

***Hassanov v. Azerbaijan***  
*Application no. 68035/17*

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

INTERVENER

*pursuant to the Section Registrar's notification dated 5 September 2018 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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## Introduction

The International Commission of Jurists (ICJ) *2008 Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* (ICJ 2008 Declaration), adopted by leading jurists from all regions of the world, affirms that the role of the legal profession is “paramount in safeguarding human rights and the Rule of Law.”<sup>1</sup> This principle itself is informed by and reflects the UN Basic Principles on the Role of Lawyers that emphasise the role of lawyers in working “to uphold human rights and fundamental freedoms.”<sup>2</sup> Critically, it also echoes the position of this Court, which has consistently referred to the “specific status of lawyers [having] a central position in the administration of justice as intermediaries between the public and the courts.”<sup>3</sup>

The role of lawyers, in light of their position in the justice system, “entails a number of duties, particularly with regard to [lawyers’] conduct”.<sup>4</sup> As the ICJ 2008 Declaration pointed out, “members of the legal profession ... have a legal and ethical responsibility to uphold and promote the Rule of Law and human rights and to ensure that in carrying out their professional functions they take no measures that would impair the enjoyment of human rights.”<sup>5</sup>

In order to effectively carry out this role, lawyers must not “suffer or be threatened with, prosecution or administrative, economic or other sanction for any action taken in accordance with recognized professional duties, standards and ethics.”<sup>6</sup> This Court has repeatedly held that “persecution and harassment of members of the legal profession strikes at the very heart of the Convention system.”<sup>7</sup>

The UN Basic Principles on the Role of Lawyers stress that States have an obligation to “ensure that lawyers ...are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; ... and [do] 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>8</sup> The Council of Europe’s *Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer* affirms that they “should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.”<sup>9</sup> The ICJ 2008 Declaration has further stressed that “[a]ll branches of government must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary

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<sup>1</sup> Principle no. 1, *2008 ICJ Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* (ICJ 2008 Declaration). See also, *ICJ Act of Athens* of 1955. See also, Article 74 of *Draft Universal Declaration on the Independence of Justice* (the Singhvi Declaration).

<sup>2</sup> Article 14 of the *UN 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.

<sup>3</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>4</sup> *Morice v. France*, ECtHR, GC, Application no. 29369/10, 23 April 2015, para. 133. See also, *Van der Musselle v. Belgium*, ECtHR, Application no. 8919/80, 23 November 1983; *Casado Coca v. Spain*, ECtHR, Application no. 15450/89, 24 February 1994, para. 46; *Steur v. the Netherlands*, Application no. 39657/98, para. 38; *Veraart v. the Netherlands*, Application no. 10807/04, 30 November 2006, para. 51; *Coutant v. France* (dec.), ECtHR, Application no. 17155/03, 24 January 2008; and *Kiprianou v Cyprus*, *op. cit.*, para. 173.

<sup>5</sup> Principle no. 13, *ICJ 2008 Declaration*.

<sup>6</sup> Article 16(c), *UN Basic Principles on the Role of Lawyers*.

<sup>7</sup> *Annagi Hajibeyli v Azerbaijan*, ECtHR, Application no. 2204/11, 22 October 2015, para. 68.

<sup>8</sup> Article 16, *UN Basic Principles on the Role of Lawyers*.

<sup>9</sup> Article I.4, *Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer*, adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers’ Deputies.

action as a consequence of their professional functions or legitimate exercise of human rights."<sup>10</sup>

In these submissions, the ICJ stresses that, while lawyers must perform their professional functions in conformity with ethical standards, the systems and procedures in respect of conditions of service, including in respect of admission to the profession and discipline, must not enforce such obligations in a way that impairs the exercise of human rights by lawyers or their capacity to effectively represent their clients.

The ICJ presents these submissions based on the jurisprudence of this Court as well as international standards governing the legal profession. In particular, the submission will address permissible restrictions of lawyers' rights to respect for private (including professional) life under article 8 ECHR and to freedom of expression under article 10 ECHR, as well as the procedural safeguards required to apply such restrictions under article 6 ECHR. Finally, the submission will set out key findings of a recent ICJ fact-finding mission to assess the compliance of the governance of the legal profession in Azerbaijan with international law and standards.

