

## Parliamentary Assembly Recommendation 2121 (2018): The case for drafting a European Convention on the Profession of Lawyer

### Comments of the International Commission of Jurists

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#### Introduction

The International Commission of Jurists (ICJ) welcomes the proposal of the Parliamentary Assembly of the Council of Europe (PACE) in its Recommendation 2121(2018) calling for the development of a Council of Europe Convention on the Profession of Lawyer. The ICJ believes that such a Convention could make an important contribution to strengthening the rule of law and the protection of human rights in the Council of Europe region, building on existing Council of Europe standards and jurisprudence of the European Court of Human Rights. The ICJ particularly welcomes PACE's call for an effective control mechanism to be put in place under a new Convention, as recent developments in a number of Council of Europe Member States show a significant gap in implementation of Council of Europe standards on the independence and security of lawyers.

Lawyers, along with judges and prosecutors, are one of the pillars on which protection of the rule of law and human rights through the justice system rests. Recognising this, the ICJ, since its foundation in 1952, has worked to protect lawyers under threat and to develop international standards for the independence, role and integrity of the profession. Successive ICJ Declarations, adopted by leading jurists from all regions of the world, have affirmed that the role of the legal profession is "paramount in safeguarding human rights and the Rule of Law" (2008 *Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* (ICJ 2008 Declaration)).

In any legal system, the legal profession plays a pivotal role in ensuring access to justice and effective remedies and accountability for violations of human rights, as well as upholding the right to fair trial, right to liberty and freedom from torture and other ill-treatment in the criminal justice process. In defending criminal cases, in advising and representing victims of human rights violations and their relatives or in challenging before the courts national legislation or policy that is contrary to human rights, lawyers give practical effect to human rights guarantees and rule of law principles.

The importance of this role has been recognized by international standards<sup>1</sup> as well

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<sup>1</sup> See, for example, the principles 4 and 12 of the *United Nations Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 and welcomed by General Assembly resolution 45/166, 1990); the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, articles 1, 9, 11; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Principle 5; *Declaration on the Protection of All Persons from Enforced*

as in the jurisprudence of the European Court of Human Rights, which has emphasized the “specific status of lawyers [having] a central position in the administration of justice as intermediaries between the public and the courts”.<sup>2</sup> It is thus of fundamental importance that lawyers are able to fulfill their professional duties without interference. As the European Court of Human Rights has held, “persecution and harassment of members of the legal profession strikes at the very heart of the Convention system.”<sup>3</sup>

## Developing international law and standards on lawyers

Although the role and independence of lawyers has been recognized under international human rights treaties and elaborated through international standards, the lack of detailed treaty provisions contributes to gaps or weaknesses in national legal frameworks and particularly in their enforcement.

International human rights law, including the jurisprudence of the European Court of Human Rights, incorporates certain guarantees for the effective functioning of lawyers, imposing duties on states, for example, to ensure that people deprived of their liberty have access to a lawyer while in detention, to establish and maintain a system of legal aid, to ensure equality of arms between the defence and prosecution in a criminal trial, and to protect the freedom of expression of lawyers.

In addition, international standard-setting on the role of lawyers has developed since the 1980s, when the work of the UN Sub-Commission on Human Rights led to the Draft Singhvi Declaration of 1989. In 1990, drawing on this work, the UN Basic Principles on the Role of Lawyers was adopted and endorsed by the UN General Assembly.<sup>4</sup> These non-treaty standards recognize principles of the independence of individual lawyers and of the legal profession as a whole. Importantly, they also recognize the duties and responsibilities of the legal profession and of individual lawyers, to work independently, diligently and with integrity to represent their clients, protect human rights, and uphold the rule of law.<sup>5</sup>

These principles have been reaffirmed and developed in other international standards established by the UN and regional organizations<sup>6</sup> and by the Council of Bars and Law

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*Disappearance*, article 13; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 6; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Principles 3 and 4; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 11, 12, 15, 17, 18, 23, 25, 32 and 33; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Rules 18, 60 and 78; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, Rules 7.1 and 15.1; *Standard Minimum Rules for the Treatment of Prisoners*, (“the Nelson Mandela Rules”), Rule 61; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, articles 17 and 18; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly, resolution 67/187); UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“the Bangkok Rules”) rules 25 and 26.

