2018 \(2016 data\): efficiency and quality of justice”](#), European Commission for the Efficiency of Justice (CEPEJ).

⁵ See [Statement](#) by Azerbaijani human rights lawyer Fuad Aghayev delivered to the European Parliament Subcommittee on Human Rights on 19 February 2019, as part of a hearing on attacks on the legal profession and lawyers defending human rights; See also, op. cit. [CommDH\(2019\)10](#); [Op. cit. ICJ, 08 May 2019](#); Report of the Special Rapporteur on the independence of judges and lawyers, [A/73/365](#), 5 September 2018.

⁶ [Op. cit. ICJ, 08 May 2019](#).

⁷ See in particular, ICJ, [Azerbaijan: lawyer Sadigov should be applauded, not sanctioned, for acting professionally](#), 4 March 2019; Human Rights House, [Bias and disbarment leave handful of lawyers to take sensitive cases](#), 26 February 2019; CCBE, [Threats to the legal profession](#), document drafted in the framework of the [public hearing on attacks against human rights lawyers](#), organised by the European Parliament’s Subcommittee on Human Rights (DROI) on 19 February 2019; ICJ, [Azerbaijan: Human Rights lawyers Asabali Mustafayev and Nemat Karimli must be allowed to practice their profession](#), 7 May 2018; Front Line Defenders, [Azerbaijan: Disbarment of Human Rights Lawyer Irada Javadova](#), 29 June 2018.

⁸ Op. cit. [CommDH\(2019\)10](#).

⁹ *Aliyev v. Azerbaijan*, [App. No. 68762/14 and 71200/14](#), 20 September 2018.

¹⁰ Op. cit. [CommDH\(2019\)10](#).

17. Lawyers seem often to be targeted for whom they represent. In its [Resolution 2231 \(2018\)](#) on “Ukrainian citizens detained as political prisoners by the Russian Federation”, the Assembly urged the Russian Federation to “stop persecution of, and pressure on,” lawyers who represent the Crimean Tatar People. Ramil Akhmetgaliyev received threats for representing the interests of the World Congress of the Ingush People in the Constitutional Court of Russia.¹¹ On 12 December 2018, Mikhail Benyash, a defence lawyer who provided legal assistance to the participants in unsanctioned rallies and who attended protests in order to monitor police brutality, was charged with the “use of violence in relation to representative of the Authority.” This was said to be in reprisal for his work defending the rights to freedom of association and freedom of expression. His own lawyer, Lyudmila Aleksandrova’s car was set on fire.¹²

18. Of particular concern is the deprivation, for political reasons, of the status of lawyer for lawyers defending against unlawful prosecution, as a means of undermining their clients’ defence.¹³

2.3. Turkey

19. A large number of lawyers were targeted during Turkey’s state of emergency, introduced following the July 2016 failed coup d’état and which lasted until July 2018. On 5 April 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.¹⁴ Pressure on lawyers seems to have continued despite the end of the state of emergency in July 2018. In January 2019, the Assembly noted “continuous restrictive measures introduced by the authorities with a view to silencing [...] dissenting voices”, including lawyers.¹⁵ In April 2019, Human Rights Watch (HRW) reported a continuing “pattern of prosecutors investigating and opening cases against lawyers”.¹⁶ HRW states that “prosecuting authorities have criminalised lawyers for activities undertaken to discharge their professional duties and have associated them without evidence with the alleged crimes of their clients” and that “some of these prosecutions appear to have come about in reprisal for their efforts to document police abuse and other human rights violations and to protect the rights of their clients”. The charges brought against lawyers are invariably terrorism-related, such as belonging to an armed terrorist organisation or spreading terrorist propaganda. HRW has also documented “cases where police have threatened and intimidated lawyers, obstructing and interfering in their professional duties”. It can also be recalled that the Turkish Criminal Procedure Code and Law on the Execution of Sentences and Security Measures authorises the police to prevent lawyers from meeting with clients during the first 24 hours of their police custody.

20. Lawyers are often targeted *en masse*. In March 2019, for example, 18 lawyers from the Contemporary Lawyers’ Association (ÇHD) and the People’s Law Office (HHB) were sentenced to prison terms ranging from just over three years to just under 19 years for terrorist offences, including “founding and managing a terrorist organisation”. HRW reported that in another “verdict on March 29 [2019], an Ankara court convicted 21 lawyers, handing down sentences of up to 8 years and 1 month, for membership in the group the government and courts refer to as the Fethullahist Terrorist Organization, which it blames for the coup attempt. In neither of these two mass trials was there evidence that the lawyers had participated in violent activity or incited violence.”¹⁷

2.4. Others

¹¹ Frontline defenders, [Threats against defence lawyer Ramil Akhmetgaliyev](#), 26 November 2018.

