

***Democracy and Human Rights Resource Centre v. Azerbaijan  
and Mustafayev and Democracy and Human Rights Resource Centre v.  
Azerbaijan***

*Applications nos. 74288/14 and 64568/16*

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

INTERVENER

*pursuant to the Section Registrar's notification dated 26 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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## **I. Introduction**

These submissions of the International Commission of Jurists (ICJ) address the question of impairment of the effective exercise of the right of application to the European Court of Human Rights (the Court), under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR), through interference in the activities of their lawyers. These submissions further examine the systemic practice in Azerbaijan of harassment of lawyers and of NGOs established by lawyers for the purpose of providing legal advice or representation, including representation of applicants before the European Court of Human Rights. They analyse the implications of such practices with regard to the State's obligations under article 18 ECHR read together with article 11 ECHR.

## **II. International standards on non-interference with the work of lawyers**

### **1. International law and standards on the role of lawyers**

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 seeking 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 emphasized, they "are assigned a fundamental role in a democratic society".<sup>3</sup> The UN Basic Principles on the Role of Lawyers affirm the importance of lawyers in ensuring protection of human rights through the fair administration of justice.<sup>4</sup> The UN Basic Principles are complemented by other standards on the role of lawyers at a global and regional level, including the Singhvi Declaration, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, and Recommendation No. R(2000) 21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer.<sup>5</sup> The core content of these standards is reflected in the jurisprudence of this Court, as well as of other international human rights tribunals, which recognise the vital role of lawyers in ensuring access to justice and protecting human rights.<sup>6</sup>

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 taking legal action to protect their interests."<sup>7</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>8</sup> and should "always loyally

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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.wpengine.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.

<sup>2</sup> UN Basic Principles on the Role of Lawyers, principles 13 and 14.

<sup>3</sup> *Michaud v. France*, ECtHR, Application no. 12323/11, Judgment of 6 December 2012, para. 118.

<sup>4</sup> UN Basic Principles on the Role of Lawyers, preamble, para.9

<sup>5</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>6</sup> *Kyprianou v. Cyprus*, ECtHR, Application no. 73797/01, Judgment of 15 December 2005, para. 58; *Kulikowski v. Poland*, ECtHR, Application no. 18353/03, Judgment of 19 May 2009, para. 32, *André and another v. France*, ECtHR, Application no. 18603/03, Judgment of 24 July 2008, para. 20.

<sup>7</sup> UN Basic Principles on the Role of Lawyers, principle 13(b).

<sup>8</sup> UN Basic Principles on the Role of Lawyers, principle 14.

respect the interests of their clients.”<sup>9</sup> International standards on the role of lawyers further reaffirm that all persons should have effective access to a lawyer to protect their rights,<sup>10</sup> and that 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.”<sup>11</sup>

Despite the international recognition of the role of lawyers as essential agents in the administration of justice,<sup>12</sup> and the duties of States to respect and safeguard their roles and independence,<sup>13</sup> lawyers in many jurisdictions incur serious risks when carrying out their professional functions.<sup>14</sup> The UN Special Rapporteur on the Independence of Judges and Lawyers has expressed particular 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>15</sup>

**The ICJ therefore submits that the special role of lawyers “as an indispensable participant in the fair administration of justice”<sup>16</sup> necessitates that States ensure that lawyers, including those providing legal advice or representation through NGOs, enjoy practical and effective guarantees which permit them to carry out their important social function, at both national and international levels, in accordance with the internationally recognised principles on the role of lawyers.**

## **2. Obligations of non-interference with the work of lawyers**

Lawyers are impeded in fulfilling their professional roles effectively when their independence is compromised by intimidation, hindrance, improper interference, or harassment of individual lawyers, or through the dependence of the legal profession as a whole on the executive.<sup>17</sup> International standards establish that, for lawyers to be able to fulfil their role and duties effectively and independently, the authorities, including those involved in the administration of justice, must ensure that lawyers are able to discharge their functions “without any restrictions, influences, inducements, pressures,

<sup>9</sup> UN Basic Principles on the Role of Lawyers, principle 15.

<sup>10</sup> UN Basic Principles on the Role of Lawyers, principles 1 and 2; Singhvi Declaration, para. 76.