<sup>2</sup> *Morice v. France*, ECtHR, GC, Application no. 29369/10, 23 April 2015, para. 132. See also *Schöpfer v. Switzerland*, ECtHR, Application no. 25405/94, 20 May 1998, paras. 29-30; *Nikula v. Finland*, ECtHR, Application no. 31611/96, 21 March 2002, para. 45; *Amihalachioaie v. Moldova*, ECtHR, Application no. 60115/00, 20 April 2004, para. 27; *Kiprianou v Cyprus*, ECtHR, GC, Application no. 73797/01, 15 December 2005, para. 173; and *André and Another v. France*, ECtHR, Application no. 18603/03, 24 July 2008, para 42.

<sup>3</sup> *Annagi Hajibeyli v Azerbaijan*, ECtHR, Application no. 2204/11, 22 October 2015, para. 68.

<sup>4</sup> UN Basic Principles on the Role of Lawyers, op cit fn.1.

<sup>5</sup> See generally, International Commission of Jurists, *Practitioners’ Guide No.1, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, 2009

<sup>6</sup> E.g. Human Rights Council, *Resolution on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, UN Doc. A/HRC/35/L.20, June 2017.

Societies of Europe,<sup>7</sup> the Union internationale des avocats<sup>8</sup> and the International Bar Association<sup>9</sup> amongst others.

The Council of Europe has played a leading role in developing standards on the role of lawyers, in particular through Committee of Ministers Recommendation R(2000) 21 on the Freedom of Exercise of the Profession of Lawyer, adopted on 25 October 2000. This Recommendations affirmed 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”, including the lawyer’s right not to suffer or be threatened with any sanctions or pressure; their right to access to their clients; the need to ensure the respect of the confidentiality of the lawyer-client relationship; and their right to access “all relevant files when defending the rights and interests of their clients in accordance with their professional standards” (principle I). It set standards for lawyers’ professional ethics (Principle III), for disciplinary proceedings against lawyers (Principle IV), and for the role and independence of bar associations (Principle V). These standards, as well as the jurisprudence of the European Court of Human Rights on the role of lawyers, have been highly significant in advancing protection of the independence of lawyers both in the Council of Europe region and globally.

What remains lacking at a Council of Europe level, are enforcement or monitoring mechanisms aimed at upholding the independence and protecting the role of lawyers. Within the UN system, a Special Rapporteur on the Independence of Judges and Lawyers was established on the recommendation of the UN Human Rights Commission in 1994, with a mandate to inquire into, report and make recommendations on attacks on the independence of judges and lawyers. In discharge of this mandate, the Special Rapporteur conducts country visits, receives complaints in individual cases and raises them with the government concerned; and makes annual thematic reports to the UN Human Rights Council. The mandate of the Special Rapporteur has been an important means to promote implementation of international standards on the independence of lawyers, but the mandate’s global reach and limited capacity means that it cannot engage in comprehensive monitoring of the situation of the legal profession in given countries on a continuous, or even regular periodic, basis. The Special Rapporteur can only visit between one and three countries globally per year. He can query governments about allegations of interference with or persecution of lawyers, but there is no mechanism to require States to respond. At a Council of Europe level, no implementation or monitoring mechanism has been established.

