

Flygtningenævnets baggrundsmateriale

Bilagsnr.:	388
Land:	Ukraine
Kilde:	ICJ
Titel:	Between the Rock and the Anvil: Lawyers under Attack in Ukraine
Udgivet:	april 2020
Optaget på baggrundsmaterialet:	7. oktober 2020

Between the Rock and the Anvil: Lawyers under Attack in Ukraine

ICJ Mission Report
April 2020



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Introduction

This report addresses the attacks on lawyers in Ukraine, including killings, physical attacks, threats, harassment, abusive legal proceedings, and obstruction of their work. Such incidents have occurred regularly in Ukraine in recent years and have had a damaging impact on lawyers' ability to protect human rights and to act independently and effectively in representing their clients.

The report analyses the security and independence of lawyers in Ukraine in practice and the consequences for the rule of law and protection of human rights, as well as Ukrainian legislation governing the legal profession. It includes recommendations for addressing the systemic problems behind these attacks, and for ensuring that lawyers can carry out their essential work without being identified with their clients, and without attack or hindrance. The report includes five chapters and is organized as follows: Chapter one is dedicated to the issues of the institutional organization and self-governance of the legal profession and the disciplinary procedure; Chapter two describes security of lawyers with reference to individual cases of attacks on lawyers; Chapters three and four address the persecution of lawyers through legal mechanisms and the problems lawyers face in protecting human rights, respectively; and Chapter five gives an overview of the work of lawyers in uncontrolled territories. The report ends with conclusions and recommendations.

ICJ mission to Ukraine

As part of the research for this report, the International Commission of Jurists (ICJ) carried out a one-week mission to Ukraine from 4 to 8 March 2019 to assess the situation of security and independence of lawyers. The mission aimed to study the problem of attacks on lawyers in Ukraine as well as the factors leading to the lack of security of lawyers. It gathered information concerning physical attacks, harassment, criminal prosecution and other undue interference with the work of lawyers and examined related systemic issues that impede the functioning of the legal profession in Ukraine.

During the mission, the ICJ met with a range of relevant actors—individual lawyers and legal experts, non-governmental and State representatives, human rights defenders and journalists who cover legal issues. The ICJ benefited significantly from meeting with a number of Inter-Governmental Organizations (IGOs) which provided valuable insights based on their work in the country. The mission was carried out in coordination with the Ukrainian National Bar Association (UNBA), which plays a key role in monitoring cases of attacks and harassment of lawyers or other interference with their work.

The mission included Róisín Pillay, Director of the ICJ Europe and Central Asia Programme, Temur Shakirov, Senior Legal Adviser of the ICJ Europe and Central Asia Programme, Monica Bremer, Acting Head of the Amsterdam Bar Association and Chair of the International Relations Committee, Josef Alkatout, Member of the Geneva Bar Association, and Mariia Rudko, Legal Consultant for the Europe and Central Asia Programme.

The mission discussed a wide range of issues in the functioning of the legal profession: cases of attacks on lawyers, the ability of the legal profession to function independently, and disciplinary proceedings against lawyers and others. The primary focus of the mission was to examine the situation of the security of lawyers, however relevant institutional issues concerning the Bar Association as well as recent legislative developments were also discussed during the mission and are considered in this report.

The Mission spent 5 days in Kyiv, during which it gathered information principally concerning the areas under the effective control of the Government of Ukraine. The report includes some limited information about the situation of lawyers in Donetsk and Luhansk, where the security situation does not allow access. It does not address

questions related to lawyers in Crimea where the security situation is different from that in the areas affected by armed conflict.

Throughout the mission attention was given to institutional independence of the Bar Association, and in particular, Draft Law No. 9055 on the reform of the Bar Association which at the time of the mission was being discussed in the Parliament with a high probability of being adopted. By the time of publication of this report, the law had been withdrawn. Yet, as institutional reforms of the wider justice system are continuing,¹ future reforms may affect the legal profession, including potentially issues related to its self-governance and independence. The report therefore addresses the previous reform proposals discussed during the ICJ mission, which may remain relevant to the independence of lawyers in Ukraine.

The ICJ had previously conducted a research mission to Ukraine in 2013 to assess the effect of the reform of the Bar Association of 2012 on the independence of the legal profession in Ukraine and subsequently published a report.² The 2013 visit responded to concerns about numerous disciplinary proceedings against Ukrainian lawyers that had led to the termination or suspension of their status as a lawyer.³ Since then, the ICJ has also monitored the major developments in the legal profession in Ukraine, and intervened in specific cases of attacks against lawyers⁴ and judges.⁵ This engagement served as a basis for understanding the national context prior to undertaking the present research.

The ICJ is grateful to all those who met with and shared their insights with the mission, and expresses its appreciation for the readiness to facilitate the ICJ mission demonstrated by its interlocutors. The ICJ is grateful to the Embassy of the Netherlands in Ukraine, which supports the ICJ's programme of work on the independence of lawyers in Ukraine.

National context

Ukraine became an independent State as a result of the break of the Soviet Union. The 2004 and 2014 "Orange" and the "Euromaidan" street protests were the two turning points in Ukraine's modern history, both, leading to changes of government and a swift political turn towards the EU. In both cases the same President—Viktor Yanukovich—was removed from office. The protests of 2013 were triggered by the decision to suspend the signing of the Ukraine—EU Association Agreement.⁶ In 2014, the agreement on the settlement of political crisis in Ukraine⁷ signed by the opposition, the

¹ Official web-page of the President of Ukraine, President Volodymyr Zelensky's team is announcing large-scale judicial reform, and, on 7 August 2019, a presidential decree was issued to create a Commission in charge of legal reform, 7 August 2019, available at: <https://www.president.gov.ua/documents/5842019-28949> (Accessed 21 February 2020).

² ICJ Report, *Ukraine: Conflict, Disbarments and Suspensions in the legal profession*, 2014, available at: <https://www.icj.org/ukraine-icj-report-casts-light-on-alarming-disbarments-and-suspensions-of-lawyers> ("ICJ Report 2014 on Ukraine") (Accessed 18 February 2020).

³ *Ibid.*

⁴ ICJ Side Event, *Defenceless defenders: addressing the attacks on lawyers in Azerbaijan, Kazakhstan and Ukraine*, 22 June 2018, available at: <https://www.icj.org/side-event-defenceless-defenders-addressing-the-attacks-on-lawyers-in-azerbaijan-kazakhstan-and-ukraine/> (Accessed 18 February 2020); HDIM 2019: ICJ and others hold a side event on attacks on lawyers in the OSCE region, 24 September 2019, available at: <https://www.icj.org/hdim-2019-icj-and-others-hold-a-side-event-on-attack-on-lawyers-in-the-osce-region> (Accessed 18 February 2020).

⁵ ICJ Statement, *Ukraine: dismissal and criminal prosecution of judges undermine independence of the judiciary*, 20 March 2014, available at: <https://www.icj.org/ukraine-dismissal-and-criminal-prosecution-of-judges-undermine-independence-of-the-judiciary> (Accessed 18 February 2020); ICJ third party intervention on a dismissal of a court president: *Anatoliy Oleksiyovych Denisov v. Ukraine*, 31 August 2017, available at: <https://www.icj.org/third-party-intervention-on-a-dismissal-of-a-court-president-anatoliy-oleksiyovych-denisov-v-ukraine> (Accessed 21 February 2020).

⁶ European Parliamentary Research Service: *Minsk peace agreement: still to be consolidated on the ground*, briefing, PE 548.991, 12 February 2015, available at: <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-548991-Minsk-peace-summit-FINAL.pdf> (Accessed 18 February 2020).

⁷ Agreement of the opposition with President Yanukovich, 21 February 2014, available at: https://espreso.tv/article/2014/02/21/uhoda_opozyciyi_z_yanukovychem_povnyy_tekst (Accessed 21 February 2020).

government, a number of EU countries with the participation of Russia, failed to prevent the removal of Yanukovich. Yanukovich's removal was triggered by the Maidan Square shootings and killings of over a hundred protesters and 13 members of the police, which remain uninvestigated to date.⁸ The clashes of "pro-federalists", those who foresaw a greater autonomy, including affiliation with the Russian Federation, and "unists" resulted in skirmishes and the taking over of governmental buildings across Ukraine.⁹ A landmark violent event took place on 2 May 2014 in Odessa where 48 people died as a result of being blocked in a building which was set on fire.¹⁰

"In Donetsk and Luhansk, in April 2014, an "anti-terrorist" operation was launched by the acting President Turchinov in attempts to take control over the self-proclaimed republic of Donetsk and Luhans.¹¹ The next several months saw a full-fledged conflict with the active participation of right-wing armed groups which fought alongside the regular army.¹² As is shown in this report, such groups have continued to be involved in attacks including on judges, lawyers, activists or others.¹³ Various attacks by such groups were accompanied by broad impunity for attacks on civilians both in the conflict-zone and in other parts of Ukraine.¹⁴ Ukraine notified the Council of Europe and UN authorities of the suspension of the application of the European Convention of Human Rights and the International Covenant on Civil and Political Rights in the Donbas areas not controlled by the government.¹⁵

In recent years the increasing climate of insecurity of activists, including human rights defenders, has become troubling, with a large number of attacks reported against a range of individuals and groups, the most frequent targets reportedly being civil society activists¹⁶, journalists, business persons, representatives of minority groups¹⁷ and human rights defenders.¹⁸ Attacks include threats of physical violence or other forms

⁸ Report of the International Advisory Panel on its review of the Maidan Investigations, 31 March 2015, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f038b> (Accessed 21 February 2020).

⁹ Report of the International Advisory Panel on its Review of the Investigations into the Events in Odesa on 2 May 2014, 4 November 2015, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048610f> (*Report into the events in Odesa*) (Accessed 21 February 2020).

¹⁰ *Ibid.*

¹¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report on the human rights situation in Ukraine*, 15 May 2014, para. 95, available at: <https://www.ohchr.org/Documents/Countries/UA/HRMMURReport15May2014.pdf> (Accessed 21 February 2020).

¹² See, for example, OSCE Special Monitoring Mission to Ukraine, Thematic Report, *Findings on Formerly State-Financed Institutions in the Donetsk and Luhansk Regions*, 30 March 2015, para. 2.1, available at: <https://www.osce.org/ukraine-smm/148326?download=true> (Accessed 21 February 2020).

¹³ See section on violent radical groups from Chapter II of this report. See also OHCHR, *Report on the human rights situation in Ukraine*, 16 May 2018 to 15 August 2018, para. 9: "OHCHR is further concerned by attacks on, and intimidation of, defence lawyers by members of extreme right-wing groups, and continuing interference with the independence of judges," available at: https://www.ohchr.org/Documents/Countries/UA/ReportUkraineMay-August2018_EN.pdf (Accessed 21 February 2020); OHCHR, *Report on the human rights situation in Ukraine*, 16 August 2018 to 15 November 2018, UN Doc. A/HRC/37/CRP.1, para. 11: "OHCHR also continued documenting cases of increasingly violent attacks against journalists and media professionals, civil society activists, affiliates of political parties and defence lawyers in conflict-related cases perpetrated by members of extreme right-wing groups, narrowing democratic and civic space in Ukraine."

¹⁴ OHCHR, *Report on the human rights situation in Ukraine*, 16 February to 15 May 2018, para. 7, available at: https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf (Accessed 21 February 2020).

¹⁵ Decree of the Verkhovna Rada "On Derogations of Ukraine from Certain Obligations Outlined by the International Covenant on Civil and Political Rights and the Convention on Human Rights and Fundamental Freedoms" No. 462-VIII, 21 May 2015, available at: <https://zakon.rada.gov.ua/laws/main/462-19?lang=en> (Accessed 21 February 2020).

¹⁶ The main types of targets of violence are reportedly anti-corruption activists; environmental protection activists; LGBTI and feminists.

¹⁷ For example, Roma camps and LGBTI community.

¹⁸ The recent statement of the OHCHR, the United Nations Monitoring Mission to Ukraine (SMM), 1 November 2019, available at: <http://www.un.org.ua/en/information-centre/news/4776-ukraine-justice-pending-for-killings-of-journalists-and-activists> (Accessed 21 February 2020).

of intimidation, by both individuals and groups.¹⁹ An increase of levels of violence is consistently reported by both international human rights bodies,²⁰ international organizations²¹ and NGOs in Ukraine.²² The mission was told that it is only due to public attention and activism that some politically sensitive or high-profile cases of attacks on some human rights defenders come to court.²³

A further contributing factor to the lack of prosecutions for such attacks appears to be the armed conflict in Eastern and some other parts of Ukraine,²⁴ where thousands of crimes have been left uninvestigated,²⁵ which has resulted in a general increase of the level of tolerance to violence, as well as radicalization of some parts of society and increase of xenophobia.²⁶ The situation is exacerbated by impunity for the commission of related crimes.

Legal and justice system reforms

In 2015 Ukraine adopted a Justice Sector Reform Strategy for 2015–2020, and undertook an ambitious plan for wide justice-sector reforms aimed at strengthening the rule of law.²⁷ The Strategy included proposals for legislative and institutional reforms of the court system, law enforcement institutions, as well as access to justice, the right to defense, independence of the judiciary and the prevention and combating of corruption.²⁸

The government adopted a comprehensive anti-corruption package of laws and established new specialized institutions in 2014–2016 as well as the number of initiatives.²⁹ In June 2018, the High Anti-Corruption Court (HACC) was established with a goal of rooting out entrenched corruption³⁰ and insulating court decisions from political pres-

¹⁹ E.g. Amnesty International Ukraine: *Human rights under pressure, their advocates under attack*, AI Index: EUR 50/9827/2019, 8 February 2019, available at: <https://www.amnesty.org/download/Documents/EUR5098272019ENGLISH.pdf> (Accessed 21 February 2020).

²⁰ Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-second and twenty-third periodic reports of Ukraine*, UN Doc. CERD/C/UKR/22-23 (2016), para. 15.

²¹ OSCE Office for Democratic Institutions and Human Rights Hate Crimes Reporting, Ukraine, available at: <http://hatecrime.osce.org/ukraine> (Accessed 21 February 2020).

²² LGBT Human Rights 'Nash Mir' Centre, *Report on Hate Crimes and Incidents in Ukraine, 2015–2018*, available at: <https://gay.org.ua/publications/hatecrime2018-e.pdf> (Accessed 21 February 2020); see also *ECRI Report on Ukraine* (5th monitoring cycle), CRI(2017)38, 20 June 2017, available at: <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8> (Accessed 21 February 2020).

²³ For example, in case of Kateryna Handziuk, an anti-corruption activist who died in February 2019 from acid burns received during an attack, there have been numerous attempts on the side of authorities to stall the investigation, but activists persistently draw attention to the case. See: OSCE SMM, Daily Report 263/2019, 6 November 2019, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/438233> (Accessed 21 February 2020); Golos Ukrainy (Voice of Ukraine, Parliamentary newspaper), 4 November 2019, available at: <http://www.golos.com.ua/article/323614> (Accessed 21 February 2020).

²⁴ See account of events in the OHCHR, *Report Accountability for killings in Ukraine from January 2014 to May 2016*, available at: https://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf (Accessed 21 February 2020).

²⁵ There is no significant progress with the investigation of Maidan and Odessa events, OHCHR, *Report on the human rights situation in Ukraine*, 16 February to 15 May 2016, para. 9, available at: https://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf (Accessed 21 February 2020).

²⁶ OHCHR, *Report on the human rights situation in Ukraine*, 16 August to November 2018, para. 114, available at: https://www.ohchr.org/Documents/Countries/UA/24thReportUkraineAugust_November2018_EN.pdf (Accessed 21 February 2020).

²⁷ In 2015 Ukraine adopted Justice Sector Reform Strategy for 2015–2020. The Strategy together with an Action Plan included proposals for legislative and institutional reforms of the court system, law enforcement institutions, as well as access to justice, the right to defence, independence of the judiciary and combating corruption. See the official website of the justice reform, available at: <http://sudovareforma.org/en/> (Accessed 24 February 2020).

²⁸ Justice Sector Reform Strategy for 2015–2020.

²⁹ National Anticorruption Bureau (NABU), Specialized Anticorruption Prosecutor's Office (SAPO), National Agency on Corruption Prevention (NACP) and Asset Recovery and Management Agency (ARMA). Furthermore, as part of the anti-corruption effort, Ukraine introduced electronic asset disclosure, e-procurement, opening up the public registries and making a number of datasets publicly available in open data format.

³⁰ Transparency International, *Corruption Perception Index 2019*: Ukraine is 126th of 180 countries, available at: <https://www.transparency.org/cpi2019> (Accessed 21 February 2020).

sure or bribery.³¹ It became operational in September 2019. However, the effectiveness of this body is under question.³²

Reforms, including those affecting human rights and the rule of law, were accelerated by Ukraine's significantly strengthened cooperation with the EU, embodied in the Association Agreement of 2017.³³ The reform of the judiciary, including the Supreme Court,³⁴ and reforms of other institutions such as the national police and the prosecution³⁵ have been implemented; however, a state of impunity for human rights violations prevails and the success of these reforms remains unclear.³⁶ Several UN mechanisms have called on Ukraine to follow through with the reforms of its law enforcement system and, in particular, to make sure that law enforcement officers receive adequate professional training with an emphasis on human rights standards and that incidents involving violence committed by them are thoroughly investigated and prosecuted.³⁷

It is therefore in a context of political turbulence, prevailing impunity and attempts at extensive justice system reforms, that lawyers have come under increasing threat and attack in recent years.

³¹ The Public Council of International Experts (PCIE) consists of foreign nationals: Great Britain, Lithuania, Canada, Denmark, and Macedonia. It was formed at the end of 2018 by the High Qualification Commission of Judges (HQCJ) for the period of six years to assist it with the preparation of decisions on the appointment of judges of the HAAC and is considered a subsidiary body of the HQCJ. Their mandate is limited to assessing the candidates' integrity and professionalism (article 9-9 of the law of Ukraine "On the High Anti-Corruption Court").

³² E.g. Group of States against corruption (GRECO), Fourth evaluation period, Corruption prevention in respect of members of parliament, judges and prosecutors, GrecoEval4Rep(2016)9, 8 August 2017, available at: <https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207> (Accessed 21 February 2020).

³³ EU—Ukraine Association Agreement, entered to force on 1 September 2017, available at: http://publications.europa.eu/resource/cellar/4589a50c-e6e3-11e3-8cd4-01aa75ed71a1.0006.03/DOC_1 (Accessed 21 February 2020).

³⁴ The main legislative changes were introduced through amendments to the Constitution and the new Law "On the Judiciary System and the Status of Judges" of 2016. They included, among others, transition from a four to three-tier system of courts, competitions for judicial positions, restriction on judicial immunity, judicial life appointment.

³⁵ The Law of Ukraine "On National Police" No. 580-VIII, 2 July 2015, available at: <https://zakon.rada.gov.ua/laws/show/580-19> (Accessed 21 February 2020); the Law of Ukraine "On the Prosecutor's Office" No. 1697-VII, 14 October 2014, available at: <http://zakon.rada.gov.ua/laws/show/1697-18> (Accessed 21 February 2020) abolished the prosecution's function of "general oversight" over compliance with the law. Later the constitutional changes of mid-2016, limited the functions of the prosecution to upholding State accusation and representation of individuals in courts as well as ensuring law compliance by law enforcement bodies and during implementation of court decisions (article 131-1 of the Constitution of Ukraine; article 2 of the Law of Ukraine "On the Prosecutor's Office").

³⁶ See, for example: HRC, *Concluding observations on the seventh periodic report of Ukraine*, UN Doc. CCPR/C/UKR/CO/7 (2013), para. 15; OHCHR, *Report on the human rights situation in Ukraine*, UN Doc. A/HRC/34/CRP.5 (16 November 2016 to 15 February 2017), pp. 13–19; Kharkiv Human Rights Protection Group, *Monitoring of unlawful violence in Ukrainian police (2004–2017)*, 18 January 2018, available at: <http://khpg.org/en/index.php?id=1516261343> (Accessed 21 February 2020), and the respective Report (in Ukrainian), available at <http://khpg.org/files/docs/1515758313.pdf>.

³⁷ OHCHR, *Compilation of recommendations of the United Nations human rights mechanisms addressed to Ukraine*, September 2017, available at: https://www.ohchr.org/Documents/Countries/UA/UN_recommendations_Ukraine.pdf (Accessed 21 February 2020); see also Working Group on the Universal Periodic Review, *Report on Ukraine*, 3rd cycle, UN Doc. A/HRC/37/16 (2018).

Chapter I. Institutions and governance of the legal profession in Ukraine

International law and standards

International standards on the independence of lawyers recognize the importance of self-governing institutions of the legal profession as well as the independence of bar associations in ensuring the fair and effective administration of justice.³⁸ Bar associations and lawyers' organizations play a key role in ensuring and defending the independence of lawyers and are responsible for ensuring that professional and ethical standards established by the bar associations instruct the work conducted under their umbrella.³⁹

Such associations must be institutionally independent, both in law and in practice, from all external actors, including the government, other executive agencies, parliaments and outside private interests.⁴⁰ In particular, the "executive body of the professional associations of lawyers shall be elected by its members and shall exercise its functions without external interference."⁴¹ A lawyer needs to be free — politically, economically and intellectually — in pursuing his or her activities of advising and representing the client.⁴² This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates.⁴³

It is the role of the bar associations to uphold professional standards and ethics, protect their members, provide legal services and cooperate with governmental and other institutions in furthering the ends of justice and the public interest.⁴⁴ Under international law and standards on the role of lawyers, self-governing institutions of the legal profession, such as bar associations,⁴⁵ are of utmost importance in "upholding professional standards and ethics, protecting members from prosecution and improper restrictions and infringements (. . .)".⁴⁶ In addition to representing the interests of lawyers, bar associations are charged with functions including promoting continuous education, pro-

³⁸ Among many others see: *Basic Principles on the Role of Lawyers*, UN Doc. A/CONF.144/28/Rev. 1, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990; the Council of Europe's Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, 25 October 2000, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d0fc8 (Accessed 21 February 2020); UN Special Rapporteur on the independence of judges and lawyers, Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, UN Doc. A/HRC/RES/23/6 (2013).

³⁹ Diego García-Sayán, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc. A/HRC/35/31 (2017), para. 92.

⁴⁰ *Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 24. See also ICJ Report, *Independence of the Legal Profession in Central Asia*, 10 September 2013, p. 9, available at: <http://www.icj.org/wp-content/uploads/2013/09/Independence-of-the-Legal-Profession-in-CA-Eng.pdf> (Accessed 21 February 2020).

⁴¹ *Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 24. See also Dr L. V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, *Draft Universal Declaration on the Independence of Justice* ("Singhvi Declaration"), para. 97, available at: <https://www.icj.org/wp-content/uploads/2014/03/SR-Independence-of-Judges-and-Lawyers-Draft-universal-declaration-independence-justice-Singhvi-Declaration-instruments-1989-eng.pdf> (Accessed 21 February 2020).

⁴² Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, 2013, Principle A, p. 9, available at: https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf (Accessed 21 February 2020).

⁴³ *Ibid.*

⁴⁴ *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, *op. cit.*, para. 91

⁴⁵ International and regional instruments generally use the expression "professional associations of lawyers" to refer to organizations established by lawyers at the national or local levels to protect the independence and interests of lawyers, e.g. see: Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/73/365 (2018), para. 15.

⁴⁶ *Basic Principles on the Role of Lawyers*, *op. cit.*, para. 18.

tection of lawyers' professional integrity⁴⁷ and strengthening the independence of the legal profession.⁴⁸

The UN *Basic Principles on the Role of Lawyers* encourage co-operation between the bar association and the institutions of the State on certain matters: "[p]rofessional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics."⁴⁹ States do not only have a negative obligation to abstain from any unlawful interference with the work of professional associations of lawyers, they also have a positive duty to encourage and support the establishment of the work of such associations.⁵⁰

Development of the legal professional in Ukraine

Although an organized legal profession has existed in Ukraine since the time of the Russian Empire,⁵¹ and continued under the USSR, the Ukrainian legal profession's contemporary history begins following Ukraine's independence in 1991 (as a result of the fall of the Soviet Union) and the adoption of the Law of Ukraine "On Entrepreneurship", under which the status of a lawyer ("advocate") was acquired through a licence issued by the Ministry of Justice by candidates holding a law degree who had passed the required examination.⁵² Soon after the independence, in 1992, the law of Ukraine "On Advokatura and Advocates' Activity" was adopted, which aimed "to renew the prestige of advokatura (the legal profession) in the society".⁵³ The two laws and the relevant procedure codes were the main legal acts regulating the organization and functioning of the legal profession. Under the legislation in force then, lawyers practiced through so-called "collegia", which were independent law firms and operated as independent legal offices without a unifying structure.