<sup>11</sup> Singhvi Declaration, para. 83; IBA Standards for the Independence of the Legal Profession, para. 6; See also: UN Basic Principles, principle 16 (a) according to which governments should ensure that lawyers “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference”; 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>12</sup> Basic Principles on the Role of Lawyers, principle 12; Commentary on IBA International Principles on Conduct for the Legal Profession, para. 1; *Sialkowska v. Poland*, ECtHR, Application no. 8932/05, Judgment of 22 March 2007, para. 111; *Morice v. France*, ECtHR, Application no. 29369/10, Judgment of 23 April 2015, para. 135.

<sup>13</sup> See, for example, UN Basic Principles on the Role of Lawyers, principles 16 to 22; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, para. 16 and principle 36.

<sup>14</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>15</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>16</sup> Commentary on IBA International Principles on Conduct for the Legal Profession, para. 1.

<sup>17</sup> As implied by: Singhvi Declaration, paras. 74, 75, 85 and 90. UN Basic Principles on the Role of Lawyers, principles 14, 16 and 17; Commentary on IBA International Principles on Conduct for the Legal Profession Adopted by the International Bar Association at the Warsaw Council Meeting 28 May 2011, para. 1.2.

threats or interference, direct or indirect, from any quarter or for any reason".<sup>18</sup>

In this regard the UN Basic Principles provide that governments must guarantee that lawyers: "(a) are able to perform all of their professional functions without intimidation, 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>19</sup> The Basic Principles require the authorities to ensure adequate protection for lawyers threatened as a result of discharging their duties, and stipulate that lawyers shall not be identified with their clients or their clients' interests as a result of discharging their duties.<sup>20</sup>

As noted in the Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, States should take all necessary measures "... 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, in particular in the light of the relevant provisions of the European Convention on Human Rights."<sup>21</sup>

The Singhvi Declaration and the *IBA Standards for the Independence of the Legal Profession* assert that "[n]o lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause."<sup>22</sup> Furthermore, "[l]awyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including: ... the right to travel and to consult with their clients freely both within their own country and abroad ... ."<sup>23</sup>

**The intervener submits that in the application of the Convention rights in cases of restrictions on the rights of lawyers related to the exercise of their profession, including those under Articles 11 ECHR, Article 13 ECHR, Article 1 of Protocol 1 and Article 2.2 of Protocol 4, States must exercise their particular responsibilities to ensure that lawyers, including those providing legal services through NGOs, are free from harassment or improper interference, direct or indirect, in their work.**

### **III. Application of article 34 to the impairment of the exercise of the right of petition through interference with lawyers' activities**

#### **1. The ability to communicate freely with the Court**

As this Court has emphasised, the provision concerning the right of individual application under article 34 ECHR is one of the fundamental guarantees of the

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<sup>18</sup> Singhvi Declaration, para. 75; see also UN Basic Principles on the Role of Lawyers, principle 16; UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (2007), para. 34.

<sup>19</sup> UN Basic Principles on the Role of Lawyers, principle 16.

<sup>20</sup> Ibid., principles 17 and 18.

<sup>21</sup> Recommendation No. R(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer, principle I.1.

<sup>22</sup> Singhvi Declaration, article 85; IBA Standards for the Independence of the Legal Profession, article 8.

<sup>23</sup> Singhvi Declaration, article 91; IBA Standards for the Independence of the Legal Profession, article 13.

effectiveness of the Convention system of human rights protection.<sup>24</sup> In light of this, and in order to ensure effective access to the Court, article 34 requires that States must "refrain from any act or omission that may hinder the effective exercise of the right to individual application".<sup>25</sup>

This obligation precludes any interference with the individual's right to effectively present and pursue his or her complaint before the Court. In this context, it has been affirmed that it is "of the utmost importance for the effective operation of the system of individual application ... that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints."<sup>26</sup>

## **2. Acts or omissions leading to a hindrance of the right of petition in the meaning of article 34, second sentence**

It is well established that, in accordance with article 34, communication with the Court must be free from pressure from national authorities; with 'pressure' including "not only direct coercion and flagrant acts of intimidation against actual or potential applicants, members of their family or their legal representatives, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy"<sup>27</sup> or "having a 'chilling effect' on the exercise of the right of individual petition of applicants and their representatives."<sup>28</sup>

Indeed, as this Court held, "[s]hould a government's actions make it more difficult for an individual to exercise his right of petition, this amounts to "hindering" his rights under Article 34 ... The intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the Convention was complied with; what matters is whether the situation created as a result of the authorities' act or omission conforms to Article 34."<sup>29</sup>

Lawyers or other legal representatives play a crucial role in facilitating an individual's access to an effective remedy on the national and international level. Indeed, 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>30</sup> The UN Basic Principles on the Role of Lawyers make clear that the adequate protection of human rights "requires that all persons have effective access to legal services provided by an independent legal profession".<sup>31</sup>

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<sup>24</sup> *Mamatkulov and Askarov v. Turkey*, ECtHR [GC], Application nos. 46827/99 and 46951/99, Judgment of 4 February 2005, para. 100.