## **I. Protection of the professional life of lawyers under article 8 ECHR**

This Court has consistently affirmed that the scope of article 8 ECHR extends to the protection of a person's professional life in certain circumstances, namely where professional life is closely related to social identity and private life.<sup>11</sup> The Court has established, in particular, that the right to private and professional life is applicable to admission and disbarment proceedings of the legal profession.<sup>12</sup>

Therefore, the requirement that a restriction on article 8 ECHR rights must be in accordance with law has specific implications in these procedures. The Court has ruled that such a restriction must be sufficiently foreseeable to enable the applicant to realise that by adopting a certain defined practice or omission he or she would be disqualified from the profession.<sup>13</sup>

The requirements of the principle of legality in the context of disciplinary proceedings are not necessary congruous with those related to criminal liability. Thus, the Court has recognised that, "in the context of disciplinary law, ... it is a matter of objective necessity that the *actus reus* of such offences should be worded in general language."<sup>14</sup> This means that an applicable provision of law may "not provide a guarantee for addressing properly the matter of the foreseeability of the law" and that, therefore, "[t]he other factors affecting the quality of legal regulation and the adequacy of the legal protection against arbitrariness should be identified and examined."<sup>15</sup>

To ensure legal foreseeability in disciplinary proceedings, and hence respect for the principle of legality, there must at least be "specific and consistent interpretational practice concerning the legal provision in issue."<sup>16</sup> Lack of guidelines or consistent

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<sup>10</sup> Article 7, ICJ 2008 Geneva Declaration.

<sup>11</sup> *Fernandez Martinez v Spain*, ECtHR, GC, Application no. 56030/07, 12 June 2014, para. 110. See also, among others, *Bigaeva v Greece*, ECtHR, Application no. 26713/05, 28 May 2009, para. 23; and *Oleksandr Volkov v. Ukraine*, ECtHR, Application no. 21722/11, 9 January 2013, paras. 165-67.

<sup>12</sup> *Mateescu v Romania*, ECtHR, Application no. 1944/10, 14 January 2014, para. 20-21. See also, *Fernandez Martinez v Spain*, GC, Application no. 56030/07, 12 June 2014, para. 108; *Bigaeva v Greece*, Application no. 26713/05, 28 May 2009.

<sup>13</sup> *Ibid.*, para. 32.

<sup>14</sup> *Oleksandar Volkov v. Ukraine*, *op. cit.*, para. 178.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, para. 179.

practice would generally invalidate restrictions on the enjoyment of article 8 ECHR rights. For example, this Court, in the case of *Mateescu*, found that the non-admission to the Bar because the applicant had also been registered as a physician was in breach of this provision. The law at issue in *Mateescu* considered as incompatible with legal practice “occupations affecting the dignity and independence of the profession or good morals.”<sup>17</sup> The Court determined that it was not objectively foreseeable that the profession of physician could be qualified in such terms. In *H. v Belgium*, where there were no clear standards, jurisprudence or codified practice, as to what amounted to “exceptional circumstances” under which a person could be readmitted to the Bar, the Court determined the procedure to be at odds with the State’s obligations under article 6 ECHR.<sup>18</sup>

The need to discharge obligations under article 6 ECHR may provide grounds for restriction of article 8 rights, in accordance with the legitimate aim of protecting the rights and freedoms of others, where such restriction is a necessary and proportionate means of addressing that aim. Of particular relevance is the requirement under article 6 ECHR that the State ensure the maintenance of public confidence in the justice system and the legal profession, and the effectiveness of legal representation and assistance. In this connection, the Court has found that it is legitimate to expect a lawyer “to contribute to the proper administration of justice, and thus to maintain public confidence in it”.<sup>19</sup>