At the time, similar to other CIS contexts, the legal profession in Ukraine was split into two groups of legal practitioners: those who represented individuals in courts—"advocates"—lawyers licensed by the MoJ with membership in collegia; and "lawyers-entrepreneurs" who carried out legal representation without a license, which the law allowed.⁵⁴ The core of the legal profession, whose activity was regulated by law, although

⁴⁷ Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, Adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies, Principles V (3) and (4); Inter-American Court of Human Rights has established that professional associations constitute a means to regulate and control professional ethics, see its Consultative Opinion of 13 November 1985, OC-5/85, Series A, No. 5, para. 68.

⁴⁸ Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Principle V (4).

⁴⁹ *Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 25.

⁵⁰ Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/64/181, 28 July 2009, para. 21.

⁵¹ See the ICJ Report, *Towards a Stronger Legal Profession in the Russian Federation*, 2015, p. 8, available at: <http://www.icj.org/wp-content/uploads/2015/11/Russia-Towards-a-Stronger-Legal-Profession-Publication-2015-Eng.pdf> (Accessed 24 February 2020).

⁵² The Law of Ukraine "On Entrepreneurship" No. 698-XII, 7 February 1991, article 2, available at: <https://zakon.rada.gov.ua/laws/card/698-12> (Accessed 21 February 2020); Decree of the Ministry of Justice of Ukraine No. 20/5 "On the Approval of Rules of Consideration of Applications on Issuing Licenses to Practice Law" from 25 June 1991. The MoJ licensing of lawyers-entrepreneurs was abandoned only in 2000, OSCE Background report, *The Legal Profession in Ukraine*, April 2008, p. 3, available at: <https://www.osce.org/odihr/36311?download=true> (Accessed 21 February 2020).

⁵³ Varfolomeyeva T., *Guide for Future Lawyers*, Kyiv, 2010, p. 14.

⁵⁴ ICJ Report, *Defenceless Defenders: systemic Problems in the Legal Profession of Azerbaijan*, 2016, p. 5, available at: <https://www.icj.org/wp-content/uploads/2016/11/Azerbaijan-Systemic-problems-Legal-Prof-Publications-Reports-Mission-reports-2016-ENG.pdf> (Accessed 21 February 2020); ICJ Report, *Towards a Stronger Legal Profession in the Russian Federation*, p. 8; see also Council of Europe, CCBE International Conference Report, *Bar Associations for Independent, Qualified and Ethical Exercise of the Profession of Lawyer*, 20–21 June 2016, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680695560> (Accessed 21 February 2020).

representing a minority of legal practitioners, was the licensed “advocates” who enjoyed protection and guarantees under legislation including the law “On Advokatura and Advocates’ Activity”, as well as various codes and other legislation. Non-licensed lawyers, while constituting a significant part of practicing lawyers, remained outside the legal framework and their activity was not regulated by law.⁵⁵ Licensed lawyers had an exclusive competence to represent defendants in criminal proceedings, while no such restriction on representation existed in civil (including family, labour and other issues considered by civil courts) and administrative proceedings.⁵⁶ Thus both private law firms and individual practitioners with or without legal training practiced law before courts.⁵⁷

The two categories still exist and although no official statistics are available, it is estimated that there are several hundred thousand legal practitioners in Ukraine who are not members of the official Bar Association, UNBA.⁵⁸ For the purposes of this report “advocates” or members of “advokatura” are called “lawyers” while “the legal profession” is used to denote what is commonly referred to in Ukraine as “advokatura”.

Prior to the 2012 reform, membership in the Bar Association was not mandatory and there was no single structure governing all practicing lawyers i.e. a national Bar Association. In 2012, the new law “On the Bar and Legal Practice” (currently in force) was adopted.⁵⁹ The law launched a reform of the legal profession aiming to establish a national Bar Association with mandatory membership.⁶⁰ The European Commission for Democracy through Law (the Venice Commission) of the Council of Europe published an opinion on the draft law concluding that “[t]he draft Law [was] coherent and provide[d] a good basis for regulating the profession of the advocate.”⁶¹ That law was the basis for the establishment of a unified Bar Association in Ukraine.

Establishment of the unified Bar Association and internal conflicts

While the draft law was generally accepted as a positive development, the formation of self-governing bodies of lawyers at the regional level (in some oblasts) and at the national level during the Constituent Congress of Lawyers of Ukraine was accompanied by conflicts and irregularities within the profession.⁶² In particular, on 17 November 2012,⁶³ two rival Constituent Congresses of Lawyers — rather than one as prescribed by

⁵⁵ Several hundred thousand practicing jurists in comparison to over 50,000 lawyers. See the OSCE Background report, *The Legal Profession in Ukraine*, *op. cit.*, pp. 3–6.

⁵⁶ Legal Overview, *Judicial Reform in Ukraine*, available at: <https://www.coe.int/en/web/cdcj/-/assessment-of-the-2014-2018-judicial-reform-in-ukraine> (Accessed on 24 February 2020).

⁵⁷ OSCE Background report, *The Legal Profession in Ukraine*, *op. cit.*, p. 4.

⁵⁸ According to the information provided by the Union of Lawyers of Ukraine (*Союз Юристів України*), it has over 100,000 individual members and nearly as many lawyers in institutions, businesses and organizations as collective members, available at: <https://lawyersunion.org.ua/istoriya-syuu/> (Accessed 21 February 2020); as of 1 January 2019, there were 104,565 students currently enrolled in law schools, according to the Statistical Research of the Ministry of Justice of Ukraine, *State of Legal Education in Ukraine, 2019*, p. 4, available at: <https://minjust.gov.ua/files/general/2019/03/18/20190318171622-46.pdf> (Accessed 21 February 2020).

⁵⁹ The official translation from the parliament website available at: <https://zakon.rada.gov.ua/laws/show/5076-17?lang=en> (Accessed 21 February 2020); The law No. 5076-VI from 5 July 2012, hereinafter referred to as “Law “On Bar and Legal Practice””.

⁶⁰ Law “On Bar and Legal Practice”, *op. cit.*, article 45.

⁶¹ Joint opinion on the draft law on the Bar and legal practice of law of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe Adopted by the Venice Commission at its 88th Plenary Session, Venice, 14–15 October 2011, para. 113, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)039-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)039-e) (Accessed 21 February 2020).

⁶² See *ICJ Report 2014 on Ukraine*.

⁶³ *Ibid.*, p. 7.

law — were held.⁶⁴ This resulted in a split in the legal profession with two organizations claiming to be the legitimate institution for the governance of the profession.⁶⁵ This was followed by disbarments of lawyers, described by the ICJ in detail in its report of 2014 *Ukraine: Conflict, Disbarments and Suspensions in the Legal Profession*.⁶⁶ Litigation related to these events continues to date.⁶⁷

In 2016, the split in the profession was further entrenched when controversy arose over whether the Qualification and Disciplinary Commission (QDC) of Kyiv City had been created in line with 2012 law “On the Bar and Legal Practice”.⁶⁸ Rather than being constituted as a structural unit of the UNBA as the law required,⁶⁹ the QDC of Kyiv had been established as an NGO, “Kyiv Qualification and Disciplinary Commission of the Bar” and, as such was independent of the UNBA while performing functions connected with access to the UNBA.⁷⁰ A UNBA extraordinary conference of lawyers in Kyiv took action to form a new “legitimate” QDC of Kyiv.⁷¹ The conference also changed the composition of the Council of Lawyers of Kyiv and appointed new Kyiv delegates to the Council of Lawyers of Ukraine and the High Qualification and Disciplinary Commission (HQDC).⁷²

As a result, two parallel organizations claimed to be the legitimate body for the qualification, disciplining and training of lawyers in Kyiv, one within the UNBA⁷³ and one established by an independent group of lawyers as an NGO.⁷⁴ This NGO continues to function, and continues to issue licenses to lawyers.⁷⁵

The mission was informed that several legal proceedings were ongoing regarding the legitimacy of the organizations. In a recent letter to the former Head of Presidential Administration,⁷⁶ the head of one of the Bar Councils of Kyiv had pointed out that “the law On Bar and Legal Practice was systematically violated since 2016 by a group of people carrying out the functions of a self-governing body”.⁷⁷ The court proceedings

⁶⁴ *Ibid.*, pp. 9–10.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ See, for example, Law and Business, Court Ruled Unlawful the Failure to Make an Entry into URAU on Basis of Illegitimate Kyiv City QDC License, 17 April 2019, available at: https://zib.com.ua/ua/print/137290-sud_viznav_zakonnim_nevnesennya_danih_do_erau_na_pidstavi_ne.html (Accessed 21 February 2020).

⁶⁸ Law “On Bar and Legal Practice”, *op. cit.*, articles 48-1, 48-2.

⁶⁹ *Ibid.*

⁷⁰ The decision of the Bar Council of Ukraine from 11 June 2013 No. 153 “On the approval of the conclusion of the special temporary commission on the inspection of the activities of the bodies of lawyers’ self-government of the city of Kiev” in paras 5 and 6 it is established that Qualification and Disciplinary Commission of the City of Kyiv since 2008 carries out its activities as an NGO created by private persons and thus it is concluded that there is no QDC in the City of Kyiv created in accordance with law.

⁷¹ On 11 June 2016 the Bar Council of Ukraine adopted decision No. 155 to convene an extraordinary conference of lawyers of the City of Kyiv to adopt rules and procedures on the election of delegates to the Kyiv City conference of lawyers and establishing the representation quota, as well as electing the Head and the members of the QDC of Kyiv and deciding on the personal composition of the Bar Council of Kyiv, available at: <https://youcontrol.com.ua/catalog/court-document/76818582/> (Accessed 21 February 2020).

⁷² Decision of the Regional Administrative Court of Kyiv No. 76818582 from 1 October 2018 established the facts of reinstitution of the QDC of Kyiv and the Bar Council of Kyiv and the Bar Council of Kyiv, available at: <https://youcontrol.com.ua/catalog/court-document/76818582/> (Accessed 21 February 2020).

⁷³ UNBA Bar Council of Kyiv page: <https://kyiv.unba.org.ua> (Accessed 21 February 2020).

⁷⁴ The Council of Lawyers of the City of Kyiv (including Qualification and Disciplinary Commission of the City of Kyiv and Centre for Traineeship and Further Professional Training), available at: <https://kmdka.com> (Accessed 21 February 2020).

⁷⁵ Two websites for the two Bar Councils: <https://kyiv.unba.org.ua> and <https://kmdka.com> (Accessed 21 February 2020).

⁷⁶ E.g. Andriy Bogdan’s (the current Head of the Presidential Administration) application to have his lawyer status suspended came before both Kyiv City Bar Councils, pointing to the continuing confusion as a result of the split, available at: <https://ua.korrespondent.net/city/kyiv/4100667-u-kyievi-pratsuiuit-sotni-fiktyvnykh-yurystiv-hlava-rady-advokativ> (Accessed 21 February 2020).

⁷⁷ See the letter at: https://unba.org.ua/assets/uploads/ab141505b5e3350b4f63_file.jpg (Accessed 21 February 2020).

regarding their legitimacy are ongoing.⁷⁸ During the mission, the ICJ was told that this internal split was one of the main challenges of the Bar Association in Ukraine in addition to the external issues threatening its operation.

The mission observed that despite the internal and external challenges which existed from the start of its foundation, the UNBA has been able to establish itself as an independent institution and functions effectively with guarantees afforded to its members under the law. While other associations of lawyers continue to exist, in line with international standards and Law on freedom of association, it is the UNBA that exercises the functions of the national Bar Association.⁷⁹

The Ukrainian National Bar Association

The UNBA is established as a non-State self-governing organization with mandatory membership⁸⁰ for all lawyers whose goal is “to provide legal defense, representation and other types of legal services on a professional basis, and independently resolve issues of its organization and operation”.⁸¹ As of 9 December 2019, there were 53,760 lawyers in the UNBA registry.⁸²

The UNBA is empowered by law to represent the legal profession in its relations with public authorities, local self-governments, public associations and international organizations⁸³ According to the law, the UNBA operates “for the purpose of ensuring proper practice of law, compliance with the professional guarantees, protection of lawyers’ professional rights, ensuring high level of professionalism of lawyers and resolution of the issues associated with the disciplinary liability of lawyers”.⁸⁴ On behalf of the legal profession, the UNBA is involved in law-making processes related to the rule of law and legal reforms.⁸⁵

A system of legislative safeguards to ensure the self-regulation and independence of the Bar Association, includes the right of lawyers to elect and to be elected to self-governing bodies,⁸⁶ the principle of non-intervention of the UNBA with the activity of regional bodies,⁸⁷ exclusive competence of the UNBA over the qualifications and disciplinary procedures⁸⁸, full financial independence of the UNBA⁸⁹ and the management by the UNBA of the registry of lawyers.⁹⁰

⁷⁸ The ICJ was told during the mission about the ongoing court proceedings. For example those regarding the legality of QDC of Kyiv under UNBA structure — decision No. 76818582, 1 October 2018, available at: <https://youcontrol.com.ua/catalog/court-document/76818582/> (Accessed 21 February 2020); Decision No. 82139793, 31 May 2019, Regional Administrative Court of Kyiv, available at: <https://youcontrol.com.ua/catalog/court-document/82139793/> (Accessed 21 February 2020).

⁷⁹ Other associations of lawyers include for example: Ukrainian Bar Association, Union of Lawyers of Ukraine, Association of Lawyers of Ukraine; those organizations are registered as NGOs.

⁸⁰ Law “On Bar and Legal Practice”, *op. cit.*, article 45-6.

⁸¹ *Ibid.*, article 2-1.

⁸² The UNBA presentation on URAU, 9 December 2019, available at: https://unba.org.ua/assets/uploads/3fd2b31f0eee97be6796_file.pdf (Accessed 21 February 2020).

⁸³ Law “On Bar and Legal Practice”, *op. cit.*, article 45-1.

⁸⁴ *Ibid.*, article 4.

⁸⁵ The UNBA Report, *Five Years of Success of the Ukrainian Bar*, November 2017, available at: https://unba.org.ua/assets/uploads/43f83bd682afc309ca20_file.pdf (Accessed 21 February 2020).

⁸⁶ Each lawyer has the right to elect and to be elected to self-governing bodies on the regional or national level. Only lawyers can be elected to the bodies self-government. Eligibility criteria for the election to the self-government bodies include requirements for lawyers to have 5 years of experience and be included in the unified registry (URAU).

⁸⁷ The following is guaranteed by regional self-government bodies as separate legal entities with separate budget and full range of responsibilities. The UNBA may not interfere with the activities of regional bodies of self-government and professional practice of lawyers in the regions.

⁸⁸ The Bar Association introduces qualification requirements to enter the profession, determines the qualification procedure and applies disciplinary sanctions in relation to the members of the Bar Association. Practical implementation of these functions is carried out by the QDC and HQDC; Adoption of the Rules of Lawyers’ Professional Conduct is the exclusive competence of the Congress of lawyers of Ukraine; the decisions of self-government bodies are binding for all lawyers-members of the UNBA.

⁸⁹ Full financial independence is guaranteed through to self-financing of the Bar Association through annual fees of lawyers.

⁹⁰ Managing of the Unified registry (URAU) is an exclusive competence of the Bar Council of Ukraine.

The bodies of self-government of the UNBA include the Congress of Lawyers of Ukraine, the Conference of Lawyers of a Region, the Council of Lawyers of Ukraine, the Council of Lawyers of Kyiv,⁹¹ the Councils of lawyers of a Region, the Higher Qualification and Disciplinary Commission of the Bar Association, the Qualification and Disciplinary Commission of a Region, the Higher Audit Commission of the Bar Association and Audit Commissions of a Region (see the table in Annex I).⁹²

The Congress of Lawyers of Ukraine is the highest body of self-governance of the legal profession,⁹³ which convenes at least once every three years or on the request of one tenth of all registered lawyers or of one third of the Councils of Lawyers of a Region.⁹⁴ Its functions include approving the Statute of the UNBA as well as other regulatory documents or reports and election of the chairperson and deputy chairpersons to the Congress of Lawyers of Ukraine, the High Qualification and Disciplinary Commission and the High Audit Commission.⁹⁵ Some important functions of the Congress go beyond the regulation of the legal profession itself: it elects/appoints two members of the Supreme Council of Justice;⁹⁶ two members of the High Qualification Commission for Judges;⁹⁷ one member of the High Qualification Commission for Prosecutors.⁹⁸

The Conference of Lawyers of a Region is the supreme body of lawyers' self-government in each region of the country convened by a Regional Council of Lawyers no less than once a year or following a proposal of one tenth of lawyers of the region or upon the request by the Congress of lawyers of Ukraine.⁹⁹ Besides the functions reflecting those of the Congress of Lawyers of Ukraine¹⁰⁰ but on the regional level, the Conference of Lawyers of a Region also elects delegates to the latter.¹⁰¹

The Council of Lawyers Ukraine (CLU) performs governance functions between the congresses of lawyers.¹⁰² It consists of thirty members who have practiced law for at least

⁹¹ See the previous Section on about two parallel councils of lawyers in Kyiv.

⁹² Law "On Bar and Legal Practice", *op. cit.*, Chapter VII, articles 45–56.

⁹³ Over the period from August 2012 until February 2019, five lawyers' congresses were conducted: Constituent Congress of Lawyers of Ukraine—17 November 2012; Extraordinary Congress of Lawyers of Ukraine—26–27 April 2014; Third Congress of Lawyers of Ukraine (four stages) 20 November 2014—3 July 2015 (the congress lasted nearly eight months); General Congress of Lawyers of Ukraine—9 June 2017; General Congress of Lawyers of Ukraine—15–16 February 2019.

⁹⁴ Law "On Bar and Legal Practice", *op. cit.*, article 45-1.

⁹⁵ *Ibid.*, article 54-7.

⁹⁶ The Law No. 1798-VIII "On the Supreme Council of Justice", 21 December 2016, articles 5, 11, available at: <https://zakon.rada.gov.ua/laws/show/1798-19> (Accessed 21 February 2020). The Supreme Council of Justice is an independent State body which nominates judges to be appointed by the President of Ukraine. It also advises on the appointment or release of judges, examines the cases of infringements, and executes disciplinary proceedings regarding judges and prosecutors. In 2017 with adoption of the Law "On Supreme Council of Justice", it replaced the High Council of Justice, and the same year the competence to appoint and to remove judges was transferred from the Ukrainian Parliament (Verkhovna Rada) to the Supreme Council of Justice. It consists of 21 members elected for maximum of two tenures of four years, available at: <http://www.vru.gov.ua> (Accessed 21 February 2020).

⁹⁷ The Law of Ukraine No. 1402-VIII "On the Structure of Courts and the Status of Judges", 2 June 2016, clause 3 of part 2 of article 94 and part 16 of article 95, available at: <https://zakon.rada.gov.ua/laws/show/1402-19> (Accessed 21 February 2020). The High Qualification and Disciplinary Commission of Judges, which is a main State judicial governance body operating on a permanent basis within the judiciary of Ukraine, having achieving judicial transparency as its main task. The HQCJ's terms of reference includes, inter alia, selection of judicial candidates and judicial qualifications assessment, ensuring maintenance of the judicial dossiers and judicial candidates dossiers, as well as keeping records on the number of judicial positions available in courts, including vacant judgeships, available at: <http://vkksu.gov.ua> (Accessed 21 February 2020).

⁹⁸ The Law of Ukraine No. 1697-VII "On the Office of the Public Prosecutor", 14 October 2014, clause 3 of part 1 of article 74, available at: <https://zakon.rada.gov.ua/laws/show/1697-18> (Accessed 21 February 2020). The Qualification and Disciplinary Commission of Prosecutors is a collegial body consisting of 11 members. Its functions, according to the law, include enhancing the independence, professionalism, integrity and effectiveness of the prosecution service, as well as ensuring a process of merit based recruitment and promotion of prosecutors, initial training, and disciplinary proceedings, available at: <https://www.kdkp.gov.ua> (Accessed 21 February 2020).

⁹⁹ Law "On Bar and Legal Practice", *op. cit.*, article 47-1.

¹⁰⁰ Except for electing members of the High Council of Justice, High Qualification Commissions for Judges and Prosecutors which is reserved to the Congress of lawyers of Ukraine only.

¹⁰¹ Law "On Bar and Legal Practice", *op. cit.*, article 47.

¹⁰² *Ibid.*, article 55-1.

five years.¹⁰³ It carries out day-to-day organizational functions¹⁰⁴, handles issues and procedures for payment of annual lawyers' fees,¹⁰⁵ and examines complaints against the decisions of regional bar councils.¹⁰⁶

At a regional level, Regional Councils of Lawyers perform similar functions during the period between the conferences of lawyers of a region.¹⁰⁷ There are twenty-seven Regional Councils of Lawyers, tasked with representing the lawyers of a region, administering funds and property, controlling the quality of free legal aid and drawing up agenda for the Regional Congress of Lawyers.¹⁰⁸

The Higher Qualification and Disciplinary Commission of the Bar Association (HQDC) is a collegial, appeals body for the Qualification and Disciplinary Commissions,¹⁰⁹ accountable to the Congress of Lawyers of Ukraine and the Council of Lawyers of Ukraine. It examines¹¹⁰ and acts on¹¹¹ complaints against the regional QDCB decisions and generalizes disciplinary practice.¹¹²

Qualification and Disciplinary Commissions (QDC) are regional qualification and disciplinary bodies of the UNBA.¹¹³ As a self-governing body, each QDC determines the level of professionalism of the persons who intend to acquire the status of a lawyer, and to resolve issues related to the disciplinary liability of lawyers.¹¹⁴ Each QDC consists of 30 members and is accountable to a Conference of Lawyers of a Region.¹¹⁵

The Higher Audit Commission of the Bar Association monitors financial and economic activities of the UNBA, its central and regional bodies, QDCs and Regional Audit Commissions.¹¹⁶

The Regional Audit Commission of the Bar Association monitors the financial and economic activities of the relevant Regional Council of Lawyers and QDC.¹¹⁷ It submits audit conclusions for consideration and approval by the Conference of Lawyers of the Region, and may submit audit results to the Council of Lawyers of Ukraine and the Congress of Lawyers of Ukraine.¹¹⁸

The independence and self-regulation of the UNBA

According to the law, the legal profession of Ukraine ("advokatura") is independent of governmental bodies, including local government, their officials and officers.¹¹⁹ The UNBA Statute defines the UNBA as an apolitical, autonomous and independent organization¹²⁰ which has financial and organizational independence.¹²¹

¹⁰³ One representative from each region elected by the Conference of Lawyers of the Region, the chair and two deputy chairs elected by the vote of the Congress of Lawyers of Ukraine, according to the Law "On Bar and Legal Practice", *op. cit.*, article 55-1.

¹⁰⁴ For example, approves rules of procedures, determines the representational quota, supports operation of regional bar councils, ensures compliance with the decisions of Congress of Lawyers of Ukraine etc., according to the Law "On Bar and Legal Practice", *op. cit.*, article 55-4.

¹⁰⁵ Law "On Bar and Legal Practice", *op. cit.*, articles 55-4-6), 55-4-7).

¹⁰⁶ *Ibid.*, article 55-4-11).

¹⁰⁷ *Ibid.*, article 48-1.

¹⁰⁸ *Ibid.*, article 48.

¹⁰⁹ *Ibid.*, article 52-1.

¹¹⁰ *Ibid.*, article 52-4-1).

¹¹¹ *Ibid.*, article 52-4-2).

¹¹² *Ibid.*, article 52-5-1), 4).

¹¹³ *Ibid.*, article 50-1.

¹¹⁴ *Ibid.*, article 50-1.

¹¹⁵ *Ibid.*, article 50-1.

