

Ukraine: Conflict, Disbarments and Suspensions in the Legal Profession

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INTRODUCTION

ICJ Mission to Ukraine

The International Commission of Jurists (ICJ), represented by its Commissioner Gulnora Ishakhanova, conducted a research trial observation mission from 20 to 22 June to assess the independence of the legal profession in Ukraine. The mission arose from concerns that numerous disciplinary proceedings had been brought against Ukrainian lawyers, in which decisions of Qualifications and Disciplinary Commissions (QDCs) led to termination or suspension of their status as a lawyer. A series of disciplinary proceedings were initiated following the adoption in 2012 of the Ukrainian Law “on Legal Profession and Practice of Law”, which provided for the establishment of a National Association of Lawyers of Ukraine and election of its subordinate bodies. Following the adoption of new law, two alternative groups of lawyers claimed to form the legitimate national association for the profession, as required by the law. Both were called the National Association of Lawyers. One of these was subsequently recognized by the government and officially registered. According to reports received by the ICJ, the disciplinary proceedings that followed were directly or indirectly linked to involvement by the lawyers concerned in “alternative and extraordinary conferences of lawyers”, which were arranged without the authorization of the official National Association of Lawyers. Some proceedings also related to failure by the lawyers to participate in meetings organized by the newly-established self-governing bodies that had obtained State registration under the new law.

Meetings and research during the mission

During her stay in Ukraine, Gulnora Ishakhanova met a number of stakeholders, including lawyers subjected to disciplinary action, heads of the disciplinary bodies belonging to the National Association of Lawyers and independent experts. She observed a hearing on several disciplinary cases, including those against lawyer Roman Martynovskiy and Lawyer Larisa Gerasko. In addition, Ms. Ishakhanova collected oral and written testimonies, court and other documents related to the establishment of the self-governing bodies of the legal profession under the new law, as well as materials concerning individual cases against lawyers.

Scope of this Report

This report offers a brief overview of the situation of the independence of the legal profession as assessed during the mission and attempts to identify some of the most problematic outcomes of the reform. The ICJ has been made aware of numerous conflicts within the profession, in different parts of the country, before the legal profession suffered a serious split at a meeting in “Rus Hotel” on 17 November 2012. The report provides a general account of this split and the ensuing conflict within the legal profession in Ukraine, the repercussions of which still affect dozens of lawyers. Some aspects of the events are contested and the ICJ is not in a position to verify or refute the allegations made in the course of interviews with lawyers in Ukraine. The report does not attempt to provide a detailed analysis of each disciplinary case against lawyers or to address comprehensively the cases of every lawyer who has been affected by the conflict between different members of the legal profession. Rather, it aims to identify certain patterns in these proceedings which point to a possible threat to the independence of the legal profession and instances of harassment of individual lawyers.

The ICJ is grateful to everyone who facilitated the mission and research for this report and who assisted in obtaining decisions of courts and disciplinary bodies. We especially appreciate the contribution of the Ukrainian Helsinki Human Rights Union, which provided valuable information, support and assistance to the ICJ mission, as well as the International Renaissance Foundation which provided financial support to the mission.

Independence of the legal profession in international law and standards

An independent and effective association of lawyers is essential in a democratic society under the rule of law. Both the independence of the judiciary and the independence of the legal profession are fundamental to the fair and effective administration of justice. Lawyers and their associations, like other actors in the justice system, form a pillar upon which the protection of the rule of law and the protection of human rights rests.¹ For lawyers to fulfill their role, they must function in an environment where full enjoyment of their rights and freedoms and their independence from any harassment, persecution or undue influence are guaranteed.

The United Nations Basic Principles on the Role of Lawyers provides the minimum baseline standards which must be respected by all branches of government to ensure independence and integrity of the legal profession. They recognize that lawyers, as essential agents in the administration of justice,² have a duty along with judges and prosecutors, to safeguard and uphold the rule of law.³ In discharging their duties, lawyers must at all times be able to “act freely [. . .] and fearlessly [. . .] and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.”⁴

Lawyers, like other persons, have a right to freedom of association, as recognized in the Universal Declaration of Human Rights (Article 20) and guaranteed in the International Covenant on Civil and Political Rights (Article 22) and the European Convention on Human Rights (Article 11), to both of which Ukraine is a party. This right includes the right to form and maintain independent, self-governing associations. Each jurisdiction may have “one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any body or person.”⁵ These associations play a vital role “in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements,”⁶ A culture of respect for the independence of the legal profession, and for its essential role in the administration of justice and the maintenance of the rule of law, needs to be supported by self-governing associations of lawyers with open and democratic structures of governance and decision-making, that safeguard against manipulation by the executive or other powerful interests.⁷

Whenever there are well-founded reasons to take disciplinary action against a lawyer, the proceedings must meet international standards, including under the UN Basic Principles on the Role of Lawyers. In accordance with those standards, charges or complaints against lawyers must be adjudicated in a fair and proper procedure, which should include assistance by a lawyer and the right to a fair hearing.⁸ The legal system and institutions of the profession must ensure that lawyers are protected against intimidation, harassment or interference, including through the abuse of disciplinary proceedings. Any sanctions against lawyers for disciplinary misconduct must be proportionate to the infraction.⁹

¹ See Practitioners Guide No. 1, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>, page 63.

² International Commission of Jurists, Congress of New Delhi (1959).

³ UN Basic Principles on the Role of Lawyers, Principles 4 and 14; Paris Minimum Standards of Human Rights Norms in a State of Emergency, Principle 1(b).

⁴ Singhvi Declaration, *op. cit.*, para. 83; see also Basic Principles on the Role of Lawyers, Principle 15.

⁵ Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), para. 97.

⁶ UN Basic Principles on the Role of Lawyers, Preamble.

⁷ See UN Human Rights Committee, Concluding Observations on Belarus, CCPR/C/79/Add. 86, para. 14.

⁸ UN Basic Principles on the Role of Lawyers, Principle 27; The Singhvi Declaration, Principle 106.

⁹ Recommendation No. R (2000) 21 of the Committee of Ministers to Member states on the freedom of exercise of the profession of lawyer, Principle VI.4.

BACKGROUND

Ukraine gained independence in 1991 as a result of the break-up of the Soviet Union. Consisting of 24 regions, an autonomous republic of Crimea and two cities having a special status (hereinafter regions), it has the second largest territory among the Council of Europe member-states. Under the current Constitution adopted in 1996, it is a unitary republic whose main state bodies are the executive, headed by the President, the unicameral Parliament of 450 seats and the Judiciary. The Judiciary consists of general and constitutional jurisdictions.¹⁰ Criminal courts, belonging to the general jurisdiction, are comprised of a three level appeal system with the High Specialized Court for Civil and Criminal Cases being the highest judicial body.

The Ukrainian legal system belongs to the European continental tradition. Ukraine's history as a part of the Soviet Union continues to affect its legislation and legal practice. For example, the current Criminal Procedure Code was introduced only in November 2012 until which time the Soviet Criminal Procedure Code, adopted in 1961, was in force. The Human Rights Committee in its recent Concluding Observations on Ukraine, of 2013, noted with concern "that judges still remain vulnerable to outside pressure" and that the independence of judges from the executive and legislative branches of government are not fully ensured.¹¹

Ukraine is a party to a number of international treaties including the International Covenant on Civil and Political Rights and to its Optional Protocol, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Convention on Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and others.¹² In 1997, it ratified the European Convention on Human Rights.