International standards on the legal profession address the primary ethical duties of lawyers relevant to an assessment of the legitimacy of the aim of the interference, as well as its necessity and proportionality. *The UN Basic Principles on the Role of Lawyers* affirm that “[l]awyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.”<sup>20</sup> They set out the principal duties of lawyers with regard to their clients: “[a]dvising 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; ... [a]ssisting clients in every appropriate way, and taking legal action to protect their interests; ... [a]ssisting clients before courts, tribunals or administrative authorities, where appropriate...”<sup>21</sup> Additionally, “in protecting the rights of their clients and promoting the cause of justice, [lawyers] shall seek to uphold human rights and fundamental freedoms ... and ... at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.”<sup>22</sup> They “shall always loyally respect the interests of their clients.”<sup>23</sup>

These duties are also reflected in the Council of Europe’s *Recommendation Rec(2000)21* which delineates some of the main roles of lawyers, including: “... advising [their clients] on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs; ... endeavouring first and foremost to resolve a case amicably;... taking legal action to protect, respect and enforce the rights and interests of their clients;... avoiding conflicts of interest;... not taking up more work than they can reasonably manage,”<sup>24</sup> and to

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<sup>17</sup> *Mateescu v Romania*, *op.cit.*, para. 31.

<sup>18</sup> *H v Belgium*, ECtHR, Application no. 8950/80, 30 November 1987, para. 53.

<sup>19</sup> *Kincses v. Hungary*, ECtHR, Application no. 66232/10, 27 January 2015, para. 41.

<sup>20</sup> Article 12, *UN Basic Principles on the Role of Lawyers*.

<sup>21</sup> Article 13, *ibid.*

<sup>22</sup> Article 14, *ibid.*

<sup>23</sup> Article 15, *ibid.*

<sup>24</sup> Article III.3, *Recommendation Rec(2000)21*.

“respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards.”<sup>25</sup>

The commentary of the Council of Bars and Law Societies of Europe (CCBE) on its *Charter of Core Principles of the European Legal Profession* sheds some light on the vague concepts of dignity, honour, integrity and good reputation that underlie the ethical codes of lawyers and links these standards to the effectiveness of legal assistance and representation for the client:

*“To be trusted by clients, third parties, the courts and the state, the lawyer must be shown to be worthy of that trust. That is achieved by membership of an honourable profession; the corollary is that the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. This does not mean that the lawyer has to be a perfect individual, but it does mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession. Disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession.”<sup>26</sup>*

**The ICJ submits that, in order to comply with the right to respect for private life under article 8 ECHR, any restriction on the professional life of lawyers must be based on a clearly defined and foreseeable application of disciplinary offences. Particularly where there is vagueness in the legal definition of disciplinary offences, these must be compensated for by an enhanced level of procedural guarantees (see, section III) in the admission and disciplinary processes. International standards on the legal profession provide that any such limitation is justifiable only where it is necessary to protect the rights of others, by ensuring effective and independent legal representation and enhancing trust in the justice system. As a consequence, restrictions on the article 8 rights of lawyers will not be justified where disciplinary procedures act as a hindrance to the capacity of lawyers to fulfil their duties to uphold human rights and the rule of law.**

## **II. The right to freedom of expression of lawyers under article 10 ECHR**

The right to freedom of expression must be guaranteed to lawyers in their professional as well as their private lives. In this regard, the Court has stressed that freedom of expression “encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed.”<sup>27</sup> In light of their particular role as protectors of human rights and the rule of law,<sup>28</sup> “[l]awyers are ... entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds.”<sup>29</sup> Importantly, “the freedom of expression of lawyers is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice.”<sup>30</sup>

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<sup>25</sup> Article III.4, *ibid.* See also, *CCBE Charter of Core Principles of the European Legal Profession*, although not directly applicable to Azeri lawyers, provides a good evidence of the common *iuris opinio* in the Council of Europe’s space.

<sup>26</sup> *CCBE Charter of Core Principles of the European Legal Profession*, commentary, principle (d).

<sup>27</sup> *Morice v. France*, ECtHR, GC, Application no. 29369/10, 23 April 2015, para. 134. See also, *Foglia v Switzerland*, ECtHR, Application no. 35865/04, 13 December 2007, para. 85; article 23, *UN Basic Principles on the Role of Lawyers*; Principle I.3, *Recommendation Rec(2000)21*.

