

Amicus Curiae

Inter-American Court of Human Rights

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Members of José Alvear Restrepo Lawyers' Collective (CCAJAR) v. Colombia

The case and rationale for submission

1. The Law Society has submitted an Amicus Curiae brief in this case, in which the lawyers' collective and former members of that collective (as separate applicants) argue that Colombia has violated their rights, as well as their family members' rights.
2. On 4 May 2019, the Inter-American Commission on Human Rights (IACH) concluded that Colombia had violated the following rights, as alleged by applicants: right to life, right to physical integrity, right to procedural guarantees, right to protection of honour and dignity, right to freedom of expression, right to freedom of assembly, rights of the child, right to freedom of movement and residence, and right to judicial protection. On 8 July 2020, the IACH referred the case to the Inter-American Court of Human Rights (IACtHR), not satisfied with compliance by Colombia with the recommendations it had made. The case is currently before the IACtHR, pending judgment.
3. The Law Society decided to submit an Amicus brief in this case for the following three reasons. First, this is the first case in which the IACtHR has an opportunity to solidify the principle of independence of the legal profession in its case-law (understood as the ability of lawyers to practise their profession freely, without undue interference). The IACtHR has established case law on judicial independence (*Apitz Barbera and others v. Venezuela*; *Reveron Trujillo v. Venezuela*; *Lopez Lone and others v. Honduras*). A case on prosecutorial independence is currently pending judgment (*Nissen Pessolani v. Paraguay*). It has not yet explicitly dealt with the independence of lawyers, although it has touched upon it indirectly in case law on right to a defence and other fair trial rights.
4. Second, the American Convention on Human Rights (ACHR) is the only treaty which explicitly includes a reference to lawyer-client confidentiality, but case law on this right is lacking (as opposed to the European Court of Human Rights' -ECtHR- elaborate case law interpreting article 6 and 8 ECHR to include such a right, even if it is not included in the European Convention on Human Rights – ECHR). Such case law is especially welcome since the legal profession in Colombia, and the wider region, is under increasing attack for carrying out its profession legitimately. The ECtHR, as well as the UN Human Rights Committee and African Commission on Human and Peoples' Rights (ACHPR) have interpreted the principle of the independence of the legal profession and relevant elements of fair trial rights that directly affect lawyers in their respective case law. This Amicus brief sets out some of that case law so that the IACtHR can draw on it in elaborating its own considerations.

5. Third, the applicants in this case and the Commission have mainly focused – as is usual in Colombia and Latin America – on the applicants being human rights defenders. Although they undoubtedly are, considering their professional activities, it should not be overlooked that they are not only human rights defenders but also *lawyers*. In fact, their profession is what has caused the alleged violations committed against them. They are lawyers who are hindered in carrying out their profession because of the cases they work on or the clients they represent. The applicants represent or have represented victims of human rights violations, many committed by the State or by non-State actors with acquiescence of the State (as concluded in various domestic judgments).
6. The fact that applicants are lawyers is important for two reasons: (i) legally, because – for example – the right to private life is impacted differently when lawyers’ communications are intercepted and their homes and offices searched (constituting a possible violation of the right to lawyer-client confidentiality), and (ii) attacks on lawyers do not only affect those lawyers and their families but also their clients, and their right to a fair trial and access to justice. This is precisely the reason why violations against lawyers are committed: because it creates a chilling effect where victims of human rights violations are prevented from accessing justice, because no one is willing to take the risk of legally representing them. The Amicus brief is intended to elucidate this point so that the IACtHR will take the undermining of the rule of law through attacks on the legal profession into consideration in its assessment of alleged violations, as well as in ordering reparations.