As a result of mass protests from November 2004 to January 2005 following presidential elections in Ukraine where Viktor Yanukovich was announced as the winner, new presidential elections were held where Viktor Yushenko, Viktor Yanukovich's rival, came to power. In 2010, Viktor Yanukovich won the elections predominantly being supported by voters from the East of Ukraine and is the currently serving his first term as the President of Ukraine. President Yanukovich's rival in those elections, Yulia Timoshenko, was arrested the following year charged with abuse of authority while being Prime Minister and subsequently sentenced to a prison term. Her imprisonment is widely perceived as being politically motivated.

Ukrainian society is divided along political and geographical lines, with the majority in the West of the country favouring closer ties with the European Union, and the majority in the East supporting alliance with Russia. In 2013, a last-minute decision by the government not to sign a European Union Association Agreement led to mass protests beginning in November 2013, which continue at the time of writing of this report.

Previous legislation on the Legal Profession

The Law of Ukraine "on the Legal Profession" that preceded the new law of 2012 was adopted on 19 December 1992. Under that law, unions and associations of lawyers could be established to represent the interests of lawyers.¹³ Certain functions which would generally be accorded to a lawyers' association, such as training of lawyers, belonged to the Ministry of Justice, and qualification and disciplinary action against lawyers were the responsibility of the local authorities which established Qualification Disciplinary Commissions¹⁴ or the Cabinet of Ministers, which established the High Qualification Disciplinary Commission of Lawyers.¹⁵ However, the law did not

¹⁰ The Law of Ukraine on Judicial System and the Status of Judges of 7 July 2010.

¹¹ Human Rights Committee, Concluding Observations on the Seventh Periodic Report of Ukraine, CCPR/C/UKR/CO/7, 22 August 2013.

¹² Full list: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

¹³ The law on Advokatura of 19 December 1992, N 2887-XII, Article 19.

¹⁴ *Ibid.*, Article 13.

¹⁵ *Ibid.*

provide for a unified association of lawyers that would have an institutional or practical capacity enabling it to effectively represent the interests of the legal profession.¹⁶

The High Qualifications Commission of Ukrainian Lawyers (“HQC”) together with its members, heads and representatives of regional QDCs, representatives of the Union of Lawyers of Ukraine, Association of Jurists of Ukraine¹⁷ and Association of Lawyers of Ukraine¹⁸ developed a Draft Law of Ukraine “On Legal Profession and Practice of Law”. The European Commission for Democracy through Law (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.”¹⁹

Pursuant to Decree No. 362/2011-rp of 22 November 2011 issued by the President of Ukraine, a working group, headed by an adviser to the President and consisting of officials, judges, lawyers, scholars and other legal experts, was set up and entrusted with drafting legislation regarding the reform of prosecutor’s office and the legal profession.²⁰ The working group developed an alternative draft law to that developed by HQC and other associations. Later, yet another draft law was introduced by the President of Ukraine to the Parliament: The Law of Ukraine “On Legal Profession and Practice of Law”. On 5 July 2012, the Parliament adopted the Law of Ukraine “On Advokatura and Lawyers’ Activity” and the law came into effect on 15 August 2012.

The 2012 law

The 2012 law provides for a unified self-governing National Association of Lawyers of Ukraine which is intended to bring together all lawyers of Ukraine and to become a single self-governing association for the legal profession. The law provides that self-governing bodies of lawyers shall be set up²¹ both at the local and national level.²² The law also provides that “advokatura (the legal profession) is independent from state bodies, municipal bodies, their officers and officials.”²³

Pursuant to the 2012 Law, founding conferences of lawyers were to be held at the local level during the sixty days following its entry into force.²⁴ Local QDCs were charged with holding founding conferences of lawyers at the local level.²⁵ The Founding Congress of Lawyers of Ukraine was to be held at the national level within one hundred days of the entry into force of the law, and was to be attended by delegates elected by the founding conferences of lawyers at the local level. The HQC under the Cabinet of Ministers of Ukraine was responsible for facilitating the latter event.²⁶

¹⁶ E.g. Draft Declaration on the Independence of Justice (Singhvi Declaration), para. 99.

¹⁷ Association of Ukrainian Jurists, All-Ukrainian Non-governmental organisation, <http://uba.ua/rus/>.

¹⁸ Ukrainian Association of Lawyers, <http://www.uaa.org.ua/>.

¹⁹ Joint opinion on the draft law on the bar and 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), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)039-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)039-e), para. 113.

²⁰ An Order of the President of Ukraine No. 362/2011-rp, <http://president.gov.ua/ru/documents/14200.html>.

²¹ Law of Ukraine No. 5076-VI of 5 July 2012 On Advokatura and Lawyers’ Activity, Article X.5.

²² *Ibid.*

²³ *Ibid.*, Article 5.

²⁴ *Ibid.*, Article X.5.

²⁵ *Ibid.*

²⁶ *Ibid.*

CONFLICT WITHIN THE LEGAL PROFESSION

Local conferences and quotas

Under the Law,²⁷ local QDCs were required to hold conferences of lawyers in all 27 regions of Ukraine. Those conferences were to be held to set up local self-governing bodies of lawyers, elect their chairs, and elect delegates to take part in the Constituent Congress of Lawyers of Ukraine and nominated for self-governing bodies of the National Association of Lawyers.²⁸

Already at this stage, conflict among lawyers started to erupt. Preliminary meetings took place consisting of informal gatherings of lawyers, not foreseen by the law, in a number of regions, including Kharkov, Kiev region, Zakarpatie and Donetsk. At these meetings, certain QDCs established quotas for participation of lawyers at local founding conferences, an additional requirement not provided by the law. Allegedly, such meetings were held at the same time across several regions.²⁹ As a result, the number of lawyers who could take part in local conferences, or participate in the election of or themselves be elected to self-governing bodies of lawyers was limited. Many lawyers protested against such quotas as being contrary to the law.³⁰ For example, the head of the HQC openly condemned them and called for their abolition.³¹

However, such protests by lawyers did not generally find support with the organizers of local conferences where quotas were established. As a result, the very beginning of the reform process was marred by clashes amongst lawyers, as well as by the imposition of quotas aimed at excluding certain lawyers who wanted to take part in the elections guaranteed by law. As reported by lawyers, such clashes at times involved the use of physical force by some lawyers and injuries leading to hospital admissions of lawyers. This happened, for example, in Zakarpatie, Donetsk and Kharkov regions, where special guards were used to prevent attendance of lawyers. Reportedly, in Kiev region the special forces "Berkut" were used to prevent lawyers from attending. A similar scheme was later used for the Constituent Congress of Lawyers (see below).

In certain regions, such as the Kharkov, Zakarpatie, lawyers who were excluded from elections held "alternative" conferences where they too elected delegates to take part in the Founding Congress of Lawyers of Ukraine. In Donetsk, however, because of the pressure exercised by the "alternative" lawyers, they were allowed to attend the conference and some were even elected to the self-governing bodies.

In some regions, as a result of holding parallel conferences where delegates were elected, two lists of delegates to take part in the national Founding Congress emerged. Each of the lawyers on those lists believed they were the "legitimate" delegates to the Founding Congress. Conflicting reports were brought to the attention of the ICJ: some indicated that the HQC accepted the coexistence of double lists and found that lawyers from each list were entitled to take part in the Congress. Other information received suggests that no double lists existed and only one list from each region was registered.

The HQC decided at its session in November 2012, with a reference to the requirements of the Law,³² to abolish the quota system when holding founding conferences. Its President, Vladimir Vysotskiy, published an address to the Presidents of local QDCs calling on them to "strictly follow

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Lawyers suggested that in some regions there were 1,000–3,000 lawyers and it was hardly possible to find a venue which would seat this number of lawyers. Nevertheless the law guaranteed that all of those lawyers were entitled to participation. So, for example, some regions of 1,000 or 2,000 lawyers could organise constituent conferences in accordance with the law. In Kiev, for example, the number of lawyers is 6,000 and no additional quotas were introduced for around 1,000 lawyers who took part in the conference.