<sup>28</sup> *Morice v. France*, *op. cit.*, para. 135.

<sup>29</sup> *Morice v. France*, *op. cit.*, para. 134. See, *Nikula v Finland*, *op.cit.*, para. 46.

<sup>30</sup> *Kincses v. Hungary*, ECtHR, Application no. 66232/10, 27 January 2015, para. 61.

This is reinforced by the UN Basic Principles on the Role of Lawyers, which provide that “[l]awyers 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 and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”<sup>31</sup>

To meet the requirements of article 10 ECHR, this Court has found that to be permissible restrictions on a lawyer’s freedom of expression should generally “lie in the usual restrictions on the conduct of members of the Bar ... , as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to “dignity”, “honour” and “integrity” and to “respect for ... the fair administration of justice” ... .”<sup>32</sup> The Court has emphasized that, because of his or her central role in the justice system, “a lawyer should be able to draw the public’s attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism.”<sup>33</sup> In addition, the Court has affirmed that the public has an interest in being informed on criminal proceedings and about the functioning of the judiciary.<sup>34</sup>

When assessing the necessity and proportionality of any restriction on the freedom of expression of lawyers, it must be borne in mind that the unimpeded exercise of this right is central to the very capacity of the lawyer to exercise the functions of his or her profession. In the landmark case *Morice v. France*, the Grand Chamber ruled that “[i]t is only in exceptional cases that restriction ... of defence counsel’s freedom of expression can be accepted as necessary in a democratic society.”<sup>35</sup> The Court has stated that “any “chilling effect” is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.”<sup>36</sup>

As recognized by this Court, “for the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. It follows that any “chilling effect” of even a relatively light penalty is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.”<sup>37</sup>

The role of lawyers in the judicial system grants them a certain latitude regarding the submissions and arguments used in court since they have the duty to defend

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<sup>31</sup> Article 23, *UN Basic Principles on the Role of Lawyers*.

<sup>32</sup> *Morice v. France*, *op. cit.*, para. 134. See *Foglia v Switzerland*, *op. cit.* A further number of ethical duties are identified in the section on article 8 ECHR. The *CCBE Charter of Core Principles of the European Legal Profession*, although not directly applicable to Azeri lawyers, provides a good evidence of the common *iuris opinio* in the Council of Europe’s space on what are the duties of lawyers: “the independence of the lawyer, and the freedom of the lawyer to pursue the client’s case; ... the right and duty of the lawyer to keep clients’ matters confidential and to respect professional secrecy; ... avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; ... the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; ... loyalty to the client; ... fair treatment of clients in relation to fees; ... the lawyer’s professional competence; ... respect towards professional colleagues; ... respect for the rule of law and the fair administration of justice; and ... the self-regulation of the legal profession.”

<sup>33</sup> *Morice v. France*, *op.cit.*, para. 167-168.

<sup>34</sup> *Ibid.*, para. 152.

<sup>35</sup> *Ibid.*, para. 135

<sup>36</sup> *Kiprianou v Cyprus*, *op. cit.*, para. 175.

<sup>37</sup> *Kincses v. Hungary*, *op. cit.*, para. 34. See also, *Hajibeyli and Aliyev v. Azerbaijan*, ECtHR, Applications nos. 6477/08 and 10414/08, 19 April 2018, para. 60.

their clients' interests zealously.<sup>38</sup> For example, a lawyer's use of a "caustic tone" to a judge has been found to be compatible with article 10 ECHR.<sup>39</sup>

With regard to conduct in courtroom, the Grand Chamber ruled that "the principle of fairness militates in favour of a free and even forceful exchange of argument between the parties,"<sup>40</sup> and the boundaries are those drawn by defamation for statements not supported by facts and the rule of secrecy of investigations.<sup>41</sup>

The *UN Basic Principles on the Role of Lawyers* state that "[l]awyers 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."<sup>42</sup> This is also affirmed in the *IBA Standards for the Independence of the Legal Profession*.<sup>43</sup> Furthermore, "... 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 organization."<sup>44</sup>