¹¹⁶ *Ibid.*, article 53.

¹¹⁷ *Ibid.*, article 51.

¹¹⁸ *Ibid.*, article 51-3.

¹¹⁹ *Ibid.*, article 5.

¹²⁰ Statute of the UNBA, 17 November 2012, article 1.6.

¹²¹ *Ibid.*, article 3. For the source of income see the Law "On Bar and Legal Practice", *op. cit.*, article 58.

The Ministry of Justice of Ukraine (MoJ) has no authority over the UNBA or licensing of lawyers¹²² and its functions in relation to the UNBA are limited to the issues related to free legal aid¹²³—regulating maintaining of the registry of free legal aid lawyers by the Free Legal Aid Coordination centre and holding regional competitions to engage free legal aid lawyers.¹²⁴ Regarding financial monitoring, the MoJ can carry out compliance assessment of lawyers and entities providing legal service¹²⁵ as well as providing methodological and other necessary support to lawyers.¹²⁶

In practice as well as in law, the UNBA appears to be independent from the executive and other State institutions and often acts in a due manner in defence of their members who come under attack or pressure. The mission noted that the notion of an independent legal profession is well-entrenched within the Bar Association and is zealously guarded as one of the key principles of the profession. Issues of threats to individual lawyers and to the independence of the profession as a whole have been raised regularly by the UNBA over recent years. The UNBA monitors cases of attacks on its members and publishes regular reports and conducts events to raise awareness about the problem. Furthermore, the UNBA took a strong active position against a proposed reform which could have undermined its independence (see below).

Access to the legal profession: the qualification procedure for lawyers

The qualification of prospective lawyers is carried out by the UNBA itself without any institutional influence from the outside. According to the law, the QDC organizes and carries out the qualification examination.¹²⁷ The attestation chamber of the QDC accepts and evaluates the examinations.¹²⁸

To obtain the status of a lawyer a candidate must have a higher legal education; proficiency in the State language (Ukrainian); at least two years of experience in law; have passed the qualifying examination; completed an internship of at least six months (unless otherwise provided by law); taken the oath of lawyer of Ukraine; and obtained a certificate for the right to practice law.¹²⁹ The law also sets certain criteria which prevent an individual from obtaining the status of a lawyer: outstanding charges or unpunished convictions; no or limited legal capacity; termination of the right to practice law for two years; dismissal from the position of a judge, public prosecutor, investigator, notary, public service or local self-government officer for breaching the oath or committing a corruption-related offense—during three years starting from the date of such dismissal.¹³⁰

While the internal issues of the functioning of the Bar Association, which should be examined separately, were not a primary focus of the mission, the ICJ has on numerous occasions heard critical remarks regarding the qualification procedure for lawyers and issuing of the certificate to practice law. It was reported that in some regions the periods of waiting before the qualifying exam as well as additional requirements for

¹²² For a discussion of previous regulatory functions of the MoJ over the Bar Association, see “Relationship Between the Bar and the Ministry of Justice. Part 1”, in URKON.info, available at: <http://urkon.info/index.php?o=123&l=2> (Accessed 21 February 2020).

¹²³ Memorandum on cooperation between the MoJ and UNBA on issues of free legal aid, 19 November 2013, available at: <https://zakon.rada.gov.ua/laws/show/n0021323-13> (Accessed 21 February 2020).

¹²⁴ Charter of the Ministry of Justice of Ukraine No. 228, approved by the Decree of the Cabinet of Ministers from 2 July 2014, article 3, paras 38–40.

¹²⁵ *Ibid.*, article 3, para. 79.

¹²⁶ *Ibid.*, article 3, para. 80.

¹²⁷ Law “On Bar and Legal Practice”, *op. cit.*, article 9-2.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, article 6-1.

¹³⁰ *Ibid.*, article 6-2.

training for interns were excessively long;¹³¹ however, the ICJ did not examine this issue in detail. With the adoption of the Concept of Reforming the Procedure for Taking the Qualifying Examination to Obtain the Right to Practice Law,¹³² a new procedure was introduced from 1 September 2018, which was characterized by some observers as “an improvement” in relation to the old procedure, with frequency of conducting examination being every month and process becoming less bureaucratic overall.¹³³ At the same time, the Concept of Reforming the Procedure for Taking the Qualifying Examination to Obtain the Right to Practice Law allows prospective lawyers to apply for a certificate, and to take the qualifying exam, to any regional QDCB, not only that of the applicant’s place of residence, on condition that the fee for the qualifying exam is paid to both the region where they apply, and that of their residence.¹³⁴

The mission was repeatedly told that there was a high level of perception of corruption in the legal profession. While most of the opinions expressed referred to a general perception of corruption rather than any specific allegations, access to the legal profession was one area raised most frequently in regard to corruption, and UNBA officials acknowledged that there was a problem in this regard.¹³⁵ In some instances corruption allegations have led to formal investigations of practices in the qualification procedure both in Kyiv¹³⁶ and in the regional QDCs.¹³⁷

The disciplinary procedure for lawyers

International standards stipulate that lawyers’ professional duties must be carried out diligently in accordance with the law and recognized standards and ethics of the legal profession.¹³⁸ In this regard, particular attention is attached to personal values such as honour, honesty and integrity, considered as professional obligations for lawyers.¹³⁹ Lawyers must be able to act freely, diligently and fearlessly in accordance with the wishes of their clients, being guided by the established rules, standards and ethics of the profession.¹⁴⁰

According to the UN *Basic Principles on the Role of Lawyers*, disciplinary proceedings should be heard by an independent and impartial disciplinary body established

¹³¹ For instance, BCU Decision No. 80 from 1 June 2018 “On the Introduction and Approval of Amendments to the Regulation Regarding the Organization and Procedure for an Internship to Obtain a Certificate of the Right to Practice Law”, places an obligation on an intern to take an “adaptation course for the profession of a lawyer” on a paid basis. There is a similar requirement for assistant lawyers—to take a special instruction course “introduction into the profession of assistant attorney” at the Higher School of Advocacy under the UNBA, according to BCU Decision No. 81 of 1 June 2018, in the Agency for Legislative Initiatives Report, *The Bar of Ukraine: the Lessons Learned from the Early Years of Self-Governance*, 2018, p. 35, available at: https://parlament.org.ua/wp-content/uploads/2018/09/bar_of_ukraine_shadow_report.pdf (Accessed 21 February 2020).

¹³² Approved by the BCU Decision No. 25, 30 March 2018, available at: https://unba.org.ua/assets/uploads/legislation/rishennya/2018-03-30-r-shennya-rau-25_5acf55f8a1406.pdf (Accessed 21 February 2020).

¹³³ See the interview with the UNBA Deputy Head Valentyn Gvozdiy, 24 May 2018, available at: <https://unba.org.ua/publications/3299-valentin-gvozdiy-neprodumana-reforma-prizvede-do-degradacii-fahovogo-rivnya-advokativ.html> (Accessed 21 February 2020).

¹³⁴ Concept of Reforming the Procedure for Taking the Qualifying Examination to Obtain the Right to Practice Law, *op. cit.*, “Lodging an Application for the Qualification Examination”, para. 5.

¹³⁵ Corruption in qualification procedures was the most common issue of concern in a recent survey among lawyers, available at: <http://tomorrowlawyer.org/en/> (Accessed 24 February 2020).

¹³⁶ QDC of Kyiv region members organized a corruption scheme to obtain a lawyer’s certificate, 12 October 2019, available at: http://antikor.com.ua/articles/263880-chleni_kdka_kijivskoj_oblasti_organizuvali_koruptsijnu_shemu_otrimannja_svidotstva_advokata_-_vijs (Accessed 21 February 2020).

¹³⁷ For example, recently in Ternopil, 14 December 2020, available at: <https://ternopil.depo.ua/ukr/ternopol-u-ternopoli-vikrili-korupciynu-shemu-oderzhannya-advokatskogo-posvidchennya-foto-20181214886392>; also in Uzhhorod, <http://uzhgorod.net.ua/news/59061> (Accessed 21 February).

¹³⁸ *Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 14.

¹³⁹ Code of Conduct for European Lawyers, adopted by the Council of Bars and Law Societies of Europe (CCBE) in 1988, General Principles 2.2, available at: https://www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/advokatetik/2006_code_en.pdf (Accessed 21 February).

¹⁴⁰ *Singhvi Declaration*, *op. cit.*, para. 83.

by the legal profession, by an independent statutory body, or by a court, and should be subject to independent judicial review.¹⁴¹ Such proceedings should be determined “in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles”¹⁴² and must be processed expeditiously and fairly in accordance with the right to a fair hearing.¹⁴³ Recommendation No. R(2000)21 of the Council of Europe Committee of Ministers prohibits arbitrariness of the disciplinary action and requires a system which “guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure threats or interference, direct or indirect, from any quarter or for any reason.”¹⁴⁴

Article 21 of the Law on the Bar and Legal Practice states that it is the primary professional duty of a lawyer to abide by the oath of lawyer and the ethical standards of the profession. The Ethical Rules for Lawyers in Ukraine were approved by the Congress of lawyers of Ukraine on 17 November, 2012. Violation of the Ethical Rules on a regular basis or committing a gross violation of the same on one occasion among other grounds leads to suspension of a lawyers’ right to practice law for a period of one month to one year.¹⁴⁵ Violating the Ethical Rules on a regular basis or committing a gross violation on one occasion in a manner that undermines the authority of the Bar Association of Ukraine is included in the grounds for termination of the right to practice law.¹⁴⁶

As mentioned earlier, a wave of disciplinary proceedings against lawyers followed the establishment of the UNBA and the conflict which erupted as a result of the creation of two parallel structures.¹⁴⁷

During the mission the ICJ was informed by lawyers and other observers that abusive disciplinary proceedings are no longer common. However, some such cases do still appear to occur, related to the participation of lawyers in “parallel” associations of lawyers.¹⁴⁸

Information obtained during the mission suggests that the following aspects of disciplinary proceedings could raise issues for further improvement:

- over-broad interpretation of grounds of misconduct such as the violation of the oath of lawyer¹⁴⁹ and “violation of the rules of professional conduct, which compromises the authority of advokatura of Ukraine” as a “one-size-fits-all” ground for applying the most severe disciplinary penalty;¹⁵⁰
- lack of legally defined criteria for bringing a complaint and grounds for a complaint against lawyers;
- a limited range of disciplinary penalties,¹⁵¹ which does not ensure compliance with the principle of proportionality in such penalties.

¹⁴¹ *Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 28.

¹⁴² *Ibid.*, Principle 29.

¹⁴³ *Ibid.*, Principle 27.

¹⁴⁴ Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, *op. cit.*, Preamble.

¹⁴⁵ Law “On Bar and Legal Practice”, *op. cit.*, article 31-2-3).

¹⁴⁶ *Ibid.*, article 32-2-1).

¹⁴⁷ ICJ Report, Ukraine: Conflict, Disbarments and Suspensions in the legal profession, *op. cit.*, pp. 13–14; Council of Bars and Law Societies of Europe (CCBE) Report on the CCBE Fact-Finding Mission to Kyiv, Ukraine, 10–12 July 2013, p. 14, available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PECO/PECO_Reports/EN_PECO_20130710_Report_on_the_CCBE_fact-finding_mission_to_Kiev.pdf (Accessed 21 February).

¹⁴⁸ Recently, lawyer Iryna Didkovska’s status was suspended as a disciplinary measure for her continued involvement in a parallel Kyiv City Bar Council, 21 June 2019, available at: <https://unba.org.ua/news/4444-kdka-prityagnulo-disciplinarnoi-vidpovidal-nosti-advokata-didkovs-ku-za-diyal-nist-u-nezakonnij-radi-advokativ-kieva.html> (Accessed 21 February 2020). Similar decision was issued concerning Inna Rafalska (<https://erau.unba.org.ua/profile/37660>) and lawyer Valentin Stepyuk (<https://erau.unba.org.ua/profile/36644>), on the same grounds.

¹⁴⁹ Law “On Bar and Legal Practice”, *op. cit.*, articles 34-2-2), 32-2-1).

¹⁵⁰ *Ibid.*, article 34-2-4).

¹⁵¹ *Ibid.*, article 35-1.

In disciplinary cases, procedural irregularities have been reported due to deficiencies in legislation or practice. For example, disciplinary proceedings regarding certain cases were conducted by QDCBs other than those of the lawyer's registered place of work, as provided for by law.¹⁵² Some lawyers raised concerns that decisions were taken without the relevant lawyers being present.¹⁵³

Proposals for reform of the Bar Association

In 2019, at the time of the ICJ mission, a reform the Bar Association was planned. A new draft law on the Bar Association was to replace the law of 2012 "On the Bar and Legal Practice" (Law No. 5076-VI). The draft law (No. 9055) was submitted by the then President Petro Poroshenko, as an "urgent" and "priority" measure.¹⁵⁴ Following the 2019 Presidential elections, the draft law was automatically withdrawn.¹⁵⁵

Among the main objectives of the proposed new law, the drafters mentioned: a need for a more transparent and democratic system of lawyers' self-government at the national and regional levels; elimination of lawyers that impede access to the profession and create corruption risks; strengthening the guarantees of practicing law and bringing lawyers' ethical standards in line with international standards; ensuring the independent administration of the Unified Register of Lawyers of Ukraine (URAU); and introducing a transparent budgetary process of national and regional bar associations.¹⁵⁶

As officially declared therefore, the draft law intended to solve important issues with the legal profession, which were caused by "the imperfection of the current law" and its application in practice. However, the ICJ did not find major apparent problems with the law of 2012, which remains in force. Besides, the majority of the stakeholders stated that although there might be issues of lawyers' self-governance that need further improvement, the law in force was not the source of the problems within the legal profession. The mission heard allegations from many quarters—which were not of course possible to verify—that the reasons for the initiation of the reform of the Bar Association were different from those declared and in fact they were a way to dismiss the current leadership of the UNBA. It is plausible that such an intention could have been connected to the internal conflict within the legal profession in Ukraine, and particularly in Kyiv (see above).

The mission learnt that the process of the development of draft law No. 9055 lacked the necessary level of consultation and participation of representatives of the legal profession, and in particular, the UNBA a main stakeholder which strongly opposed it.¹⁵⁷ Indeed, its development began in 2015 as part of the 2015–2020 Strategy for Reforming the Judiciary and Related Institutions the Action Plan thereto. The working group of the Judicial Reform Council,¹⁵⁸ Free Secondary Legal Aid (FSLA) and Public Prosecutor's

¹⁵² *Ibid.*, article 33-3.

¹⁵³ ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 36, case of Olha Prosyanyuk, Oleksandr Horoshynskyi.

¹⁵⁴ See the timeline for the Draft law "On Bar and Legal Practice" No. 9055, 7 February 2019, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64557 (Accessed 24 February 2020).

¹⁵⁵ Automatic withdrawal of Presidential draft laws with the end of their term in office if provided for in the Rules of Procedure for the Verkhovna Rada, No. 1861-VI, 10 February 2010, article 105-3, available at: <https://zakon.rada.gov.ua/laws/show/1861-17/> (Accessed 21 February 2020).

¹⁵⁶ See the Explanatory note of 9 September 2018 for the draft law "On Bar and Legal Practice" No. 9055, 7 February 2019, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64557 (Accessed 24 February 2020).

¹⁵⁷ On 26 February 2019, the UNBA submitted its Resolution against the adoption of the draft law (the Resolution was adopted by the Congress of Lawyers of Ukraine on 15 February 2019) to the Parliament. The UNBA requested to have the draft law returned to the drafters for revision and has been actively campaigning against its adoption.

¹⁵⁸ The Judicial Reform Council is an advisory body under the President of Ukraine. The Council develops and submits proposals to the President on the strategy for reforming judiciary and justice system, and other related legal institutions, as well as the strategy implementation plan. The Judicial Reform Council was created by the Presidential Decree No. 826/2014 from 27 October 2014 and replaced by the Commission on Legal Reform, created by the Presidential Decree No. 421/2019 from 21 June 2019, available at: <https://zakon.rada.gov.ua/laws/show/584/2019>, <http://sudovareforma.org/people/shcho-take-rada-z-pytan-sudovoyi-reformy/> (Accessed 21 February 2020).

office developed a draft law. Significantly, the Bar Association itself was not included in the working group (some international experts did comment on the law¹⁵⁹). Official representatives of the UNBA who visited Geneva in December 2018 informed the ICJ that their participation in the debate on the draft law had been hampered and that they were not able to contribute to the work of the Working Group and were not aware for a long time of the content of the draft law.

In January 2019, the UN Special Rapporteur on the Independence of Judges and Lawyers in a letter to the President of Ukraine recommended “to revise the draft law... in order to ensure its compliance with the existing international human rights standards regarding the independence of the profession of lawyers.”¹⁶⁰ He noted in particular that “[. . .] according to information received, during the development of the draft law, consultation with members of the legal profession—alone and through their professional associations—was limited. Allegedly, only a few representatives of the national bar association were allowed to participate in the consultative process, with the result that their views failed to be taken into account during the drafting stage. Furthermore, it appears that the final draft was made public by the President’s office without providing the national bar association any possibility to provide comments on its content.”¹⁶¹

In this context the mission did not see compelling reasons to submit the draft law to the Parliament through an “urgent procedure”. As noted by the Special Rapporteur in his letter on the Draft Law, “legislation regulating the role and activities of lawyers and the legal profession should aim at enhancing the independence, self-regulation and integrity of the legal profession.”¹⁶² The UNBA is an organization established by law and the legal profession represented by it should be duly consulted at all stages of the legislative process in any legislative reform affecting the profession.¹⁶³

Shortly after the mission, the process for the adoption of the new law was halted, as a result of the election of a new President of Ukraine on 20 May 2019, which implied an automatic withdrawal¹⁶⁴ of presidential draft laws from the Parliament.¹⁶⁵ At present, the legal profession therefore continues to function under the law of 2012. However, under President Volodymyr Zelensky, institutional reforms of the wider justice system are continuing,¹⁶⁶ and there are indications that future reforms may touch upon

¹⁵⁹ See Opinion Prepared by the Council of Europe’s project “Support to the implementation of the judicial reform in Ukraine” on the basis of analysis of the Council of Europe experts Rytis Jokubauskas and Vahe Grigoryan, 8 November 2018, available at: <https://rm.coe.int/opinion-draft-law-on-the-bar-eng/16808f0e2b> (Accessed 21 February 2020).

¹⁶⁰ *Communication of the Special Rapporteur on the independence of judges and lawyers to the President of Ukraine*, OL UKR 1/2019, 28 January 2019, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24313> (Accessed 21 February 2020).

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ Note by the Secretary-General, Independence of judges and lawyers, UN Doc. A/64/181, 28 July 2009, para. 52. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/427/91/PDF/N0942791.pdf?OpenElement> (Accessed 21 February 2020).

¹⁶⁴ Draft Law No. 9055 “On Bar and Legal Practice”, 7 February 2019, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64557 (Accessed 21 February 2020). Automatic withdrawal of Presidential draft laws with the end of their term in office if provided for in the Rules of Procedure for the Verkhovna Rada, No. 1861-VI, 10 February 2010, article 105-3, available at: <https://zakon.rada.gov.ua/laws/show/1861-17/> (Accessed 21 February 2020).

¹⁶⁵ Eurointegration (Evropeyska Pravda): The Venice Commission is considering what to do with the draft law that “died” with Zelenskyi taking office, 4 June 2019, available at: <https://www.eurointegration.com.ua/rus/news/2019/06/4/7096925/> (Accessed 21 February 2020).

¹⁶⁶ President Volodymyr Zelensky’s team is announcing large-scale judicial reform, and on 7 August 2019 a presidential decree was issued to create a Commission in charge of legal reform, 7 August 2019, available at: <https://www.president.gov.ua/documents/5842019-28949> (Accessed 21 February 2020).

the legal profession, including, possibly the issues related to its self-governance.¹⁶⁷ No information is yet available as to the content of these proposals. Yet, it should be stressed, that as mentioned by the UN Special Rapporteur on the independence of judges and lawyers in his letter, “the legislation concerning the legal profession should be developed by the legal profession itself. When established by law, the legal profession should be duly consulted at all stages of the legislative process (see A/64/181, para. 53).”¹⁶⁸

¹⁶⁷ The Association of Advocates of Ukraine (UAA) has written an open letter to the Head of Presidential Administration in reaction to the recent statements of the Presidential Office that lawyers in Ukraine have too many procedural rights and in course of the legal reform procedural codes have to be amended to narrow down the rights of lawyers, 24 July 2019, available at: <https://porady.org.ua/asociaciya-advokativ-ukraini-zvernulas-z-vidkritim-listom-do-kerivnika-ofisu-prezidenta-ukraini> (Accessed 21 February 2020). Recently, the Draft law No. 2303 on the amendments to the current law “On Bar and Legal Practice” was introduced in the Parliament, 23 October 2019, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67168 (Accessed 21 February 2020). Also, the law on “reloading” of judicial reform No. 193-IX, from 16 October 2019 was adopted and entered into force, aimed to relaunch the Supreme Council of Justice and the Supreme Court, available at: <https://zakon.rada.gov.ua/laws/show/193-ix> (Accessed 21 February 2020).

¹⁶⁸ *Communication of the Special Rapporteur on the independence of judges and lawyers to the President of Ukraine*, OL UKR 1/2019, 28 January 2019, pp. 6 and 7, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24313> (Accessed 21 February 2020).

Chapter II. Security of lawyers

International law and standards

Lawyers, along with judges and prosecutors, play an essential role in upholding the rule of law and ensuring that human rights are guaranteed.¹⁶⁹ International law and standards on the role of lawyers recognize that lawyers are key actors in the justice system and the protection of human rights¹⁷⁰ as “essential agents of the administration of justice” who “shall at all times maintain the honour and dignity of their profession”.¹⁷¹ They stipulate that the institutional independence and self-governance of the profession as a whole should be guaranteed.¹⁷²

In accordance with the UN *Basic Principles on the Role of Lawyers*, at an individual level, the State must take measures to ensure that lawyers “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference”.¹⁷³ These protection measures are crucial to lawyer’s ability to provide effective legal assistance to the clients.¹⁷⁴

The State has a duty to ensure that lawyers are not identified with their clients or their clients’ causes as a result of discharging their professional functions.¹⁷⁵

Recommendation R(2000)21 of the Council of Europe Committee of Ministers identifies the obligations of States to take all necessary measures “...to respect, protect and promote the freedom of exercise of 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.”

Under international human rights law, lawyers must be protected against attacks both in connection with the human rights of their clients and the human rights of the lawyers themselves. Harassment of lawyers may lead to violations of the rights of their clients including, among others, the right to a fair trial (ICCPR, article 14; ECHR, article 6), the right to liberty (ICCPR, article 9; ECHR, article 5), or freedom from torture or other ill-treatment (ICCPR, article 7; ECHR, article 3).

National legal framework

The Constitution of Ukraine guarantees the independence of legal practice in Ukraine.¹⁷⁶ The Constitution also establishes the right of an accused person to a defence; adversarial procedure and freedom of the parties to legal proceedings to present their evidence to and make a case before the court; and equality before the law and the court of all participants in a trial as a key principle of judicial proceedings.¹⁷⁷

¹⁶⁹ UN Human Rights Council Resolution, *Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, UN Doc. A/HRC/29/L.11 (2015).

¹⁷⁰ ICJ Practitioners Guide No. 1, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, p. 63. Available at: <http://icj2.wpengine.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-ProsecutorsNo.1-Practitioners-Guide-2009-Eng.pdf> (Accessed 21 February 2020).

¹⁷¹ *Basic Principles on the Role of Lawyers*, op. cit., Principle 12.

¹⁷² See, inter alia, *Basic Principles on the Role of Lawyers*, op. cit., Principle 24; Human Rights Council, Resolution 23/6, *Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers* (2013), Preamble.

¹⁷³ *Basic Principles on the Role of Lawyers*, op. cit., Principle 16.

¹⁷⁴ *Ibid.*, Principles 16 (b), 22.

¹⁷⁵ *Ibid.*, Principle 18.

¹⁷⁶ The Constitution of Ukraine, article 131-2, in accordance with the amendments dated 2 June 2016.

¹⁷⁷ *Ibid.*, article 129.

