

***Bagirov v. Azerbaijan***

**Application no. 81024/12**

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WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS  
(ICJ)

INTERVENER

*pursuant to the Section Registrar's notification dated 30 September 2015 that the  
President of the Section had granted permission under Rule 44 § 3 of the Rules of the  
European Court of Human Rights*

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4 November 2015

## I. Introduction

These written submissions are presented on behalf of the International Commission of Jurists (ICJ) pursuant to the grant of permission to intervene of the President of the First Section of the Court notified in a letter dated 30 September 2015 and addressed to the ICJ by the registrar.

In this intervention the ICJ argues that the special role of lawyers in the administration of justice, pursuant to the rule of law, necessitates their ability to carry out their important professional functions without undue restrictions, which requires close scrutiny of any limitations imposed, including concerning those statements made by lawyers outside of courts. The ICJ further submits that the role and responsibility of lawyers in imparting information to the public on issues of public concern related to the justice system, is not confined to comments on individual cases in which the lawyer represents a client. In addition, such remarks warrant particularly strong protection under Article 10 of the European Convention. The ICJ argues that comments by a lawyer that are critical of State authorities responsible for the detention of a person who has been injured or has died in their custody should be interpreted and be presumed to constitute protected forms of expression, unless they can be shown to have been made in bad faith, and that disciplinary action against lawyers should be subject to strong safeguards against arbitrariness or disproportionate penalties.

## II. The role of lawyers in the justice system

A free and independent legal profession is essential to the protection of human rights and the maintenance of the rule of law.<sup>1</sup> By facilitating access to justice and acting to protect the rights of their clients, lawyers play a crucial role in ensuring respect for human rights<sup>2</sup> and, as this Court has affirmed, they "are assigned a fundamental role in a democratic society".<sup>3</sup> In international human rights law, the role of lawyers is inextricably connected to the effective discharge of States of their duty to ensure the right to a fair trial, including under article 6 of the European Convention and article 14 of the International Covenant on Civil and Political Rights. The Geneva Declaration adopted by the ICJ in 2008 says in this regard " [...] lawyers should assume enhanced responsibilities both in protecting the rights of their clients and in promoting the cause of justice and the defence of human rights".<sup>4</sup> This Court has stressed that "[...] the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance".<sup>5</sup>

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<sup>1</sup> UN Basic Principles on the Role of Lawyers, preamble; Draft Universal Principles on the Independence of Justice (Singhvi Declaration), para. 74; International Commission of Jurists, Congress of New Delhi, (1959), <http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf>, pp. 13, 158 and 311; International Bar Association, Standards for the Independence of the Legal Profession, 1990, [http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/2014/10/IBA\\_Resolutions\\_Standards\\_for\\_the\\_Independence\\_of\\_Legal\\_Prof\\_1990.pdf](http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/2014/10/IBA_Resolutions_Standards_for_the_Independence_of_Legal_Prof_1990.pdf), Preamble.

<sup>2</sup> UN Basic Principles on the Role of Lawyers, principles 13 and 14. *Sialkowska v Poland*, ECtHR, Application no. 8932/05, judgment 22 March 2007, para.111; *Mor v France*, ECtHR, Application No.28198/09, judgment 15 December 2011, para.42; *Daynan v Turkey*, ECtHR, Application no. 7377/03, judgement 13 October 2009, 13/01/2010, para. 32; *Michaud v France*, ECtHR, Application, Application no.12323/11, 6 December 2012, para.118; *Morice v France*, ECtHR, Application no. 29369/10, judgment 23 April 2015, para.132.

<sup>3</sup> *Michaud v. France, op cit*, para. 118.

<sup>4</sup> ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (The Geneva Declaration), <http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>, Principle 7.

<sup>5</sup> *Daynan v Turkey*, ECtHR, Application no. 7377/03, judgment 13 October 2009,, para. 32; ICJ, International standards on the independence and accountability of judges, lawyers and prosecutors,

The UN Basic Principles on the Role of Lawyers set out guarantees, which States should respect and implement in law and practice to enable lawyers to be able to carry out their roles and functions effectively and in accordance with their specialized status. They affirm the importance of lawyers in ensuring protection of human rights through the fair administration of justice.<sup>6</sup> The UN Basic Principles are complemented by other standards on the role of lawyers at the global level, including the Singhvi Declaration, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>7</sup> and other standards.<sup>8</sup> In Europe, Recommendation No. R(2000) 21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer<sup>9</sup> states in its preamble the “fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms.”