Summary of the Amicus brief

7. The introduction refers to the Law Society and its public interest mandate, as well as the reasons for making the submission (as described above). This case presents some questions regarding the international legal obligations of States, including Colombia, regarding the free exercise by lawyers of their profession as important actors in sustaining the rule of law. This Amicus brief does not refer to the merits of the case or arguments of the parties, nor to elements that are mostly factual in nature or regard domestic law.
8. This Amicus refers to: (A) the international legal system protecting lawyers, (B) the principle of independence of the legal profession, (C) the right to legal representation and to prepare a defence, (D) the right to lawyer-client confidentiality (subdivided in: i) introduction to the principle, (ii) ECtHR’s case law on lawyer client confidentiality, (iii) professional confidentiality in legislation of Colombia and other countries worldwide, (iv) ECtHR’s case law on surveillance and national security, and (v) ECtHR’s case law on collection and storage of personal data.
9. Reference is made to the Law Society’s Lawyers at Risk programme and data compiled and analysed through its Intervention Tracker of violations committed against lawyers.



10. Apart from three (geographic) levels of rights: international, regional, and domestic, the following three levels of rights of lawyers are distinguished: rights they hold as individuals, as lawyers (while exercising their profession or by virtue of being a lawyer, and as human rights defenders (lawyers who work on human rights related matters).
11. This Amicus focuses on the rights that lawyers hold *as lawyers*. It then refers to some examples of these rights, as well as some rights of lawyers as human rights defenders. It is noted that, although all lawyers to some extent ensure the enjoyment of rights of their clients, not all lawyers can be regarded as human rights defenders only by virtue of being a lawyer.
12. The principle of independence of the legal profession is explained with reference to the UN Basic Principles on the Role of Lawyers, Recommendation R(2000) 21 of the Committee of Ministers of the Council of Europe (noting the ongoing work on the European Convention on the Profession of Lawyer), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of the ACHPR, and others. Reference is also made to case law of the UN Human Rights Committee (*Hammel v. Madagascar*), ECtHR (*Elçi and others v. Turkey*), and ACHPR (*Patrick Okiring and Agupio Samson v. Republic of Uganda*, for example).
13. Attacks on lawyers not only affect lawyers but also their clients. Moreover, such attacks prevent accountability and the establishment of responsibility for human rights violations. This precisely seems to be the objective of attacks against lawyers and other members of the legal profession.
14. Reference is made to the IACtHR's case law on the right to legal representation and to prepare a defence (*Ruano Torres and others v. El Salvador*, for example). It also mentions the IACtHR's *Advisory Opinion OC-11/90*, in which the IACtHR established that "when a generalised fear of lawyers exists to provide legal assistance to a person who needs it, and that person as a consequence cannot obtain [such legal representation]" the person is exempt from the requirement of having to exhaust domestic remedies. In addition, reference is made to ECtHR and ACHPR on the right to legal representation and a defence.
15. Such a generalised fear can exist due to threats and intimidation, but also through public statements made by high officials in which often lawyers are identified with their clients or their clients' causes. Such expressions not only increase risk for lawyers, but also erode public trust in the legal profession and the justice system, which undermines the rule of law and democracy. When such statements are made during criminal proceedings against lawyers, the principle of presumption of innocence may be violated and, with it, the right to a fair trial.
16. The principle of lawyer-client confidentiality takes different forms in different jurisdictions but usually is regarded as a right of the client and an obligation of the lawyer (and sometimes as a right of the lawyer). This principle is recognised in almost all jurisdictions and, even in jurisdictions where it is not – such as Japan – Law Society

research shows that case law in that jurisdiction in practice shows an acceptance of this principle in certain cases.¹