³⁰ The lawfulness of these preliminary quotas were later approved by administrative courts.

³¹ Call of the President of the HQC under the Cabinet of Ministers of Ukraine Vysotsky V.I, 4 October 2012, <http://yurpravda.info/index3478.html>.

³² Law of Ukraine on Advocatura and Lawyers' Activity, article X.5.

the law and provide an opportunity for lawyers to take part in constitute conferences.”³³ Afterwards, the above address served as a basis for disciplinary proceedings against Mr. Vysotskiy which ultimately resulted in his disbarment.

As a result of the clashes during local conferences, legal proceedings were initiated in different regions. For instance, the decision of the conference that took place in the Dnepropetrovsk Region on 25 September 2013 where delegates to the Constituent Congress of Lawyers of Ukraine were elected was subsequently quashed by the Circuit Dnepropetrovsk Administrative Court on 23 October 2013,³⁴ i.e. shortly before the convening of the Congress.³⁵ A number of lawyers who supported the HQC³⁶ challenged the decision of the local constituent conference of Zakarpatie Region of 31 August 2012 in relation to the order for the regional conference. The administrative Circuit Court of Zakarpatie dismissed the case on formal grounds.

On 6 October 2012 a group of lawyers of Zakarpatie lodged a complaint before Uzhgorod City-Regional Court, challenging the imposition of the extra quotas. The complaint was dismissed by the court and by the appeal courts. Similar claims were brought regarding decisions of Dnepropetrovsk and Kharkov regional QDC and the quotas they introduced. All of these claims were dismissed. It was brought to the attention of the ICJ that whenever a case was brought against lawyers supporting the position of the HQC the case was decided in favour of the applicant, while all claims by lawyers linked with the rival group were dismissed. Lawyers to whom the ICJ spoke consistently suggested that this pattern was due to the fact that the courts were not impartial and acted in accordance with instructions given to them. The ICJ is not in a position to support or refute these allegations. We consider that a further investigation or an analysis of the hearings and decisions and proceedings may clarify the situation.

On 31 October, the President of Ukraine signed a decree which reduced the functions of the HQC to those related to the organization of the Congress.³⁷

Constituent Congress of Lawyers

On 17 November 2012, the Constituent Congress of Lawyers was scheduled to take place at “Rus Hotel”. Delegates from all regions, including those represented by two competing delegations (Kharkov Region and Zakarpatie Region), arrived at “Rus Hotel”.

Reportedly, some 450 as opposed to the expected 370 delegates arrived at the hotel. The ICJ heard that official invitations, authorizing participation in the Conference, were sent not only to those delegates who were elected to take part, but also to lawyers from alternative lists.

Reportedly, the delegates were registered by a group of lawyers who were not authorized by the HQC.³⁸ This was done despite the fact that the HQC had approved the list of the members of the organizing committee responsible for conducting registration. However, when the members of the organizing committee arrived, the tables at the entrance to the conference hall were already occupied by “registrars” who used another, unknown list of attendees to allow or deny the access of lawyers to the Congress.

The admission of lawyers was facilitated by the staff of a private security company. Lawyers were able to make several video recording of the exchanges and arguments between lawyers and the security company personnel, which are currently available on the Internet.³⁹ Reportedly, the security personnel made contradictory statements, first maintaining they had been hired by

³³ Call of the President of the HQC under the Cabinet of Ministers of Ukraine Vysotsky V.I, 4 October 2012, <http://yurpravda.info/index3478.html>.

³⁴ The claim was brought by lawyer S. Zhukov.

³⁵ 23 delegates from Dnepropetrovsk region were therefore prevented from participating in the Constitutive Congress of 17 November 2012. It was reported that those lawyers openly supported the position of the HQCL.

³⁶ L.Yu. Gerasko, O.A. Mashkarynets, I.S.Orlova, V.V. Durdynets, V.I. Mytrovtsyi.

³⁷ Ukraine President Decree No. 620/2012, <http://www.president.gov.ua/ru/documents/15110.html>.

³⁸ Open Call of the Lawyers elected to the self-governing bodies of the Kharkov Region and the delegates to the Constituent Congress of Ukrainian Lawyers, <http://vkdkka.com.ua/news-121.html>.

³⁹ E.g. see <http://www.youtube.com/watch?v=2WNFSqE2dNU>; <http://www.youtube.com/watch?v=2WNFSqE2dNU>.

the HQC and then stating that they had been hired by the hotel. It still remains unclear as to who exactly hired the security company and why and under whose instructions it had prevented the admission of delegates who were not on their list of attendees. Independent lawyers informed the ICJ that their enquires about this, including through complaints to the police, failed to produce a response, while the courts dismissed their motions to clarify this issue.

Only those lawyers who were on the list used at the entrance to the Congress were admitted to the congress hall, while the access of those delegates who were excluded from that list was physically blocked by security staff. Lawyers openly raised concerns over the alleged blacklisting of certain lawyers.⁴⁰ It was said that the list of delegates “emerged” only at the Congress at “Rus” and was not based on the lists of the candidates for the Congress approved at regional conferences. In fact, the ICJ was told that no list existed before the Congress and the registers for the regions were the documents to be used to identify the candidates. These registers were at the disposal of the HQC, which drafted them based on the record of the meetings of the regional conferences. It remains unclear as to how, why and by whom the attendee’s list was drafted. As it was not based on the registers from regional conferences it was difficult to establish the identity of the lawyers on the list. It was reported that some lawyers were in fact not actually delegates. It must be noted that the HQC did not disclose the names of the delegates and it is also unclear why this information was not made public.

In all, some 200 lawyers from 24 regions of Ukraine could not access the Congress. They were registered separately on the second floor of “Rus” using the official registers. Lawyers who controlled the blocking of the conference hall suggested the re-registration of the delegates, but the proposal was rejected by other lawyers. At the same time it was suggested by lawyers who could not enter that the lists of both registrations should be joined, and the voting powers of each of the persons who were already in the room should be checked, but this was also rejected by the lawyers in control of the entrance.

As a result of the conflict at the Congress, which reportedly included the use of physical force resulting in a number of injuries, lawyers not admitted to the congress hall, led by Vladimir Vysotsky, who himself had been at least initially denied entry to the conference hall, left “Rus” and held a parallel Founding Congress. This Congress took place at the Kinopanorama Cinema.⁴¹ Reportedly, the majority of local delegations took part in the Congress, so a quorum was present.⁴²

The Constituent Congress of lawyers that took place at “Rus Hotel” was attended by delegates from 19 regions (including the City of Kiev, the Kiev, Zakarpatie, Donetsk and Kharkov Regions).⁴³ According to different sources, the total number of delegates at “Rus Hotel” ranged from more than 100 to more than 200 lawyers. However, as it was reported, the total number of those who were delegated by their regions could not exceed 165 lawyers.

Both constituent congresses elected members of self-governing bodies for the legal profession, approved a Charter and Regulations on Higher Qualifications and a Disciplinary Commission of Lawyers and a Higher Auditing Commission of Lawyers, as required by the Law. As a result, two mirror structures were put in place, although the law requires establishment of a unified organization with mandatory membership for all lawyers.⁴⁴

⁴⁰ Open Call of the Lawyers elected to the self-governing bodies of the Kharkov Region and the delegates to the Constituent Congress of Ukrainian Lawyers, <http://vkdka.com.ua/news-121.html>.