In accordance with the UN Basic Principles on the Role of Lawyers, it is the role as well as the duty of lawyers to assist their clients “in every appropriate way, and [to take] legal action to protect their interests.”<sup>10</sup> Lawyers should at all times act “freely and diligently in accordance with the law and recognized standards and ethics of the legal profession”<sup>11</sup> and should “always loyally respect the interests of their clients.”<sup>12</sup> Providing legal assistance to the best of their abilities includes: “(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.”<sup>13</sup> Article 1.1 of the Code of Conduct for European lawyers stipulates that “a lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s cause but to be the client’s adviser”.<sup>14</sup>

International standards provide that States must provide the conditions in which lawyers can discharge their professional duties and functions and ensure that their role is safeguarded and their rights are protected, along with those of other actors in the justice system. The UN Basic Principles on the role of lawyers require governments to ensure that lawyers: “(a) are able to perform all of their professional functions without intimidation,

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<http://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/>.

<sup>5</sup> Basic principles on the Role of Lawyers, *op cit*.

<sup>6</sup> *Ibid*, preamble, para.9

<sup>7</sup> Adopted by the UN General Assembly on 20 December 2012, A/RES/67/187.

<sup>8</sup> E.g. see ICJ, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Principles-independence-lawyers-publication-2007.pdf>; ICJ, Legal Commentary to the ICJ Geneva Declaration, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>.

<sup>9</sup> Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”). The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, in understanding lawyers as the primary providers of legal aid (para. 9), highlight their special status in contributing to a legal aid system capable of ensuring “fundamental fairness and public trust” in the criminal justice system (paras. 1 and 14; see also para. 3). See also, Recommendation no. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer; Consultative Council of European Judges (CCJE) Opinion No.(2013)16 on the Relations Between Judges and Lawyers; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; IBA Standards for the Independence of the Legal Profession.

<sup>10</sup> Basic Principles on the Role of Lawyers, *op cit*, principle 13(b).

<sup>11</sup> UN Basic Principles on the Role of Lawyers, *op cit*, principle 14.

<sup>12</sup> *Ibid.*, principle 15; See also <sup>12</sup> Singhvi Declaration, *op cit*, para. 83 Lawyers should, in discharging their duties, “at all times act freely, diligently and fearlessly (...) without any inhibition or pressure from the authorities or the public.”; IBA Standards for the Independence of the Legal Profession, para. 6; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 36, according to which states should inter alia ensure providers of legal aid can carry out their professional functions free from intimidation, hindrance, harassment or improper interference, including the explicit responsibility of states not to interfere with the independence of the legal aid provider (para. 16).

<sup>13</sup> Basic Principles on the Role of Lawyers, *op cit*, principle 13.

<sup>14</sup> Charter of Core Principles of the European Legal Profession, adopted by Council of Bars and Law Societies of Europe, 29 November 2008, article 1.1.

hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”<sup>15</sup>

UN Basic Principle 20 states that, “Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.” These protection measures are crucial to providing effective legal assistance.<sup>16</sup>

Despite the international recognition of the role of lawyers as essential agents in the administration of justice,<sup>17</sup> and the duties of States to respect and safeguard their roles and independence,<sup>18</sup> lawyers in many jurisdictions incur serious risks when carrying out their professional functions.<sup>19</sup> The UN Special Rapporteur on the Independence of Judges and Lawyers, in a recent report, expressed concern: “[...] at cases in which lawyers have been sanctioned because of political activities, advocacy work, confusion between the lawyer’s cause and his/her client’s cause, and involvement in the legal representation of clients in sensitive cases. In that context, she has urged States to refrain from criminally convicting or disbaring lawyers for the purposes of silencing them, preventing them from criticizing public policies or obstructing them in their legal representation of specific clients.”<sup>20</sup>

**The ICJ therefore submits that the special role of lawyers in the administration of justice necessitates that they are able to carry out their important function without undue restrictions. Therefore, close scrutiny of any restrictions on their rights by States in accordance with the internationally recognised principles on the role of lawyers should be undertaken with a view to ensuring respect not only for the rights of lawyers, but also for their capacity to effectively carry out their professional functions.**

### **III. Freedom of expression of lawyers**

Under general international law, lawyers, like any other individuals, have the right to freedom of expression. This right is guaranteed under article 10 of the ECHR, as well as universally under article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Guarantees of their freedom of expression may have a dual significance when linked to the professional functions of a lawyer, protecting not only the rights of the lawyer, but also enabling the lawyer to effectively protect the rights and interests of his or her client. Freedom of expression of lawyers is linked with and necessary for the independence of the legal profession, and thereby to the fair administration of justice.<sup>21</sup>

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 (Human Rights Defenders Declaration), adopted by the General Assembly,

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<sup>15</sup> Basic principles on the Role of Lawyers, *op cit*, principle 16.