Principle I.3 of Council of Europe's *Recommendation Rec(2000)21* affirms that lawyers "should have the right to take part in public discussions on matters concerning the law and the administration of justice and to suggest legislative reforms."<sup>45</sup> A similar provision is contained in article 14 of the *IBA Standards for the Independence of the Legal Profession*. Furthermore, in an assessment of the necessity and proportionality of a restriction on the exercise of a lawyers' freedom of expression, account must be taken of the public's interest in receiving information about questions arising from judicial decisions, as well as the need for the proper administration of justice and upholding the dignity of the legal profession.<sup>46</sup> It has been held that there are no grounds for according national authorities a wide margin of appreciation in regard to lawyers' freedom of expression in such cases.<sup>47</sup>

The widest protection of freedom does not, however, extend to all forms or manner of expression. For instance, the Court has stressed that "a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention ... ."<sup>48</sup> The ICJ notes that the distinction between the two elements is principally one of **intent**, which becomes a key element in any disciplinary proceedings with regard to freedom of expression of lawyers.

**The ICJ submits that, taking into account the duties of lawyers towards their clients and their crucial public interest role in the protection of human rights and the rule of law, any restrictions on their right to freedom of expression must be subject to particularly close scrutiny and are**

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<sup>38</sup> *Ibid.*, para. 60. *Morice v. France*, *op. cit.*, para. 133. See, *IBA Standards for the Independence of the Legal Profession*, article 6; and, *Kiprianou v Cyprus*, *op. cit.*, para. 175.

<sup>39</sup> *Morice v. France*, *op. cit.*, para. 161.

<sup>40</sup> *Ibid.*, para 137.

<sup>41</sup> *Ibid.*, 138-139.

<sup>42</sup> Article 20, *UN Basic Principles on the Role of Lawyers*.

<sup>43</sup> Article 11, *IBA Standards for the Independence of the Legal Profession*.

<sup>44</sup> Article 23, *UN Basic Principles on the Role of Lawyers*.

<sup>45</sup> Article I.3, *Recommendation Rec(2000)21*.

<sup>46</sup> *Nikula v Finland*, *op. cit.*, para. 46. See also, *Morice v. France*, *op. cit.*, para. 148: lawyers' and journalists' "respective positions and roles in judicial proceedings are intrinsically different. Journalists have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party. They cannot therefore be equated with an external witnesses whose task it is to inform the public."

<sup>47</sup> *Nikula v Finland*, *op. cit.*, para. 46; *Morice v. France*, *op. cit.*, para. 152.

<sup>48</sup> *Kincses v. Hungary*, *op. cit.*, para. 61.

**permissible only when strictly necessary in order to protect the integrity of the justice system and the rights of others. In particular, such restrictions must not impair the duty of lawyers to defend their clients to the best of their ability and to uphold human rights and the rule of law.**

### **III. The ICJ findings on the governance of the legal profession in Azerbaijan with regard to admission and disciplinary proceedings**

Pursuant to a fact-finding mission to Azerbaijan carried out in June 2016, the ICJ concluded, in its report *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan* (ATTN1), that “the profession operates in a difficult environment [and] the Bar Association’s internal problems and deficiencies have undermined its independence for many years.”<sup>49</sup>

The ICJ mission noted that the Bar Association was failing to fulfil its role of protecting the independence of the legal profession and upholding high ethical standards, as it “too often act[ed] as a top-down bureaucracy whose interests are not those of its members.”<sup>50</sup> The mission reported serious shortcomings in the Bar Association’s management and action, including with regard to “to transparency of the budget, accountability before its members, democratic participation of lawyers and their protection in instances of harassment and persecution of lawyers.”<sup>51</sup> The ICJ concluded that, “[i]n this environment, the Bar Association tends to function, in practice, to repress the independence of lawyers rather than to defend it.”<sup>52</sup>

As regards the disciplinary procedure, the report found that the Code of Ethics includes as ethical obligations requirements of politeness, objectivity or political neutrality that “are vague and raise concerns about their possible improper use against lawyers”.<sup>53</sup> In particular, ‘politeness’ was considered to be a term with starkly subjective implications and the duty of ‘political neutrality’ contrasts with the fact that lawyers, unlike judges, are not required to be impartial. This concern notwithstanding, the ICJ expressed concern that the Code of Ethics had not been used as an operative everyday guide for the work of Azerbaijani lawyers,<sup>54</sup> but primarily as a means to repress the activity of lawyers dedicated to defending human rights.<sup>55</sup>