<sup>25</sup> *Khloyev v. Russia*, ECtHR, Application no. 46404/13, Judgment of 5 February 2015, para. 59.

<sup>26</sup> *Mamatkulov and Askarov v. Turkey*, op cit, para 102; see also *Akdivar and Others v. Turkey*, op cit, para 105; *Campbell and Others v. UK*, ECtHR, Application no. 13590/88, Judgment of 25 March 1992, paras. 55; *Akdivar and Others v. Turkey*, ECtHR, Application no. 21893/93, Judgment of 16 September 1996, para. 101, where applicants were approached in absence of their legal representatives, questioned as to the status or their filing of a complaint and made sign respective declarations.

<sup>27</sup> *Mamatkulov and Askarov v. Turkey*, op cit, para 102; *Kurt v. Turkey*, ECtHR, Application no. 24276/94, Judgment of 25 May 1998 paras. 159; *Akdivar and Others v. Turkey*, ECtHR, Application no. 21893/93, Judgment of 16 September 1996, para. 105.

<sup>28</sup> *Rasul Jafarov v. Azerbaijan*, ECtHR, Application no. 69981/14, para. 177. See also, among others, *Hilal Mammadov v. Azerbaijan*, ECtHR, Application no. 81553/12, paras 115-126.

<sup>29</sup> *Rasul Jafarov v. Azerbaijan*, ECtHR, Application no. 69981/14, para. 178. See also, among others, *Hilal Mammadov v. Azerbaijan*, ECtHR, Application no. 81553/12, paras 115-126.

<sup>30</sup> *Annagi Hajibeyli v. Azerbaijan*, ECtHR, Application no. 2204/11, para. 68.

<sup>31</sup> UN Basic Principles on the Role of Lawyers, preamble and principles 1 and 2.

The important role of lawyers in ensuring the effective exercise of the right of petition to the Court is reflected in the Court's jurisprudence in respect of conduct directed at the lawyers or legal representatives of applicants, that was found to discourage or impair the pursuance of an individual's right of petition. Examples of actions found to breach Article 34 include the institution of criminal proceedings against a lawyer involved in the preparation of an application to the Commission<sup>32</sup> as well as the threat of the institution of criminal proceedings against an applicant's lawyer.<sup>33</sup> This Court has made a similar finding where disciplinary proceedings were instituted against applicants' lawyers with regard to the submission of information to the Court.<sup>34</sup> The Court has also found a police inquiry into disbursements made from the applicant to her representative before the Court and the translator of her correspondence with the Court, to amount to a hindrance to the exercise of the right of petition.<sup>35</sup> The seizing of an applicant's file from his or her lawyer's office has also been repeatedly found to be an undue interference with the right to application under article 34, irrespective of whether or not the act itself had any practical impact on the case.<sup>36</sup>

This jurisprudence is re-enforced by international standards, in particular 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* (Declaration on Human Rights Defenders). The Declaration affirms that everyone who acts in the exercise of human rights and fundamental freedoms, including their promotion and protection, has the right to "unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms."<sup>37</sup> The UN Declaration also affirms that "[e]veryone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means."<sup>38</sup>

Violations of article 34 may arise from cases of indirect as well as direct coercion.<sup>39</sup> To determine whether acts that are not directly related "to [a lawyer's] role in the Strasbourg proceedings, at least not formally",<sup>40</sup> fall within the scope of article 34, relevant factors include an assessment of the "real intent of the authorities in the situation complained of".<sup>41</sup> To determine the real intent of the authorities' acts, the Court has considered "the specific role played" by the lawyers, especially those active in the proceedings before the Court itself.<sup>42</sup> In *Khodorkovsky and Lebedev*, the Court found sufficient to establish a violation of article 34 that the measures taken had been primarily, even if not exclusively, directed at intimidating the first applicant's lawyers.