⁴¹ See video: <http://www.youtube.com/watch?v=BV9jRf3RMds>.

⁴² Reports of the number of delegates at each of the two Congresses differ. According to reliable information at the ICJ’s disposal, 373 lawyers, including those from alternative lists, sought access as delegates to the official Congress. Without lawyers from Dnepropetrovsk whose participation was banned by a court decision and lawyers from Poltava, the total comes to around 350 delegates. The number of lawyers at the alternative Kinopanorama Cinema meeting was 197 (or 173 if the lawyers from Kharkov and Zakarpatie regions from alternative lists, are not taken into account). For this reason it appears that the number of delegates at “Rus” did not exceed 165 persons. The Congress was also attended by more than 20 members of the HQCL who were entitled to take part in the Constituent Congress of Lawyers.

⁴³ See video: <http://www.youtube.com/watch?v=hU1iFEeii3c>.

⁴⁴ Law of Ukraine on Advocatura and Lawyers’ Activity, article 45.6.

Lidia Izovitova was elected President of the Council of Lawyers of Ukraine and National Association of Lawyers of Ukraine at "Rus Hotel". Some lawyers who met with ICJ commissioner Gulnora Ishankhanova during her visit raised concerns that Ms. Izovitova could not be elected under the law. The rationale for this view was that as she was a public servant at the material time, serving as deputy chair of the National High Justice Council, her appointment was therefore apparently contrary to article 7 of the Law on Advokatura and paragraph 3 of the transition provisions of the Law, pursuant to which she had to provide, within 90 days, reasons why she should not be considered ineligible. Vladimir Vysotsky, who headed the parallel Conference, was elected President of the Association of Lawyers established by the Congress held at Kinopanorama Cinema.

On 18 November, the Council of Ukrainian Lawyers and the HCDC of the National Association of Lawyers, established at the Kinopanorama Cinema, held its first constituent session, as required by the law,⁴⁵ in order to further submit the documents for registration. It was reported that the bodies of the NAL, established at "Rus Hotel", could not establish a quorum, despite numerous attempts, due to the fact that more than half of the Members of the Council of Ukrainian Lawyers and the HQDC, elected at constituted conferences of the regions, did not take part in the meeting. For this reason the documents for the registration were submitted without the first constituent sessions.

Reportedly, members of the HQDC of Kinopanorama received telegrams from the HQDC of the National Association of Lawyers, established at the "Rus Hotel", with warnings of possible sanctions including withdrawal of their licenses. At the same time, in the Kiev Circuit Administrative Court, several disciplinary procedures were initiated (see below). In fact, non-participation in the sessions of the Council of Ukrainian Lawyers and the HQDC lawyer-members of self-governing bodies representing their regions with instructions not to participate in those sessions, were later used as grounds for disciplinary action. The measures were taken notwithstanding the lawyers were trapped in a confusing situation of competing demands of the newly elected bodies and the instructions by the regional self-governing bodies.

The ICJ's attention was also drawn to the decisions of the first instance and appeal administrative courts in Dnepropetrovsk region to ban participation of 23 lawyers in the Constituent Congress of Ukrainian Lawyers who were elected at their regional constituent conference. The ICJ did not receive further information regarding the position of the judicial authorities on this issue. However, a number of lawyers did raise concern at whether the administrative courts should have assumed jurisdiction of the case. According to a letter dated 19 September 2013 the President of the High Administrative Court of Ukraine responding to the appeal of the Chair of Pechersk District Court of Kiev the letter explained that the association of lawyers carried out public functions for which reason these claims were recognized as falling under the jurisdiction of administrative courts. While the ICJ is not in a position to assess the merits of the jurisdiction question, it notes that the legal status of such letters, which interpret the law and further affect its application in practice, is unclear under the legislation of Ukraine.

Registration of the Association of Lawyers

On 19 November 2012, the National Association of Lawyers of Ukraine and Higher Qualifications and Disciplinary Commission of Lawyers, which had been set up at the Congress held at "Rus Hotel", were registered. The representatives of the Constituent Congress of Ukrainian Lawyers held at Kinopanorama Cinema later failed to register the organization despite multiple attempts to do so, starting from 19 November. For example, according to those lawyers, on 26 November the documents "were left without consideration" on the grounds that they "were submitted at an improper place for registration" because they used the second of the two names used for the street in official documents. On 27 November, registration was refused as the documents were submitted by a courier. It was also explained verbally that quotes were not used for the name of the Association. On 11 December a registration was refused again on similar grounds.

⁴⁵ Law of Ukraine "On Advokatura and Lawyers' Activity", section X.6.

Extraordinary Congress of Lawyers of Ukraine on 9 February 2013

To resolve the untenable situation of two coexisting parallel structures, each of them considering itself legitimate, councils of 12 regions of Ukraine requested the Council of Lawyers of Ukraine⁴⁶ to convene an Extraordinary Congress of lawyers pursuant to Article 54(4) of the current Law on Advokatura. On 28 November 2012, a decision was made to convene, to facilitate and to hold an Extraordinary Congress of Ukrainian Lawyers in the City of Odessa on 2 February 2013. An organizational committee⁴⁷ was set up, empowered to make arrangements to hold the Congress.⁴⁸ On 22 January 2013 the Council of Lawyers of Ukraine moved the date of the Extraordinary Congress to 9 February 2013.

It was reported that during November 2012 more than 3,000 signatures were received from Ukrainian lawyers in support of the initiative to hold the Extraordinary Congress. Conferences were held in some regions to elect delegates for the Extraordinary Congress. Overall 195 delegates from 16 regions were reportedly elected. However, it was also reported that some delegates received phone calls from people associated with the registered Association of Lawyers advising them to avoid participating in the Extraordinary Congress of Ukrainian lawyers and threatening to subject them to disciplinary action for failure to comply with the instructions of the leadership of the legal profession—lawyers who were members of the Council of Lawyers of Ukraine. It must be mentioned that the allegations of threatening phone calls were reported to the ICJ by the lawyers aligned with alternative structures. On 15 April, disciplinary proceedings were initiated against all the members of the organizational committee (see below).

On 6 February 2013, the Kiev Circuit Administrative Court prohibited the holding of the Extraordinary Congress of Lawyers.⁴⁹ Having regard to the judicial decision, lawyers decided to move the Extraordinary Congress of Lawyers from Odessa to the village of Zatoka (Belgorod-Dnestrovsky District, the Odessa Region) on 9 February 2013. The Extraordinary Congress Lawyers of Ukraine in Zatoka was attended by 159⁵⁰ delegates from 16 regions.⁵¹ This representation corresponded to article 54(6) of the Law on Advokatura and Lawyers' Activity. The Congress was presided over by Gennady Avramenko—President of the Council of Lawyers for the Chernigov Region.

The Extraordinary Congress abolished the decisions made by the Congress of lawyers held at "Rus Hotel", while recognizing the Kinopanorama Cinema decisions as "the only legitimate ones".⁵² In addition, delegates decided to address the Ukrainian Parliament with a request to set up an investigative committee in view of the situation around the legal profession. The Congress further requested the Prosecutor General's Office to investigate the activities of Deputy President of the HCJ, Lidia Izovitova, as her election was allegedly contrary to the law due to her being a civil servant.

The Congress further abolished, by secret vote, the decision of the Congress pursuant to which Mr. Vysotskiy was removed from the HCJ and Igor Temkizhev was elected to the HCJ. It terminated the powers of Lidia Izovitova as a member of the HCJ.

