

## CCBE response to the open call for input for the 4<sup>th</sup> Council of Europe Summit (Reykjavik 16-17 May 2023)

27/02/2023

### Introduction and Executive Summary

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries and, through them, more than 1 million European lawyers.

The Council of Europe has decided to hold a 4th Summit of Heads of State and Government on 16-17 May 2023 in Reykjavik, Iceland. The Summit strives to ensure that the Council of Europe is fit for purpose to meet current and future challenges as well as the expectations of future generations.

In this context, the Council of Europe has seek the input of all stakeholders with several questions. The CCBE focused its answers on the two questions here below and submitted those via the [online form](#) provided by the Council of Europe.

*What role can the Council of Europe play in ensuring accountability for Russia's aggression against Ukraine?*

Firstly, the Council of Europe should support an **independent and well-functioning justice system in Ukraine** in order to ensure the accountability for Russia's aggression against Ukraine. The CCBE proposes therefore some ways on how this could be achieved.

Secondly, **legal aid schemes** and funds should be put in place by governments to enable lawyers to assist people who fled Ukraine. In addition, the Council of Europe should continue supporting **training for lawyers** to increase the number of lawyers specialised in asylum and immigration law.

*How can the Council of Europe create a framework for efficient action on current and future challenges (for example on issues such as environment and human rights, inequality and digital)?*

- **Rule of law as the "guarantee of guarantees"**: It is crucial to secure the independence and safety of all justice actors, including lawyers and Bars in order to properly defend citizens' rights, including in their actions against the State, to protect lawyers from being identified with their clients, to build trust between lawyers and their clients through the right to consult a lawyer in confidence, to preserve the rule of law, and to fulfil the important and irreplaceable role to prevent the abuse of powers.
- **Rule of law in times of crisis**: Crises and global challenges, including tackling crimes, should not be an excuse for undermining fundamental rights or principles, including access to justice. In this context, the CCBE has serious concerns over the use of surveillance technologies, such as

spyware, targeting lawyers, and where the principle of confidentiality of lawyer-client communications is undermined.

- **Lawyers as guarantors of human rights and the need for a European Convention on the protection of the profession of lawyers:** To provide adequate access to justice for citizens for the protection of their fundamental rights and freedoms, it is essential to ensure that lawyers are able to exercise their profession in complete independence, freedom and security, without prejudice and without hindrance. To achieve this goal, the CCBE calls upon Council of Europe Member States to strongly support the adoption and ratification of a future European Convention on the protection of the profession of lawyer.
- **Effective implementation of the European Convention on Human Rights (ECHR) Machinery:** The CCBE reiterates its proposals addressed towards the national courts, the ECtHR, the Committee of Ministers and to national Bars and Law Societies, to improve the efficiency of the ECHR machinery and address ways to improve the implementation of ECtHR judgements, including the need to address the continuing long delays in the ECHR system, both in the ECtHR and in the supervision of the execution of judgments by the Committee of Minister.
- **EU Accession to the ECHR:** The EU Accession to the ECHR will reinforce the protection of Human Rights in Europe. The CCBE therefore looks forward to a positive conclusion of the ongoing negotiations between the EU and the Council of Europe and will continue to provide its contribution to this end.
- **Effective and fair safeguards in criminal proceedings:** The CCBE believes the time has come to look at additional measures to further promote the principle of mutual recognition and mutual trust. We believe the Council of Europe will share the CCBE's view that an effective area of EU judicial cooperation in criminal matters can only be achieved if fair and necessary safeguards have not been compromised.
- **Asylum and Migration:** Member States must always guarantee the fundamental rights and freedoms of all persons entering their territories or attempting to cross their borders, and thus uphold the full respect for the rule of law in all circumstances, even in time of crisis. Actions and initiatives should therefore be undertaken to ensure that States do not practice pushbacks and collective expulsions that, as confirmed by the ECtHR, are illegal. Additionally, the Council of Europe should further support and encourage Member States to introduce measures that allow migrants to readily access a lawyer, courts and tribunals with the benefit of legal aid and legal representation in order to ensure the right to an effective remedy is guaranteed.
- **Digitalisation of justice and AI:** The CCBE welcomes initiatives to support the digitalisation of judicial procedures, to foster interoperability of different national systems, and to support the uptake of new technologies in the day-to-day functioning of justice systems. However, in order to uphold fair trial rights, such endeavours must always be coupled with sufficient safeguards and due process procedures, including the protection of professional secrecy and legal professional privilege.  
As regards the use of Artificial Intelligence (AI) in the judicial process, if deployed, principles governing the use of AI must be defined and adopted in order to ensure that AI tools are properly adapted to the justice environment, taking into account the principles and procedural architecture underpinning judicial proceedings. It is of paramount importance that the entire