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<sup>32</sup> *Sarli v. Turkey*, ECtHR, Application no. 24490/94, Judgment of 22 May 2001, paras. 85-86.

<sup>33</sup> *Kurt v. Turkey*, op cit, paras. 158, 164 and 165.

<sup>34</sup> *McShane v. UK*, ECtHR, Application no. 43290/98, Judgment of 28 May 2002, para. 151.

<sup>35</sup> *Fedotova v. Russia*, ECtHR, Application no. 73225/01, Judgment of 13 April 2006, paras. 45-51.

<sup>36</sup> *Annagi Hajibeyli v. Azerbaijan*, ECtHR, Application no. 2204/11, para. 68; *Shukurov v. Azerbaijan*, ECtHR, Application no. 37614/11, para. 24; *Khodorkovsky and Lebedev v. Russia*, ECtHR, Application nos. 11082/06 and 13772/05, Judgment of 25 July 2013, paras. 916-923.

<sup>37</sup> UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), Doc. No. A/RES/53/144 of 8 March 1999, article 9, paras. 1 and 4.

<sup>38</sup> UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, article 13.

<sup>39</sup> *Mamatkulov and Askarov v. Turkey*, op cit, para. 102; *Kurt v. Turkey*, op cit, paras. 159f; *Akdivar and Others v. Turkey*, op cit, para. 105.

<sup>40</sup> *Khodorkovsky and Lebedev v. Russia*, op cit, para. 929.

<sup>41</sup> *Ibid.*, para. 929.

<sup>42</sup> *Khodorkovsky and Lebedev v. Russia*, op cit, para. 930 to 933.

This points toward the high level of scrutiny that is appropriate when examining the harassment or intimidation of lawyers.<sup>43</sup>

In addition to the intent of State authorities, the actual effects such measures have on an applicant's case before the Court have to be taken into account.<sup>44</sup> Any impact which is not "negligible" is likely to lead to interference with the right of individual petition, in violation of article 34.<sup>45</sup>

#### **4. Relevance of the National Context**

In assessing the impact of any acts by the authorities which may impair the applicant's effective exercise of the right to individual application account should be taken of the national context. The Court has recognised the importance of the factual situation at national level in making such assessments, as pointed to in *Akdivar and Others*<sup>46</sup> and in *Sisojeva and Others*.<sup>47</sup> In *Khodorkovsky and Lebedev*, the Court referred to the wider national context, finding a violation of article 34 in light of the fact that the particular difficulties faced by the "applicant's Strasbourg lawyers were to be seen in the broader context of the consistent harassment of the first applicant's lawyers and the manifest disregard the authorities had shown for lawyer/client confidentiality."<sup>48</sup> In this light, the interveners wish to draw the Court's attention to the current situation in Azerbaijan identified by various credible sources expressing growing concern at the treatment of human rights defenders, including lawyers. The ICJ has itself analysed the situation of lawyers in Azerbaijan in its report *Defendless Defenders*,<sup>49</sup> and this issue is further elaborated on in section IV of this intervention concerning article 18 ECHR.<sup>50</sup>

It has also been widely recognised that action by national authorities that affects individual petition, including action against the applicant's lawyer, may also have a wider impact on access to the European Court of Human Rights by applicants in the country concerned<sup>51</sup> and may "have a chilling effect on the exercise of the right of individual petition by applicants and their representatives."<sup>52</sup> It is submitted that this chilling effect should be considered in light of the particular national context in every case.

The ICJ refers to the recent assessment made by the Court under article 18 ECHR in the case of *Aliyev v. Azerbaijan*, where it determined that

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<sup>43</sup> *Yuditskaya and Others v. Russia*, ECtHR, Application no. 5678/06, Judgment of 12 February 2015, para. 27.

<sup>44</sup> *Khodorkovsky and Lebedev v. Russia*, op cit, para. 933.

<sup>45</sup> *Khodorkovsky and Lebedev v. Russia*, op cit, para. 933.

<sup>46</sup> *Akdivar and Others v. Turkey*, op cit, para. 105; *Kurt v. Turkey*, op cit, para. 160.

<sup>47</sup> *Sisojeva and Others v. Latvia*, ECtHR [GC], Application no. 60654/00, Judgment (striking out) of 15 January 2007, para. 116.