These principles are further detailed in legislation. Article 23 of the Law “On the Bar and Legal Practice” provides for the guarantees against interference with or impediment of lawyers’ work, in particular “[. . .] life, health, honour and dignity of an attorney and of his/her family members and their property are under protection of the state, and any encroachments thereupon shall entail liability established by law [. . .].”¹⁷⁸ Lawyers are entitled to have measures taken to ensure their safety and protection while they are participating in criminal proceedings¹⁷⁹ along with several other guarantees¹⁸⁰ elaborated further later in this report.

Moreover, special procedures have to be employed to bring disciplinary actions against lawyers, to carry out investigative actions against them, detain them or apply other measures of restraint;¹⁸¹ notice of suspicion against a lawyer for committing a criminal offence is also subject to specific rules.¹⁸²

Furthermore, the Criminal Code of Ukraine establishes five crimes specifically relating to action against lawyers (defence counsel) or legal agents,¹⁸³ namely:

- violation of the right to defense committed by an investigator, prosecutor or judge;¹⁸⁴
- interference with lawful activity of defense lawyers or violation of legal guarantees of their professional activity;¹⁸⁵
- threats of murder, violence, destruction or impairment of property made in respect of lawyers or their close relatives, in connection with their legal assistance;¹⁸⁶
- wilful destruction or impairment of property owned by lawyers or their close relatives, in connection with their legal assistance;¹⁸⁷
- murder or attempted murder of a defense lawyers or the close relatives, in connection with their legal assistance.¹⁸⁸

¹⁷⁸ Law “On Bar and Legal Practice”, *op. cit.*, article 23-1-6).

¹⁷⁹ *Ibid.*, article 23-1-7).

¹⁸⁰ *Ibid.*, article 23, part 1, paras: 1) any interference and obstacles to the exercise of legal practice are prohibited; 2) it is prohibited to require a lawyer, his/her assistant, trainee, a person employed by/employing a lawyer, a law firm, attorneys at law, as well as a person whose licence to practice law is terminated or suspended, to provide information that is attorney-client privilege; [. . .] 5) a lawyer is guaranteed equality of rights with other participants in proceedings, adherence to adversarial procedure and freedom to provide evidence and prove the credibility thereof; 6) life, health, honour and dignity of an lawyer and his/her family members, their property are protected by the State, and offences against such are punishable by law; 7) a lawyer is guaranteed the right to safety during participation in criminal proceedings in accordance with the procedure established by law; [. . .] 11) interference in a lawyer’s legal position is prohibited; [. . .] 14) it is prohibited to bring criminal or other actions against a lawyer (a person whose licence to practice law is terminated or suspended), or threaten to impose liability in connection with practicing of law by him/her in accordance with legislation; 15) attorney’s statements in a case, including those reflecting a client’s position, statements in mass media, unless it violates attorney’s professional duties, may not be the basis for prosecuting an attorney; 16) it is prohibited to identify an attorney with a client [. . .].

¹⁸¹ *Ibid.*, article 23-1-17).

¹⁸² In accordance with article 481-1-1) of the Criminal Procedure Code of Ukraine and article 23-1-13) of the Law “On Bar and Legal Practice”, the note of suspicion might only be issued to a lawyer by the Prosecutor General, his or her deputy, or the Prosecutor of the Autonomous Republic of Crimea, oblasts, Cities of Kyiv and Sevastopol.

¹⁸³ Hereinafter, the words “or legal agent” contained in each of the below articles are omitted.

¹⁸⁴ The Criminal Code of Ukraine, Law No. 2341-III, 5 April 2001, article 374, available at: <https://zakon.rada.gov.ua/laws/show/2341-14> (Accessed 21 February 2020); qualifying element of the criminal offence—whereas [above] actions resulted in conviction of an innocent person, or committed by a group of persons upon their prior conspiracy, or where they caused any grave consequences.

¹⁸⁵ The Criminal Code of Ukraine, *op. cit.*, article 397; qualifying element—committed by a person through abuse of office.

¹⁸⁶ *Ibid.*, article 398; qualifying element—wilful battery, infliction of minor or medium grave bodily injuries; grave bodily injuries.

¹⁸⁷ *Ibid.*, article 399; qualifying element—setting fire, explosion, or any other generally dangerous method, or where they caused damages in especially gross amount; whereas such actions caused death of people, grave bodily injuries or any other grave consequences.

¹⁸⁸ *Ibid.*, article 400.

The Criminal Procedure Code of Ukraine stipulates procedural rights and guarantees of the right of defence,¹⁸⁹ which reflects the provisions defined by the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*¹⁹⁰ and the *Basic Principles on the Role of Lawyers*.

Security climate for lawyers in Ukraine

During the mission, the ICJ repeatedly heard testimonies of the deteriorating security situation in the country. Concerns over this general situation with a large number of attacks reported against individuals and specific groups were raised consistently throughout the mission, and elsewhere both at the national¹⁹¹ and international¹⁹² level. The number of physical attacks against such groups, is increasing, and lawyers constitute a frequent target.¹⁹³ At the end of 2019, the UNBA has reported that over 2,500 infringements of the rights of lawyers had been committed in Ukraine over the past 5 years.¹⁹⁴

Intimidation of judges, of court staff and lawyers by representatives of far-right radical groups was highlighted during the mission as one of the existing patterns of such attacks. Such attacks are not carried out in isolation from the judicial process but are often organized to influence the outcome of the case through intimidation or actual physical attacks which often constitute a major obstacle to the fair judicial process. The mission heard of various incidents at court hearings in which judges and lawyers as well as litigants or their family or friends were attacked in the courtroom; aggressive slogans were shouted and painted on placards;¹⁹⁵ court buildings were surrounded with posters calling for a strict sentence on the day of a decision on whether to prolong or change a measure or restraint;¹⁹⁶ and meetings were held next to the court house with participants displaying abusive signs.¹⁹⁷ The ICJ heard of many cases where such actions were carried out in a highly aggressive or threatening manner¹⁹⁸ or involved hate speech¹⁹⁹ and were carried out to harass and threaten members of the judiciary, lawyers or parties to the proceedings.

¹⁸⁹ Under the Criminal Procedure Code of Ukraine No. 4651-VI, 13 April 2012, available at: <https://zakon.rada.gov.ua/laws/show/4651-17> (Accessed 24 February 2020), suspected and accused persons are granted the following rights:

- to have a defence lawyer provided immediately upon request, and to meet with him/her before the first interrogation, provided that the conditions ensuring the confidentiality of communication are observed (article 42-3);
- to a confidential visit by a lawyer without restrictions in number and duration (article 46-5);
- to have a defence lawyer present during the interrogation and other procedural actions (article 46-5);
- to receive legal aid from a defence lawyer at the expense of the state in cases stipulated by the Criminal Procedure Code of Ukraine and/or the law regulating the provision of free legal aid, including in connection with the lack of funds for payment of aid (article 20-3).

¹⁹⁰ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Adopted by General Assembly resolution 43/173(1988).

¹⁹¹ LGBT Human Rights 'Nash Mir' Centre, *Report on Hate Crimes and Incidents in Ukraine, 2015–2018*, available at: <https://gay.org.ua/publications/hatecrime2018-e.pdf> (Accessed 21 February 2020); see also *ECRI Report on Ukraine* (5th monitoring cycle), CRI(2017)38, adopted on 20 June 2017, available at: <https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8> (Accessed 21 February 2020).

¹⁹² Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-second and twenty-third periodic reports of Ukraine*, UN Doc. CERD/C/UKR/22-23 (2016), para. 15; OSCE ODIHR Hate Crimes Reporting, Ukraine, *op. cit.*

¹⁹³ E.g. International Society for Human Rights Report, *Right to a Fair Trial in Ukraine*, January 2019, p. 10, available at: https://humanrights-online.org/wp-content/uploads/2019/03/report_english_version.pdf (Accessed 21 February 2020).

¹⁹⁴ UNBA, Over 2,500 crimes against lawyers committed in Ukraine over the past 5 years, 20 December 2019, available at: <https://unba.org.ua/news/5032-za-5-rokiv-v-ukraini-stalosya-bil-she-2500-zlochiv-proti-advokativ.html> (Accessed 21 February 2020).

¹⁹⁵ E.g. unambiguous slogans "kollorady — out, in jail!" referring to people who opposed Maidan in 2014.

¹⁹⁶ E.g. "Strict Sentence to Murderers of Babaev!" At the same time on the car of one of the attorneys was pasted a poster "Murderer's defender!" in case of A. Melnyk, A. Kryzhanovsky, I. Pasichny and I. Kunik.

¹⁹⁷ ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, e.g. Oleksandr Horoshynskyi, p. 24; Kyrylo Lehkykh, p. 14.

¹⁹⁸ E.g. see the case of Povalyaev in below section on physical attacks on lawyers.

¹⁹⁹ The mission was presented with a number of examples of hate speech.

The mission was informed about a case where so-called “activists” visited a judge’s house with banners stating “You are a criminal and cannot try this case”. This was considered by judges as pressure on the court, which may amount to a criminal offense.²⁰⁰ However the ICJ did not hear of instances where a formal inquiry or other proceedings would be initiated for such attempts to intimidate judges.²⁰¹ An extreme example of intimidation took place in 2014, when a group of individuals broke into the building of the Supreme Court of Ukraine and forced the judges of the Supreme Court to leave the Supreme Court building and to march through the “corridor of shame”.²⁰² No investigation of this incident has been carried out to date.

Security in and around courts continues to be an issue in Ukraine. As of the autumn of 2018, 464 court buildings were not guarded, 161 were guarded only during the day time, 7 only during the night while 136 court buildings were guarded 24 hours a day.²⁰³ To address the problem, in accordance with the Law on Judiciary and Status of Judges from June 2016, the Court Security Service, a new security organization to guard the courts, was to be established by 1 January 2018. At the time of writing of this report, it has already been created and staff selection is ongoing²⁰⁴, although it has not become operational yet (full entry into operation is expected in mid-2020)²⁰⁵ and courts security in Ukraine continue to be the responsibility of the National Police and National Guards.²⁰⁶

The activity of radical right-wing groups

As described above, violence against lawyers, as well as against other human rights defenders, is sometimes perpetrated by organized, nationalist political groups.²⁰⁷ Such groups have continued to be involved in attacks including on judges, lawyers, activists or others who were seen as “traitors” or “separatists”.²⁰⁸

²⁰⁰ As based on the information of the interlocutors of the mission.

²⁰¹ The mission was informed that, for example, during 2013 Ukrainian courts did not issue a single decision regarding the interference with professional activity of judges, although there were 400 reported cases and complaints submitted to the Supreme Council of Justice.

²⁰² OHCHR, *Report on the human rights situation in Ukraine*, 15 May 2014, para. 29, available at: <https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf> (Accessed 21 February 2020); see also BBC Ukraine, The Congress of Judges was sabotaged in Kyiv, 7 April 2020, available at: https://www.bbc.com/ukrainian/news/2014/04/140407_ukraine_judges_court_ak (Accessed 21 February 2020); TSN, In Kyiv the activists seized the Supreme Court of Ukraine building, 7 April 2020, available at: <https://tsn.ua/ru/politika/v-kieve-aktivisty-shturmuyut-zdanie-verhovnogo-suda-ukrainy-359174.html> (Accessed 21 February 2020).

²⁰³ According to the information reported at the presentation of the final report on the assessment of safety and security of the Ukrainian courts organized by the European Union Advisory Mission (EUAM) on 27 September 2018 in Kyiv.

²⁰⁴ Decree on the Court Security Service, approved by the Supreme Council of Justice, 4 April 2019, available at: <https://zakon.rada.gov.ua/rada/show/v1051910-19> (Accessed 21 February 2020); see also Military Portal, The Court Security Service is being created in Ukraine, 7 November 2019, available at: <https://mil.in.ua/uk/news/v-ukrayini-stvoryuyut-sluzhbu-sudovoyi-okhorony/> (Accessed 21 February 2020).

²⁰⁵ Sudebno-Yuridicheskaya Gazeta, Court Security Service Expected to Start Working in 2020, 8 April 2019, available at: <https://sud.ua/ru/news/publication/139290-sluzhba-sudovoyi-okhoroni-zapratsyuye-na-pochatku-2020-roku> (Accessed 21 February 2020).

²⁰⁶ The Law of Ukraine “On Judiciary and Status of Judges”, *op. cit.*, Chapter XII. Final and Transitional Provisions, para. 39.

²⁰⁷ E.g. see OHCHR definition of extreme right-wing groups: “In this report, the term “extreme right-wing groups” refers to political parties, movements and groups who blame vulnerable groups for societal problems and incite intolerance and violence against them. In Ukraine, extreme right-wing groups have perpetrated attacks against Roma and other minorities, including LGBTIQI. Through their actions, they bring into question the fundamental principle of non-discrimination by propagating an ideology based on racism, discrimination, xenophobia and intolerance. See Reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (UN Doc. A/HRC/35/42 of 26 April 2017 and A/HRC/18/44 of 21 July 2011).”

²⁰⁸ See OHCHR, *Report on the human rights situation in Ukraine*, 16 May 2018 to 15 August 2018, para. 9: “OHCHR is further concerned by attacks on, and intimidation of, defence lawyers by members of extreme right-wing groups, and continuing interference with the independence of judges”; OHCHR, *Report on the human rights situation in Ukraine*, 16 August 2018 to 15 November 2018, para. 11: “OHCHR also continued documenting cases of increasingly violent attacks against journalists and media professionals, civil society activists, affiliates of political parties and defence lawyers in conflict-related cases perpetrated by members of extreme right-wing groups, narrowing democratic and civic space in Ukraine.”

Extreme right-wing political parties, organizations and groupings have increased their presence in the Ukrainian social and political landscape often in the name of “patriotism”.²⁰⁹ The mission heard that such groups appear to have a well-developed organization structure with divided spheres of activity and influence within the group. These groups often carry out violent attacks while enjoying a high level of impunity, which, as the mission heard, could be the result of the alleged endorsement or direct guidance of such groups by high level politicians.²¹⁰ The mission heard that operating mostly in Kyiv and big cities, such violent groups attempt to shape their public image as NGOs that protect the “Ukrainians” and “look for traitors”. While there are several widely known violent groups, the mission most frequently heard references to the group S14.

The UNBA as well as individual lawyers reported to the ICJ that S14 frequently obstructs Bar Association activities in addition to committing attacks on individual lawyers. Cases have been reported where S14 members broke into the conference room during UNBA Committee meetings and applied physical force to the participants. The ICJ has heard consistent concerns from various quarters, including the victims of such attacks, that the police take a passive role in ensuring security of those under attack even where they are present during the attacks.

The mission heard numerous accounts of cases where violent “activists” had carried out attacks in the court premises or outside, while the police officers were present during such actions and merely passively witnessed the violence or other unlawful actions taking place, without reaction. Instances where perpetrators physically assaulted lawyers in the presence of the police, are corroborated by video footage which is available online, but appear not to have been investigated by law enforcement bodies.²¹¹

OHCHR in its quarterly reports²¹² continues to document “cases of interference by members of extreme right-wing groups in criminal proceedings of conflict-related and high profile criminal cases through the intimidation of judges, defendants and their lawyers.” In a recent report, it notes that “In three documented cases²¹³ members of extreme right-wing groups disrupted court hearings by verbally abusing judges and defendants. In one case, they beat a defendant in a conflict-related case outside the courtroom,²¹⁴ but police did not stop the beating.”²¹⁵

On 28 September 2018, approximately 15 members of the extreme right-wing group S14 physically attacked a lawyer defending a local journalist accused of high treason for his publications and assaulted another journalist observing the trial — as observed by OHCHR in Koroliovskiy district court of Zhytomyr. Police who arrived after the incident did not apprehend the perpetrators, allowing them to stay in the courtroom when the hearing

²⁰⁹ Amnesty International Ukraine, *Human rights under pressure, their advocates under attack*, op. cit. Investigative journalists exposed several instances during the year in which the government provided grant funds to or cooperated with violent groups. On 8 June, the Ministry of Youth and Sport announced that it would award S14, a violent nationalist group, 440,000 hryvnia (\$17,000) to hold a youth summer camp. The ministry later justified the decision by stating that it provided the funds only for specific project activities that were not violent. Media outlets reported that S14 and other violent groups had entered into formal agreements with municipal authorities in Kyiv and other cities to form “municipal guard” patrol units to provide public security. In a December 2017 media interview, the head of S14 described cooperation with the SBU and police.

²¹⁰ E.g. Amnesty International Ukraine, *Human rights under pressure, their advocates under attack*, op. cit.

²¹¹ Strana.ua news agency, S14 beat up lawyers of Muravitsky in court, 28 September 2018, available at: <https://strana.ua/video/163600-v-sude-zhitomira-natsionalisty-iz-s14-izbili-advokatov-muravitskoho-.html> (Accessed 21 February 2020).

²¹² OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2018 to 15 February 2019, para. 68, available at: <https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf> (Accessed 21 February 2020).

²¹³ Court hearings at the Dzerzhynskiy district court of Kharkiv, 12 December 2018, the Ordzhonikidzevskiy district court of Mariupol, 13 December 2018, and the Shevchenkovskiy district court of Zaporizhzhia, 21 January 2018.

²¹⁴ *Report on the human rights situation in Ukraine*, 16 November 2018 to 15 February 2019, UN Doc. A/HRC/40/CRP.3 (2019), para. 66.

²¹⁵ *Ibid.*

resumed after a break.²¹⁶ Another examples of activists trying to obstruct justice in sensitive cases through pressure on judges and intimidation of defense lawyers was documented by OHCHR, where observers shouted to judges “We came to oversee the court, to ensure you pass the right ruling”,²¹⁷ or verbally abusing lawyers during a court hearing or putting up leaflets accusing the defence lawyer of “defending armed insurgents”.²¹⁸

In some cases, the emergency patrol police are contacted as the attack is happening or immediately afterward but either do not arrive, or arrive only after several hours. This scenario of police inactivity was also reported by the UNBA, in cases where S14 attacked their premises or individual lawyers. On 30 July 2018, during an extraordinary session of the Committee on the Rights of Lawyers and Guarantees for Advocates’ Activities about the case of Valentin Rybin, who was attacked in court premises on 27 July 2018, about 30 members of S14 entered the UNBA premises and prevented the session from taking place. The police had been warned in advance²¹⁹ of a possible attack and were present in the UNBA building, however no action was taken in regard to the group.²²⁰ The attack has not led to any criminal investigation.²²¹

Physical attacks on lawyers

Lawyers face physical attacks or threats of such attacks almost on a daily basis, the mission was told on multiple occasions. Physical violence against lawyers was said often to be committed among others by law enforcement officers: lawyers may be physically assaulted in local police departments,²²² their own offices,²²³ or even before witnesses and clients²²⁴ in order to intimidate the lawyer, for example, to force him or her to “quit” the case; to prevent the lawyer from seeing a client (violation of the right to defense), to unlawfully obtain documents that are covered by professional privilege etc.²²⁵ Such treatment may lead to the eventual arrest of a lawyer.²²⁶

Attacks are often carried out by violent extreme right-wing political groups, such attacks may involve men in face masks, black outfits, shouting nationalist, xenophobic or

²¹⁶ *Ibid.*, para. 60.

²¹⁷ OHCHR, *Report on the human rights situation in Ukraine*, 15 February to 15 May 2019, para. 63, available at: https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Feb-15May2019_EN.pdf (Accessed 21 February 2020).

²¹⁸ *Ibid.*, footnote 72.

²¹⁹ The Bar Association Committee appealed to the police regarding the likelihood of obstruction of an emergency meeting, 31 July 2018, available at: <https://unba.org.ua/news/3436-komitet-zahistu-prav-advokativ-zvernuvsya-do-policii-v-zvyazku-z-jmovirnistyu-zrivu-ekstrenogo-zasidannya.html> (Accessed 21 February 2020).

²²⁰ Law and Business, UNBA declared police inaction during S14 provocations, 1 August 2018, available at: https://zib.com.ua/ua/print/133932-v_naau_zayavili_pro_bezdiyalnist_policii_pid_chas_provokacij.html (Accessed 21 February 2020).

²²¹ OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2018 to 15 February 2019, para. 70, available at: <https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf> (Accessed 21 February 2020). According to Rybin, police were reluctant to investigate the incident at the time of the above report. See also UNBA, *The State avoids the obligation to protect lawyers from interference with their professional activity*, 1 August 2018, available at: <https://unba.org.ua/news/3439-derzhava-unikae-obov'yazku-zahishati-advokativ-vid-vtruchannya-u-ihnyu-profesijnu-diyal-nist.html> (Accessed 21 February 2020).

²²² UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013-2018)*, approved by Decision of the Bar Council of Ukraine No. 2 of 26 February 2016, p. 21, available at: [https://en.unba.org.ua/assets/uploads/news/zvity/UNBA_Zahyst_Adv_2018_ENG_WEB\(1\).pdf](https://en.unba.org.ua/assets/uploads/news/zvity/UNBA_Zahyst_Adv_2018_ENG_WEB(1).pdf). For instance, On January 14, 2014, lawyer Roman Osynskyi was attacked by an officer of the police at Leninskyi District Department (Kharkiv City) in front of his client, at p. 22.

²²³ On 27 July 2017 an investigator of the GPO has conducted an unsanctioned search while ordering his colleagues (special SSU forces ‘Alpha’) to apply physical violence to lawyer Vadim Semenov for the entire duration of a search and verbally insulting the him. He forbade the doctors to hospitalize the beaten lawyer and pushed him outside when the search protocol was filled in.

²²⁴ On 13 December 2018 physical force was used by three police officers to Masi-Mustafa Nayem when he assisted his client. Gas spray was applied to lawyer’s skin and eyes.

²²⁵ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013-2018)*, *op. cit.*

²²⁶ In another case earlier that year, the SSU officers have subjected Liushyk V. V. to beating, verbal threats and insults during his arrest and had kept him in detention for several months before the note of suspicion was issued.

anti-Russian slogans, carrying placards, and are apparently organized—for example in some cases the attackers arrive by bus.²²⁷ As was mentioned above, during attacks by such groups the police are as a general rule reluctant to contain their violent activities.²²⁸ By way of example, lawyer Valentin Rybin was repeatedly threatened by representatives of S14 for representing individuals in cases which include political charges. On 27 July 2018 he was threatened by a group of representatives of a violent group in the premises of the Kyiv Appeal Court.²²⁹ On 24 December 2018, his car was burnt in his parking lot.²³⁰

On 7 August 2018, lawyer Oleg Povalyaev was attacked by several representatives of S14 in the Kyiv Court of Appeal. They disrupted the court hearing by shouting offensive slogans and following Povalyaev's remark that such behaviour was unacceptable, two men grabbed his hands and a third one hit him in the face. The incident was witnessed by two prosecutors and the judge, after which the court recess was announced. When Povalyaev exited the courtroom he was surrounded by a group of around 30 men threatening him with violence for defending the "wrong people", and one of the S14 members whom he identified to be one of the S14 leaders, assaulted him, while the police present during these incidents did not react.²³¹

Lawyer Oleksiy Nesvitaylo was attacked by a group of 7–8 people on 20 May 2019, while he carried out his professional duties. The lawyer was cruelly beaten and his property damaged, but the perpetrators were not identified since the police had not arrived promptly on the scene of the incident.

In certain cases attacks on lawyers are carried out by the representatives of the opposite side in a case²³² or by unknown individuals breaking into the court premises including with baseball bats²³³ or carrying out violent physical assault on the street with metal sticks or inflicting knife wounds.²³⁴

There have also been documented instances in which lawyers have experienced physical violence by law enforcement personnel. In February 2019, tax police investigators in Zhytomyr used physical force against lawyer Oleksandr Soldatkin, in response to which, representatives of the UNBA Committee on the Protection of Lawyers held a peaceful demonstration outside the Zhytomyr Tax Police building. Special forces with guns were present at the demonstration.²³⁵

²²⁷ On 1 June 2017, at the end of a court hearing in Chornomorskyi District Court of Odesa, Lawyer Volodymyr Boyuk was attacked by violent activists, which led to the lawyer suffering severe bodily injuries, at, ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, op. cit., p. 21. See also the case of Valentyn Rybin, attacked several times by radical activists. On 2 August 2018 a group of violent right wing activists burst into the premises of the UNBA Secretariat, breaking the session of the Disciplinary Chamber, UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine (2013–2018)*, op. cit., p. 39.