decision-making process remains a human-driven activity and that human judges take full responsibility for all decisions.

- **Environment and Climate Change:** Recognising that, as a key organisation representing the legal profession in Europe and defending the rule of law, fundamental and human rights, the CCBE – together with its member bars – has a role to play in addressing the climate crisis and its consequences, the CCBE welcomes and will continue to follow and contribute, where relevant, to the work of the Council of Europe CDDH Drafting Group on Human Rights and Environment (CDDH-ENV).

## Meeting the challenges of today and tomorrow

### What role can the Council of Europe play in ensuring accountability for Russia’s aggression against Ukraine?

#### **An independent and well-functioning justice system**

In order to ensure the accountability for Russia’s aggression against Ukraine, the Council of Europe should support an independent and well-functioning justice system in Ukraine. It could explore ways and multiply initiatives to provide support to Ukrainian legal professionals in Ukraine – especially lawyers, judges, and prosecutors, who remained in Ukraine. These legal professionals work with Ukrainian victims on the ground and thus, are closest to the witnesses of the Russian atrocities and might collect evidence and testimonies to bring wrongdoers to justice. The Council of Europe could strengthen its support to European legal professionals who can contribute to this work and support their Ukrainian peers. In this regard, the CCBE has already taken action to provide assistance to both the Ukrainian National Nar Association (UNBA), Ukrainian lawyers and citizens through various initiatives<sup>1</sup>.

#### **Legal assistance for migrants**

The Council of Europe could also urge governments to ensure that legal assistance is ensured to people fleeing the war in Ukraine. Although legislation facilitating stay and integration of people fleeing war in Ukraine has been enacted in many countries, many of those persons might still need legal assistance. Therefore, **legal aid schemes and funds** should be put in place by governments to enable lawyers to assist people who fled Ukraine.<sup>2</sup> In addition, the Council of Europe should support **training for lawyers** to increase the number of lawyers specialised in asylum and immigration law. Asylum/Migration HELP eDesks on asylum are a good example of positive actions in this direction. Supporting people fleeing the war in Ukraine is a way to support Ukraine in its fight against Russia’s aggression.

---

<sup>1</sup> See pages 17-20 of CCBE annual 2022:

[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/Publications/EN\\_2022\\_Annual\\_Report.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Publications/EN_2022_Annual_Report.pdf)

<sup>2</sup> See on this topic, the CCBE statement on the application of the Temporary Protection Directive to certain persons displaced by the Russian invasion of Ukraine, available [here](#).

How can the Council of Europe create a framework for efficient action on current and future challenges (for example on issues such as environment and human rights, inequality and digital)?