¹² Frontline defenders, [Defence lawyer Mikhail Benyash indicted](#), 12 December 2018; [Human rights defender’s car set on fire](#), 6 November 2018; Lawyers for lawyers, [Lawyer Mikhail Benyash indicted](#), 15 December 2018; ICJ, [Russian Federation: criminal proceedings against lawyer raise concerns](#), 3 October 2018.

¹³ According to the decision of the Moscow Law Office on April 24, 2018, lawyer Mark Feigin, who defended the political prisoner Oleg Sentsov and other clients in politically sensitive cases, was disbarred for allegedly unethical behaviour. Lawyer Emil Kurbedinov, who operates in the occupied Crimea, was twice the subject of administrative procedures for several publications on social networks.

¹⁴ See also, Avocats barreau de Paris, [Journée internationale de l’avocat en danger consacrée aux avocats en Turquie](#), 24 January 2019. See also, [World observatory for defence rights and attacks against lawyers](#).

¹⁵ [Resolution 2260 \(2019\)](#) on “the worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member State?”.

¹⁶ Human Rights Watch, [“Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey”](#), 10 April 2019.

¹⁷ Human Rights Watch, [Turkey: Mass Prosecution of Lawyers - Misuse of Terrorism Charge Undermines Fair Trial Rights](#), 10 April 2019.

21. In Ukraine, concerns have been raised regarding intimidation, harassment and physical attacks on lawyers, as well as the failure to investigate attacks, even when resulting in death.¹⁸ Such matters are even increasing; they have become widespread and systematic.¹⁹ These include, amongst other acts: 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. As a result of such flagrant violations of the rights of lawyers by the State, the Regional council of lawyers even made a decision on the strike of lawyers demanding adherence to lawyers' rights and ensuring proper investigation of violations.²⁰

22. In Greece, it has been reported that a number of lawyers were placed under investigation after monitoring possible push-backs in the Evros region. It is also claimed that lawyers representing applicants before the ECtHR have been subjected to harassment by law enforcement authorities.²¹

23. The Serbian and Belgrade bar associations have expressed their concern at the risk of violence against lawyers. In July 2018, Serbian defence lawyer Dragoslav Ognjanović was killed. There is no information on any investigation, nor on any perpetrators having been brought to justice.²²

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

24. 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

25. 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

26. 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."

3.1.2. Authorisation to practice as a lawyer

27. 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.

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

¹⁸ 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.

¹⁹ See Ukrainian National Bar Association (UNBA), [Violations of Attorneys](#), 2013-2018; See also, UNBA, [Defenseless Defenders](#), 13 May 2019.

²⁰ [Decision](#) of the Kyiv Regional Council of Attorneys to declare strike, No. 71, 12 June 2019.

²¹ Op. cit. [CommDH\(2019\)10](#).

²² ICJ, [Serbia: killing of lawyer must be urgently investigated](#), 30 July 2018.

28. 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

29. Lawyers should not be subjected to sanctions or pressure, or threats thereof, when acting in accordance with professional standards. This means that 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, without any restriction, influences, pressures, threats or undue interference from any quarter. Lawyers shall not be identified with their clients or their clients' causes to justify discharging their functions.

30. This also means, for example, that the authorities should not interrogate a lawyer as a witness in a criminal case against his or her client at any stage of the proceedings.

31. 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

32. Lawyers should have access to their clients, including (and 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. As noted in the motion underlying this report, access of lawyers to detainees is particularly important as a safeguard against torture and other unlawful mistreatment.²³

3.1.6. Confidentiality of lawyer-client relationships

33. The confidentiality of the lawyer-client relationship must be respected.²⁴ In this regard, the UN Basic Principles require State authorities to recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential (Principle 22). The principle of confidentiality refers to all types of communications between a lawyer and a client. Regrettably, lawyers defending political prisoners or people accused of terrorism are particularly subject to harassment and illegal searches, and often have their documents, cell phones and other electronic devices carefully scrutinized.²⁵

34. This right has been elaborated through case law 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.

35. In *Laurent v. France*²⁶, 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*²⁷, 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

²³ 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.

²⁴ 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.

²⁵ [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.

²⁶ *Laurent v. France*, [App. No. 28798/13](#), 24 May 2018 [French only].

²⁷ *Pruteanu v. Romania*, [App. No. 30181/05](#), 3 February 2015 [French only].

been disproportionate to the legitimate aim pursued – namely to establish truth in connection with criminal proceedings and therefore to prevent disorder – and that, consequently, the applicant had not had an effective means as required by the rule of law and capable of limiting the interference complained of to that which was necessary in a democratic society. 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”.

36. It should be noted that the development of new surveillance technologies poses new challenges to the confidentiality of lawyer-client relations and must be carefully assessed.

37. 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 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 hand in hand 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.²⁸

38. 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.²⁹

39. 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. Such an observer should have requisite legal qualification in order to effectively participate in the procedure.³⁰ 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 sifting procedure, any possible interference with the lawyer’s professional secrecy.³¹ The lawyer’s presence during a search and seizure should also be guaranteed; and the search should be supervised by an investigative judge.³²

3.1.7. Access to a court

40. 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.