## Risks faced by lawyers in practice

Although there is growing awareness of the standards outlined above by national lawyers and policy makers in Council of Europe countries, in the absence of monitoring or enforcement mechanisms, they are not consistently complied with across the Council of Europe region. The experience of the ICJ, which works to support and defend the independence of lawyers and legal professions in the region, confirms that the challenges faced by lawyers in discharging their duties to their clients remain significant in several Council of Europe countries, and are increasingly a cause for concern. In recent years, the ICJ has documented lawyers having been

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<sup>7</sup> See the Council of Bars and Law Societies of Europe’s [Charter of Core Principles of the European Legal Profession of the Council of Bars and Law Societies of Europe](#), 2013.

<sup>8</sup> See the Union internationale des avocats’ [Turin Principles of Professional Conduct for the Legal Profession in the 21st Century](#), 2002.

<sup>9</sup> See the International Bar Association’s [Standards for the Independence of the Legal Profession](#), 1990; the [International Principles on Conduct for the Legal Profession](#), 2011; and the [Guide for Establishing and Maintaining Complaints and Discipline Procedures](#), 2007; *Committee of Ministers Recommendation R(2000) 21 on the Freedom of Exercise of the Profession of Lawyer*, adopted on 25 October 2000.

killed or subjected to physical attack, including in Ukraine,<sup>10</sup> the Russian Federation<sup>11</sup> and Turkey.<sup>12</sup> It has found lawyers facing harassment, including through abusive criminal or disciplinary proceedings, in Azerbaijan,<sup>13</sup> Turkey,<sup>14</sup> and the Russian Federation.<sup>15</sup> Lawyers in several countries regularly face legal or practical restrictions in visiting clients in detention.<sup>16</sup> Concerns also arise about the practice of investigators of preventing lawyers from representing their clients in certain proceedings by summoning them as witnesses, and subjecting them to interrogation.<sup>17</sup> Freedom of expression of lawyers has become an issue where lawyers may face disciplinary measures including disbarments or even criminal prosecution for public statements (in the media, online platforms) particularly about human rights violations of their clients.<sup>18</sup>

Furthermore, although the institutional independence of bar associations from the executive is well established in most Council of Europe states, there are notable exceptions. In Azerbaijan, the dependence of the bar association on the executive has allowed it to become an instrument for the harassment of lawyers through arbitrary disbarments and denial of qualification to lawyers litigating human rights cases. Across the Council of Europe region, in a climate where the rule of law and the institutions that protect it are increasingly under question and threat, enhanced protection of the independence of the legal profession's governing institutions would be timely. It should be noted that, in several neighbouring countries outside the Council of Europe region, reforms of the legal framework for the governance of the legal profession have either introduced greater executive control, or have attempted to do so.<sup>19</sup>

## Conclusions and recommendations

Enhanced international protection measures are needed for lawyers, individually and collectively, to allow them to be effective agents for the protection of human rights and the rule of law. This protection is needed not only in respect of those countries where the security and independence of lawyers is under severe and immediate threat, but also to re-enforce good practices and strengthen the legal profession across the region. This would, in turn, ensure that strong legal professions are equipped to withstand any attempts to undermine their independence, and can play a full role in the protection of human rights within national justice systems, thereby strengthening the national implementation of Council of Europe human rights law.

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<sup>10</sup> ICJ, [Ukraine: violent death of a lawyer is an attack on the legal profession](#), 29 March 2016.

<sup>11</sup> ICJ, [Russian Federation: ICJ calls for prompt and effective investigation into killing of lawyer Vitaliy Moiseyev](#), 24 October 2014; ICJ, [Russian federation: ICJ urges protection for security of lawyers following attack on Murad Magomedov](#), 5 February 2015. According to the Russian Federal Chamber of Lawyers, at least 40 lawyers were killed between 2002 and 2015, Federal Chamber of Lawyers, [Performance Report of the Board for the period of April 2013 and April 2015](#), para. 2.2.22.

<sup>12</sup> ICJ, [Turkey: the Judicial System in Peril, A Briefing paper](#), 2 June 2016 pp.20-21.