### **Rule of law as the “guarantee of guarantees”**

As the primary pan-European political community based on respect for human rights and democratic values, the Council of Europe and its Member States should continue their important work strengthening the rule of law and ensuring for the protection of human rights in Europe. In particular, the CCBE condemns any attempts to jeopardise and endanger judicial independence and stresses that the **independence of lawyers and Bars** is unconditionally interlinked with the independence of other actors of the judiciary and is therefore an indispensable part of the independence of the judiciary in general. There is a strong need to develop a clear rule of law understanding that explicitly includes lawyers and recognises their important role in the administration of justice. It is crucial to secure the independence and safety of all justice actors, including lawyers and Bars. The independence of the legal profession is important to properly defend clients, including in their actions against the State, to protect lawyers from being identified with their clients, to build trust between lawyers and their clients through the right to consult a lawyer in confidence, to preserve the rule of law and to fulfil the important and irreplaceable role to prevent the abuse of powers. In this context, a continuous dialogue and cooperation between the European profession of lawyer and the Council of Europe is crucial to achieve these goals and the CCBE very much welcomes the recent MoU of cooperation that was recently signed between the Council of Europe and the CCBE.

### **Rule of law in times of crisis**

The pandemic we have been confronted with has caused numerous Member States countries to invoke a State of Emergency or to grant special powers to their government to contain the pandemic. The CCBE emphasises that it is essential to be vigilant and guard against the abuse of such powers against citizens’ rights. The CCBE stresses the importance of learning from these developments so that the fundamental rights and freedoms of citizens can prevail - even in a crisis situation. The CCBE therefore very much welcomes the initiative taken by the Council of Europe to look at this issue through the creation of the **Drafting Group on Human Rights in situations of crisis (CDDH-SCR)**.

In the context of the CDDH-SCR’s work, the CCBE urges scrutiny of potential risks, such as the excessive concentration of powers in law enforcement, the lack of access to a lawyer/justice, procedural safeguards and equality of arms in judicial proceedings, the non-respect of the presumption of innocence, the targeting of specific minorities, migrants or vulnerable persons, or the limitation of freedom of movement, assembly and expression. The Council of Europe should also endeavour to remind States that some principles should not be undermined or contested based on urgency or crisis situations. In addition, the CEPEJ evaluation report on the efficiency and quality of justice could also measure the resilience of these systems. This would constitute a useful tool to monitor the efforts made by governments to ensure continuity of access to justice in times of crisis.

In this regard, not only public health crises, natural disasters or widespread security threats may place exceptional stress on public administration, creating challenges for the full and effective respect and protection of human rights. Other global challenges may have similar effects, and should also be taken into consideration. **Crises and global challenges should not be an excuse for undermining fundamental rights or principles.** For example, when enacting measures to fight against such global phenomena like money laundering/terrorist financing, or tax evasion, States should be careful to preserve the right to a fair trial or the right to private life. A balanced approach is needed between, on the one hand, tackling crime, and, on the other hand, rights of citizens. For example, when imposing obligations on legal profession in the field of AML, such as reporting obligations, solutions must be

balanced to preserve lawyer-client confidentiality and the independence of lawyers and Bars and thus, their crucial role in the administration of justice.<sup>3</sup>

Moreover, the CCBE has **serious concerns over the use of surveillance technologies**, such as spyware, targeting lawyers. The principle of confidentiality of lawyer-client communications is undermined by the use of sophisticated technical capabilities by private or public entities, such as state bodies. Nowadays, lawyers have no choice but to use modern technology when communicating with clients, courts, lawyer colleagues and others. Yet it appears that such technology is not safe to use, no matter how prudently the lawyer uses it. The CCBE underlines that the erosion of the confidentiality of lawyer-client communications also erodes the trust of a citizen in the administration of justice and the rule of law. Therefore, the CCBE calls upon the Council of Europe to take steps to protect and enhance this principle in view of the use of modern technologies, and ensure that material protected by professional secrecy is out of the scope of surveillance operations. In that regard, the CCBE invites the Council of Europe to take consideration of its recommendations on the protection of fundamental rights in the context of 'national security'<sup>4</sup> as well as on the protection of client confidentiality within the context of surveillance activities<sup>5</sup>.