17. The ECtHR's case law shows that this is a right included within article 6 ECHR (right to a fair trial) and article 8 ECHR (right to private life). The objective of this principle is not to protect the client or the lawyer, but the integrity of the justice system itself. Respect for this principle is essential for the administration of justice and for public trust in the rule of law. Limitations on this right are interpreted strictly and can arise in the following circumstances: (i) a lawyer is authorised to divulge information, (ii) a client divulges information, or (iii) a tribunal or similar authority orders to divulge information covered by this principle. In most cases, a Court order is needed to divulge privileged information, which also means that the lawyer and their client will be able to oppose such an order before it is issued.
18. Only article 8(2)(d) of the American Convention explicitly refers to this principle, but the ECtHR's has interpreted articles 6 and 8 of the ECHR to include it. The IACtHR found a violation of this right in *Lopez and others v. Argentina* (due to physical distance between lawyers and their clients) and has referred to it, but finding a violation of other fair trial guarantees, in *Castillo Petruzzi and others v. Peru*.
19. The ECtHR established, for example in *Lanz v. Austria*, that the surveillance of communications between lawyers and clients represents a serious interference with the right to a fair trial and that very weighty reasons are necessary to justify it. Similarly, in *Sakhnovskiy v. Russia*, the ECtHR determined that confidentiality of communications between lawyers and clients can only be restricted in exceptional cases.
20. Most of the ECtHR's case law on lawyer-client confidentiality regards an interpretation of article 8 ECHR, in which more protection is offered to the confidentiality of communications between lawyers and clients than in other cases. The justification given by the ECtHR for this difference is the fundamental role that lawyers play in a democratic society. In many cases, the ECtHR has established that States did not strike the right balance between requirements in the public interest and the protection of the right to private life of lawyers (which includes their professional activities), usually through lack of procedural guarantees, including effective judicial control. Although in many cases the ECtHR has ruled that there was a legitimate objective in limiting the right to private life, the measure that violated lawyer-client confidentiality was disproportionate to such objective. For example, when a court order to search a lawyer's office is too broadly worded.
21. It should be noted that article 8 ECHR is also violated when the measures taken against lawyers result in a chilling effect which prevents them from exercising their profession, affecting their livelihood.

¹ <https://www.lawsociety.org.uk/topics/research/un-basic-principles-on-the-role-of-lawyers>.

22. The Colombian Disciplinary Code for Lawyers and case law of its Constitutional Court, to which the Amicus brief refers, recognise the principle of lawyer-client confidentiality. In Chile, the Supreme Court of Justice has established that such confidentiality is a matter of “public interest”, which ensures due process. The Federal Constitutional Court of Germany ruled that, where a search of a lawyer’s office had taken place in which documents were seized, the right to a defence of the client had been violated, as well as the right of the lawyer to practise his profession freely, his right to private life, his right not to testify, and his right to maintain professional secrecy. The Amicus brief makes further reference to case law on lawyer-client confidentiality in Brazil and South Africa.
23. Regarding surveillance in general, the ECtHR has established that the interception of telephone conversations represents a grave interference in private life and that, when executive power is exercised in secret, the risks of arbitrariness are evident. The ECtHR generally accepts the protection of national security as a legitimate objective of a surveillance measure but has noted that a system of secret surveillance designed to protect national security, also has the potential to erode or destroy such security. Therefore, there should be sufficient safeguards against the abuse that is inherent in any form of surveillance. The ECtHR has also established that States do not have unlimited discretion to use secret surveillance in their fight against terrorism and espionage.
24. The mere collection and storage of personal data by public authorities can violate the right to private life, regardless of use and whether it concerns sensitive information or has affected the victim negatively. The collection of information can sometimes be permitted whereas storage may lead to a violation of the right to private life, especially when it regards information about political opinions of individuals which requires more protection.

Conclusion

25. This Amicus brief concludes by pointing out the opportunity and necessity for the IACtHR to elaborate its case law on the independence of the legal profession and lawyer-client confidentiality. It refers to the international legal obligation of States to ensure that lawyers in their jurisdiction can practise their profession freely, noting that a failure to do so obstructs the administration of - and access to - justice. An attack on a lawyer constitutes an attack on the justice system. A State that does not adequately protect members of the legal profession, or whose authorities are directly or indirectly implicated in hindering lawyers in practising their profession, cannot be considered a State with a functioning rule of law.