On 10 December, lawyer Slabak Y.V. filed a complaint with Galich District Court of Lvov against lawyers Vysotsky V.I. (HQC Chair), Fostyak A.Ya., Komarnitsky O.A. (Member of the Council of

⁴⁶ The body established under the Law on Advokatura and Lawyers' Activity, article 55.

⁴⁷ Chair: Avramenka G.M.; Members: Fostyak A.Ya., Baranskaya N.S., Durdinets V.V., Zadneprovskiy A.P., Shechenko A.G., Slivinskiy A.V., Smola I.V., Polonsky Yu.N., Budz T.V., Goroshenko L.V., Bozhik V.I., Atrosheknko N.A., Komarnitskaya A.N., Vysotsky V.I., Zamedyanskaya N.M., Shiryi L.A., Malanyuk N.N., Belousov A.I., Marchenko I.V.

⁴⁸ See http://vkdk.com.ua/index.php?page=r_vkka&id=1136, http://vkdk.com.ua/index.php?page=r_vkka&id=1137, <http://vkdk.com.ua/index.php?page=news&id=134>.

⁴⁹ Legal Practice Newspaper, The Court Bans an Extraordinary Congress of Lawyers, <http://pravo.ua/news.php?id=0035363>.

⁵⁰ In fact 170 were initially registered as delegates. 12 lawyers from Kharkov did not take part as they were not elected through a regional conference, which made the number of the voting lawyers 147.

⁵¹ Crimea Autonomous Republic, Volyn, Zhitomir, Zakarpattia, Zaporozhie, Kirovograd, Lvov, Lugansk, Odessa, Rovno, Sumy, Kharkov, Khmelnytskyi, Chernigov, Chernovtsi regions and Sevastopol.

⁵² E.g. The Extraordinary Congress of Lawyers Revokes Lidiya Izovitova's membership in the High Judiciary Council, <http://yurpravda.info/index3849.html>.

Lawyers), Isakov M.G., Zhukovskaya O.L. (Vice President of the Union of Lawyers), Kotelevskaya E.V (HQDC member asking these lawyers not to represent themselves as officials of lawyers' self-governing bodies. The Court, upheld the application and among other things, prohibited lawyers Vysotsky, Komarinskaya, Fostyak from representing themselves as officials of lawyers' bodies, and from making statements, signing papers or making payments on behalf of such bodies. They were ordered not "in any way and in any manner to distribute any information about election of officials to lawyers' self-governing bodies, which took place on 17 November 2012 in Kiev, 19, Shota Rustavelli str., in the premises of Kinopanorama Cinema." Following a number of postponements and appeals,⁵³ the case was returned to first instance consideration by the Galich district court and left without consideration "as the plaintiff had withdrawn the complaint".

A decision was taken by the Circuit Administrative Court of Kiev to the effect that the decisions of the Council of Lawyers of Ukraine of 28 November, 11 December 2012 and 22 January 2013 were not the decisions of the Council of Lawyers of Ukraine within the meaning of the Law of Ukraine "on Legal Profession and Practice of Law". In addition, the decisions of the Extraordinary Congress of Lawyers of Ukraine of 9 February 2013 (City of Odessa and village of Zatoka, Belgorod-Dnestrovskiy District, the Odessa Region) were also declared non-qualifying for the decisions of the Congress of Lawyers of Ukraine within the meaning of the Law of Ukraine "On Legal Profession and Practice of Law". The Organizational Commission responsible for arranging for the Extraordinary Congress of Lawyers of Ukraine, represented by its President Gennady Avramenko and its members, was one of the defendants. Nevertheless, the dispute was examined by the administrative court, contrary to an earlier decision to the effect that bodies of the legal profession shall be exempt from the jurisdiction of administrative courts.⁵⁴ The case was examined by Judge Danilishin, who earlier imposed a ban on the Extraordinary Congress of Ukrainian Lawyers and subsequently examined the case on its merits, finding a violation of the law due to non-compliance with the court decisions. The ICJ has also heard that files against lawyers who organized the extraordinary congress were also forwarded to law enforcement bodies in order to initiate criminal proceedings against those lawyers.

Suits against lawyers

At this stage, judicial authorities became involved in the clash between the two structures of lawyers. For instance, on 10 December 2012, the Galich District Court of Lvov ordered a provisional remedy related to the claim of Mr. Slabak, pursuant to which Vladimir Vysotskiy, Andrey Fostyak, Oksana Komarnitskaya, Mikhail Isakov, Olga Zhukovskaya, Ekaterina Kotelevskaya and Dmitry Kukhnyuk were prohibited from acting in the capacity of members of lawyer's self-governance bodies and from making any statements on behalf of the legal profession.⁵⁵

Several cases were instituted before the Kiev Circuit Administrative Court related to administrative claims lodged by lawyer Evgeny Grushovets against the Higher Qualifications and Disciplinary Commission of Lawyers and members of the Council of Lawyers of Ukraine⁵⁶ to declare the omission to act as unlawful and to oblige them to commit certain acts.⁵⁷ In particular, they were accused of violating the rights of the applicant by not participating in the sessions of the Council of Ukrainian Lawyers of "Rus Hotel". The cases before the Court were withdrawn and disciplinary cases were submitted to the HQDC, which forwarded them to the Donetsk, Zakarpatie, Kharkov QDCs. It was alleged by some lawyers who the ICJ interviewed that lawyer Grushovets was "used" to initiate proceedings against those lawyers.

⁵³ Legal Pravda, "Do 'proper' decisions lead to appointment to administrative positions for judges?"; <http://yurpravda.info/index3946.html>.

⁵⁴ Decision of the Circuit Administrative Court of Kiev of 8 April 2010, Case No. 2a-13388/09/2670; <http://advocat-cons.info/index.php?newsid=7041#.Uo4gYnqsOLA>.

⁵⁵ Legal Practice, Court Prohibits Vysotsky to Represent himself as a representative of self-governing bodies of advokatura, <http://yurpraktika.com/news.php?id=0034547/>; Legal Pravda: "Cases against Vysotsky are procrastinated. Judges get sick, go for vacation. . . Plaintiffs live abroad", <http://yurpravda.info/index3922.html>.

⁵⁶ 9 lawyers on the whole—Mr. Malanyuk, Mr. Marchenko, Mr. Slivinskiy, Mr. Smola, Ms. Zamedyanskaya, Mr. Shevchenko, Mr. Pogrebnyak, Mr. Budz, Goroshchenko (http://sevastopol.su/author_page.php?id=47823).

⁵⁷ The inquisition of the Ukrainian legal profession, http://sevastopol.su/author_page.php?id=47823.

According to the reports of independent lawyers who met with the ICJ representative, the above claims amounted to an attempt to intimidate and put pressure on them among other reasons to get them to resign from the positions they held. For instance, Mr. Marchenko, Mr. Slivinskiy and Ms. Zamedyanskaya stepped down from the Council of Lawyers of Ukraine pending the disciplinary proceedings.⁵⁸ As to the representative of the Ternopol Region at the Council of Lawyers of Ukraine Mr. Budz, he made several public statements to the effect that he wished to step down from the Council of Lawyers of Ukraine, statements he subsequently retracted.

Disciplinary proceedings against lawyers were often initiated by one and the same lawyer, in some cases by a very recently qualified lawyer. The ICJ heard allegations that this demonstrated a coordinated plan to deliberately attack certain lawyers. On 31 May 2013, Evgeniy Grushovets filed a complaint against lawyer N. Atroshenko, member of the Council of Ukrainian Lawyers from Chernigov Region. Zakarpacie regional QDC suspended the lawyer's right to practice law for six months. In addition, Evgeniy Grushovets initiated proceedings before Zakarpacie regional QDC against lawyer Yu. M. Polonsky, a representative of the Odessa region, member of the Council of Lawyers of Ukraine. Reportedly, in one set of proceedings Grushovets was represented by lawyer Pushko S.V., who in other proceedings represented the interests of the HQDC.