41. 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.

3.1.8. Equal respect by the court

42. Lawyers acting in the same case 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).

²⁸ *Andre & Another v. France*, [App. No. 18603/03](#), 24 July 2008.

²⁹ *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].

³⁰ *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.

³¹ *Golovan v. Ukraine*, [App. No. 41716/06](#), 5 July 2012.

³² *Sérvulo & Associados - Sociedade de Advogados, RL & Others v. Portugal*, [App. No. 27013/10](#), 3 September 2015 [French only].

It is particularly important in criminal cases, which pit the individual against the state, with the former potentially at risk of severe sanction such as imprisonment; the court must not favour prosecutors over defence lawyers.

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

43. 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 2019, almost 20 years after Recommendation No. R(2000)21 was drafted, the list of prohibited grounds for discrimination needs to be reviewed.

44. Entry to the profession should require a “high standard of legal training and morality”, and provision should be made for continuing education. Both initial 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*

45. 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. Any abstention from professional activities should not damage the client’s interests.

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

46. 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*

47. 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.”

3.6. *Principle VI: Disciplinary proceedings*

48. 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. *Specific situations*

49. 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.)³³ 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 unlawfully to instrumentalise lawyers and interfere with their professional activities to this end. Particular vigilance and caution are therefore needed. The 2002 Guidelines are not intended to deprive a person accused of a “terrorist” offence of adequate legal representation.

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

50. 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 lawyers’ rights. The question is whether or not that “interference” amounts to a violation, which will often depend on whether or not it is proportionate. Assembly [Recommendation 2121 \(2018\)](#) repeated a previous call for the creation of an early warning mechanism to respond to immediate threats to the safety and independence of lawyers, similarly to the platform for the protection of journalists established by the Council of Europe in 2015. This new platform could cover situations of human rights defenders in general, including also, for example, journalists and civil society activists.

51. Following the Assembly’s earlier request for creation of a ‘platform’ on human rights defenders, the Secretary General had appointed a person in his Private Office as a contact point to co-ordinate potential action on alleged reprisals against defenders who interact with the Council of Europe.³⁴ Since then, the Secretary General has indicated that the methodology of this new mechanism, including the criteria for establishing causal link and the possibility for direct reporting from defenders to his Office, was under review.³⁵ The Committee of Ministers has recently called for further information on the activities of this mechanism. The Assembly’s view, however, is that this apparently very modest and discrete mechanism is unlikely to be a sufficient substitute for the recommended platform.

52. In 2018, the Assembly approved the creation of a General Rapporteur on the situation of human rights defenders within the Commission on legal affairs and human rights. The current General Rapporteur is Mr Raphaël Comte (Switzerland, ALDE). His mandate includes the situation of lawyers who act in human rights-related cases.

53. 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, cooperation with other international partners and in the framework of dialogue with member States.³⁶

54. Finally, professional assistance to lawyers and professional associations has often 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 have in the past been organised in the Republic of Moldova and Georgia, and are currently underway in Turkey and on a regional level involving Armenia, Georgia, the Republic of Moldova and Ukraine. These projects 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.³⁷

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

55. As noted above, the Committee of Ministers has now replied to Assembly [Recommendation 2121 \(2018\)](#). Of greatest interest is the fact that the Committee of Ministers, having received positive comments from relevant inter-governmental expert committees, has instructed the European Committee on Legal Co-operation (CDCJ) to prepare a feasibility study covering the following points:

³³ Op. cit. *Klass & others v. Germany*, [App. No. 5029/71](#), 6 September 1978.

³⁴ Reply by the Committee of Ministers to [Recommendation 2133 \(2018\)](#), [Doc. 14772](#), 05 December 2018.

³⁵ Secretary General, [Private Office procedure on Human Rights Defenders](#), 21 December 2018.

³⁶ Reply by the Committee of Ministers to [Recommendation 2085 \(2016\)](#), [Doc.14285](#), 10 April 2017.

³⁷ For further information, see <https://www.coe.int/en/web/help/home?desktop=true>.

- 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.

56. [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 European Court of Human Rights (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 recommendation was drafted and, as noted in [Recommendation 2121 \(2018\)](#), there may be areas in which it could be developed and updated.

6. Conclusions

57. 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 a lawyer, it is essential for the Assembly to remain informed of and respond to such threats. The purpose of this report, therefore, will be to examine recent developments across the member States, with a view to making necessary 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.

58. 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.

59. At this stage of the preparation of the draft report, I propose to organise a hearing to gather information on recent cases of lawyers under threat and any concrete recommendations from civil society organisations. The hearing may also be an opportunity for the committee to be updated on progress further to Assembly [Recommendation 2121 \(2018\)](#), notably as regards the feasibility study. Once this step is completed, I will present a draft report to the committee.