<sup>16</sup> *Ibid*, principles 16 (b), 22.

<sup>17</sup> *Ibid*, principle 12; Commentary on IBA International Principles on Conduct for the Legal Profession, para. 1; *Sialkowska v. Poland*, *op cit*, para. 111; *Morice v. France*, *op cit*, para. 135.

<sup>18</sup> See, for example, Basic Principles on the Role of Lawyers, *op cit*, principles 16 to 22; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, para. 16 and principle 36.

<sup>19</sup> See, for example, Human Rights Council, Communications report of Special Procedures, UN Doc. A/HRC/28/85, 19 February 2015; Human Rights Council, Communications report of Special Procedures, UN Doc. A/HRC/27/72, 20 August 2014; Human Rights Council, Communications report of Special Procedures, UN Doc. A/HRC/26/21, 2 June 2014.

<sup>20</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/26/32, 28 April 2014, para. 68.

<sup>21</sup> *Morice v France*, *op cit*, para.135; *Sialkowska v Poland*, *op cit*, para. 111.

affirms that “everyone has the right, individually and in association with others ... (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.”<sup>22</sup>

The particular right of lawyers to freedom of expression, both in course of their professional activities and elsewhere, is described in the UN Basic Principles: “Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights... Without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation.” The Basic Principles recognise, however, that in exercising these rights, lawyers must “conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession.”<sup>23</sup>

At a Council of Europe level, Recommendation R(2000)21 of the Committee of Ministers, in Principle I, article 3, provides that: “Lawyers should enjoy freedom of belief, expression .... and in particular should have the right to take part in public discussion on matters concerning the law and the administration of justice and suggest legislative reforms.”

The emphasis placed by these standards on the special role of lawyers in providing information to the public, and engaging in discussion on, matters concerning the law and the administration of justice, is also reflected in the European Court jurisprudence concerning permissible limitations to freedom of expression of lawyers under Article 10 ECHR. Thus when assessing the restriction of rights “the particular situation of the person exercising freedom of expression and the duties and responsibilities attaching to that situation” should be taken into account.<sup>24</sup>

Under Article 10, protection of freedom of expression is accorded to remarks concerning matters of public interest.<sup>25</sup> It has been established that, given the particular role of lawyers, an interference with the freedom of expression of a lawyer related to his or her professional role also merits protection. It is accepted that lawyers are entitled to comment in public on issues of the justice system, so long as their remarks stay within acceptable limitations of respect for others, as well as respect for the fair administration of justice.<sup>26</sup>

It is furthermore well established that lawyers’ speech meriting protection under Article 10 ECHR includes both speech in court, and comments made outside the courtroom, including through media statements or television interviews.<sup>27</sup> This recognises both the potential of such activity to contribute to the defence of the rights of a client, and the wider role and responsibility of lawyers in providing information to the general public about the administration of justice, thereby helping to fulfil the public’s right to information about matters of public interest.<sup>28</sup>

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<sup>22</sup> 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, A/RES/53/144 (1999), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>, para. 9.

<sup>23</sup> Basic Principles on the Role of Lawyers, *op cit*, Principle 23, See also Singhvi Declaration, *op cit*, para.92 (a).

<sup>24</sup> *Handyside v United Kingdom*, the ECHR, Report of 30 September 1975, para. 141; *Koseik v FRG*, ECtHR, Application no. 9704/82, judgment 28 August 1986, para. 110.

<sup>25</sup> *Surek v Turkey* (No.1), ECtHR, [GC] Application No.26682/95, judgement 8 July 1999, para.61; *Lindon, Otchakovsky-Laurens and July v. France*, ECtHR [GC], Application nos. 21279/02 and 36448/02, judgement 22 October 2007, para.46; and *Axel Springer AG v. Germany*, ECtHR [GC], Application no. 39954/08, judgement 7 February 2012, para. 90.