The ICJ is not in a position to determine whether the actions of the above individuals were controlled or influenced by any third party, however the situation raises reasonable suspicions in this regard which warrant further investigation.

It is also striking that cases brought against lawyers were often examined by QDCs other than those located at the place of the lawyer's registration or employment as required by law. The lawyers reported that the QDCs of the Zakarpacie, Kharkov and Kiev Regions were the most frequent venues for initiating proceedings against lawyers. Out of 15 cases, 10 were examined in the above three regions. It is unclear as to why none of the courts gave due consideration to this issue.

Furthermore, the governing bodies of the legal profession have demonstrated a tendency to limit the right of lawyers to take part in the governance of the profession. For example, the Council of Lawyers of Ukraine by its decision No. 247 of 19 November 2013 which introduced a restriction not provided under the law that a lawyer who has been disciplined may not be elected to the governing bodies even after the disciplinary penalty has terminated.⁵⁹

Disciplinary proceedings against lawyers and their disbarment

A number of disciplinary cases taken against lawyers were either directly or indirectly related to their participation in parallel conferences. For instance, a number of lawyers were disciplined on account of their failure to take part in the activities of certain bodies of the legal profession. The ICJ did not undertake a full evaluation of the procedural or substantive fairness and rule of law compliance of each case mentioned below, which constitute only a partial accounting of all of the cases lodged. The number of cases reported to the ICJ demonstrates the existence of a pattern of disciplinary proceedings against lawyers who held high level positions among the legal professions.

Among the disciplinary cases against lawyers were the following:

- *Lawyer Gennady Avramenko*, former Chair of the QDC of Chernigov region. Disciplinary proceedings were initiated by the Disciplinary Chamber of the Zakarpatsk Regional QDC. The plaintiff was Evgeniy Grushovets. On 19 July 2013, the Chamber suspended the lawyer's status for the term of six months. On 26 July 2013, the Disciplinary Chamber of the Zakarpatsk Regional QDC disbarred Mr. Avramenko for disciplinary misconduct.
- *Lawyer Natalia Atroshchenko*, former member of the Council of Lawyers of Ukraine, Chernigov region. Disciplinary proceedings were initiated by the Disciplinary Chamber

⁵⁸ Afterwards administrative claims were retracted due to the fact that complaints about disciplinary misconduct committed by members of the Council of Lawyers of Ukraine were lodged by the President of the HQDC with the Donetsk Regional QDC.

⁵⁹ Decision No. 247 of 13 November 2013, <http://www.unba.org.ua/upload/Дон%20обл/ПІШЕННЯ%20247%20%20повнення.pdf>.

of the Zakarpacie Regional QDC. The plaintiff was Evgeny Grushovets. On 26 July 2013, the Disciplinary Chamber of the Zakarpacie Regional QDC terminated her right to practice law.

- *Lawyer Vladimir Vysotskiy*, former President of the HQC, one of the main actors in the conflict in the legal profession. Disciplinary proceedings against the lawyer, registered in Sevastopol, were initiated by the Disciplinary Chamber of Kiev Regional QDC. A group of lawyers from Zakarpacie Region lodged a claim against Mr. Vysotskiy on account of public insults that were allegedly made on the internet. On 5 April 2013, Kiev Regional QDC disbarred Mr Vysotsky.
- *Lawyer Roman Martynovskiy*, former representative of Sevastopol at the HQC. Disciplinary proceedings against the lawyer were initiated by the Disciplinary Chamber of Zakarpacie Regional QDC. On 17 April 2013, his right to practice was suspended for six months. On 21 June 2013, an ICJ observer was present at the appeal hearing of the HQDC of lawyer Martynovskiy against the decision of the Zakarpatsk QDC. When considering this issue a number of the members of the HQDC left the session before it officially ended as a result of which the HQDC lost the quorum and could not take a decision on the case (The HQDC had not taken a decision on the Martynovsky case earlier as well).
- *Lawyer Lyudmila Gerasko*, former member of the Zakarpacie Regional QDC, President of the Regional Council of Lawyers at the parallel local conference of Zakarpacie Region. On 21 June 2013, the HQDC held its hearing—attended by the ICJ observer—where it quashed the decision of the Kharkov Regional QDC against Ms. Gerasko.⁶⁰ Nevertheless, on 25 September, the Circuit Administrative Court of Kiev examined the request to declare the decision of the HQDC invalid. The court granted the request and reversed the HQDC's decision, thus upholding the decision of the Kharkov Regional QDC to disbar Ms. Gerasko.⁶¹
- *Lawyer Nadezhda Baranskaya*, Rovno Region, member of the Council of Lawyers of Ukraine representing the Rovno Region. Zakarpacie Regional QDC examined a disciplinary case initiated pursuant to the complaint lodged by Mr. Grushovets. On 17 April 2013, Ms. Baranskaya's status as a lawyer was suspended for a period of one year.
- *Lawyer Olga Mashkarynets*, Zakarpacie region. Elected to chair an alternative conference of lawyer of Zakarpacie Region. Disbarred by the Zakarapattia Regional QDC.
- *Lawyer Sergey Safulko*, Lutsk, the Volyn Region, former Deputy President of the HQC. The case against lawyer Safulko—related to a lawyer's requests lodged by him—was examined by the Disciplinary Chamber of the Zakarpacie Regional QDC.
- *Lawyer Sergei Udovichenko*, Rovno Region. The Disciplinary Chamber of the Zakarpacie Regional QDC suspended the right to practice law of Mr. Udovichenko—member of the HQDC (representative of the Rovno Region)—for the term of six months.
- *Lawyer Yury Polonskiy*, former member of the Council of Lawyers. Disciplinary proceedings were brought against lawyer Polonskiy—member of the Council of Lawyers of Ukraine representing the Odessa Region—by the Zakarpacie Regional QDC, pursuant to the complaint of Mr. Grushovets.
- *Lawyer Tatyana Podolnaya*, Odessa Region former member of the HQDC. On 14 March 2013, the Disciplinary Chamber of the Kharkov Regional QDC suspended the right to practice law for the term of 6 months in respect of lawyer Tatyana Podolnaya, representative of the Odessa Region before the HQDC.
- *Lawyer Pavel Bobrov*, member of the HQDC of Chernigov region. Disciplinary proceedings were initiated by the Kiev Regional QDC.

⁶⁰ Ukraine: ICJ welcomes decision to reinstate disbarred lawyers <http://www.icj.org/ukraine-icj-welcomes-decision-to-reinstate-disbarred-lawyer/>.

⁶¹ Kharkov QDC revokes the right of Zakarpacie-based lawyer Larisa Geraska, <http://www.mukachevo.net/ru/News/view/80567>.

In addition, disciplinary proceedings against Kharkov-based lawyers Efim Goland, Alexander Zadneprovskiy, Alexander Goncharenko and other lawyers are pending before the Kharkov authorities. In those cases, the claimant asked that the lawyers be required to refute their earlier statements to the effect that an alternative conference was held in Kharkov in October 2012.