<sup>13</sup> ICJ, [Defenseless Defenders: Systemic Problems in the Legal Profession of Azerbaijan](#), Mission Report, November 2016, p. 32-36. See also the [ICJ's statement](#) before the Human Rights Council of 22 June 2016

<sup>14</sup> Statement before the UN Human Rights Council, op cit, 22 June 2016; ICJ, [Turkey: arrests of human rights defenders are alarming setback for the rule of law](#), 6 July 2017.

<sup>15</sup> ICJ, [Towards a stronger legal profession in the Russian Federation: a mission report](#), 2015 pp. 54-56. ICJ, [Russian Federation: ICJ concerned at prosecution of lawyer Georgy Antonov](#), 22 July 2014.

<sup>16</sup> See, e.g., ICJ, [Towards a Stronger Legal Profession In the Russian Federation](#), op cit, pp. 43-45; ICJ, [Defenseless Defenders: Systemic Problems in the Legal Profession of Azerbaijan](#), Mission Report, November 2016, p. 6

<sup>17</sup> ICJ, [ICJ calls for an end to improper interrogation of lawyers](#), 3 May 2016.

<sup>18</sup> See: ICJ, [Azerbaijan: Human Rights lawyers Asabali Mstafayev and Nemat Karimli must be allowed to practice their profession](#), 7 May 2018; ICJ, [Azerbaijan: ICJ calls for respect of lawyer's freedom of expression in disbarment case](#), 10 May 2016.

<sup>19</sup> ICJ, [Kazakhstan: the reform of the legal profession should aim to strengthen its independence, ICJ says](#), 5 December 2017; ICJ, [Recommendations on the Independence of the Legal Profession in the Republic of Tajikistan](#), 23 February 2016, pp. 7-8.

The Council of Europe, which has already played a leading role in the development of standards on the role of lawyers, is best placed to further strengthen their protection, through development of standards, whether binding or declaratory, and through the establishment of monitoring and enforcement mechanisms.

A Convention on the Exercise of Profession of Lawyer would provide vital support for the rule of law and strengthen justice systems in the Council of Europe region at a time when institutions that protect the rule of law are increasingly under threat. Such a Convention would significantly strengthen Council of Europe protection for lawyers, in several ways:

- It would re-enforce Member States' commitment to protecting the independence, role and integrity of lawyers and would recognize the importance of independent, well-qualified legal professions as a means to uphold the rule of law and ensure reliable implementation of rights protected under Council of Europe human rights instruments.
- It would codify and re-enforce the authority of current standards on the role of lawyers, drawing on the jurisprudence of the European Court of Human Rights, as well as Committee of Ministers Recommendation R (2000) 21, and other global and regional standards, to provide a high standard of protection. In doing so it could take account of recent developments, including recent decisions of the European Court of Human Rights and reports of the UN Special Rapporteur, including in relation to Council of Europe countries.
- It would provide a strong foundation for the establishment of an enforcement mechanism, which could, as PACE has noted, include regular reporting and monitoring. It could also encompass country visits, and /or inquiry into urgent cases of attacks on individual lawyers, or into urgent country situations.
- A Convention, especially one that would be open to ratification by non-Member States, could also play an important and much-needed role in advancing standards on the protection of lawyers globally.

The ICJ also welcomes the proposal of PACE to develop an early-warning mechanism to respond to immediate threats, similar to that in place for journalists. Although such a mechanism is not a substitute for a Convention, it would be a useful complement to it, and would be of value in itself even in the absence of a Convention, in helping to raise awareness of attacks on lawyers and on the independence of the legal profession, in co-operation with NGOs, bar associations and lawyers.

**The ICJ therefore recommends that the CDDH endorses the recommendation of PACE and supports further exploration by the Committee of Ministers of strengthened Council of Europe protection for the independence and security of lawyers, including the possibility of a Convention on the exercise of the profession of lawyer, as well as a control mechanism such as a committee of experts or special rapporteur, and the establishment of an early warning platform.**