²²⁸ For detailed information see Section on lack of investigation and impunity.

²²⁹ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine (2013–2018)*, op. cit., p. 25.

²³⁰ Gordon news website, In Kiev, the car of lawyer defending Ruban and the alleged customer of the murder of Babchenko, 24 December 2018, available at: <https://gordonua.com/ukr/news/kyiv/-u-kijevi-spalili-mashinu-advokata-shcho-zahishchaje-rubana-i-peredbachuvanogo-zamovnika-vbivstva-babchenko-606970.html> (Accessed 21 February 2020).

²³¹ UNBA, Kiev, another attack on a lawyer by radical organizations, 7 August 2018, available at: <https://unba.org.ua/news/3452-u-kievi-stavysya-chergovij-napad-na-advokata-z-boku-radikal-nih-organizacij.html> (Accessed 21 February 2020).

²³² In January 2018, when Nyenov A. I. arrived to represent his clients, he was physically attacked and beaten by two men who also tried to seize his briefcase with case materials and turned out to be representatives of the opposite side in the case. Several days later a personal laptop of Nyenov was stolen from his residence with data on the cases where he was a lawyer. UNBA report, op. cit., p. 26.

²³³ In January 2018 a group of unknown people broke into the apartment of Zaichenko A. A. and violently beaten up the lawyer and his wife with baseball bats, latter hospitalized in a severe condition, UNBA Report, op. cit., p. 26.

²³⁴ Oleksandr Vyshnevyy who defended victims of traffic incidents and revealed that transportation company operated illegally was attacked twice in one year, the first time violently beaten by a group of several masked men near his office with metal sticks on his head and body, and the second time attacked from behind with a knife on his chest. UNBA Report, op. cit., p. 18.

²³⁵ UNBA brochure on violations against lawyers, 20 December 2019, available at: https://unba.org.ua/assets/uploads/news/UNBA_Zahyst_Prav_2019.pdf (Accessed 21 February 2020).

On 20 June 2019, lawyer Hanna Kolesnyk was pushed aside by the police officer while trying to approach her client and her hands were twisted. Another officer took her phone and, when her husband started to video record the assault, he was also attacked and his phone and some personal belongings were taken from him.

Killings of lawyers

Violent attacks on lawyers have not only led to bodily injuries but also involve killings, including premeditated murders of lawyers. In at least twelve cases in the period 2013–2019, murder or attempts to murder lawyers in Ukraine were reported.²³⁶ In eight cases lawyers died as a result of such attacks.²³⁷ Lawyers are subjected to killings in both high-profile and other cases.

Lawyer Yuriy Ihnatenko was kidnapped and later murdered in Boryspil in 2015, one day after a case was decided in favour of his client, an elderly woman who was a victim of real estate fraud. The lawyer had received threats before the death and was kidnapped and severely beaten before being killed.²³⁸ Although suspects were identified soon after the murder, those responsible for the murder have not been held accountable to date.

Lawyer Viktor Loiko, killed in his office in January 2016, represented defendants in two cases on drug trafficking involving the police.²³⁹

Lawyer Valeriy Rybalchenko, contractually murdered in January 2017, defended a well-known developer company in Kyiv.²⁴⁰

In some cases killings of lawyers included particularly brutal use of violence, as in the case of Oleksandr Drachuk who was found drowned in the river with numerous bruises on head and body and rib fractures.²⁴¹ Lawyer Tatiana Popova was found cruelly murdered with a broken neck and a large number of knife wounds in 2016.²⁴²

The murder of two lawyers was directly connected to the representation of defendant in a high-profile case. Yuri Grabovski and Oksana Sokolovska represented a Russian national, Aleksandr Aleksandrov, who along with Evgeniy Yerofeyev, was detained in May 2014 in the Luhansk Region in Eastern Ukraine and accused of terrorism and a number of other crimes.²⁴³ Since they started working on the case, both Oksana Sokolovska and Yuri Grabovski repeatedly spoke publicly about the harassment and intimidation they had been subjected to, including by the Ukrainian authorities.²⁴⁴ On 25 March 2016, the body of Grabovski was found after he had gone missing three weeks earlier. Subsequent to the finding, a video was released, which showed the lawyer promising to stop rendering legal assistance to Aleksandrov and recognising that taking this case had been “a mistake”. The murder was therefore widely assumed to be related to his job as a defence lawyer for Aleksandrov, although the authorities stated that it was not connected to Grabovsky’s professional activity as a criminal defender.²⁴⁵ As of today,

²³⁶ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013–2018)*, *op. cit.*, p. 5.

²³⁷ *Ibid.*

²³⁸ *Ibid.*, pp. 17–18.

²³⁹ ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 16.

²⁴⁰ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013–2018)*, *op. cit.*, p. 19.

²⁴¹ *Ibid.*, p. 17.

²⁴² ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 16.

²⁴³ Aleksandrov and Yerofeyev were found guilty of a number of crimes under the Criminal Code of Ukraine, including article 437(2) — “waging a war of aggression”, and sentenced to 14 years of imprisonment. The other charges included the commission of an act of terrorism under article 258, unlawfully dealing with weapons, munitions or explosives pursuant to article 263 and unlawfully crossing the border of Ukraine under article 332.

²⁴⁴ ICJ Statement, *Ukraine: violent death of a lawyer is an attack on the legal profession*, 29 March 2016, available at: <https://www.icj.org/ukraine-violent-death-of-a-lawyer-is-an-attack-on-the-legal-profession/> (Accessed 21 February 2020).

²⁴⁵ Hromadske, The Chief Military Prosecutor of Ukraine Anatoliy Matios: “The murder of Grabovsky is not connected to his professional activity”, 13 August 2016, available at: <https://hromadske.ua/posts/vbyvstvo-advokata-hrabovskoho-ne-poviazane-z-ioho-profesiinoiu-diialnistiu-matios> (Accessed 21 February 2020).

those responsible have not been brought to justice. Lawyers representing the family members have expressed concern over their security while allegations have been made that the murder was “ordered” by high level officials. Furthermore, Sokolovskaya’s assistant, Sergey Fedosenko, a key witness in the case of Grabovsky, went missing and there is strong evidence that his body was found in January 2017.²⁴⁶

Unsuccessful attempts on lawyers’ lives have included firing at the house of Olena Harmash from a grenade launcher in April 2016;²⁴⁷ shooting at a windscreen of a car of Vitaliy Serdyuk;²⁴⁸ bullets fired at Olena Prosyanyuk, whose death was prevented by a car passing nearby at the very moment of the shooting. Both Vitaliy Serdyuk and Olena Prosyanyuk were lawyers for Ukraine’s former President Victor Yanukovich.²⁴⁹

In September 2019, the UNBA reported the case of lawyer L. V. Lazorenko, who, allegedly because of his work on a case on the killing of a judge, regularly receives death threats to both himself and his family, including receiving through an internet messenger a video of a torturous murder.

Lack of investigation and impunity

The mission heard of rampant impunity for various cases of attacks on lawyers, especially where such attacks occur in court and lawyers are attacked verbally or physically. In such cases, the attacks remain mainly unaddressed by the justice system.²⁵⁰ The existing state of impunity for attacks on lawyers was said to constitute a real obstacle in tackling the problem of security of lawyers in the country and their ability to effectively defend human rights of their clients.

The mission was informed that around ninety percent of cases of attacks on lawyers are not effectively investigated, and ninety-five percent of cases do not come to court. The ICJ could not verify these figures, and while these estimations cannot be understood as accurate statistical data, they point to the general perception within the profession of a climate of impunity around such attacks. This further contributes to the overall chilling effect on the legal profession and lawyers’ ability to work independently without fear of reprisals for exercising their profession in line with national legislation and international law.

The most common problem lawyers who have been subjected to an attack immediately encounter is the reluctance of law enforcement officials to initiate a case and record it in the Unified Register of Pre-trial Investigations of Ukraine.²⁵¹ Even following repeated official complaints by lawyers, these complaints were said to remain unaddressed by

²⁴⁶ Law and Business, The body of a witness was found in the case of Grabovsky, —lawyer, 10 January 2017, available at: https://zib.com.ua/ru/127091-nayden_trup_svidetelya_po_delu_grabovskogo_advokat.html (Accessed 21 February 2020).

²⁴⁷ ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, op. cit., p. 17.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ OHCHR, *Report on the human rights situation in Ukraine*, 16 February to 15 May 2019, para. 64, available at: https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Feb-15May2019_EN.pdf (Accessed 21 February 2020): “OHCHR also notes with concern the absence of progress in the investigation and prosecution of previous attacks and intimidation of judges and defence lawyers”; see also OHCHR, *Report on the human rights situation in Ukraine*, 16 August to November 2018, para. 114, available at: https://www.ohchr.org/Documents/Countries/UA/24thReportUkraineAugust_November2018_EN.pdf (Accessed 21 February 2020): “OHCHR remains concerned that systemic impunity is contributing to fuelling attacks on journalists, civil society activists, lawyers and political opponents. Such attacks, which have become increasingly visible, fuelling intolerance and discrimination, risk stifling freedom of expression and compromising rule of law protections [. . .].”

²⁵¹ The Unified Register of Pre-trial Investigations (ERDR) is an electronic database created by an automated system, according to which the collection, storage, protection, search, summary of data on criminal offenses and the course of pre-trial investigation in criminal proceedings is carried out. The entry of a case into ERDR signifies the initiation of a criminal proceeding. ERDR is used since 2012—entry into force of the new Criminal Procedure Code and opened to the public briefly, now available only for authorized users (investigators, prosecutors, judges), available at: <https://erdr.gp.gov.ua/erdr/erdr.web.system.LoginPage.cls> (Accessed 21 February 2020).

the law enforcement bodies. A number of lawyers told the mission that only a complaint to court on failure to act followed by a court decision led to action being taken on their cases. An additional importance of initiating a criminal proceeding stems from the bureaucratic need to present an excerpt from the above-mentioned registry if lawyers choose to take further action to protect their rights in court—in practice such an excerpt is required to confirm victim status, or to be able to file motions in a case or appeal action or inaction of investigators, prosecutors or judges in a particular case.²⁵²

Even where criminal proceedings are initiated, the mission was told that often the investigative actions are not carried out and the perpetrators are not in fact searched for, although in some instances there are video recordings confirming their identities. The ICJ also heard that in some cases perpetrators of the crime are identified, but those ordering the attack or who are behind the scheme are generally not prosecuted.²⁵³

In some cases, lawyers may be subjected to attacks several times without any criminal investigation taking place.²⁵⁴ There have been instances when lawyers went on hunger strike because of absence of any progress in investigating their cases.²⁵⁵

While the problem of impunity appears to be complex, lawyers and experts the mission met with listed a number of factors contributing to impunity for cases of attacks on lawyers, including the weak State institutions, particularly law enforcement bodies²⁵⁶ and the weak judiciary. The majority of the experts the mission met characterized the police and prosecutorial reforms as not being effective. Among other contributing causes to impunity, the stakeholders mentioned the lack of political will, and a lack of sufficient resources, knowledge or competence for effective investigation. Corruption seems to be a key factor. Impunity for the suspected perpetrators such as S14 was repeatedly mentioned in connection with the allegations of their involvement with certain law enforcement authorities, leading to even flagrant crimes where S14 are suspected to be perpetrators, not being investigated.²⁵⁷

Whether or not the allegations of ties of law enforcement bodies with S14 group are justified, the reluctance to investigate and prosecute killings and violent attacks on lawyers is apparent and points to the weak state of the rule of law in the country. In this connection particularly, it is reported that presently in Ukraine hate crimes are investigated by default as mere hooliganism²⁵⁸ and the European Commission against Racism and Intolerance (ECRI) has recommended to Ukrainian government to invoke specific hate grounds in investigation of crimes instead of mere hooliganism.²⁵⁹ Given that lawyers attacked by radical activists are often those defending individuals who are victims or at risk of hate crime, crimes against lawyers are also apparently perceived by many law enforcement officials as not more than hooliganism.

²⁵² IMI, *What should a journalist do when police would not investigate a crime*, 19 November 2019, available at: <https://imi.org.ua/monitorings/shho-robyty-zhurnalistu-yakshho-politsiya-ne-rozsliduye-zlochyn-i30496> (Accessed 21 February 2020).

²⁵³ E.g. see the case of Kateryna Handziuk above.

²⁵⁴ As was the case with Oleksandr Vyshnevyi or Serhii Kozachenko.

²⁵⁵ Sergey Kozachenko went on hunger strike in 2015 due to no investigation of circumstances of an attack on him (two military grenades fired in his yard) by the prosecutor's office and the National Police. However, the perpetrators of the crime were neither found nor punished. He was shot dead a year later.

²⁵⁶ See, for example, OHCHR, *Report on the human rights situation in Ukraine*, 16 February to 15 May 2016, *op. cit.*, para. 54.

²⁵⁷ The mission was told that some of the reasons why attacks by violent radical activists are not investigated might be the lack of the rule of law in general, that they are covered by particular State bodies or politicians.

²⁵⁸ See many recent examples with cases of Roma camp "pogroms" in Written comments of the European Roma Rights Centre concerning Ukraine to the United Nations Committee on Economic, Social and Cultural Rights for the consideration of the Committee on the 63 Pre-Sessional Working Group, 15–19 October 2018, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/UKR/INT_CESCR_ICS_UKR_32438_E.doc (Accessed 21 February 2020); also in LGBT Human Rights Nash Mir Centre Report, *Hate Crimes and Incidents in Ukraine*, 2018, available at: <https://gay.org.ua/publications/hatecrime2018-e.pdf> (Accessed 21 February 2020).

²⁵⁹ ECRI, *Report on Ukraine*, *op. cit.*, paras 34–36.

The Ukrainian National Bar Association's response to attacks on lawyers

The UNBA is actively raising issues of attacks on lawyers nationally and internationally, and provides information to international human rights mechanisms. In 2013, the UNBA established a Committee on Protection of Advocates' Professional Rights and Guarantees (the UNBA Committee), which proactively addresses individual cases of harassment, intimidation, threats, and attacks on its members. In 2016 it established a hotline for 24/7 response to violations of lawyers' rights. There is also a "Legal Alarm" smartphone application allowing a lawyer exposed to violation of professional rights to immediately contact a person from the Committee on duty and send precise geo-location. In every Regional Council of Lawyers there is a designated person to receive information on violations. The statistics is also being recorded.²⁶⁰

The UNBA in response to the attacks sought opportunities for a closer coordination with State institutions. While some responded positively to this initiative,²⁶¹ the Prosecutor General's Office (PGO), the Security Service of Ukraine (SSU) and the State Fiscal Service (investigative departments) in official letters stated that they were not interested in cooperation with the UNBA pointing to the existing legal mechanisms the UNBA should resort to in order to seek protection of lawyers against attacks.²⁶²

The UNBA regularly appeals to the State authorities, law enforcement agencies and international organizations both concerning particular cases of violations and concerning the institutional attempts to undermine the independence of the legal profession. Moreover, in April 2019, the UNBA renewed its cooperation with the Parliamentary Committee on Human Rights on the issues of safety and security of lawyers.

²⁶⁰ UNBA Report, *Five Years of Success of the Ukrainian Bar*, November 2017, available at: https://unba.org.ua/assets/uploads/43f83bd682afc309ca20_file.pdf, pp. 19, 21 (Accessed 21 February 2020).

²⁶¹ Including, the National Anticorruption Bureau (NABU), the State Bureau of Investigations (SBI), the Specialized Anti-Corruption Prosecutor's Office (SAPO) and the Qualification and Disciplinary Commission of Prosecutors.

²⁶² Letter to the UNBA from General Prosecutors Office from 15 April 2019; Letter to the UNBA from State Fiscal Service dated 25 April 2019; Letter from Security Service dated 3 April 2019.

Chapter III. Harassment of lawyers through legal mechanisms

Criminal prosecution

International standards

According to international law and standards on the role of lawyers, lawyers should be able to exercise their functions freely and independently.²⁶³ States must guarantee that lawyers can discharge their professional duties and functions, that their role is safeguarded and their rights are protected.²⁶⁴ The UN *Basic Principles on the Role of Lawyers* require governments to ensure that lawyers: "(a) are able to perform all of their professional functions without intimidation, 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."²⁶⁵ These protection measures are crucial to providing effective legal assistance to clients.²⁶⁶ The State has a duty to ensure that lawyers are not identified with their clients or their clients' causes as a result of discharging their professional functions.²⁶⁷ The UN *Basic Principles* provide 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."²⁶⁸ Recommendation R(2000)21 of the Council of Europe Committee of Ministers identifies the obligations of States to take all necessary measures "...to respect, protect and promote the freedom of exercise of 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."²⁶⁹

National law and practice

The Criminal Procedure Code and the Law "On Bar and Legal Practice"²⁷⁰ stipulates that a lawyer cannot be subject to prosecution (including after his/her status as a lawyer was suspended or terminated) on account of his or her professional activities, or public statements or opinions expressed in a case, including those reflecting the client's position.²⁷¹ These safeguards, inter alia, include a special procedure for the initiation of any investigative or procedural action against a lawyer²⁷² and limitations regarding the subjects authorized to issue a notice of suspicion to a lawyer.²⁷³

²⁶³ *Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 14.

²⁶⁴ *Ibid.*, Principle 16.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*, Principles 16(b), 22.

²⁶⁷ *Ibid.*, Principle 18.

²⁶⁸ *Ibid.*, Principle 20.

²⁶⁹ *Ibid.*, Principle I, 1).

²⁷⁰ Law "On Bar and Legal Practice", *op. cit.*

²⁷¹ *Ibid.*, article 23-14), 15).

²⁷² *Ibid.*, article 23-3) stipulating that any investigative action regarding a lawyer which requires authorization by the court can only be initiated by the Prosecutor General, his or her deputy, or the head of the regional public prosecutor's office.

²⁷³ Criminal Procedure Code of Ukraine, *op. cit.*, article 481-1-1), Law "On Bar and Legal Practice", *op. cit.*, article 23-1-13) stating that the note of suspicion might only be issued to a lawyer by the Prosecutor General, his or her deputy, or the prosecutor of the Autonomous Republic of Crimea, oblasts, Cities of Kyiv and Sevastopol. [According to article 133 of the Constitution of Ukraine, the territory of Ukraine is divided into 24 oblasts and the Autonomous Republic of Crimea, with cities Kyiv and Sevastopol having a special status. Although Crimea is presently uses the legislation of the Russian Federation, Ukraine does not recognize it and legislative framework, including administrative and territorial structure has not been amended in 2014].

The ICJ heard during the mission, that in recent years lawyers in Ukraine have increasingly become subjected to prosecution in relation to cases in which they represent clients. While the legislative guarantees mentioned above specifically address lawyers and their professional activities, these safeguards appear not to provide sufficient protection in practice.²⁷⁴ Investigative judges were said to be reluctant to pay due attention to this violation and there is no positive court practice of obliging the prosecution to comply with the law.²⁷⁵

Initiation of criminal proceedings against lawyers, sometimes based on forged documents,²⁷⁶ can be a way for investigators to remove lawyers from representation of their clients in criminal proceedings.²⁷⁷ Courts tend to affirm such motions.²⁷⁸ Notices of suspicion in regard to lawyers may be issued, followed by their detention or imposition of other preventive measures such as house arrest, bail or personal bond.²⁷⁹ Thus in practice, lawyers may be identified with their clients as they are accused of serious crimes because they obtain privileged information or because they zealously defend their clients.²⁸⁰ This happens particularly often in high-profile and politically sensitive cases including those which include allegations of high-treason or terrorism in connection with the armed conflict in Eastern Ukraine.

In March 2017, Oleksandr Chibirdin was detained on criminal charges, in regard to which an agreement on rendering legal assistance between him and his clients was considered as evidence of conspiracy.²⁸¹ Chibirdin was charged with organization of crimes of his clients and for 30 months remained in custody in Kyiv SIZO until 23 December 2019, when UNBA posted his bail, although the investigation continues.²⁸²

Since January 2016, a high-profile lawyer, Oksana Sokolovska, who represented Russian citizens Yevgeniy Yerofeyev and Alexandr Alexandrov, has faced criminal prosecution: the Prosecutor of Kyiv Region had conducted separate investigative actions in the framework of criminal proceedings.²⁸³ Oksana Sokolovska was given a notice of suspicion and interrogated as a suspect.²⁸⁴ Another fellow lawyer in these cases allegedly had clothes and guns from a criminal incident planted on them, and the mission was

²⁷⁴ UNBA submission to the Parliamentary Committee on Human Rights.

²⁷⁵ Ukrainian Law, Challenging a suspicion notice in practice: how effective is the newly introduced procedure, 27 March 2019, available at: <http://ukrainepravo.com/scientific-thought/pravova-pozytsiya/praktyka-oskarzhennya-pidozry-naskilky-efektyvny-m-ye-neshchodavno-zaprovadzhenny-institut/> (Accessed 21 February 2020); Law and Business, Is it always a good idea for a lawyer to appeal against a suspicion notice? 20–26 April 2019, available at: https://zib.com.ua/ua/137331-praktika_skasuvannya_pidozri_advokati_chekayut_uzagalnennya_.html (Accessed 21 February 2020).

²⁷⁶ In December 2016, the lawyer Ihor Dmytrovych Povkh lodged a statement with the UNBA, reporting that the criminal proceedings were fabricated against him and the reports about the commission of the crime were presented. The lawyer provided copies of certain materials of the criminal proceedings and evidence that some procedural documents in the case contained evidence of forgery. The alleged grounds for prosecuting the lawyer were the revenge of the local Prosecutor's Office for the principled position of the lawyer in a number of high-profile cases, at UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 21.

²⁷⁷ For example, an SBU employee, using physical violence, took the lawyer Eduard Pukanych's personal mobile phone, and threatened to bring a criminal action against him, at ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 22; in 2013 only criminal proceedings were initiated against lawyers Serhiy Petrenko, Andriy Mamlyha, Ihor Cherezov, Viktor Smaliy, at UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, pp. 19–20.

²⁷⁸ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 21.

²⁷⁹ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 19; other alternative preventive measure in accordance with article 176 of the Criminal Procedure Code include house arrest, bail, personal warranty or personal commitment.

²⁸⁰ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 20.

²⁸¹ UNBA brochure on violations against lawyers, *op. cit.*

²⁸² UNBA, *Lawyer Chibirdin is released from SIZO*, 23 December 2019, available at: <https://unba.org.ua/news/5044-advokata-chibirdina-zvil-neno-z-sizo-de-vin-probu-v-30-misyaciv.html> (Accessed 21 February 2020).

²⁸³ ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 28.

²⁸⁴ *Ibid.*

informed that the incident was never investigated by the police. As described earlier, lawyer Yurii Grabovsky was killed in connection with the case and Sokolovska's assistant Sergiy Fedosenko was found dead (see Chapter II above).

Known for representing individuals facing political persecution, lawyer Andriy Domanskyi was subjected to criminal prosecution in connection with his representation of Kyryl Vyshynskyi, Chief of a Ukrainian branch of Russian news agency RIA-Novosti, accused of high treason.²⁸⁵ Several searches of Domanskyi's office, home and relatives' premises had been carried out to coincide with important developments in his client's case, and he was twice given a notice of suspicion (on the searches of lawyers' offices see Chapter IV below).²⁸⁶

There are indications that criminal proceedings are initiated against lawyers as a means of putting pressure on them and seeking to damage their professional reputation.²⁸⁷

Criminal cases against lawyers who are "too active" in protecting the interests of their clients in politically sensitive cases are also common. During the mission, the ICJ heard of cases where lawyers face criminal investigation after they made official allegations that their clients had been ill-treated by law enforcement officers. In such cases, the heads of law enforcement bodies would side with their personnel, which puts lawyers at risk of arbitrary prosecution for making public information about abuse of their clients.²⁸⁸ The court proceedings against the former president Viktor Yanukovich charged with State treason lasted about two years and were marked by various attacks on the lawyers throughout,²⁸⁹ including the opening of a criminal case against the private lawyers of the former President by the office of the Prosecutor General.²⁹⁰ Moreover, Victor Yanukovich's public defender stated during the trial that he had been forced to take part in the trial under threat of criminal prosecution.²⁹¹

Actions to initiate disciplinary proceedings

International standards

According to the UN Basic Principles on the Role of Lawyers, disciplinary proceedings against lawyers should be heard by an independent and impartial disciplinary body established by the legal profession, by an independent statutory body, or by a court, and should be subject to independent judicial review.²⁹² Such proceedings should be determined "in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles",²⁹³ and must be processed expeditiously and fairly in accordance with the right to a fair hearing.²⁹⁴ Recommendation No. R(2000)21 of the Council of Europe Committee of Ministers

²⁸⁵ ICJ Statement, *Ukraine: criminal proceedings against lawyer Andriy Domanskyi raise concerns*, 12 April 2019, available at: <https://www.icj.org/ukraine-criminal-proceedings-against-lawyer-andriy-domanskyi-raise-concerns/> (Accessed 21 February 2020).