The ICJ expressed concern at the fact that the list of grounds for initiation of disciplinary proceedings was excessively broad in scope, including, for example, the possibility to initiate disciplinary proceedings for contravention of undefined “other legal acts.”<sup>56</sup> This contravened the requirement of foreseeability of the principle of legality.<sup>57</sup> Furthermore, the ICJ report documents that it is unclear from the law or other normative acts what are the grounds for disbarment referred to in article 22(VIII) of the *Law on Advocates and Advocates’ Activity*, making it extremely difficult to foresee the threshold for the application of the sanction of disbarment, which leads to the termination of the lawyer’s professional activity as an advocate.<sup>58</sup>

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<sup>49</sup> International Commission of Jurists, *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan*, Geneva, 2016, p. 35.

<sup>50</sup> *Ibid.*, p. 35.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*,

<sup>53</sup> *Ibid.*, p. 20.

<sup>54</sup> *Ibid.*, p. 21.

<sup>55</sup> *Ibid.*, pp. 35-36.

<sup>56</sup> Article 22(1), Law of the Republic of Azerbaijan on Advocates and Advocates’ Activity, 28 December 1998 no. 783-IQ (unofficial translation).

<sup>57</sup> ICJ, *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan*, *op. cit.*, p. 23.

<sup>58</sup> Article 22(VIII), *Law on Advocates and Advocates’ Activity*.



The ICJ mission reported that it was unclear that disciplinary procedure administered by the Presidium, the governing body of the Bar Association in charge of the final decision within the Bar for disciplinary proceedings, was regulated by any written guidance or other document.<sup>59</sup> The decision of the Presidium to disbar a lawyer must be ratified by a court, but the ICJ report found that in practice this requirement had not appeared to be an “effective check against arbitrary decisions which undermine the independence of the legal profession.”<sup>60</sup>

Recent reforms have not addressed any of these concerns. An amendment of 31 October 2017 to the Law on Advocates and Advocates’ Activities has restricted representation of clients before courts only to lawyers that are members of the Bar Association of Azerbaijan, without a proper transition period, thereby making it impossible for other lawyers to exercise their professional functions. Despite a change in leadership in the Bar Association, the disbarment of lawyers to curb their freedom of expression has continued.<sup>61</sup> An update on this situation is outlined in the ICJ Briefing Paper annexed to this third party intervention (ATTN2).<sup>62</sup>

**In light of its observations on the independence of the Azerbaijan Bar Association, the ICJ submits that the system of governance of the legal profession in Azerbaijan does not ensure that its procedures of admission and disbarment are presided over by an independent and impartial body; nor does it meet the requirement that disciplinary offences must be sufficiently prescribed by law; nor are the disciplinary procedures in line with the obligations of the State under article 6.1 ECHR. The judicial system does not constitute a sufficiently thorough, effective and independent judicial review to be able to compensate for the fundamental flaws of the disbarment procedures.**

#### **IV. The ICJ findings on harassment of lawyers in light of the application of article 18 ECHR**

The Grand Chamber of this Court has recently expanded its jurisprudence on the interpretation of article 18 ECHR.

It is the established jurisprudence of this Court that article 18 does not have an autonomous role but must be read in conjunction with other articles.<sup>63</sup> In its landmark ruling in *Merabishvili v Georgia*, the Grand Chamber found that violations of article 18 may arise either when a right was restricted “solely for a purpose which is not prescribed by the Convention”<sup>64</sup> or where it is done for such non prescribed purpose combined with other purposes.<sup>65</sup> With regard to this latter situation, the Court held that “a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant.”<sup>66</sup>

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<sup>59</sup> ICJ, *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan*, *op. cit.*, p. 24.

<sup>60</sup> *Ibid.* p. 34.