<sup>26</sup> *Amihalchioaic v Moldova*, ECtHR, Application no.60115/00, judgement 20 April 2004; *Mor v France*, *op cit*, para.43; *Morice v France*, *op cit*, para. 134.

<sup>27</sup> *Morice v France*, *op cit*, para. 138.

<sup>28</sup> *Ibid.*, paras 149-153.

The ICJ notes that in some States access to official processes or legal proceedings for protection of rights or an effective remedy for human rights violations may be unavailable or ineffective. In such circumstances, for lawyers to be effective in protecting the rights of their clients, they may need to engage in activity, which may include statements or other forms of expression, that take place outside of the strict confines of judicial proceedings. Such activity may be seen as necessary or useful for a variety of reasons, for example, to draw the attention of the public to the case or to assist in research and fact finding on the case. Because such activities are part and parcel of lawyer's professional functions, strict scrutiny of restrictions of freedom of expression of lawyers outside of court is also necessary.

The ICJ further submits that the role and responsibility of lawyers in seeking information from and imparting information to the public on issues of public concern related to the justice system, is not confined to comments on to individual cases in which the lawyer represents a client. Lawyers, as a consequence of the nature their profession, have a wider societal role and responsibility in drawing attention to concerns relating to the justice system. Within the bounds of lawyer-client confidentiality, lawyers have a role and a responsibility to inform the public on such matters and in particular to raise concerns about possible violations of human rights in the justice system. Such remarks warrant particularly strong protection under Article 10 ECHR.

#### **IV. Legitimacy of restrictions on lawyers' freedom of expression under Article 10 ECHR**

The particular role and responsibilities of lawyers as established in international standards and jurisprudence are relevant to any assessment of whether interference with their freedom of expression is necessary in a democratic society in pursuit of a legitimate aim, and proportionate to the aim pursued, under Article 10 ECHR.

The general principle that freedom of expression applies to all ideas, including those that are critical or that "offend, shock or disturb"<sup>29</sup> is significant in assessing the legitimacy of restrictions on freedom of expression of lawyers, part of whose function is to present arguments in adversarial proceedings, and to represent zealously the viewpoints of one party to a dispute.<sup>30</sup> Such arguments will of their nature often be unwelcome or offensive to other parties concerned. International standards and authoritative international commentaries on the role of lawyers consistently refer to the role and duty of lawyers to defend their clients' interests "zealously" and "fearlessly".<sup>31</sup> The UN Special Rapporteur on the Independence of Judges and Lawyers has noted that: "[l]awyers are not expected to be impartial in the manner of judges, yet they must be as free as judges from external pressures and interference".<sup>32</sup>

In relation to the analogous provision under the ICCPR, the Human Rights Committee's General Comment 34 on the scope of freedom of expression says: "The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, 22 although such expression may be restricted in accordance with the provisions of article 19,

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<sup>29</sup> *Handyside v United Kingdom*, ECtHR, Application no. 5493/72, judgment 7 December 1976, para. 49; *Stoll v. Switzerland*, ECtHR, ECtHR, [GC], No. 69698/01, judgement 10 December 2007, para. 101.

<sup>30</sup> See *Nikula v Finland*, *op cit*, para. 54

<sup>31</sup> Singhvi Declaration, *op cit*, para.83; CCBE, Opinion no (2013) 16 on the relationship between judges and lawyers, adopted by the Consultative Council of European Judges on 13-15 November 2013.

<sup>32</sup> Report of the Special Rapporteur on the independence of judges and lawyers, 28 July 2009, A/64/181, para. 12. The Special Rapporteur on the Independence of Judges and Lawyers is an independent expert appointed and mandated by the UN Human Rights Council, to inquire into and report on allegations of attacks on the independence of judges, lawyers and court officials and on progress achieved in protecting such independence, see: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>.

paragraph 3 and article 20".<sup>33</sup> In light of this, even where restrictions on a lawyers freedom of expression may be undertaken in pursuit of a legitimate aim, such as preserving the authority of the judiciary, they will only exceptionally be considered to be necessary in a democratic society.<sup>34</sup> Such restrictions will generally only be permissible under Article 10 where the exercise of expression consists of insults, or has no sound factual basis.<sup>35</sup> Although there are boundaries to acceptable criticism from lawyers, lawyers' remarks that are highly critical are nevertheless protected, so long as they do not amount to a gratuitous attack. In *Gouveia Gomes Fernandes et Freitas E Costa v Portugal*,<sup>36</sup> for example, it was held that where the applicants had adopted an "acerbic, even sarcastic" tone, this did not justify restriction of freedom of expression under Article 10.