<sup>48</sup> *Khodorkovsky and Lebedev v. Russia*, op cit, para. 923.

<sup>49</sup> ICJ, *Defendless Defenders: Systemic Problems in the Legal Profession of Azerbaijan*, 2016, available at <https://www.icj.org/azerbaijan-the-independence-and-role-of-lawyers-must-be-respected-icj-report-says/>

<sup>50</sup> See for example, PACE Monitoring Committee, draft resolution 'The functioning of democratic institutions in Azerbaijan' to be discussed at the Assembly on 22-26 June 2015 (accessible via <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5631&lang=2&cat=3>), paras. 8 and 10, inter alia; See further concerns voiced by Council of Europe Commissioner for Human Rights, Nils Muižnieks, in his third party intervention before the Court in the case of *Aliyev v. Azerbaijan* (Application no. 68762/14), of 16 March 2015; Statement of UN Special rapporteur on the situation of human rights defenders, Michel Forst, 'Azerbaijani activists must be freed before the Baku 2015 games', on 2 June 2015; Joint statement of UN Special Rapporteur on the situation of human rights defenders, Michel Forst, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 'Persecution of rights activists must stop – UN experts call on the Government of Azerbaijan', on 19 August 2014; Amnesty International, 'Azerbaijan: Guilty of defending rights: Azerbaijan's human rights defenders and activists behind bars', report of March 2015.

<sup>51</sup> *McShane v. UK*, ECtHR, Application no. 43290/98, Judgment of 28 May 2002, para. 151.

<sup>52</sup> *McShane v. UK*, op cit, para. 151; see also *Sarli v. Turkey*, op cit, para. 85.

*"the general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding cannot simply be ignored in a case like the present one, where such a situation has led to an NGO activist being prosecuted for an alleged failure to comply with legal formalities of an administrative nature while carrying out his work ... . The Court reiterates that the way in which national legislation enshrines the freedom of association and its practical application by the authorities reveal the state of democracy in the country concerned ... . It goes without saying that, while the States may have legitimate reasons to monitor financial operations in accordance with international law with a view to preventing money laundering and terrorism financing, the ability of an association to receive and use funding in order to be able to promote and defend its cause constitutes an integral part of the right to freedom of association."*<sup>53</sup>

The Court further stressed that "[a]s a result of the *de facto* criminalisation of his activities and the measures taken against him in this context, which, as the Court has found above, did not have any legitimate purpose, the applicant was prevented from conducting his NGO activity in any meaningful way. Moreover, the Court cannot lose sight of the chilling effect of those measures on the civil society at large, whose members often act collectively within NGOs and who, for fear of prosecution, may be discouraged from continuing their work of promoting and defending human rights."<sup>54</sup>

## **5. Conclusion**

**The ICJ therefore submits that, in light of international standards on the role of lawyers and this Court's own jurisprudence and taking into account the central role of lawyers, including those providing legal services through NGOs, in ensuring access to justice and effective remedies for violations of the Convention rights at national and international levels, application of Article 34 should entail especially strict scrutiny of any interference with the work of an applicant's representatives. Consideration of any interference with the work of lawyers representing applicants to the Court should be informed by the particular national context in the relevant Contracting Party in the case before the Court, as well as the chilling effect which the action may have on application to the Court in respect of the relevant Member State.**

## **IV. The ICJ findings on harassment of lawyers in Azerbaijan 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>55</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>56</sup> or where it is done for

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<sup>53</sup> *Aliyev v. Azerbaijan*, ECtHR, Applications nos. 68762/14 and 71200/14, para.212.

<sup>54</sup> *Ibid.*, para.213.

<sup>55</sup> *Tchankotadze v. Georgia*, ECtHR, Application No. 15256/05, Judgment of 21 June 2016, para. 113.

<sup>56</sup> *Merabishvili v. Georgia*, ECtHR, Application No. 72508/13, Judgment of 28 November 2017, para. 292.

such non prescribed purpose combined with other purposes.<sup>57</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>58</sup>

More precisely, the Court indicated that “[w]hich purpose is predominant in a given case depends on all the circumstances. In assessing that consideration, 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>59</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>60</sup> of the violation. Rather, it is 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>61</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 stressed 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>62</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>63</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 has 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

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, para. 305.

<sup>59</sup> *Ibid.*, para. 307

<sup>60</sup> *Ibid.*, para. 316.