<sup>61</sup> See, ICJ: *Azerbaijan: Human Rights lawyers Asabali Mustafayev and Nemat Karimli must be allowed to practice their profession*, May 7, 2018. Available at: <https://www.icj.org/azerbaijan-human-rights-lawyers-asabali-mustafayev-and-nemat-karimli-must-be-allowed-to-practice-their-profession/>.

<sup>62</sup> ICJ: *Azerbaijan: briefing paper on new legislation restricting court representation by lawyers*, 1 December, 2017. Available at: <https://www.icj.org/wp-content/uploads/2017/12/Azerbaijan-legalsubmission-accesstoalawyer-2017-eng.pdf>.

<sup>63</sup> *Tchankotadze v. Georgia*, ECtHR, Application No. 15256/05, Judgment of 21 June 2016, para. 113.

<sup>64</sup> *Merabishvili v. Georgia*, ECtHR, Application No. 72508/13, Judgment of 28 November 2017, para. 292.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, para. 305.

More precisely, the Court indicated that “[w]hich purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law.”<sup>67</sup>

The Court went further and clarified that, for a violation of article 18 to be found, there is no need to provide “direct proof”<sup>68</sup> of the violation. Rather, it was sufficient to bring “circumstantial evidence (that) in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts ... . Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts are often taken into account to, in particular, shed light on the facts, or to corroborate the findings made by the Court ....”<sup>69</sup>

Prior to the judgement in *Merabishvili v Georgia*, the Court had previously found violations of article 18 read in conjunction with article 5 ECHR with regard to the harassment of human rights defenders in Azerbaijan. In *Rasul Jafarov v. Azerbaijan* the Court found that “the general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding cannot be simply ignored in a case like the present one (and noted) the numerous statements by high-ranking officials and articles published in the pro-government media, where local NGOs and their leaders, including the applicant, were consistently accused of being a “fifth column” for foreign interests, national traitors, foreign agents, and so on ... . They were harshly criticised for contributing to a negative image of the country abroad by reporting on the human rights situation in the country.”<sup>70</sup> It further added that the “applicant’s situation cannot be viewed in isolation. Several notable human rights activists who have cooperated with international organisations for the protection of human rights, including, most notably, the Council of Europe, were similarly arrested and charged with serious criminal offences entailing heavy imprisonment sentences.”<sup>71</sup> The cumulative consideration of these circumstances led the Court to find a violation of article 18 ECHR read in conjunction with article 5 ECHR.

Since the issuance of the *Merabishvili* judgment, the Court found a violation of article 18 ECHR read together with article 5 ECHR in the cases of *Mammadli v. Azerbaijan* and *Rashad Hasanov and others v. Azerbaijan*. In these cases, the Court applied the same standard of *Jafarov* in determining of that arrests of civil society activists for ordinary criminal offences in Azerbaijan had the unique purpose of curtailing their human rights activities.<sup>72</sup> In the recent case of *Aliyev v. Azerbaijan*, where it found a violation of article 18 ECHR read together with articles 5 and 8 ECHR, the case took also in consideration the fact that “the applicant is a human-rights defender and, more specifically, a human-rights lawyer ... . In line with the international materials ... the Court attaches particular importance to the special role of human-rights defenders in promoting and defending human rights, including in close cooperation with the Council of Europe, and their contribution to the protection of human rights in the member States.”<sup>73</sup>

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<sup>67</sup> *Ibid.*, para. 307

<sup>68</sup> *Ibid.*, para. 316.

<sup>69</sup> *Ibid.*, para. 317.

<sup>70</sup> *Case of Rasul Jafarov v. Azerbaijan*, ECtHR, Application No. 69981/14, Judgment of 17 March 2016, paras. 159-160.

<sup>71</sup> *Ibid.*, para 161.

<sup>72</sup> *Ibid.*, paras. 96 and 104.; *Rashad Hasanov and Others v. Azerbaijan*, ECtHR, Application No.(s) 48653/13, 52464/13, 65597/13 and 70019/13, Judgment of 07 June 2016, paras. 119-127.

<sup>73</sup> *Aliyev v. Azerbaijan*, ECtHR, Applications nos. 68762/14 and 71200/14, Judgment of 20 September 2018, para. 208.