### **Lawyers as guarantors of human rights and the need for a European Convention on the protection of the profession of lawyers**

Lawyers are the embodiment of human rights as one of the main guarantors of citizens' fundamental rights and freedoms. For the same reason, the legal profession can come under considerable pressure from the executive and legislative powers, as well as sometimes the judiciary, and non-State actors. Harassment, threats, imprisonments, surveillance, hindrances and murders against members of the legal profession continue to occur in several European countries. To provide adequate access to justice for citizens for the protection of their fundamental rights and freedoms, it is essential to ensure that lawyers are able to exercise their profession in complete independence, freedom and security, without prejudice and without hindrance. The CCBE reaffirms its strong support to the work of the Council of Europe in drafting a new legal instrument on the protection of the profession of lawyer, and calls on the Council of Europe Member States to support the adoption of an open binding Convention on the protection of profession of lawyer accompanied by a strong and effective implementation mechanism to create the necessary conditions for effective accountability of States and non-State actors. To achieve this goal, the CCBE calls upon Council of Europe Member States to strongly support the adoption and ratification of a future European Convention on the protection of the profession of lawyer.

### **Effective implementation of the European Convention on Human Rights (ECHR) Machinery**

In addition, recognising the effective protection of human rights as crucial, the CCBE believes that the role of the European Court of Human Rights (ECtHR) as an authoritative guide to national authorities, courts and justice actors, including lawyers, is vital. In this regard, the crucial role of the Committee of Ministers in supervising the effective execution of the ECtHR's judgments is frequently neglected.

Both institutions are undermined by inadequate resources and, in the case of the execution of judgments, a lack of political commitment by Member States. Collaboration between both the ECtHR and the Committee of Ministers with the legal profession is therefore essential to ensure the proper functioning of the ECHR system and thus fully effective protection of human rights. In this regard, the

---

<sup>3</sup> See for example the CCBE position paper on the AML package, available [here](#). In addition, for the topic of tackling aggressive tax arrangements and reporting obligations, see the recent judgment of the Court of Justice of the EU, Case C-694/20, that declared invalid some provisions of directive DAC6 on reporting by lawyers, available [here](#).

<sup>4</sup> [CCBE Recommendations on the protection of fundamental rights in the context of "national security"](#), available [here](#).

<sup>5</sup> [CCBE recommendations on the protection of client confidentiality within the context of surveillance activities](#), available [here](#).

CCBE closely follows and gives its input in the ongoing process to improve the efficiency and impact of the ECtHR. The CCBE has made several proposals primarily intended to improve the efficiency of the ECHR machinery and address ways to improve the implementation of ECtHR judgements. It emphasised the need to address the continuing long delays in the ECHR system, both in the ECtHR and in the supervision of the execution of judgments by the Committee of Ministers. The CCBE proposals are addressed towards the national courts, the ECtHR, the Committee of Ministers, and national Bars and Law Societies. They are directed at accelerating proceedings and making them more transparent in the interests of improving human rights protection in Europe. These proposals can be found here:

- [CCBE Proposals for further reform of the ECHR machinery \(21/05/2021\)](#)
- [CCBE Proposals for reform of the ECHR machinery \(28/06/2019\)](#)

### **EU Accession to the ECHR**

Since the Lisbon Treaty entered into force, the European Union has the right and the possibility to access the ECHR. The CCBE believes that the promotion of the rule of law, human rights, democratic values, and especially, the right of access to justice will find essential and crucial support in the accession of the EU to the ECHR. Indeed, accession will reinforce the protection of human rights by entitling any natural or legal person to lodge an application with the European Court of Human Rights claiming to be the victim of a violation by the EU of the ECHR. The CCBE therefore looks forward to a positive conclusion of the ongoing negotiations between the EU and the Council of Europe, and will continue to provide its contribution to this end.

