

# Independence of the Legal Profession in Central Asia

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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International Commission of Jurists  
P.O. Box 91  
Rue des Bains 33  
Geneva  
Switzerland

# **Independence of the Legal Profession in Central Asia**



# CONTENTS

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<b>I. INTRODUCTION TO THE REPORT</b>	6
The International Commission of Jurists	6
The role of the legal profession	6
The legal profession in Central Asia	7
Purpose and structure of this report	7

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<b>II. INSTITUTIONAL INDEPENDENCE AND GOVERNANCE OF THE LEGAL PROFESSION</b>	9
<b>A) INTRODUCTION</b>	9
Overview	9
International Standards	9
Institutional independence of lawyers' associations in Central Asia	10
<b>B) LAWS REGULATING THE ORGANIZATION OF THE LEGAL PROFESSION</b>	12
Republic of Kazakhstan	12
Kyrgyz Republic	13
Republic of Turkmenistan	14
Republic of Tajikistan	15
Republic of Uzbekistan	17
<b>C) LAWS REGULATING INTERNAL GOVERNANCE OF BAR ASSOCIATIONS</b>	19
Republic of Kazakhstan	19
Kyrgyz Republic	20
Republic of Turkmenistan	21
Republic of Tajikistan	22
Republic of Uzbekistan	24

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<b>III. ACCESS TO THE LEGAL PROFESSION: QUALIFICATION AND DISCIPLINARY ACTION</b>	26
<b>A) INTRODUCTION</b>	26
Overview	26
International Standards	26
Practice in Central Asia	28
<i>Entry to the profession</i>	28
<i>Professional ethics</i>	29
<i>Disciplinary action and termination of licenses</i>	29
<b>B) LAWS REGULATING ISSUING OF A LICENCE TO PRACTICE</b>	31
Republic of Kazakhstan	31
Kyrgyz Republic	31
Republic of Turkmenistan	32

Republic of Tajikistan . . . . .	33
Republic of Uzbekistan . . . . .	34
<b>C) LAWS REGULATING ORGANIZATION OF THE QUALIFICATION EXAMINATION. . .</b>	<b>36</b>
Republic of Kazakhstan . . . . .	36
Kyrgyz Republic . . . . .	36
Republic of Turkmenistan . . . . .	37
Republic of Tajikistan . . . . .	37
Republic of Uzbekistan . . . . .	39
<b>D) LAWS REGULATING SUSPENSION, REVOCATION OF LICENCES AND DISCIPLINARY PROCEEDINGS. . . . .</b>	<b>41</b>
Republic of Kazakhstan . . . . .	41
Kyrgyz Republic . . . . .	42
Republic of Turkmenistan . . . . .	44
Republic of Tajikistan . . . . .	46
Republic of Uzbekistan . . . . .	47

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## **IV. THE ROLE, STATUS AND INDEPENDENCE OF LAWYERS IN PRACTICE . . . . .**

<b>IV. THE ROLE, STATUS AND INDEPENDENCE OF LAWYERS IN PRACTICE . . . . .</b>	<b>51</b>
<b>A) INTRODUCTION . . . . .</b>	<b>51</b>
Overview . . . . .	51
International Standards. . . . .	51
<i>The right to liberty and rights of access to a lawyer in detention . . . . .</i>	<i>51</i>
<i>The right to a fair trial. . . . .</i>	<i>52</i>
<i>International standards of the role of lawyers. . . . .</i>	<i>52</i>
<b>B) REGIONAL OVERVIEW: LAWYERS IN THE CRIMINAL JUSTICE PROCESS . . . .</b>	<b>54</b>
Powers of defence lawyers and prosecutors . . . . .	54
The role of defence lawyers and prosecutors at the investigative stage. . . . .	54
The role of lawyers and prosecutors in court . . . . .	55
Preventing torture and other ill-treatment . . . . .	56
Other impediments to the work of lawyers . . . . .	57
<b>C) COUNTRY SITUATIONS. . . . .</b>	<b>58</b>
Republic of Kazakhstan . . . . .	58
<i>Legal framework related to the role of lawyers . . . . .</i>	<i>58</i>
<i>Independence of lawyers and undue influence . . . . .</i>	<i>60</i>
<i>Equality of arms and unequal treatment of lawyers in court . . . . .</i>	<i>60</i>
<i>Restrictions on the work of lawyers by law enforcement agents . . . . .</i>	<i>62</i>
<i>Harassment, threats and violence against lawyers . . . . .</i>	<i>63</i>
Kyrgyz Republic . . . . .	64
<i>Legal Framework . . . . .</i>	<i>64</i>
<i>Independence of lawyers and undue influence . . . . .</i>	<i>67</i>
<i>Equality of arms and treatment of lawyers in court . . . . .</i>	<i>67</i>