COMPLIANCE WITH INTERNATIONAL STANDARDS: ISSUES OF CONCERN

A justice system comprising an independent judiciary and independent legal profession is essential to governance under the rule of law and the separation of powers. It is also requisite for the effective protection of human rights of all persons in the country. An independent legal profession requires that the profession be self-governed through fair and transparent procedures. These relate both to the establishment and governance of the institutions of the profession, including its supervisory mechanisms and procedures. These principles are set forth international standards on the independence of the legal profession, particularly the United National Basic Principles on the Role of Lawyers, against which the recent developments in the legal profession in Ukraine should be measured. International standards governing the grounds for disciplinary action against lawyers and the fairness of procedures in such cases, and requiring that lawyers are able to work without intimidation, hindrance, harassment or improper interference must be applied to the disciplinary action which followed the split in the profession in Ukraine.

The establishment of a new structure for the governance of lawyers was a crucial point for the development of the legal profession in Ukraine, and provided an opportunity to enhance compliance with international standards on the independence of the legal profession, such as those set out in the Basic Principles on the Role of Lawyers. To ensure a strong, united and independent legal profession for the long-term, it was important that the foundation of the new structure be conducted in a credible, transparent and a fair manner. This could have allowed for a diverse and pluralistic composition of the new Association. However, the current conflict and the events surrounding it undermine the ability of the Association of Lawyers to unite the legal profession.

A *prima facie* examination of the dramatic events surrounding the Congress of Lawyers and the registration of the National Association of Lawyers, and the related split in the profession, raise serious concerns regarding the independence of the process. They point to possible interference with the operation of the legal profession by State officials, and harassment of individual lawyers, contrary to international law and standards. There are indications that the way in which the reform was implemented led to the use of powers of public authorities for inappropriate purposes, which undermine the independence of the profession. The fact that more than half of lawyers-delegates did not take part in the main founding Congress of the National Association of Lawyers, is in itself striking, and point to a worrying fracturing and weakness in the institutions and procedures of the profession.

The events leading to the split in the profession present a complex picture, and this report does not purport to consider its full scope. The conflict connected with the establishment of the Association of Lawyers under the new law was the product of developments that had already begun at regional conferences prior to the main conflict on 17 November 2012. The ICJ mission did not seek to undertake a comprehensive examination of all aspects of the situation. Nevertheless, certain patterns, which are contrary to international law and standards, are manifest.

Right to form an association of lawyers without undue interference

The right to freedom of association is guaranteed under several binding international human rights treaties, universal and regional.⁶² Lawyer, like other persons, are entitled to exercise these rights, subject only to restrictions that are adequately prescribed by law, are necessary in a democratic society for the pursuit of a legitimate aim, proportionate to that aim, and not discriminatory. In accordance with these rights, as well as with international standards on the legal profession, lawyers have a right to form and maintain independent, self-governing professional associations to represent their interests, promote their training and protect their professional

⁶² E.g. International Covenant on Civil and Political Rights, article 22; European Convention on Civil Rights and Fundamental Freedoms, article 11.

integrity. This is crucial to ensuring the independence of both the legal profession as a whole and individual lawyers. The UN Basic Principles establish that “[l]awyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.”⁶³ The Committee of Ministers of the Council of Europe has affirmed that: “[. . .] it is essential to the protection of human rights, as well as to the maintenance of the rule of law, that there be an organized legal profession free to manage its own affairs.”⁶⁴ Furthermore, participation of lawyers in certain organizations does not prejudice their right to take part in other organizations of lawyers, and cannot provide grounds for punitive, including disciplinary, measures.⁶⁵

With regard to the governance of the legal profession in Ukraine, credible allegations of involvement of governmental institutions in the operation of the legal profession and of bias in decisions concerning the conflict of the legal profession raise concerns as to inappropriate external influence on the founding and governance of the institutions of the profession, contrary to the UN Basic Principles. These allegations have not been sufficiently scrutinized by the national authorities, including by the courts.

For example, the basis and reasons for the state registration agency decisions to support the registration of one faction of the profession rather than the other, after the conferences at the “Rus Hotel” and the Kinopanorama Cinema remain unclear. The speedy registration of one Association of Lawyers and the refusal to accept the documents for the registration of the other Association of Lawyers, at a time when the division and conflict in the profession must have been known to the registration authorities, raise doubt as to the impartiality of the decision to register and the fairness of the procedure.

While it is for the State authorities to decide on questions of registration, there are serious consequences that necessarily arise from the conflict among competing organizations, where most of the representatives of the HQDC, the body primarily responsible for the organization of the conference, did not take part in an event during which the main central bodies of the profession were established. It is obvious that a refusal to accept the registration documents of one of the organization purporting to represent the profession did not allow for a serious consideration, evaluation, and fair resolution, under legal due process, of the division in the profession and its consequences for the Association of Lawyers, in light of the intention of the Law to unite the profession in a single association. The situation raises reasonable suspicions of at least indirect involvement of the State bodies in the organization and self-governance of the legal profession. The conduct of the registration process therefore raises concerns as to compliance with international standards on the independence of the legal profession, and casts doubt on the legitimacy of the system of self-governance of the profession which has now been established. A thorough, fair, independent and impartial examination of the case where both parties have a real opportunity to present their case has not taken place. In the view of the ICJ, such an inquiry is necessary in order to restore confidence in the authority and independence of the governing bodies of the legal profession.

Right to participate in the governance of the legal profession

An independent and self-governing legal profession entails the right of individual lawyers to participate in the governance of the profession. This reflects rights under international human rights law to freedom of association and assembly. The UN Basic Principles on the Role of Lawyers establish that: “[l]awyers like other citizens are entitled to freedom of [. . .] association and assembly. In particular, they shall have the right [. . .] to join or form local, national or

⁶³ United Nations Basic Principles on the Role of Lawyers, Principle 24.

⁶⁴ Explanatory Memorandum on Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, para. 10.

⁶⁵ Draft Declaration on the Independence of Justice (Singhvi Declaration), para. 97.

international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization [. . .].”⁶⁶ International standards further stipulate that in self-governing associations of lawyers the executive bodies should “be elected by all members without interference of any kind by any other body or person.”⁶⁷

During founding conferences at a local level in several regions, there was no consensus among lawyers in those regions as to the restrictions on participation in the local founding conferences. The reasons and justification for decisions to exclude significant segments of the legal profession from those events, which were essential for the future organization of the legal profession and its self-governance, remain unclear. It may be argued that the reason for this exclusion was the large number of lawyers seeking to take part, however the drafters of the law were aware of this and explicitly entitled every lawyer to take part in such events. Therefore, the exclusion of lawyers who wished to exercise their right to participate in matters regarding the governance of the profession runs contrary to national law as well as to international standards including principle 23 of the UN Basic Principles on the Role of Lawyers. Moreover, the existence of a pattern of exclusion in different regions raises at least a suspicion that there was a coordinated effort to exclude lawyers from participation in establishing the bodies of the Association of Lawyers. Whether or not this suspicion is well-founded, the right of lawyers to take part in the administration of the legal profession and to participate in elections have not been ensured, contrary to national law and international standards on the role of lawyers.⁶⁸

Disciplinary action against individual lawyers

A fair disciplinary system, that holds lawyers accountable for professional misconduct, is an important and necessary means to uphold the integrity of the legal profession, bolster its independence and ensure the fair administration of justice under the rule of law.