### **Effective and fair safeguards in criminal proceedings**

In the same line of thought of effective protection of citizens' rights, the CCBE observes that criminal procedures vary enormously across European jurisdictions and this is also true for the level of legal protection offered to suspects in criminal proceedings. Despite the success of the current procedural safeguards at an EU level, the CCBE believes the time has come to look at additional measures to further promote the principle of mutual recognition and mutual trust. We believe the Council of Europe will share the CCBE's view that an effective area of EU judicial cooperation in criminal matters can only be achieved if fair and necessary safeguards have not been compromised. It is therefore important that this issue is considered by the Council of Europe in the context of its work with the European Committee on Crime Problems (CDPC) and its subordinate bodies.

We also believe there is an increasing urgency to address this topic due to issues that will arise in European Public Prosecutor Office (EPPO) proceedings which will impact on the effectiveness, efficiency and fairness of proceedings. It has been recognised by the EPPO that the unique structure and mandate of the EPPO bring about some novel issues where simple adherence to national procedural safeguards will not offer the necessary solutions.

It is hoped that the Council of Europe can look into this issue in order to inject momentum into the assessment of the current measures and the need for additional measures. The CCBE would be pleased to assist in these discussions.

### **Asylum and Migration**

Trust in the Council of Europe is also shaped by the way it addresses Europe's challenges. One of these challenges is migration and asylum, and how Member States are able to guarantee the fundamental rights and freedoms of all persons entering their territories or attempting to cross their borders, and thus uphold the full respect for the rule of law in all circumstances, even in time of crisis.

Migration, whether documented or undocumented, currently poses joint challenges for European states and not simply those on the frontline. Migration is a complex and diverse matter giving rise to concerns and issues across a broad spectrum of rights and law including but not limited to human rights and humanitarian law, criminal law, employment law, family law and administrative law.

The Council of Europe and its Member States must guarantee the rights and dignity of migrants. Whilst it must be recognised that there can undoubtedly be very significant pressure placed on some Member States or some neighbouring countries and their authorities, this cannot be a justification to violate human rights.

Thus, the Council of Europe should ensure that its Member States safeguard the rights of migrants and asylum seekers who find themselves on the European territory or at the borders. It should remind states that they have human rights obligations stemming from the ECHR and the case law of the ECtHR. It should undertake actions to preserve the right to asylum that is also guaranteed by international instruments, such as the Geneva Convention on the Status of Refugees of 1951.

First, actions and initiatives should be undertaken to ensure that **States do not practice pushbacks and collective expulsions** that, as confirmed by the ECtHR, are illegal.<sup>6</sup>

Second, the **right to legal aid** is enshrined in the [European Convention on Human Rights](#) (ECHR) - Article 6 (3)(c) of the Convention guarantees the right to legal assistance where the defendant has insufficient means to pay for legal assistance, and to get free legal “where the interests of justice so require”. This article also enshrines the right to “practical and effective” legal assistance. It allows those who do not have sufficient financial resources to defend themselves or cover the costs of bringing the case to the court. Therefore, the Council of Europe should further support and encourage Member States to introduce measures that allow migrants to readily access a lawyer, courts and tribunals with the benefit of legal aid and legal representation in order to ensure the right to an effective remedy is guaranteed. The increase of migration and mobility of people all over Europe entails the need to protect the refugees’ and migrants’ rights. In view of these developments, it is necessary to foresee and cater for an increasing number of special legal aid applications emanating from migrant and refugee communities. Persons who do not have the financial means to cover the cost of legal advice are denied access to justice and, as a consequence, cannot protect their rights.<sup>7</sup>

The principles of our society, including the rule of law and the protection of fundamental human rights and freedoms, must always prevail over any political or economic consideration, and the protection of our security must not be at the cost of human rights and the rule of law at any time.