<sup>61</sup> *Ibid.*, para. 317.

<sup>62</sup> *Rasul Jafarov*, paras. 159-160.

<sup>63</sup> *Case of Rasul Jafarov v. Azerbaijan*, ECtHR, Application No. 69981/14, Judgment of 17 March 2016, paras. 159-160.

that arrests of civil society activists for ordinary criminal offences in Azerbaijan had the unique purpose of curtailing their human rights activities.<sup>64</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 Court also took into 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>65</sup>

The ICJ, through findings made during and following its 2016 mission and its continued monitoring of the situation of Azerbaijan lawyers in 2018, has provided objective documentation of the fact that in Azerbaijan, the legal profession lacks independence; and that 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>66</sup>

As highlighted above, this Court has also found in *Aliyev v Azerbaijan* that the freezing of assets of NGOs, including - and especially - those led by lawyers representing clients before the European Court of Human Rights - were part of a general tendency of repressing the freedom of association and the professional activities of this group of lawyers. It specifically found that "the totality of the above circumstances – specifically, the applicant's status as a lawyer representing applicants before the Convention institutions, the nature and substance of the charges brought against him, the statements made by public officials, the arbitrary manner in which the search and seizure took place, the general context of the legislative regulation of NGO activity, the repercussions on the applicant's right to freedom of association and the general situation concerning human-rights activists in the country – indicates that the authorities' actions were driven by improper reasons and the actual purpose of the impugned measures was to silence and to punish the applicant for his activities in the area of human rights as well as to prevent him from continuing those activities ... ." <sup>67</sup> The Court in that case found unnecessary to examine separately the claims under article 11 ECHR, because it had already found violations of articles 5, 8 and 18 because of the same facts.<sup>68</sup>

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<sup>64</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>65</sup> *Aliyev v. Azerbaijan*, ECtHR, Applications nos. 68762/14 and 71200/14, Judgment of 20 September 2018, para. 208.

<sup>66</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>67</sup> *Aliyev v. Azerbaijan*, *op. cit.*, para.215.

<sup>68</sup> *Ibid.*, para.219.

The ICJ notes that, since the publication of its report in September 2016, the UN Human Rights Committee, in assessing the compliance of Azerbaijan with its obligations under articles 2 and 14 of the International Covenant on Civil and Political Rights, 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>69</sup> The situation of lawyers has not changed with regard to the abuse of disciplinary proceedings to unduly restrict their freedom of expression. Recently, for example, on 23 April 2018, lawyers Asabali Mustafayev and Nemat Karimli have been suspended for having exercised their right to freedom of expression.<sup>70</sup> Other cases have been documented during the last year.<sup>71</sup>

The Council of Europe's Commissioner for Human Rights has recently brought to the attention of this Court her conclusion that "the prosecutions of human rights defenders and prominent journalists in Azerbaijan constitute reprisals against those who have co-operated with the Council of Europe or other organisations and denounced human rights violations in the country."<sup>72</sup> She concluded that "[t]here is a clear pattern of repression in Azerbaijan against those expressing dissent or criticism of the authorities. This concerns human rights defenders, but also journalists, bloggers and other activists, who may face a variety of criminal charges which defy credibility. Such charges are largely seen as an attempt to silence the persons concerned and are closely linked to the legitimate exercise by them of their right to freedom of expression."<sup>73</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 the right to freedom of association of lawyers, particularly those representing applicants before this Court, under articles 11 and 34 ECHR. In the great majority of cases assessed by ICJ, it appears that the motives behind the disbarment were uniquely the arbitrary restriction of legitimate criticism of public authorities or institutions and/or of their work in defence of or in their role as human rights defenders.**

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<sup>69</sup> Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/4 (2016), para. 28.

<sup>70</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>71</sup> ICJ: *Azerbaijan: briefing paper on new legislation restricting court representation by lawyers*. 2017, available at <https://www.icj.org/wp-content/uploads/2017/12/Azerbaijan-legalsubmission-accessstoalawyer-2017-eng.pdf>;

<sup>72</sup> CoE Commissioner for Human Rights, *Third Party Intervention in Emin Huseynov v. Azerbaijan*, CoE Doc.: CommDH(2018)23, 28 September 2018, para. 19.

<sup>73</sup> CoE Commissioner for Human Rights, *Third Party Intervention in Emin Huseynov v. Azerbaijan*, para. 53.