International principles on the role of lawyers require the State to ensure that neither disciplinary sanctions, nor other measures such as criminal penalties, are unfairly or arbitrarily imposed on lawyers for action taken in accordance with the legitimate exercise of their professional duties, and in accordance with accepted standards of professional conduct, including those enshrined in the Basic Principles on the Role of Lawyers.⁶⁹

Disciplinary proceedings must comply with standards of due process, reflecting the right to a fair hearing guaranteed in international human rights law. According to Principle 27 of the UN Basic Principles, “[c]harges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.” Principle 28 of the UN Basic Principles further guarantees that “[d]isciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.”⁷⁰

Following the split in the profession, a wave of disbarments of lawyers occurred. A consistent pattern is evident in the initiation of disciplinary proceedings, most of which were brought against lawyers holding senior positions in the lawyers’ bodies. The decisions to initiate proceedings against lawyers in such a manner suggest reasons other than those related their professional conduct. In particular, it is evident from various examples mentioned in the report that proceedings were often initiated by one and the same person against other lawyers who have been in the profession for a long time and have had certain influence and a reputation, but who

⁶⁶ UN Basic Principles on the Role of Lawyers, Principle 23.

⁶⁷ Draft Declaration on the Independence of Justice (Singhvi Declaration), para. 97.

⁶⁸ UN Basic Principles on the Role of Lawyers, Principle 23; 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.

⁶⁹ Basic Principles on the Role of Lawyers, Principle, Principle 16(c).

⁷⁰ Basic Principles on the Role of Lawyers, Principle, Principle. 28.

took part in parallel events. This was the case for instance in the case of lawyer Vladimir Vysotsky, former head of the QDC, proceedings against whom were initiated by a lawyer.

Furthermore, cases were normally forwarded to collegia other than those where that lawyer practices law. This was repeatedly done despite the provision in the law which clearly prescribes that the hearing should be carried out by the disciplinary body of the local association where the lawyer is registered.⁷¹ In addition, these cases involving lawyers from disparate regions were often sent to the same regions. In several such cases, it is alleged that lawyers were not duly informed of the hearing or were informed shortly before the hearing, which may constitute impediments to participation in the proceedings. It is a matter of serious concern that these proceedings may have been forwarded to other regions in order to inhibit attendance of lawyers, or otherwise ensure a finding against the lawyers concerned. Any such practice would be contrary to Principle 27 of the UN Basic Principles on the Role of Lawyers, as well as, more generally, the right to a fair hearing guaranteed in international human rights law.

It is unacceptable that the process of formation of the Association of Lawyers, the body entrusted "to defend the role of lawyers in society"⁷² and "preserve the independence of the profession"⁷³ was marred not only by exclusion of lawyers, but also by poorly justified disciplinary action against members of the profession. The fact that the bodies of the Association of Lawyers were involved in disciplinary sanctioning of lawyers for actions which do not appear to have been contrary to professional standards (see below), raise concern as to the impartiality and independence of the disciplinary bodies which considered those cases against lawyers, in accordance with Principle 28 of the UN Basic Principles on the Role of Lawyers. In this case, undue interference with the profession and the professional functions of lawyers are evident, in violation of Principle 16(a) of the UN Basic Principles.

Grounds for disciplinary action

Whenever there are reasons to take disciplinary action against a lawyer, the proceedings must meet the standards guaranteed by the UN Basic Principles on the Role of Lawyers. In particular, in accordance with Principle 29: "[a]ll disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles."⁷⁴

Disciplinary action against lawyers must be based solely on a code or other enumeration of professional conduct established under law which is consistent with accepted ethical and professional standards, including the Basic Principles on the Role of Lawyers, and must not be arbitrary. The code must be written in a manner that is consistent with the principle of legality and must be applied proportionately, through consistent interpretational practice by the relevant authorities, in the course of fair proceedings. Both the offence with which the lawyer is charged and the proceeding itself should correspond to both the letter and the spirit of the legal provisions.

Where a disciplinary offence set out in law or in a code is aimed at "general and innumerate application" it is unlikely to satisfy the requirement of foreseeability.⁷⁵ A violation of the rights of a lawyer would arise in a case when "nearly any misbehaviour [. . .] could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge" [. . .] and lead to an individual's removal from office or from their profession.⁷⁶

Arbitrary disciplinary or other punitive measures may also run contrary to international standards that prohibit the harassment of lawyers. The UN Basic Principles on the Role of Lawyers provide that "Governments shall ensure that lawyers . . . (c) shall not suffer, or be threatened

⁷¹ The Law of Ukraine "On Advokatura and Lawyers' Activity", Article 33.3.

⁷² Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession lawyer, Principle V(4)(b).

⁷³ Singhvi Declaration, para. 99(c).

⁷⁴ Basic Principles on the Role of Lawyers, Principle 29.

⁷⁵ *Oleksandr Volkov v. Ukraine*, ECtHR, Application No. 55480/00, Judgment of 9 January 2013, para. 178.

⁷⁶ *Oleksandr Volkov v. Ukraine*, *op. cit.*, para. 185.

with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”⁷⁷

The ICJ notes with concern that instances of “misbehaviour” for which lawyers were faced with disciplinary sanctions including disbarment, following the split in the profession, included various acts which should not be considered punishable behaviour. For example, lawyers were disciplined for submitting documents for a registration of an organization or for non-attendance of certain meetings of lawyers. The ICJ observed one such hearing and welcomed the decision of the HQDC to reinstate the status of lawyer Larisa Gerasko who was previously disbarred.⁷⁸ Her subsequent disbarment on the same grounds, following an appeal, does not appear to be founded upon a lawful basis and is contrary to international standards.⁷⁹

Such instances of disciplining lawyers for acts which clearly do not constitute unethical behavior may amount to use of disciplinary mechanism to harass or intimidate a lawyer, contrary to the UN Basic Principles on the Role of Lawyers, principles 26 and 16. Furthermore, it raises concerns in regard to ensuring the freedom of association guaranteed under the ICCPR (article 22) and the European Convention on Human rights (article 11).

The ICJ recalls that in accordance with international standards on the role of lawyers, it must be ensured that the disciplinary system is not abused or used to subject lawyers to intimidation, harassment, hindrance or undue interference. The authorities must guarantee that sufficient safeguards to prevent such abuses are put in place.⁸⁰ In addition, any sanction imposed as a result of a disciplinary process must be proportionate to the offence and the circumstances of the case.⁸¹ The disciplinary system as a whole must be designed to ensure that the only purposes for which disciplinary action is used are maintaining the professional standards of lawyers and ensuring that lawyers act in the best interests of their clients, in a manner that is consistent with professional standards and the independence, honour, and dignity of the profession as set out in international standards.⁸²

Furthermore, the ICJ is concerned at information it has received suggesting that criminal prosecutions of lawyers may be initiated in relation to their participation in sessions of lawyers’ bodies.⁸³ Such action could constitute a form of harassment for a legitimate exercise of the rights of lawyers under international standards on the legal profession and may itself have extremely problematic consequences among other lawyers in the country, who may be intimidated by such punitive measures, and discouraged from seeking to participate in the governance of the profession.

⁷⁷ United Nations Basic Principles on the Role of Lawyers, Principle 16.

⁷⁸ Ukraine: ICJ welcomes decision to reinstate disbarred lawyer, <http://www.icj.org/ukraine-icj-welcomes-decision-to-reinstate-disbarred-lawyer/>.

⁷⁹ Kharkov QDC annuls Zakarpacie lawyer’s certificate, <http://www.mukachevo.net/ru/News/view/80567>.

⁸⁰ Basic Principles on the Role of Lawyers, Principle 16(c).

⁸¹ Recommendation No. R (2000) 21 of the Commission of Ministers to Member states on the freedom of exercise of the profession of lawyer, Principle VI.4.

⁸² See: Disciplinary action against lawyers in CIS countries: analysis of international law and standards, <http://www.icj.org/disciplinary-action-against-lawyers-in-cis-countries-analysis-of-international-law-and-standards/>, page 7.

⁸³ See section Extraordinary Congress of Lawyers of Ukraine on 9 February 2013 above.

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