### **Digitalisation of justice and AI**

Efforts should be centred around how the digitalisation of justice can benefit society in the long term by focusing on improving the quality of justice from a user perspective. One must remain vigilant that digitalisation efforts stay focused on improving the quality of our justice systems and are not only introduced for achieving efficiency gains or cost savings. The CCBE welcomes initiatives to support the digitalisation of judicial procedures, to foster interoperability of different national systems, and to support the uptake of new technologies in the day-to-day functioning of justice systems. However, in order to **uphold fair trial rights**, such endeavours must always be coupled with sufficient safeguards and due process procedures, including the protection of professional secrecy and legal professional privilege. These safeguards should be ensured in all current and future Council of Europe initiatives on digitalisation of justice. To this end, the CCBE calls for the establishment of a structural dialogue and collaboration among all justice stakeholders, such as Council of Europe institutions and bodies, national Ministries of Justice, judges, councils of the judiciary, court staff, and especially legal

---

<sup>6</sup> Moreover, the CCBE recalls the jurisprudence of the European Court of Human Rights which stipulates that “in order for the State’s obligation under Article 3 of the Convention to be effectively fulfilled, a person seeking international protection must be provided with safeguards against having to return to his or her country of origin before such time as his or her allegations are thoroughly examined.

Therefore, the Court considers that [...] a State cannot deny access to its territory to a person presenting himself or herself at a border checkpoint who alleges that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk”. <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203840%22%5D%7D>

<sup>7</sup> CCBE recommendations on a framework on legal aid in the field of migration and international protection, available [here](#).

practitioners such as lawyers. Such a dialogue could consider the various challenges regarding the digitalisation of justice and offer the necessary intellectual and ethical guidance - not only from the perspective of the administration of justice - but also from a users' and practitioners' point of view.

Furthermore, the CCBE recalls that the use of **Artificial Intelligence** raises many questions, especially with regard to fundamental rights and the rule of law, and thus constitutes a real challenge for both judicial institutions and lawyers<sup>8</sup>. When considering the different possible uses of AI in the judicial process, its introduction within court systems could undermine many of the foundations on which justice is based. Therefore, it is important that, if deployed, AI tools are properly adapted to the justice environment, taking into account the principles and procedural architecture underpinning judicial proceedings. Before AI tools are implemented in judicial systems, the CCBE considers that a set of rules and principles governing the use of AI must be defined and adopted. Furthermore, the CCBE recalls that a fair trial begins with a fair investigation, and that the use of AI by law enforcement authorities must also be assessed having regard to the uses that may be made of the outputs of AI systems during any subsequent trial. It is of paramount importance that the entire decision-making process remains a human-driven activity and that human judges take full responsibility for all decisions. A right to a human judge should be guaranteed at all stages of the proceedings. The CCBE encourages the Council of Europe to ensure these principles in the development of a Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law.

### **Environment and Climate Change**

The protection of the environment and the pressing challenges posed by the current climate crisis directly affect the fundamental rights and freedoms of citizens, as well as the right of access to justice.

The CCBE acknowledges that Bars and Law Societies play an essential role in ensuring that lawyers fulfil their function of strengthening and upholding the rule of law, human rights and access to justice. The possibility for everyone to be advised, defended and represented in legal proceedings where their freedoms are at stake is a fundamental right in the European legal sphere. The legal profession plays a crucial role in the realisation of this fundamental right. This important role of the lawyer also means that lawyers shall not be identified with their clients or client's causes.

It also acknowledges that lawyers have played a crucial role, through both climate change litigation and legal advice, in ensuring fundamental positive social changes, and that they can play a leading role in mitigating climate change to avert its worst effects.

As a key organisation representing the legal profession in Europe and defending the rule of law, fundamental and human rights, the CCBE – together with its member bars – has a role to play in addressing the climate crisis and its consequences. Furthermore, a strong commitment from the legal profession to engage with current and future legislative and policymaking efforts to address the climate crisis is crucial, and should be further promoted. In this context, the CCBE welcomes and will continue to follow and contribute, where relevant, to the work of the Council of Europe CDDH Drafting Group on Human Rights and Environment (CDDH-ENV).

---

<sup>8</sup> CCBE considerations on the legal aspects of Artificial Intelligence are available [here](#).