²⁸⁶ *Ibid.*

²⁸⁷ In November 2013, criminal proceeding was initiated against Ihor Cherezov and information about his alleged crimes was sent out by e-mail to almost 300 persons, allegedly, as an attempt to damage his professional reputation.

²⁸⁸ In December 2013, Victor Smalii, who was a defender an activist Andriy Dzyndzia, was arrested. His detention was marked by numerous procedural violations.

²⁸⁹ More detailed information and reports from trial monitoring can be found in International Society for Human Rights, Ukrainian Bar Association Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, pp. 11, 33, 36; ISHR Report, *Right to a Fair Trial in Ukraine*, *op. cit.*, p. 11, reports of Yanukovich trial monitorings at pp. 96–111.

²⁹⁰ One criminal case against Ms Prosyanyuk and Mr Goroshinsky and another case against lawyers Mr Serdyuk, Mr Fedorenko, Ms Fazekosh and Mr Bilenko.

²⁹¹ ISHR Report, *Right to a Fair Trial in Ukraine*, *op. cit.*, p. 11.

²⁹² *Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 28.

²⁹³ *Ibid.*, Principle 29.

²⁹⁴ *Ibid.*, Principle 27.

prohibits arbitrariness of disciplinary action and requires a system which “guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason.”²⁹⁵ Furthermore, disciplinary processes must comply with the rights of the lawyer concerned to a fair hearing and must not lead to sanctions in violation of lawyer’s human rights, including for example their rights to freedom of expression (ICCPR, article 19; ECHR, article 10), freedom of association (ICCPR, article 22; ECHR, article 11) and respect for private life (ICCPR, article 17; ECHR, article 8).

National law and practice

In Ukraine, grounds and procedures for disciplinary actions are prescribed in the Law of Ukraine “On the Bar and Legal Practice”²⁹⁶, which also provides for adherence to the Rules of Professional Conduct as one of the main professional duties of a lawyer.²⁹⁷ (See Chapter I for more details on the disciplinary procedure).

The ICJ mission was told that there has recently been an increase in cases where law enforcement officers use complaints of disciplinary offences in order to influence the legal position of the lawyer.²⁹⁸ While this is usually done by law enforcement agencies, judges reportedly also resort to such practice.²⁹⁹ For example, in the case of the lawyer Hanna Kolesnyk, in 2014, judges of Shevchenkivskyi District Court of Kyiv City appealed to the QDC of the region concerning the fact that, taking a categorical position of disagreement with the prosecution side, the lawyer allegedly hurt his client by his actions. The QDC refused to uphold the complaint.³⁰⁰ In February 2016, a number of complaints were filed against the lawyer Immileyla Abdullaieva-Martirosian to the QDC and HQDC, apparently to pressure her into resigning from the case.³⁰¹ The employees of the National Security and Defense Council of Ukraine pressured the lawyer Kostyantyn Doroshenko by regular failure to provide answers to the lawyer’s requests and at the same time submitting complaints against him to the QDC.³⁰² As a measure of intimidation or reprisal, threats about filing a disciplinary complaint when the lawyer does not agree with the position of the prosecutor or the court are reported.³⁰³

²⁹⁵ Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, *op. cit.*, Preamble.

²⁹⁶ Article 34. Grounds for lawyer’s disciplinary liability: 1. Misconduct shall be the ground for disciplinary liability of the lawyer. 2. Misconduct of the lawyer is: 1) non-compliance with the requirements as regards incompatibility; 2) violation of the oath of lawyer of Ukraine; 3) violation of the rules of professional conduct; 4) disclosure of lawyer-client privilege or performance of actions that resulted in the disclosure thereof; 5) failure to perform or to properly perform his/her professional duties; 6) failure to comply with the decisions taken by the bodies of lawyers’ self-government; 7) violation of other lawyer’s duties provided for by law.

²⁹⁷ Law “On Bar and Legal Practice”, *op. cit.*, article 21-1.

²⁹⁸ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, pp. 34–35.

²⁹⁹ For instance, Hanna Boriak’s right to practice law was terminated by the QDBC of Kyiv Region at the appeal of Irpin Court of Kyiv Region. Later, the decision of the QDBC was cancelled by the decision of the HQDBC. The lawyer’s alleged misconduct was that she had left the courtroom thus denying her client legal assistance. From the beginning of the trial, the lawyer insisted on the removal of the presiding judge due to his incompetence and his demonstrated bias regarding the outcome of the case. In response to the conduct of the judge, Hanna Boriak, having consulted with the client, left the courtroom.

³⁰⁰ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, pp. 34–35.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ In 2017, privately contracted lawyers of the former President Viktor Yanukovich have also been pressured via disciplinary means. Judges of Pechersky District Court of Kyiv repeatedly filed complaints with the Kyiv Qualification and Disciplinary Commission.

Chapter IV. Problems lawyers face in protecting human rights

In addition to violent attacks, and abusive criminal or other proceedings against lawyers, lawyers in Ukraine may face other harassment or obstruction in their work, inhibiting their ability to protect the human rights of their clients. Notably, this includes difficulties in accessing clients in detention, interference with confidentiality of lawyer-client consultations in places of detention, interferences with confidential telephone conversations including through tapping of lawyers' telephones, and searches of lawyers' offices. Lawyers may also sometimes be as witnesses in cases in which they represent the defendant, in order to force them to withdraw from the case. Finally, defence lawyers are routinely affected by the lack of equality of arms between the prosecution and defence in criminal proceedings in Ukraine, hampering their ability to prepare and defend their clients' cases.

There are recent instances, where a complex of such measures are applied to lawyers in order to interfere with their professional activity. For example, in August 2019 in course of pre-trial investigation in the Lviv region, lawyer Mykhailo Saloponov was prohibited by the prosecution to meet with his client, investigative measures were conducted regarding him and he was questioned as a witness.

In September 2019, with regard to lawyer Kirill Yakovets police officers in Kharkiv region forbade access of lawyer to the client; unlawfully detained and searched the lawyer and conducted other investigative measures that can be carried out only by authorization from the court. His personal belongings, including electronic devices containing data protected by lawyer-client privilege were seized; the authorities failed to fulfil the legal obligation to immediately notify the Regional council of lawyers about undertaking the above actions.

Access to clients in detention

Under international law and standards, the right of prompt and confidential access to an independent lawyer of one's own choosing constitutes an integral part of the right to a fair trial,³⁰⁴ as well as the right to liberty including the right to challenge detention, the right to an effective remedy for violations of human rights³⁰⁵ and the right to be protected against torture or other cruel, inhuman or degrading treatment.³⁰⁶ Protection of each of these rights depends greatly on the capacity of lawyers to give prompt and unhindered legal advice that is competent and independent.³⁰⁷

In its *General Comment No. 32* (2007), the Human Rights Committee considered that the right to communicate with a lawyer of one's own choosing is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.³⁰⁸ The right to communicate with lawyer requires that the accused is granted prompt access to a lawyer.³⁰⁹ A lawyer should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.³¹⁰ Furthermore, lawyers should be able to advise and to represent

³⁰⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (ICCPR), which Ukraine ratified on 12 November 1973, article 14; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5, (ECHR), article 6.

³⁰⁵ ICCPR, *op. cit.*, article 14; ECHR, *op. cit.*, articles 5, 6, 13.

³⁰⁶ ICCPR, *op. cit.*, article 7; ECHR, *op. cit.*, article 7.

³⁰⁷ Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, *op. cit.*, Preamble; *Basic Principles on the Role of Lawyers*, *op. cit.*, Preamble.

³⁰⁸ HRC *General Comment No. 32*, *op. cit.*, para. 40.

³⁰⁹ *Ibid.*, para. 34.

³¹⁰ *Ibid.*

persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter.³¹¹ The UN *Basic Principles* provides that "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention."³¹²

A person's right to have access to a lawyer must be guaranteed immediately after detention in order to seek remedy for any violation of their rights or indeed prevent such violations and guarantee a fair trial from the outset.³¹³ The independence of lawyers is therefore one of the foundations of a fair justice system, which is based on the rule of law and protects human rights.³¹⁴

Article 1312 of the Constitution of Ukraine guarantees exclusive competence of lawyers to carry out representation in criminal proceedings. Article 42-3 of the Criminal Procedure Code and article 9 of the Law of Ukraine "On Pre-Trial Detention" provide for a right to a defence lawyer for a suspected or accused person. At the same time, under article 21 of the Law of Ukraine "On Pre-Trial Detention" administrations of detention centres are obliged to create necessary conditions for work of prosecutors, investigating judges and courts in criminal proceedings. The law does not mention lawyers.³¹⁵

The ICJ was informed during the mission, that lawyers' access to pre-trial detention facilities is often impeded, as is their access to the premises of the courts, the public prosecutor's office, the police and other law enforcement agencies, or government buildings when their clients are held there. According to UNBA reports, obstruction of the right of access to a lawyer is not only a problem of practice, but also on the level of regulations, as elaborated further in section on lack of equality of arms.³¹⁶

The mission was told that lawyers who attempt to see their clients in detention may be subjected to undisguised physical and verbal abuse of lawyers by law enforcement personnel: this can take different forms from verbal insults or threats of violence to physically blocking access to the facility where lawyer's clients are held³¹⁷ to hitting or beating up a lawyer.³¹⁸ Cases have been reported of physically destroying lawyers' documents, such as the certificate of the right to practice law or the written agreement between a lawyer and a client.³¹⁹ Given the frequency of these attacks, lawyers may be aware of the likelihood of obstruction of their work and often record them, which allows them to

³¹¹ *Ibid.*

³¹² *Basic Principles on the Role of Lawyers, op. cit.*, Principle 7.

³¹³ ICCPR, *op. cit.*, article 14, para. 3 (b) and (d) provides for the right to communicate with a lawyer of their choice, the right to have adequate time and facilities for the preparation of their defence and the right to defend themselves in person or through legal assistance of their own choosing; See also Human Rights Committee, *General comment No. 35*, article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014).

³¹⁴ ICJ Report, *Defenceless Defenders: systemic Problems in the Legal Profession of Azerbaijan, op. cit.*, p. 8.

³¹⁵ Law on Pre-Trial Detention, article 21 "Staff of Pre-trial detention facilities": "administration of pre-trial detention facilities has an obligation [. . .] to create necessary conditions of the work of an investigator, prosecutor, an investigative judge, and a court, which is connected to a criminal proceeding; [. . .]."

³¹⁶ See section on lack of equality of arms; see also UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 35.

³¹⁷ Physical violence was imposed on the lawyer M. M. Biriuk to prevent her from entering the Kyiv Pre-Trial Detention Facility to provide free legal aid to the client. Employees of the pre-trial detention facility spoke outrageously at the address of the lawyer. Despite evidence of denying lawyer access to a client by officials of Kyiv Pre-Trial Detention Centre which constitutes a criminal offence, no one was brought to responsibility.

³¹⁸ In September 2017, lawyer Alina Samarets arrived to provide legal assistance at the venue of the proceedings in Pre-Trial Detention Facility No. 13 in Kyiv upon the orders of the Centre for Provision of Free Secondary Legal Aid, however, she was told that the client already had already been assigned a defence lawyers. A detective of the National Anti-Corruption Bureau of Ukraine (NABU) insisted on the lack of legal grounds for her further participation in the procedural action. She was forcefully confined by the detective in the office room and beaten. The assault was terminated only through the intervention of penitentiary personnel who reacted to the lawyer's cry for help.

³¹⁹ In the above case, the NABU detective snatched and ripped up the Certificate of right to practice law owned by A. M. Samarets. UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 25.

secure evidence. Yet, even in such cases where the alleged perpetrators are known and evident, they are rarely brought to disciplinary or other legal responsibility.³²⁰

The Committee on Prevention of Torture (CPT) has reported numerous cases of informal questioning of suspects by police officers without the presence of a lawyer, cases of serious delays in access to a lawyer, instances of suspects having met their State appointed lawyer for the first time in court, at the temporary detention facilities called ITT³²¹ or SIZO.³²²

Confidentiality of communication between lawyers and clients

Confidential communication with one's lawyer is an important safeguard of the right to defence and therefore of the right to a fair trial.³²³ Where a lawyer is unable to communicate with his or her client in private, both the right to a fair trial, and the right to respect for private life may be violated.³²⁴ The authorities must therefore respect the confidentiality of communications and consultations within the professional relationship between lawyers and their clients.³²⁵ The right to confidential communication with a lawyer applies to all people, including those arrested or detained on a criminal charge.³²⁶ Governments must ensure that detainees can consult and communicate with counsel without delay, interception or censorship.³²⁷

In *Laurent v. France*, the Court emphasized that the content of the documents exchanged between detainees and their lawyer and intercepted by the police had been immaterial since, whatever their purpose, the correspondence between lawyers and their clients concerned matters of a private and confidential character.³²⁸ To that end, police stations and places of detention, including in rural areas, must provide adequate facilities for arrested and detained individuals to meet and communicate privately with their lawyers.³²⁹ For example, where the facilities in a remand detention centre required detainees to speak to their lawyers through two panes of glass with holes covered with mesh, the ECtHR found that it created real impediments to confidential communications between the detainee and lawyer.³³⁰

Confidentiality of meetings and communications between lawyers and their detained clients is guaranteed under Ukrainian law.³³¹ In particular, the Law "On Pre-Trial Deten-

³²⁰ Submission of UNBA to the Parliamentary Human Rights Committee, *op. cit.*

³²¹ ITT (*Ізолятор тимчасового тримання*—Ukrainian)—is a prison cell designated as a temporary holding facility for people detained on suspicion of commission of criminal offence; common for former USSR countries. See the Decree No. 638 of the Ministry of Interior of Ukraine on ITTs, 2 December 2003, available at: <https://zakon.rada.gov.ua/laws/show/z0137-09> (Accessed 21 February 2020).

³²² CPT Report on the visit to Ukraine (8–21 December 2017), CPT/Inf (2018) 41, September 2018, available at: <https://rm.coe.int/16808d2c2b> (Accessed 21 February 2020); SIZO (*Слідчий ізолятор*—Ukrainian) is a penitentiary facility for detention at any stage of the criminal proceeding, including after the verdict and before transferring a person to prison or correctional facility. See the Law of Ukraine "On Pre-Trial Detention" No. 3352-XII, 30 June 1993, article 4, available at: <https://zakon.rada.gov.ua/laws/show/3352-12> (Accessed 21 February 2020).

³²³ *Altay v. Turkey* (No. 2), ECtHR, Application No. 11236/09, Judgment of 9 July 2019 (final), para. 50.

³²⁴ *Apostu v. Romania*, ECtHR, Application No. 22765/12, Judgment of 6 July 2015, paras 96–98; see also *Castravet v. Moldova*, *Cebotari v. Moldova* and *Sakhnoskiy v. Russia* cases.

³²⁵ Human Rights Committee, *General Comment No. 32*, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 34 b). UN *Basic Principles on the Role of Lawyers*, *op. cit.*, Principles 8 and 22.

³²⁶ Human Rights Committee, *General Comment No. 32*, *op. cit.*, para. 34 c).

³²⁷ *Ibid.*, para. 34 d).

³²⁸ *Laurent v. France*, ECtHR, Application No. 28798/13, Judgment of 24 May 2018, para. 47.

³²⁹ CAT Concluding Observations: Jordan, UN Doc. CAT/C/JOR/CO/2 (2010), para. 12; see also *Modarca v. Moldova*, ECtHR, Application No. 14437/05, Judgment of 10 August 2007, paras 84–99.

³³⁰ *Modarca v. Moldova*, *op. cit.*

³³¹ Criminal Procedure Code, *op. cit.*, article 42-3, The Law of Ukraine "On Pre-Trial Detention" No. 3352-XII, 30 June 1993, Part 5, article 12, available at: <https://zakon.rada.gov.ua/laws/show/3352-12> (Accessed 21 February 2020).

tion” stipulates that a detained person is entitled to a meeting with the defense lawyer alone, without limiting the number of visits and their duration, at any time and without surveillance or the presence of investigators. The administration of the institution should provide conditions for the meeting, inter alia excluding the possibility of third parties to have access to the information exchanged during the meeting of the visit with the lawyer.³³²

The powers of the defense lawyer to represent the detained person can be confirmed by a license granting the right to practice law, a warrant, a contract between lawyer and client or by an order from a free legal aid body. Any other additional requirements to confirm the powers of the defense lawyer are prohibited.³³³

During the mission, the ICJ was told that the law is routinely disregarded in practice and that lawyers have learned to work with the presumption that their conversations with a detainee are always overheard by the law enforcement agents.³³⁴ The problem has been raised by the international human rights bodies in their recent³³⁵ reviews of Ukraine, which have pointed to a lack of significant progress despite the recent reforms.

The following factors were said by the UNBA to contribute to widespread failure to secure the right to confidential communication between lawyers and clients. In particular:

- cells in a pre-trial detention centres are located far from the lawyer’s seat, forcing them to speak loudly;
- doors to investigation rooms do not close tightly, which allows a lawyer’s conversation with a client to be listened to;
- listening devices are installed in rooms where lawyers provide legal aid to a client;
- guards reading documents when they transfer them from a lawyer to a client;
- glass cells in court rooms are often soundproof, making it impossible to communicate with the client.³³⁶

One reported technique of interference with lawyers’ work is covert investigative procedures against lawyers, especially those who work on high-profile cases. These include tapping telephone conversations of lawyers with a client and reviewing the lawyers’ correspondence. This allows investigators to obtain evidence and reveal the information protected by attorney-client privilege while not resorting to a search. Lawyers report interference of third parties in communicating with their clients, and with their correspondence.³³⁷ The problem is exacerbated by the fact that it is practically impossible to officially establish the legal status of a covert investigative procedures during their implementation, due to the very nature of such procedures. In this regard it is reportedly a common practice that law enforcement officers, applying to the court with a request for permission for covert investigative procedures, such as tapping a mobile phone, are not required to specify the exact phone number, and do not need to specify the owner of the phone to be tapped, thus authorizing listening to any phone.³³⁸

³³² Law “On Pre-Trial Detention”, *op. cit.*

³³³ The Criminal Procedure Code of Ukraine, *op. cit.*, article 50-1.

³³⁴ In February 2018, the lawyer Ruslan Lazarenko stated in court that his rights as a lawyer were violated, as he was not able to communicate confidentially with his client due to the lack of necessary premises in court, and during the proceedings his client was kept in a metal cage. The situation is similar to that in the trial of S. Zinchenko, P. Ambroskin, A. Marynchenko, S. Tamtura, O. Yanishevskiy. See, for example, the ISHR Report, Monitoring of the trial of O. Melnyk, O. Kryzhanovskiy, I. Pasichnyi, I. Kunik (hearings held from 5 February to 6 February 2018).

³³⁵ OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2016 to 15 February 2017, para. 129, *op. cit.*; CPT Report on the visit to Ukraine (8–21 December 2017), CPT/Inf (2018) 41, September 2018, para. 39, available at: <https://rm.coe.int/16808d2c2b> (Accessed 21 February 2020).

³³⁶ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 26.

³³⁷ In 2016–2017 lawyers Ruslan Babenko, Hanna Boriak, Oleksandr Yarmola, Yurii Demchenko, O. Iskizarov informed the UNBA on the covert investigative procedures.

³³⁸ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 32.

Designation of lawyers as witnesses

The principle of international human rights law that all communications and consultations between lawyers and their clients within their professional relationship must be confidential³³⁹ requires amongst other things that lawyers should not testify as a witness in their client's case. Where a lawyer is required to testify, this creates a conflict of interest and *de facto* means that the lawyer is prevented from representing a party in the case. The practice whereby lawyers are intentionally made witnesses in order to force their removal from representing a client is inconsistent with the prohibition of improper interference with the lawyer's work, and frequently, with the right of confidential communication between lawyers and their clients.³⁴⁰

The Ukrainian legislation specifically provides that it is prohibited to demand disclosure of data constituting professional secrecy from a lawyer.³⁴¹ In addition, the Criminal Procedure Code provides that lawyers cannot disclose privileged information except when the client has released the lawyer from the duty to keep professional secrets.³⁴² The Code of Professional Conduct of Lawyers states that a lawyer cannot disclose information protected by the confidentiality rules under any circumstances, including unlawful attempts of pre-trial investigative bodies and courts to interrogate him or her.³⁴³ Violation of these provisions by a lawyer is subject to disciplinary penalties, including disbarment.³⁴⁴

The new Criminal Procedure Code, which came into force in 2012,³⁴⁵ does not include the provision present in earlier versions of the Code, which automatically excluded a lawyer who was called as a witness from representation in this case.³⁴⁶ This provision had often been used against lawyers. Despite the absence of the provision from the new Code however, questioning of lawyers as witnesses continues as a means to obtain information about the case which otherwise would be unavailable due to professional lawyer's secrecy.³⁴⁷

Concerns about this issue have previously been raised by international organizations of lawyers including the IBA and the CCBE,³⁴⁸ as well as by the UNBA. In response to the

³³⁹ UN *Basic Principles on the Role of Lawyers*, *op. cit.*, articles 8, 22 and other sources cited above.

³⁴⁰ Among other documents see: HRC, *General Comment No. 32*, *op. cit.*, para. 34; *Basic Principles on the Role of Lawyers*, *op. cit.*, Principles 8, 16 and 22.

³⁴¹ Law "On Bar and Legal Practice", *op. cit.*, article 23-2.

³⁴² *Ibid.*, article 47-3.

³⁴³ Code of Professional Ethics of Lawyers of Ukraine, article 10(4). "[. . .] disclosure of information constituting an lawyer-client privilege is forbidden in all circumstances, including unlawful attempts by pre-trial authorities and the court to interrogate a lawyer about the circumstances constituting an lawyer-client privilege."

³⁴⁴ Law "On Bar and Legal Practice", *op. cit.*, article 34-2-4.

³⁴⁵ Criminal Procedure Code entered into force on 20 November 2012, the previous one was the Criminal Procedure Code of 1960. See also the Venice Commission opinion, recommendations of which were incorporated by the drafters, DG-I (2011)16, available at: <https://rm.coe.int/16802e707c> (Accessed 21 February 2020).

³⁴⁶ Criminal Procedure Code of Ukraine of 1960, articles 61-2 and 611 stipulate that a witness cannot participate as a defender in the same case and should be recused.