The ICJ findings during and following its 2016 mission to present days have provided objective documentation of the fact that in Azerbaijan, the legal profession lacks independence; individual lawyers often face harassment for exercising their functions, including through criminal prosecutions, disciplinary action, and other administrative measures. Disbarments of lawyers who work to protect human rights, along with criminal prosecutions, searches and measures such as freezing of assets of such lawyers, are part of a wider picture of harassment of human rights defenders, including not only lawyers, but also journalists, NGO workers and others. Disciplinary measures may, for example, follow allegations by a lawyer that client had been subjected to human rights violations, as was the case, recently, with respect to Yalchin Imanov, a human rights lawyer disbarred after making public allegations that his client had been subjected to torture in detention.<sup>74</sup>

As documented in the ICJ report, the Bar Association has so far failed to strive to protect its members from harassment, in particular from abusive disciplinary proceedings. To the contrary, because of its lack of independence, in practice, it has functioned as an instrument of the executive to repress the independence of lawyers, rather than to defend it.

The ICJ notes that, since the publication of its report in September 2016, the UN Human Rights Committee has expressed concern "about reports of physical attacks, politically motivated criminal charges and other adverse repercussions, such as disbarment, against lawyers who make critical statements about State policies and State officials and against lawyers representing victims of torture, human rights defenders, activists and journalists. It is further concerned about the alleged practice of calling lawyers as witnesses in cases in which they are representing a defendant with a view to removing them from the case for alleged conflict of interest".<sup>75</sup> More recently, on 23 April 2018, lawyers Asabali Mustafayev and Nemat Karimli have been suspended for having exercised their right to freedom of expression.<sup>76</sup> Other cases have been documented during the last year.<sup>77</sup>

**The ICJ submits that the situation of harassment of lawyers protecting human rights in Azerbaijan has become a systematic practice aimed at unduly restricting their right to freedom of expression and to professional life under articles 8 and 10 ECHR. In all cases assessed by ICJ, it appears that the sole motive behind the disbarment was the arbitrary restriction of legitimate criticism against public authorities or institutions.**

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<sup>74</sup> International Partnership for Human Rights: *Justice under threat in Azerbaijan as Bar Association bans yet more independent lawyers*, 16 May 2018. Available at: <http://iphronline.org/justice-under-threat-in-azerbaijan-as-bar-association-bans-yet-more-independent-lawyers.html>.

<sup>75</sup> Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/4 (2016), para. 28.

<sup>76</sup> ICJ: *Azerbaijan: Human Rights lawyers Asabali Mustafayev and Nemat Karimli must be allowed to practice their profession*. Op. Cit.; ICJ: *Attacks on lawyers: Turkey, Azerbaijan, Kazakhstan, and China (UN statement)*, March 1 2018. Available at: <https://www.icj.org/hrc37lawyersstatement/>; Amnesty International: *Azerbaijan: New blow for justice as lawyers excluded from trials*, 1 December 2017. Available at: <https://www.amnesty.org/en/latest/news/2017/12/azerbaijan-new-blow-for-justice-as-lawyers-excluded-from-trials/>; International Association of Lawyers: *Joint oral statement to the UN Human Rights Council concerning the attack on lawyers in Azerbaijan, Kazakhstan, and China*, 1 March 2018. Available at: <https://www.uianet.org/en/news/joint-oral-statement-un-human-rights-council-concerning-attack-lawyers-azerbaijan-kazakhstan>; International Partnership for Human Rights: *Azerbaijan: Legislative amendments raise alarm*, 9 November 2017. Available at: <http://iphronline.org/azerbaijan-legislative-amendments-raise-alarm.html>; International Partnership for Human Rights: *Statement in Support of Azerbaijani Human Rights Lawyer Elchin Sadigov*, 18 September 2018. Available at: <http://iphronline.org/statement-in-support-of-azerbaijani-human-rights-lawyer-elchin-sadigov.html>.

<sup>77</sup> ICJ: *Azerbaijan: briefing paper on new legislation restricting court representation by lawyers*. Op. cit.