There is also a narrow scope for restrictions on critical comments of lawyers, and others, which are directed at government or public authorities, including law enforcement authorities.<sup>37</sup> In *Nikula v Finland*, for example, it was held that prosecutors should be expected to tolerate very considerable criticism from defence counsel, where the remarks relate to a client's case, and where they do not amount to personal insults.<sup>38</sup> This principle reflects the public interest, in a democratic State, in scrutiny of the actions of public authorities, including in regard to the protection of human rights.

In assessing whether constraints on a lawyer's freedom of expression can be considered to be necessary and proportionate, this court has drawn a distinction between factual statements and value judgments, holding that expressions of value judgments, since they are not susceptible of proof, may not be the subject of restriction: "it is necessary to distinguish between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof; a requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10."<sup>39</sup> On the other hand, the "factual basis" for the value judgements may be ascertained.<sup>40</sup> It is further established that the context in which the comments were made must be taken into account. The ICJ submits that the assessment of the sound factual basis of a value judgment should take account of the nature and context of the statement and the extent to which it is susceptible of being factually substantiated. The UN Human Rights Committee stated as follows: "Defamation laws must be crafted with care to ensure that ... they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification".<sup>41</sup>

Specifically, in regard to serious human rights violations, such as ill-treatment or deaths in the custody of the State, it is relevant to consider the principle established in the jurisprudence of this Court that such events are peculiarly within the knowledge of the authorities and will often not be capable of being substantiated by factual records or witnesses, in particular in the absence of a thorough and independent investigation at national level.<sup>42</sup> Indeed, in its jurisprudence regarding Article 2 ECHR, the Court has applied a presumption that a death is the responsibility of the State where the person was last seen in the custody of State authorities.<sup>43</sup> **Comments by a lawyer that are critical**

<sup>33</sup> UN HRC General Comment 34, 12 September 2011, CCPR/C/GC/34, para. 11.

<sup>34</sup> *Mor v France*, *op cit*, para.44; *Morice v France*, *op cit*, para.135; *Nikula v Finland*, ECtHR, Application no 31611/96, judgement 21 March 2002, para. 55.

<sup>35</sup> *Morice v France*, *op cit*, para.139; *Nikula v Finland*, *op cit*, para 50-52

<sup>36</sup> *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal* (dec.), ECtHR, Application no. 1529/08, Judgement 26 May 2009, para.48.

<sup>37</sup> *Surek v Turkey*. *op cit*, para.61.

<sup>38</sup> *Nikula v Finland*, *op cit*, para.51.

<sup>39</sup> *Morice v France*, *op cit*, para.126.

<sup>40</sup> *Ibid.*, para.155.

<sup>41</sup> UN HRC, General Comment 34, *op cit*, para. 47.

<sup>42</sup> See for example, *Salman v Turkey*, ECtHR, Application no. 21986/93, judgement 27 June 2000, para. 100; *Rehbock v Slovenia*, ECtHR, Application no. 29462/95, judgment 28 November 2000, para. 72.

<sup>43</sup> *Aktaş v Turkey*, ECtHR, Application no. 24351/94, judgment 24 April 2003, para. 291; *Utsayeva and others v Russia*, ECtHR, Application no. 29133/03, judgment 29 May 2008, para. 159.

**of State authorities responsible for the detention of a person who has been injured or has died in their custody, should be interpreted accordingly and should be presumed to constitute protected form of expression, unless they can be shown to have been made in bad faith.**

**Furthermore, where such matters are addressed, restrictions of the freedom of expression of lawyers on grounds of confidentiality of proceedings should be subject to particularly strict scrutiny for necessity and proportionality, taking into account the importance of the public interest in receiving information on these issues.** Where facts or allegations are already in the public domain, a lawyer should not be penalised on grounds of confidentiality or secrecy of proceedings, for expressing his or her views on these facts.<sup>44</sup> Moreover it is clear that, where the client supports the disclosure of the information in order to draw attention to the case, or has already put the information in the public domain, the lawyer should not be prohibited from disclosing it by principles of lawyer-client confidentiality. Indeed, a lawyer might be failing in his or her duty to zealously defend the interests of a client where he or she declined to speak publicly, contrary to the request of the client, about violations of the client's human rights.