³⁴⁷ Below are cases documented by UNBA and UBA where lawyers have been interrogated as witnesses in disregard of their professional guarantees, in cases in 2013–2019, reported in UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, pp. 32–33; UBA Report, *op. cit.*, pp. 28–29; UNBA letter to the Parliamentary Committee on Human Rights, May 2019, p.12; International Bar Association Letter to the President of Ukraine, 16 May 2016, available at: <https://unba.org.ua/assets/uploads/news/advocatura/2016-06-02.IBA.letter.pdf> (Accessed 21 February 2020): 2013—Juliiia Shestakova, A. Vetrov; 2014—Euhennii Riiaak, Myroslava Kolo-siuk; 2015—Oleksandr Horoshynskiy, Maryna Buriakova; 2016—Ihor Cherezov, Oksana Tomchuk, Andrii Bohdan; Serhhi Vesnin, Ruslan Kapran, Nadiia Brattseva; Serhii Vilkov; Oksana Sokolovska; Oleksandr Drozdovych; Andriy Tsyhankov. 2017—Igor Pokotylo; Vadym Samoilenko, Igor Kravchenko. Information from the UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, pp. 32–33; UBA Report, pp. 28–29; UNBA letter to the VRU Human Rights Committee, May 2019, p. 12, International Bar Association Letter to the President of Ukraine, 16 May 2016, *op. cit.*

³⁴⁸ See CCBE letters to the President of Ukraine regarding violations of rights of lawyers in Ukraine, including interrogation of lawyers as witnesses: 2014—https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Ukraine_-_Ukraine/2014/EN_HRL_20140415_Ukraine_Concerns_regarding_incidents_of_serious_violation_of_the_rights_of_lawyers_in_Ukraine.pdf; 2016—<https://unba.org.ua/assets/uploads/site/12/Letter%20to%20President%20of%20Ukraine%2023.12.pdf>; 2017—https://unba.org.ua/assets/uploads/1ce75aae67ad49f6464c_file.pdf.

formal complaints of the UNBA about the problem, the Prosecutor General's Office and pre-trial investigation authorities responded that such actions do not conflict with the requirements of the criminal procedure or the professional rights of lawyers.³⁴⁹ Yet, as mentioned above, lawyers may face disciplinary action should they provide information about the case where they represent a client. It is clear this practice runs contrary to international standards on the role of lawyers and in particular the principle of confidential communication between lawyers and their clients.³⁵⁰

Lack of equality of arms

The principle of equality of arms, enshrined in article 14 of ICCPR and article 6 of the ECHR, is one of the essential components of the rights to a fair trial.³⁵¹ It means that the procedural conditions at trial and sentencing must be the same for all parties.³⁵² It requires a "fair balance" between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the opponent.³⁵³ Equality of arms must be guaranteed at all stages of criminal proceedings, which demands at a minimum that the procedures prescribed by law are strictly adhered to by law enforcement bodies and that defence lawyers are given a genuine opportunity at all stages of the proceedings to operate on an equal basis with the investigation and the prosecution.³⁵⁴

According to the Ukrainian law, a lawyer for any party to legal proceedings is guaranteed equality of rights with other participants in proceedings, adherence to adversarial procedure and freedom to provide evidence and prove the credibility thereof.³⁵⁵

The Constitution of Ukraine enshrines equality before the law for all citizens,³⁵⁶ while the Criminal Procedure Code stipulates that no one can be restricted in procedural rights on the political, religious or any ground, inter alia, on the basis of occupation.³⁵⁷ Equality of arms envisages independent assertion by prosecution and defence of their legal positions, rights, freedoms and legitimate interests,³⁵⁸ while having equal rights with regard to collecting and producing items, documents, other evidence, motions, complaints, as well as to enjoy other procedural rights.³⁵⁹ Courts must ensure the necessary conditions for the latter, while maintaining the objectivity and impartiality.³⁶⁰

³⁴⁹ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 32.

³⁵⁰ Among other documents see: HRC, *General Comment No. 32*, *op. cit.*, para. 34; *Basic Principles on the Role of Lawyers*, *op. cit.*, Principles 8 and 22.

³⁵¹ *General Comment No. 32*, *op. cit.*, para. 39; ECtHR, *Guide on Article 6 of the European Convention on Human Rights*, Right to a fair trial (criminal limb), updated on 31 August 2019, Chapter V (A) (2), para. 134.

³⁵² *Öcalan v. Turkey*, ECtHR, Application No. 46221/99, Judgment of 12 May 2005, para. 140; see also in *Foucher v. France*, ECtHR, Application No. 22209/93, Judgment of 18 March 1997, para. 34; *Faig Mammadov v. Azerbaijan*, ECtHR, Application No. 60802/09, Judgment of 26 January 2017, para. 19.

³⁵³ *Salov v. Ukraine*, ECtHR, Application No. 65518/01, Judgment of 6 September 2005, para. 87, see also in *Werner v. Austria*, ECtHR, Application No. 21835/93, Judgment of 24 November 1997, para. 63; *Coëme and others v. Belgium*, ECtHR, Application Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 18 October 2010, para. 102; *G. B. v. France*, ECtHR, Application No. 44069/98, Judgment of 2 October 2001, para. 58.

³⁵⁴ OSCE Human Dimension Seminar, Upholding the rule of law and due process in criminal justice systems. Consolidated summary. Warsaw, 10–12 May 2006, available at: <https://www.osce.org/odihr/35999> (Accessed 21 February 2020).

³⁵⁵ Law "On Bar and Legal Practice", *op. cit.*, article 23 "Guarantees of the lawyer's activity", 1. Professional rights, honour and dignity of a lawyer are protected by the Constitution of Ukraine, this law and other laws, in particular: "[. . .] 5) a lawyer is guaranteed equal rights with those of other parties to the proceedings and compliance with the adversarial principle and freedom in the process of presenting evidence and proving its credibility."

³⁵⁶ The Constitution of Ukraine, No. 254к/96-BP, 28 June 1996, article 24, available at: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> (Accessed 21 February 2020).

³⁵⁷ *Ibid.*, article 10.

³⁵⁸ Criminal Procedure Code of Ukraine, article 22-1.

³⁵⁹ *Ibid.*, article 22-2.

³⁶⁰ *Ibid.*, article 22-6.

Additionally, according to the law, the investigator, public prosecutor, and court are required to provide necessary assistance in establishing the contact between a person in custody and a lawyer and enable means of communication between them.³⁶¹

The mission heard reports that judges often accept all the materials submitted by the prosecutor and attach them to the indictment, vouching all the witnesses declared by the prosecution while at the same time raising questions about the submission of evidence and the witnesses of the defense.³⁶² The same attitude is reported in regard to expert report or opinions: if they are conducted according to the decision of the investigator, then the court accepts them, and if initiated by the party of defense, then the court rejects such expertise.³⁶³ Besides, lawyers may not be informed or not informed in due time about the court hearings, which may in practice lead to adoption of decisions without the participation of a lawyer, even where this is mandatory, and violation of the defendant's right to defense.³⁶⁴ For example, in the case of former Ukrainian President Viktor Yanukovich, mentioned earlier, the court rushed defence through questioning key witnesses saying that the questions asked by the defence were "a waste of time" and dismissed witnesses before the defence asked all their questions.³⁶⁵ The court further refused to call key witnesses, including high-level officials of the Yanukovich's government, the judge stated that the court had already fully clarified the circumstances of the case.³⁶⁶

Differences in treatment of defence lawyers as compared to prosecutors may also be of a more subtle nature such as absence of desks for the defence in courts or better desks for the prosecution.³⁶⁷ The ICJ was informed that such unequal rules are common for most courtrooms. It is reported that courts often do not comply with the requirements of regulations that provide for availability of a room for defence lawyers as often courts make rooms available only for the Free Secondary Legal Aid lawyers.³⁶⁸

In practice, lawyers often work in conditions which as described as poor and which can have a negative impact on their ability to prepare and present their client's case. These include long waiting times when visiting clients (including outside during weather such as rain, cold, heat, etc.), working in rooms which are not heated, sometime in poor sanitary conditions without working toilets that lawyers can use.³⁶⁹ This may be exacerbated by attitude of the personnel of the detention facilities.³⁷⁰ Yet, the problems are not only of practical character. According to the Law of Ukraine "On Pre-Trial Detention", the administration of the centres is obliged to create appropriate working conditions only for the prosecutor, the investigating judge and the court, omitting defence lawyers.³⁷¹

³⁶¹ *Ibid.*, article 48-1.

³⁶² The United Nations Monitoring mission in Ukraine engages, *inter alia*, in monitoring of court trials and its observations support findings by the ICJ — lack of equality of arms in a number of cases, with courts disregarding arguments of the defence lawyer, OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2017 to 15 February 2018, *op. cit.*, para. 44.

³⁶³ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 36.

³⁶⁴ *Ibid.*

³⁶⁵ ISHR Report, *Monitoring of the trial of V. Yanukovych* (summary of the court hearings held from 4 December to 12 December 2017); ISHR Report, *Monitoring of the trial of V. Yanukovych* (summary of the court hearings held from 17 January 2018 to 25 January 2018) in UBA Report, p. 40.

³⁶⁶ ISHR Report, *Monitoring of the trial of V. Yanukovych* (summary of the court hearings held from 21 February 2018 to 14 March 2018), *op. cit.*; ISHR Report, *Monitoring of the trial of V. Yanukovych* (summary of the court hearings held on 18 April 2018 and 19 April 2018) in UBA Report, *op. cit.*, p. 40.

³⁶⁷ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 36.

³⁶⁸ According to article 13 of the law of Ukraine "On Free Legal Aid", the secondary legal aid is a form of legal assistance guaranteed by the State enabling equal opportunities of access to justice, and consists of defense, legal representation in court or before State authorities and drafting of procedural documents. Free legal aid (primary), in contrast, is legal assistance in the form of consultations, providing legal information, guidance on drafting the legal documents (except for procedural) etc., according to article 7 of the cited law.

³⁶⁹ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 36.

³⁷⁰ *Ibid.*

³⁷¹ Law "On Pre-Trial Detention", *op. cit.*, article 21 "Staff of Pre-trial detention facilities": "administration of pre-trial detention facilities has an obligation [. . .] to create necessary conditions for the work of an investigator, prosecutor, an investigative judge, and a court, which is connected to a criminal proceeding; [. . .]."

The ICJ was also told that when accessing a court, prosecutors and investigators can pass by presenting an ID, while lawyers wait in a general line for registration.

The mission heard that at the pre-trial stage, defence lawyers often do not have access to the case files, often because they are unable to locate them and the procedure for such access is not prescribed. Thus, lawyers continue to be dependent on procedural decisions taken by investigators or prosecutors who may often refuse to accept procedural request or submissions, instead referring the lawyer to the registry office, which slows down consideration of their request, because it will take several days to be transferred from the registry to the investigator.³⁷² Besides, investigators may make themselves “unavailable” for days before lawyers may be able to see them.³⁷³ Lawyers might also be excluded from participation in proceedings for political reasons.³⁷⁴

At the same time, it is reported that prosecutors may visit the offices of judges in the absence of the defence lawyer, contrary to the Code of Judicial Ethics, which prohibit communication of judges with a party of the process in the absence of the other one, whereas defence lawyer cannot visit the office of the judge in the absence of the prosecutor.³⁷⁵

Problems with ensuring fair trial guarantees in the treatment of the defence in Ukraine have been illustrated by judgments of the European Court of Human Rights, and have also been raised by the UN Office of the High Commissioner of Human Rights (OHCHR). In *Lutsenko v. Ukraine*, the European Court, reiterating that the proceedings must be adversarial and must always ensure “equality of arms”,³⁷⁶ found violations of these principles by law enforcement personnel due to the treatment of defence lawyers who inter alia, had not received their own copy of the case files, were forbidden to copy the case files and were restricted as to the time and place for studying them, meaning that they could not effectively render legal assistance or challenge the detention of their clients.³⁷⁷

In a 2014 report on the human rights situation in Ukraine, the OHCHR pointed out: “[. . .] the exercise of the profession and working conditions require enhanced protection. Courts do not have any premises for defence lawyers; legislation does not regulate the right to rest or social protection for defence lawyers. The current Criminal Procedure Code limits the number of defence lawyers allowed to work on one case; in case of absence, a lawyer can be replaced by a state-appointed lawyer.”³⁷⁸

Searches of lawyers’ offices

Searches of lawyers’ homes or offices will generally amount to an interference with the right to respect for private life or for the home, protected under article 8 ECHR and article 17 ICCPR. Any such interference will only be justified where it is adequately

³⁷² The Agency for Legislative Initiatives Report, *The Bar of Ukraine: the Lessons Learned from the Early Years of Self-Governance*, 2018, p. 45, available at: https://parlament.org.ua/wp-content/uploads/2018/09/bar_of_ukraine_shadow_report.pdf (Accessed 24 February 2020).

³⁷³ ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 18.

³⁷⁴ OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2015 to 15 February 2016, available at: https://www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf, para. 133: “[o]n 16 December, the Administrative District Court in Kyiv issued a decision prohibiting the Communist Party, in the second such suit brought by the Ministry of Justice. OHCHR learned that the lawyer representing the Communist Party was prevented from participating in the hearings of the Commission established by the Ministry of Justice on violations of the ‘de-communization’ law. Subsequent court proceedings were characterized by procedural irregularities. According to witnesses, the court proceedings were truncated and only written submissions were heard.”

³⁷⁵ UNBA Report, *Violation of Attorneys’ Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 36.

³⁷⁶ *A. and others v. the United Kingdom* [GC], ECtHR, Application No. 3455/05, Judgment of 19 February 2009, paras 203–204.

³⁷⁷ *Lutsenko v. Ukraine* [GC], ECtHR, Application No. 6492/11, Judgment of 19 November 2012, paras 89–90, 96.

³⁷⁸ OHCHR, *Report on the human rights situation in Ukraine*, 15 July 2014, available at: https://www.ohchr.org/Documents/Countries/UA/Ukraine_Report_15July2014.pdf, para. 89.

prescribed by law, and can be shown to be necessary for and proportionate to a legitimate aim. The European Court of Human Rights, in the case of *André and others v. France* has found that where the law allows for the search of lawyers' offices, "it is essential that such searches are accompanied by particular safeguards".³⁷⁹

In Ukraine, lawyers' security may be put in danger when State agents resort, without justification or in excess of authorizations, to searching and seizing documents from lawyers by force, including through searches of lawyers' offices involving the use of violence by armed officers to obtain evidence in cases.³⁸⁰ Under the guise of search of a lawyer's premises, documents concerning all clients, laptops, phones, and even money are seized, and offices are vandalized, hindering their operation for considerable periods of time.³⁸¹ When investigated, such instances may then be qualified as "searches with minor violations of the procedure",³⁸² as in the case of search of Soratnyk Attorneys at Law, whose premises were searched by the SBU officers, but despite the lawyers' insistence, no record of the search was compiled and no reason for it was indicated.³⁸³

Reportedly, instances of searches of lawyers' premises and infringement of professional secrecy are increasing³⁸⁴ and have gradually spread across all regions of Ukraine.³⁸⁵ Mostly carried out by police investigators, but often also by the personnel of the Ministry of Interior, Security Service of Ukraine, newly created anti-corruption bodies, tax and financial inspections, these searches go far beyond what is envisaged by a search warrant issued by a judge,³⁸⁶ and often take on a violent character—and almost always result in violation of attorney-client privilege.³⁸⁷

Additionally, the mission heard that the representatives of the regional Councils of Lawyers who are required by law to be present at the search of lawyers' offices,³⁸⁸ are either not told about the searchers or are informed about them immediately before the beginning of a search operation, which makes it impossible for representatives to arrive in time. Furthermore, often, law enforcement personnel go beyond the limits set by the decision of the investigating judge in the permission to conduct a search, seizing

³⁷⁹ *André and another v. France*, ECtHR, Application No. 18603/03, Judgment of 24 July 2008, para. 42; Also see: *Wieser and Bicos Beteiligungen GmbH v. Austria*, ECtHR, Application No. 74336/01, Judgment of 16 October 2007.

³⁸⁰ In case of Soratnyk Attorneys At Law, on the night of 19–20 September 2016, armed officers and SBU searched the premises of the office, injuring the lawyers and seizing computers and documents, leaving the office smashed, at ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 30.; see also UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 16.

³⁸¹ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 16.

³⁸² *Ibid.*, pp. 28–29.

³⁸³ ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 30.

³⁸⁴ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine* (2013–2018), *op. cit.*, p. 28.

³⁸⁵ *Ibid.*

³⁸⁶ Lawyers M. H. Korotiuk, S. M. Lysenko, A. A. Busel, O. M. Iskizarov, S. V. Pliaka, V. V. Liushyk, V. V. Kosianchuk, Law Association "Dimicandum", V. I. Semenov, T. M. Voronenko, S. M. Tarasiuk, O. O. Lytvyn, M. V. Honcharov, I. V. Rudniv, I. A. Mudra, O. L. Pryshedko, L. M. Holovachova turned to the UNBA regarding the violation of the guarantees of the practice of law during the search.

³⁸⁷ For instance, in July 2016, the National Anti-Corruption Bureau of Ukraine (NABU) conducted a series of searches of law offices in Kyiv City, in particular at the offices of the lawyers A. I. Tsyhankov, S. M. Tarasiuk, O. P. Serhienko and others, resulting from participation of these lawyers in a number of high-profile criminal cases. The pre-trial investigation authority tried to obtain evidence through direct interference with the activities of defense lawyers, the removal of communication between lawyers and clients. During the investigation activities, the lawyers' files were examined, documents and electronic storage containing information constituting the lawyer-client privilege were seized, and unauthorized removal of information from telecommunication channels related to the content of conversation of the lawyer with the client was reportedly carried out, in UNBA Report, *op. cit.*, p. 31.

³⁸⁸ Law "On Bar and Legal Practice", *op. cit.*, article 23-2.

objects and documents not covered by the permission.³⁸⁹ There are cases where investigators hide from the investigating judge the fact that the search will take place in the premises of the lawyer, thus successfully avoiding judicial control.³⁹⁰

³⁸⁹ For example, in July 2016 NABU detectives conducted a series of searches in the lawyers' offices (of Andrii Tsyhankov, Serhii Tarasyuk, Oleksandr Serhiienko) and during the investigative actions, the lawyers' files, documents and electronic media, which are protected by lawyer-client privilege, were unlawfully examined, information from telecommunication channels relating to the content of the lawyers' conversation with clients was secretly copied, at ISHR, UBA Report, *Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine*, *op. cit.*, p. 29.

³⁹⁰ UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine (2013–2018)*, *op. cit.*, p. 32.

Chapter V. Lawyers in uncontrolled territories of Ukraine

Functioning of the justice system

The ICJ did not visit the territories which are outside the control of Ukraine's central government during its mission to Ukraine. However, in a number of meetings during the mission the problem of access to justice in relation to those territories was raised by the stakeholders. While no hostilities take place in Crimea, where Russian law is presently applied,³⁹¹ the situation remains highly unstable in parts of Donetsk and Luhansk and it is difficult to obtain information about the actual situation of access to justice for those who reside in those territories.

In general, "continued erosion of the rule of law" in the conflict-related areas is reported.³⁹² Following a period of absence of justice system institutions,³⁹³ parallel justice structures were developed in the territory controlled by the self-proclaimed "Donetsk People's Republic" and "Luhansk People's Republic".³⁹⁴ This included adoption of the legislation, which the ICJ heard was a mix of the Soviet, Ukrainian and Russian legislation. These parallel "justice systems", however, are reported to be largely non-operational³⁹⁵ and raise concerns about the protection and fulfilment of basic human rights of those seeking justice by turning to those bodies.³⁹⁶

Regarding the Donbas region,³⁹⁷ the newly formed authorities started operation in "Donetsk People's Republic" and "Luhansk People's Republic", including organs of the judiciary and law enforcement. All lawyers who wished to remain on that territory were forced to turn to the justice system organs (formed on the place of the existing ones) of "Donetsk People's Republic" and "Luhansk People's Republic" and file a statement of intent to practice law and register with the tax authorities of "Donetsk People's Republic" and LPR. In "Donetsk People's Republic", new legislation regulating the legal profession was adopted in March 2015 and amended in 2018. In Luhansk, until 2018 there was no law regulating the legal profession and the status of lawyers was unclear.³⁹⁸ Both laws

³⁹¹ OHCHR, *Report on the situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine*, 13 September 2017 to 30 June 2018, para. 3, available at: https://www.ohchr.org/Documents/Countries/UA/CrimeaThematicReport10Sept2018_EN.pdf (Accessed 24 February 2020).

³⁹² OHCHR, *Report on the Human Rights Situation in Ukraine*, 15 June 2014, para. 176, available at: <https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf> (Accessed 24 February 2020).

³⁹³ UHHRU Report, *Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine*, op. cit., p. 30.

³⁹⁴ Hereinafter "Donetsk People's Republic", "Luhansk People's Republic". UHHRU Report, *Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine*, op. cit., pp. 30–31. The OHCHR in its reports has concluded that parallel DPR and LPR judicial system and law enforcement bodies ('legislation', 'police', 'prosecutors' and 'courts') are prima facie contrary to international law (see OHCHR Reports on the human rights situation in Ukraine from 15 December 2014; 16 May to 15 August 2016; 16 August to 15 November 2016).

³⁹⁵ OSCE Special Monitoring Mission to Ukraine (OSCE SMM), Thematic report, *Access to Justice and the Conflict in Ukraine*, December 2015, p. 14, available at: <https://www.osce.org/ukraine-smm/212311?download=true> (Accessed 24 February 2020): "government services are absent in the TOT, parallel DPR and LPR 'justice systems' established remain largely non-operational, face serious constraints and raise considerable access to justice concerns particularly with respect to due process and fair trial rights."

³⁹⁶ OSCE SMM, Thematic report, *Access to Justice and the Conflict in Ukraine*, op. cit., p. 16: "the SMM observes that the absence of effective and transparent judicial services, coupled with the removal and obstruction of services by the government, raises serious access to justice concerns for people in 'DPR'- and 'LPR'-controlled areas. As the 'DPR'- and 'LPR'-justice systems' are largely undeveloped and unable to provide many basic services to people in the region, flexible solutions must be adopted in order to ensure that basic legal rights."

³⁹⁷ Includes Donetsk and Luhansk regions.

³⁹⁸ UHHRU Report, *Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine*, op. cit., p. 30.

provide for free legal aid.³⁹⁹ Lawyers who wish to practice law in these areas and are members of UNBA needed to lodge a special application to the “Ministry of Justice” of the self-proclaimed republics in order to be “re-validated”.⁴⁰⁰

Both “Luhansk People’s Republic” and “Donetsk People’s Republic” have established lawyers’ self-governing bodies and adopted legislation regulating the legal profession.⁴⁰¹ All lawyers continuing practice in the territories are expected to cooperate with the de facto authorities and be governed by the new legislation. Since 2015, lawyers were offered the opportunity to “renew” their licenses by addressing the “Ministry of Justice”, filing the documents and undergoing special checks by the existing security bodies. In uncontrolled territories, around 300 lawyers registered with the new justice system organs in “Donetsk People’s Republic” and 90 lawyers with “Luhansk People’s Republic”, while in the URAU there are over 3000 lawyers registered in Donetsk and 600 lawyers in Luhansk regions.⁴⁰² However, while some lawyers quit the profession or fled the territories, others remained and accepted the new terms, and registered with tax authorities which enabled them to return to their practice.

The mission was informed that the Free Secondary Legal Aid (FSLA) office has mobile checkpoints close to contact line⁴⁰³, but not in the conflict area itself. The same applies to NGOs, many of which provide assistance, including legal advice (reportedly there are service desks set up with Skype/phone consultations), but in the non-government-controlled area it is limited to only one NGO and one university legal clinic specializing in legal aid.

Security of lawyers and access to justice

In the situation of an ongoing conflict and regular attacks, lawyers who reside, practice law or represent clients in the conflict related zone have found themselves caught in the middle of a situation where they risk their security, liberty or legal practice coming under attack either by the local authorities, violent extreme right wing groups or the State authorities of Ukraine. This has significant consequences for the human rights and access to justice of people in these regions.

With regard of access to justice, it was on numerous occasions reported that arbitrary deprivations of liberty and incommunicado detentions⁴⁰⁴ continue to be applied to people residing in the conflict zone, including mass preventive arrests.⁴⁰⁵ In particular, banning or denying access to one’s lawyer⁴⁰⁶ is taking place for prolonged periods of time,⁴⁰⁷

³⁹⁹ *Ibid.*, pp. 30–31.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*, pp. 27, 30.

⁴⁰² *Ibid.*, p. 32.

⁴⁰³ On the issues along the contact line see: OSCE Report, *Checkpoints along the contact line: reasons why civilians cross and the challenges they face*, November 2019, available at: <https://www.osce.org/special-monitoring-mission-to-ukraine/440504> (Accessed 24 February 2020).

⁴⁰⁴ OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2017 to 15 February 2018, paras 46, 67, available at: https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf (Accessed 24 February 2020).

⁴⁰⁵ OHCHR, *Report on the human rights situation in Ukraine*, 16 February to 15 May 2018, paras 7, 51, 55, available at: https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf (Accessed 24 February 2020).

⁴⁰⁶ OHCHR Reports in Ukraine, available at: <https://www.ohchr.org/en/countries/enacaregion/pages/uareports.aspx>: 9th Report, para. 97; 10th, para. 124–5; 12th, para. 50; 14th, para. 99 (interrogated without a lawyer); 15th, para. 43; 16th, paras 94, 163; 18th, para. 43; 19th, paras 55, 58, 78; 20th, paras 40–41, 50, 56, 75; May–August 2018, para. 47; May–August 2019, para. 47.

⁴⁰⁷ OHCHR, *Report on the human rights situation in Ukraine*, 15 June 2014, *op. cit.*, para. 218; OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2016 to 15 February 2017, *op. cit.*, para. 75; OHCHR, *Report on the human rights situation in Ukraine*, 16 May to 15 August 2017, para. 185, available at: https://www.ohchr.org/Documents/Countries/UA/UAReport19th_EN.pdf (Accessed 24 February 2020); OHCHR, *Report on the human rights situation in Ukraine*, 16 May to 15 August 2018, para. 80, available at: https://www.ohchr.org/Documents/Countries/UA/ReportUkraineMay-August2018_EN.pdf (Accessed 24 February 2020); OHCHR, 12th Report in Ukraine (see footnote above), para. 50.

as are mass detentions without access to lawyers,⁴⁰⁸ with reported cases of confessions being extracted under duress, following torture and ill-treatment, without the presence of a lawyer.⁴⁰⁹

Another issue brought to the ICJ's attention was the ineffective legal representation provided by State appointed lawyers in the conflict zone. Detainees complained that free secondary legal aid lawyers did not make real efforts in their case⁴¹⁰ or declined to assist clients with complaints about torture.⁴¹¹

Already at the very beginning of the conflict, international organizations reported the abduction of two lawyers by armed groups.⁴¹² The mission was told that while it is a general problem for all individuals, lawyers specifically cannot travel freely to and from the uncontrolled territories. Moreover, the mission was informed that lawyers' travel to other parts of Ukraine was hampered by the de facto local authorities.

On the other hand, when lawyers practicing in Ukraine travel to the uncontrolled territories, upon their return from the conflict zone to government-controlled Ukraine, they may face prosecution for collaboration with the de facto authorities of "Luhansk People's Republic" and "Donetsk People's Republic".⁴¹³ It was also reported that lawyers who applied for licenses in non-government-controlled areas later face problems in Ukraine.⁴¹⁴ For example, there are at least two cases in the Unified Registry of Court Decisions where lawyers have been convicted for collaboration with "Donetsk People's Republic" and "Luhansk People's Republic" judicial bodies.⁴¹⁵ The official charges against them included creation of a terrorist group or a terrorist organization (article 258-3 (1) of the Criminal Code of Ukraine, banditry (article 187), illegal seizure of a vehicle (article 289).⁴¹⁶

The ICJ also heard of reported cases of physical violence against lawyers in the conflict area, but only in one case has an investigation has been launched in these cases by the Ukrainian authorities.⁴¹⁷

⁴⁰⁸ OHCHR, *Report on the human rights situation in Ukraine*, 16 May to 15 August 2016, <https://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport.pdf>, para. 104: "[o]n the evening of 4 July 2016, more than 100 persons protested peacefully against the presence of military equipment in the centre of Toretsk, Donetsk region. Police arrested eight men and charged them with wilful disobedience, interrogated them without lawyers and did not bring them before court within three hours, as required by domestic law. SBU officers threatened and intimidated the detainees and demanded access to their social media, interrogating them about their affiliation with the armed groups."

⁴⁰⁹ OHCHR, *Report on the human rights situation in Ukraine*, 16 May to 15 August 2016, para. 77, available at: <https://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport.pdf> (Accessed 24 February 2020).

⁴¹⁰ OHCHR, *Report on the human rights situation in Ukraine*, 16 November 2017 to 15 February 2018, *op. cit.*, para. 49.

⁴¹¹ OHCHR, *Report on the human rights situation in Ukraine*, 16 May to 15 August 2016, para. 75, available at: <https://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport.pdf> (Accessed 24 February 2020).

⁴¹² OHCHR, *Report on the human rights situation in Ukraine*, 15 June 2014, *op. cit.*, para. 35.

⁴¹³ UHHRU Report, *Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine*, *op. cit.*, p. 37.

⁴¹⁴ OHCHR, *Report on the human rights situation in Ukraine*, 16 August to 15 November 2017, para. 83, available at: https://www.ohchr.org/Documents/Countries/UA/UAREport20th_EN.pdf (Accessed at 24 February 2020): "Persons residing in territory under the control of armed groups, including those in detention, who wished to obtain a lawyer faced new challenges. On 30 June 2017, the 'head' of 'Donetsk People's Republic' issued a 'decree' stating that only lawyers who were 'certified' by the 'Donetsk People's Republic' may represent a 'defendant' in 'criminal cases', which is in conflict with the 'law on bar and practice of law'. Many lawyers fear obtaining such 'certification', as it may put them at risk of arrest and prosecution when they travel to government-controlled territory because the certification procedure requires taking an oath to the 'Donetsk People's Republic'."

⁴¹⁵ UHHRU Report, *Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine*, *op. cit.*, p. 37.

⁴¹⁶ Information on the two cases in the court registry, available at: <http://www.reyestr.court.gov.ua/Review/61286091>; <https://farwater.net/novosti/v-zhitomire-vzyali-pod-strazhu-posobnicu-terroristov/> (<https://web.archive.org/web/20181223181222/https://farwater.net/novosti/v-zhitomire-vzyali-pod-strazhu-posobnicu-terroristov/>) (Accessed at 24 February 2020).

⁴¹⁷ The only exception is the kidnapping of I. Radchenko, in connection to which the media immediately reported under Part 3, article 146 of the Criminal Code of Ukraine, was included in the Unified Register of Pre-Trial Investigations. However, the progress of the investigation and its results remain unknown, in UHHRU Report, *Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine*, *op. cit.*, p. 34. See the GPO response at p. 77.

One specific problematic issue identified is that those lawyers registered with de facto authorities of “Luhansk People’s Republic” and “Donetsk People’s Republic” did not terminate their registration in Ukraine. The UNBA does not keep track of lawyers and has no way of checking the number of lawyers actually practicing law in “Luhansk People’s Republic” and “Donetsk People’s Republic”, since according to Ukrainian legislation a lawyer can carry out professional activities anywhere in Ukraine regardless of registered workplace⁴¹⁸ (and many lawyers leaving breakaway territories did not register respective changes).

Lawyers who visit the regions reported that they were not able to reveal their status as registered lawyers in Ukraine due to possible harassment from the authorities. Some lawyers manage to represent clients from uncontrolled territories in neighbouring regions of Ukraine under Government control. Inability of members of the UNBA to represent clients including risks to security and other obstacles hampers access to justice, including for those seeking remedies for human rights violations.

⁴¹⁸ Law “On Bar and Legal Practice”, *op. cit.*, article 17-2.

Conclusions and recommendations

The conflict of 2014 has significantly affected the justice system and individual lawyers have found themselves at the front-line of the conflict or its ideological aftermath in one form or another. While not every lawyer's work was affected, those who work on politically sensitive cases have faced attacks and harassment, and in some cases have been killed. This cannot but send a strong signal to all lawyers of the consequences they may face for a zealous defence of the clients and has a chilling effect on work of the legal profession. Political endorsement of violent extreme right-wing groups operating in the name of patriotism has resulted in weakening of the rule of law and a significant level of impunity for carrying out attacks on lawyers. Not only lawyers, but judges as well as the justice system as a whole have been undermined by the regular and frequent attacks and impunity for them. Lawyers have often been left alone and without effective legal recourse against groups who intimidate, threaten, attack or otherwise harass them and interfere with their professional activity. The greatest irreparable consequences of such attacks are killings of lawyers for which the perpetrators have not been brought to justice. In this regard it is commendable that the UNBA plays an active role in monitoring these cases, though little has been done to speedily and fully investigate them.

A further problem is that lawyers continue to be regularly targeted through the justice system for undue reasons, despite various reforms of the judiciary and law enforcement agencies. Lawyers continue to be associated with their clients and may face consequences for representing them not only at the hands of violent extreme right wing groups or private individuals but also through abuse of legal proceedings. High-profile cases bear risks for independent lawyers who choose to diligently represent their clients.

Ukraine has not yet become free from the common complaint heard across Post-Soviet countries that there are good laws and poor practice, which often renders the justice system dysfunctional, and undermines reforms. Lawyers continue to face obstruction and hindrance when representing clients, especially when seeking to access clients held in detention. Basic guarantees prescribed by law such as confidential communication with clients have not become the reality as lawyers continue facing problems even where certain guarantees are clearly prescribed by law. This and other factors result in the failure of the justice system to ensure the actual equality of arms where lawyers operate on an equal footing with the prosecutors, including in regard to access to the case-materials or calling witnesses.

Furthermore, lawyers continue to experience searches of their premises. It is a particular problem that covert operations may be conducted against lawyers while they have no legal checks or means to counter these actions.

The Ukrainian legal profession's self-governing body—the Ukrainian National Bar Association—is relatively young. The reform of 2012 created challenges for the profession, though subsequent events have shaped its institutional independence which has crystallized in its active support of lawyers under threat. The legal and political developments taking place in the country, including the highly volatile environment brought about by the armed conflict, have undoubtedly influenced the profession and have had a detrimental effect on the security of lawyers and their ability to protect the rights of their clients. The polarization of opinions and politicization of the social landscape is the reality which continues to shape the Ukrainian legal profession and which poses risks not only for individual lawyers but for the independence of the profession as a whole.

The UNBA has ensured its independence not only in law but in practice, having gone through a period of turbulence. This independence constitutes an important achievement which should not be underestimated or taken for granted. The independence of

the profession is a bedrock for the independence of the justice system which cannot function effectively without independent lawyers.

While the UNBA has a well-developed institutional structure, which is functional and effective, both qualification and disciplinary processes require significant improvement in order to ensure that the legal profession, its institutions and individual lawyers can function in line with international standards on the role of lawyers. The process for admission to the profession remains weak, outdated and does not appear to be free from deeply entrenched corrupt practices, which undermine the credibility of the profession and weaken its independence. Besides, the legacy of the internal split within the profession in 2012 has not been fully resolved and though the court decision recognizing the UNBA as the sole Bar Association has advanced institutional capacity of the UNBA.

It is of concern that the Bar Association was excluded from meaningful participation in the process of developing proposed reforms of the legal profession under the previous Presidential administration despite being a key stakeholder. The unjustified use of the urgent procedure raised concerns as to the possible undermining of the independence of the Bar Association therefore the withdrawal of the Draft Law is welcome. However, as it is possible that Ukraine may experience another whirlwind of reforms, the risk of the legislative initiatives which may aim or result in undermining the independence of the legal profession remains.

It is self-evident that the territories of Ukraine touched by the conflict, where the rule of law is barely established, experience the most serious problems. Impediments in regard to providing legal representation in those territories are created both by the de facto authorities of the self-proclaimed republics — “Luhansk People’s Republic” and “Donetsk People’s Republic” — and by the Ukrainian central government. Lawyers who risk their lives working on these territories face further problems upon return due to the restrictions on providing legal service in the territories. Those who choose to provide legal service there are forced to hide the fact that they provide such representation, which appears to obstruct access to justice. Furthermore, neither the government nor the UNBA as an institution have yet been able to take action to ensure recognition of the important role and protection of lawyers who provide legal service in the territories affected by the conflict.

Bearing in mind the findings and conclusions of the mission and based on international human rights law the ICJ recommends to the relevant governmental structures as well as the Ukrainian National Bar Association address the problems of attacks and harassment of lawyers and as a matter of urgency take the following measures.

In regard to security of lawyers the ICJ recommends that:

- The decline in security of lawyers in and outside of courts, the problem of threats, harassment and attacks against lawyers should be addressed as a matter of priority at policy and legislative levels. Urgent security measures should be taken by the law enforcement agencies to ensure that lawyers work in an atmosphere free from intimidation, harassment and improper interference.
- State institutions, including the judiciary, law enforcement agencies and the UNBA should work together to ensure that lawyers are able in practice to protect the human rights of their clients without fear of attacks or reprisals.
- In consultation with the UNBA and with individual lawyers, a system of protection for lawyers who are at risk of violent attacks should be elaborated and put in place across the country including for those lawyers who regularly work in the territories not controlled by the government; this system should prescribe the actions to be taken by responsible entities in cases of threat to lawyers.

- Where attacks occur, prompt, thorough, impartial and independent investigations into such incidents should be carried out to ensure independence, by another authority or mechanism, which should, where appropriate, result in bringing those responsible to justice.
- The Court Security Service should have sufficient staff with adequate professional training and capacity to be able to ensure safety and security in courts. Courts should be provided with adequate security personnel to ensure the security and protection of participants in judicial proceedings against any attacks, be they physical or verbal.
- To this end, security and law enforcement personnel should be provided with policy guidelines and training to effectively address instances of attacks on lawyers by organized groups or individuals and themselves refrain from physical force in interaction with lawyers. Such policy and training should emphasize their responsibility to protect the physical integrity of all those present in and outside courtrooms.
- Persons convicted of criminal offences for attacking lawyers in relation to carrying out their professional activities, for the purpose of impeding the due administration of justice or procuring miscarriages of justice, should incur sentences that adequately reflect the gravity of such acts.

In regard to cases of killings of lawyers:

- Law enforcement bodies should take all measures necessary, in co-operation with the UNBA, to protect the lives and physical integrity of lawyers, and prevent killings or threats to kill lawyers in relation to exercising their professional duties.
- Relevant law enforcement agencies should investigate promptly and effectively all killings and attacks on lawyers with the aim of identifying those responsible and bringing them to justice in proceedings which fully respect international fair trial standards. Where there are concerns that law enforcement agencies may not be sufficiently independent to carry out such an investigation, in particular where law enforcement agents of the same body are implicated in the killing, a separate independent investigative mechanism should be established.

In regard to attacks on lawyers through legal mechanisms:

- The independence and role of lawyers must be respected by all State institutions: the executive, legislative and the judiciary, by all other public authorities including law enforcement authorities, and by all participants in legal proceedings. No executive or judicial authority should initiate or threaten lawyers with criminal, administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics of lawyers. Lawyers should never be identified with their clients or their clients' causes as a result of representing clients, including those whose political convictions are opposed to those of the official position of the Government.
- When lawyers are arrested or detained, the representatives of the relevant Council of Lawyers should be informed immediately of the reason and legal basis for the arrest or detention and have unhindered access to the lawyer arrested or detained.
- Lawyers should not suffer or be threatened with disciplinary action for zealous representation of their clients in line with their professional duties. Disbarment or other disciplinary measures can only be invoked or imposed in the most serious cases of misconduct, including where lawyers act against the interests of their clients, as provided in the professional code of conduct, and only as a result

of a due process before an independent and impartial body which respects all procedural guarantees afforded to the lawyer by law. The use of disciplinary action for any purposes other than ensuring high professional standards, integrity and independence of lawyers should be excluded in practice.

In regard to the problems lawyers face when protecting human rights:

- A system should be introduced to effectively guarantee in practice that lawyers are able to meet and communicate with their clients in detention expeditiously and in private without any impediments, restrictions and without authorization by an investigator or other prosecuting authorities which have an investigative interest in the case. Such meetings should be of sufficient duration both in law and in practice to guarantee sufficient time and facilities for the preparation of the defence.
- Courts should not tolerate practices where access of a lawyer to a client is obstructed, including on grounds of inaccessibility of the investigator, or other justifications for obstacles to the rights of access to a lawyer, guaranteed under the law.
- Facilities must be provided in places of detention which ensure genuine lawyer-client confidentiality, including special rooms that allow for consultation outside of the presence and hearing of law enforcement personnel. In any event, in cases where information originating in lawyer-client consultations is suspected to have been obtained through unlawful means, the courts should inquire into the matter and decide on the admissibility of such evidence.
- Legal provisions, strictly respected in practice, must protect against lawyers being called as witnesses without justification or for improper purposes in cases where they represent clients, with the result that they are prevented from continuing to act on behalf of their client.
- Equality of arms must be guaranteed at all stages of criminal proceedings, which should mean at a minimum that the procedures prescribed by law are strictly adhered to by law enforcement bodies and that lawyers are given a genuine opportunity at all stages of the proceedings to operate on an equal basis with the investigation and the prosecution.
- The law enforcement authorities should refrain from intimidation of lawyers by procedural means, such as resorting to unjustified or otherwise improperly conducted searches of lawyers' offices and homes, particularly those that fail to respect lawyer-client privilege, covert investigative procedures or seeking disciplinary liability of lawyers merely for the reason of their active position.

In regard to the independence of the legal profession in Ukraine:

- The independence of the Bar Association should be protected against legal or other initiatives which may undermine its independence and the role it plays in the governance of the legal profession. While lawyers should be guaranteed enjoyment of freedom of association including by organising themselves through various associations of lawyers, the Ukrainian National Bar Association as the self-governing body of the legal profession established by law, has a key role to play including as regards admission to the profession, ethics and disciplinary responsibility of lawyers. It is important that the UNBA retains these functions and that the independence of the UNBA and its constituent bodies be upheld.

- The UNBA should continue improving and strengthening the qualification process for lawyers, to ensure that lawyers are capable of protecting human rights of their clients. To this end, The UNBA should take urgent measures to ensure full transparency of the qualification procedure for lawyers which should in practice be free of any corruption, and should ensure accountability of its members for any practices that undermine the credibility and integrity of the admission to the profession
- The disciplinary bodies should develop standards which provide clear guidance to lawyers about unethical behaviour that would lead to disciplinary responsibility, including grounds for disbarment. In particular, the grounds for disciplinary action should be specified, the rules applicable to disciplinary proceedings should be clarified, and the types of penalties that may be applied should be differentiated. Where lawyers act against the interest of their clients they should be held accountable in line with international law and standards.
- The procedural rights of lawyers subject to disciplinary proceedings should always be guaranteed, through a full, independent and impartial assessment of the facts and law that takes into account the submissions of the lawyer concerned. Lawyers in particular should be made aware of the hearing of their case in sufficient time to allow for their participation and adequate preparation of their defence; and have the right to defend themselves in person or with the assistance of a lawyer of their choice
- Decisions imposing disciplinary sanctions should be reasoned and made public so that they may be scrutinized by appeal bodies and inform the development of principled application of the code of professional conduct.
- Lawyers should not face disciplinary penalties for exercising their right to freedom of association. In particular, disciplinary penalties should not be used as means of reprisal against lawyers for the mere fact of joining a particular association of lawyers.

In regard to the reform of the legal profession the ICJ notes that:

- Any legislative reform of the Bar Association should have as its goal the independence of the legal profession. Any reform should aim to further protect lawyers rather than impose institutional control over the Bar Association or otherwise weaken its independence and self-governance.
- The UNBA, as well as individual lawyers, should be included in every stage of the elaboration of legislation concerning its functioning, in particular those laws which affect the legal profession and the Bar Association itself. The UNBA should take part in the public discussion of matters concerning the law, the administration of justice system and the promotion and protection of human rights through the justice system. The Bar Association should also be consulted on other legislative procedures that could affect the rights and independence of the legal profession.

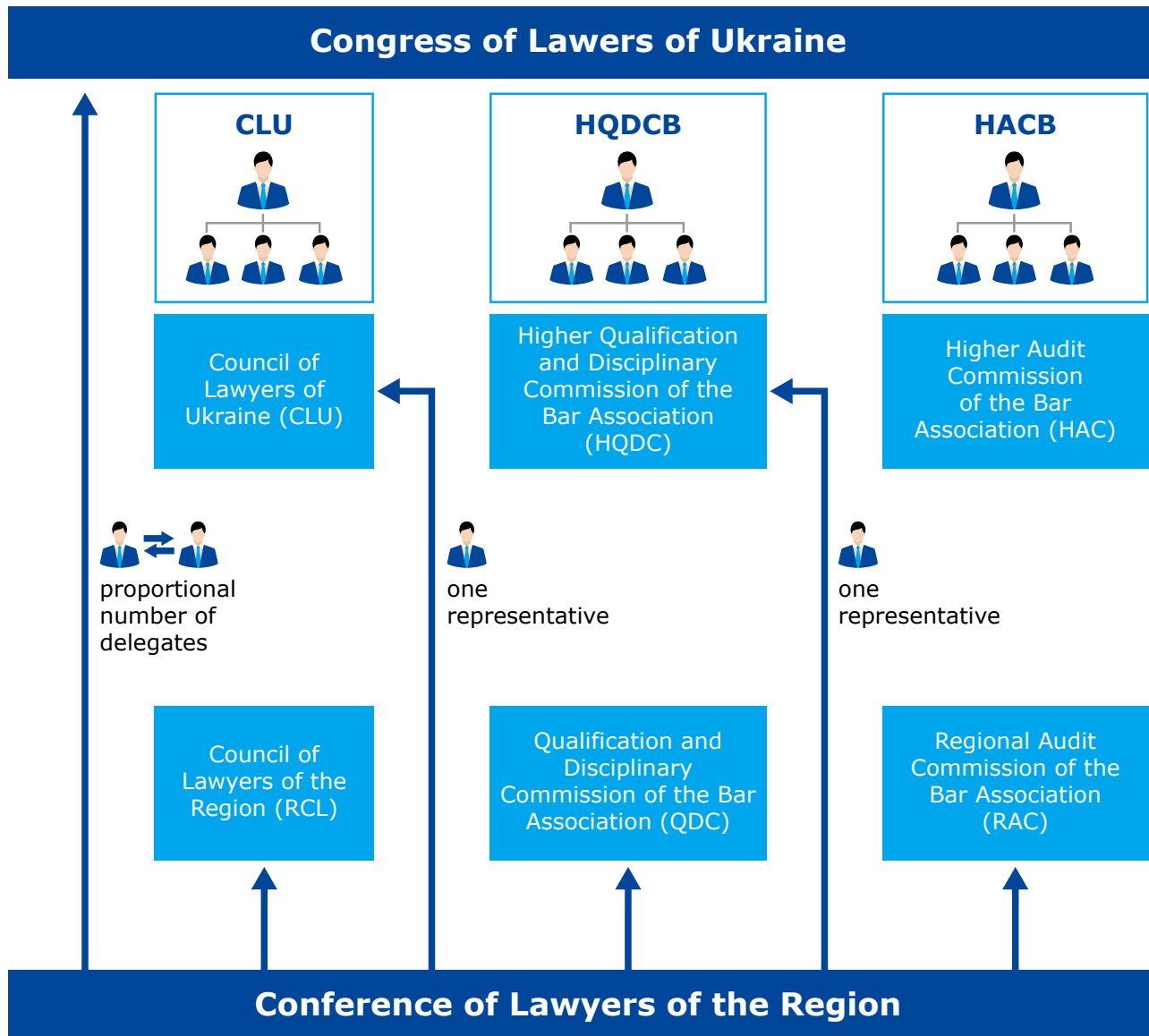
In regard to the work of lawyers in uncontrolled territories:

- Lawyers' work in all uncontrolled territories should not be impeded by State or non-State actors to ensure that access to justice in the uncontrolled territories is improved, in particular that all persons on the territory of Ukraine who are detained are afforded all the legal safeguards in accordance with international human rights law, including ensuring that all persons are provided with competent legal advice and prompt access to a lawyer in case of detention.

- Prompt, thorough and independent investigations should be carried out into known cases of harassment of lawyers in relation to providing legal assistance in uncontrolled territories, where such harassment takes place in the territory controlled by the Government of Ukraine. In such cases, every effort should be made both by the UNBA and relevant State authorities to regularly monitor violations of lawyers' rights. Where cases of attack on lawyers due to representing clients in uncontrolled territories become known, full and impartial investigations should be conducted and effective measures to prevent similar violations in the future should be taken whether by de facto authorities or the national authorities of Ukraine.

Annex I

Organizational structure of the Ukrainian National Bar Association



ICJ Commission Members

March 2020 (for an updated list, please visit www.icj.org/commission)

President

Prof. Robert Goldman, United States

Vice-Presidents

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

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ISBN 978-92-9037-264-6



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