## **V. Disciplinary proceedings and penalties against lawyers arising from the exercise of freedom of expression**

It is clear that disciplinary proceedings against lawyers as a result of exercise of their freedom of expression may interfere with rights under Article 10 ECHR. Given the serious consequences of disciplinary penalties such as disbarment for private life, they may also interfere with the right to private life under Article 8 ECHR.<sup>45</sup>

In order to comply with Articles 8 and 10, the grounds for such disciplinary action, the procedures for consideration of the case, as well as an appropriate scale of sanctions, must be clearly prescribed by law, and the law must be of sufficient quality and precision that the application of disciplinary measures is reasonably foreseeable and predictable.<sup>46</sup> Although it has been accepted by the Court that in disciplinary law, it is acceptable to formulate laws in relatively broad terms,<sup>47</sup> this does not release states from the obligation to ensure that other elements are in place to prevent arbitrary application of the law. Such measures may include guidance on the application of the law or consistent interpretational practice by the relevant disciplinary bodies.<sup>48</sup>

International standards recognise the need for safeguards to ensure that disciplinary proceedings are not misused to interfere with the independence of the legal profession or to restrict the work of lawyers in defence of their clients. According to the UN Basic Principles, disciplinary proceedings should be heard by an independent and impartial disciplinary body established by the legal profession, by an independent statutory body, or by a court, and should be subject to independent judicial review.<sup>49</sup> Such proceedings should be determined "in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles"<sup>50</sup> and must be processed expeditiously and fairly in accordance with the right to a fair hearing.<sup>51</sup> Recommendation R(2000)21 of the Committee of Ministers of the Council of Europe states in Principle VI.3 that "Disciplinary proceedings should be conducted with full respect of the principles and rules laid down the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision."

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<sup>44</sup> *Morice v France*, *op cit*, para.138

<sup>45</sup> *Oleksandr Volkov v Ukraine* Application no.21722/11, Judgment of 9 January 2013, para.165; *Ozpinar v Turkey*, Application no.20999/04, Judgment of 9 October 2010, paras.43-38.

<sup>46</sup> *Ibid.*, para.169-176

<sup>47</sup> *Ibid.*, para.176- 178

<sup>48</sup> *Ibid.*, para.179

<sup>49</sup> Basic principles on the Role of Lawyers, *op cit*, Principle 28 ,

<sup>50</sup> *Ibid*, Principle 29.

<sup>51</sup> *Ibid*, Principle 27.



The fairness of disciplinary procedures, as well as the penalty imposed, will both be relevant to the assessment of proportionality of the interference.<sup>52</sup> The parties to disciplinary proceedings must enjoy equality of arms,<sup>53</sup> and the lawyer who is the subject of the proceedings must be afforded a realistic chance to prove that there was a sufficient factual basis for his or her allegations.<sup>54</sup>

Finally, in assessing the proportionality of disciplinary sanctions on a lawyer as a result of exercise of his or her freedom of expression, the extent to which the sanctions may have a chilling effect on the practice of other lawyers, and in particular on their capacity to draw public attention to possible violations of human rights, must also be taken into account, bearing in mind the particular national context and the circumstances of the case.<sup>55</sup>

**The ICJ therefore submits that, in order to preserve the independence of the legal profession as a whole and the capacity of lawyers to fulfill their role in protecting and defending human rights, the grounds of disciplinary action leading to restriction on freedom of speech, the procedures for disciplinary action, and the rules regarding disciplinary penalties, should be subject to strong safeguards against arbitrariness or disproportionate penalties. They may not be undertaken against a lawyer for the exercise of protected human rights such as freedom of expression.**

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<sup>52</sup> *Morice v France*, *op cit*, para.155 and 175; *Steel and Morris v. the United Kingdom*, Application no.68416/81, judgment of 15 February 2005, para.95.

<sup>53</sup> *Steel and Morris v the United Kingdom*, *op cit*, para.95

<sup>54</sup> *Morice v France*, *op cit*, para 155

<sup>55</sup> See: *Annagi Hajibeyli v Azerbaijan*, ECtHR, Application no. 2204/11, judgment 22 October 2015, para. 77.