<i>Restrictions on the work of lawyers by law enforcement agents</i> . . . . .	68
<i>Harassment, threats and violence against lawyers</i> . . . . .	69
Republic of Turkmenistan . . . . .	69
<i>Legal Framework</i> . . . . .	69
<i>Independence of lawyers and undue influence</i> . . . . .	71
<i>Equality of arms and treatment of lawyers in court</i> . . . . .	71
<i>Restrictions on the work of lawyers by law enforcement agents</i> . . . . .	72
<i>Harassment, threats and attacks on lawyers</i> . . . . .	73
Republic of Tajikistan . . . . .	73
<i>Legal Framework</i> . . . . .	73
<i>Independence of lawyers and undue influence</i> . . . . .	74
<i>Equality of arms and treatment of lawyers in court</i> . . . . .	75
<i>Restrictions on the work of lawyers by law enforcement agents</i> . . . . .	77
<i>Harassment, threats and attacks on lawyers</i> . . . . .	78
Republic of Uzbekistan . . . . .	78
<i>Legal Framework</i> . . . . .	78
<i>Independence of lawyers and undue influence</i> . . . . .	81
<i>Equality of arms and treatment of lawyers in court</i> . . . . .	82
<i>Restrictions on the work of lawyers by law enforcement agents</i> . . . . .	82
<i>Threats, harassment and attacks against lawyers</i> . . . . .	83

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<b>V. CONCLUSIONS AND RECOMMENDATIONS</b> . . . . .	84
Institutional independence . . . . .	84
Qualification of lawyers . . . . .	85
Disciplinary bodies and procedures . . . . .	86
The role, status and independence of lawyers in practice . . . . .	87

# I. INTRODUCTION TO THE REPORT

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## The International Commission of Jurists

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the rule of law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

## The role of the legal profession

Lawyers, along with judges and prosecutors, are one of the pillars on which protection of the rule of law and human rights through the justice system rests.<sup>1</sup> If the justice system is to be effective, then judges, lawyers and prosecutors must each be free to carry out their professional duties independently, without interference from the executive or from other powerful interests and must be protected, in law and in practice, from attack or harassment as they carry out their professional functions.<sup>2</sup>

Lawyers play an essential role in the protection of human rights, in particular when they represent those individuals whose rights are most vulnerable to abuse, including individuals deprived of their liberty, who are frequently at risk of ill-treatment or arbitrary detention; people suspected or accused of criminal offences; and victims of human rights violations who seek reparation and accountability for the wrongs done to them. Lawyers, when they represent these individuals effectively and independently, defend their human rights; they also make the rule of law a reality, transforming the law's abstract guarantees of protection from abuse by the powerful, into tangible protection from harm. Lawyers cannot fulfill this role, however, when their independence is compromised, whether by pressure, attacks or harassment of them as individuals, or through the dependence of the legal profession as a whole on the executive, or where courts are not independent and impartial and the role of lawyers as prescribed by international standards is not respected and protected.

International human rights law recognizes the important role of the legal profession, imposing duties on states, for example, to ensure that people deprived of their liberty have access to a lawyer while in detention, to establish and maintain a system of legal aid that guarantees individuals' access to independent and competent legal advice when they do not have their own lawyers, including free of charge, in certain cases, or to ensure equality of arms between the defence and prosecution in a criminal trial.

International standards on the role of lawyers reflect these legal obligations, stressing that an independent legal profession is essential to access to justice and to the protection of human rights.<sup>3</sup> In order to ensure that lawyers can fulfil their proper role in the justice system, they establish safeguards for the independence of individual lawyers and for the legal profession as a whole.<sup>4</sup> Importantly, they also recognize the duties and responsibilities of the legal profession

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<sup>1</sup> ICJ 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>, p. 63.

<sup>2</sup> *Ibid.*, p. 4.

<sup>3</sup> UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, preamble, para. 9; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), Principles 74, 76.

<sup>4</sup> UN Basic Principles on the Role of Lawyers, preamble, para. 11.



and of individual lawyers, to work independently, diligently and with integrity to represent their clients, protect human rights, and uphold the rule of law.<sup>5</sup>

## The legal profession in Central Asia

This report analyses the law applicable to the legal profession and its implementation in the countries of Central Asia, in the light of international standards on the role of lawyers, which aim to safeguard the independence of the legal profession. In particular it focuses on the ability of lawyers to operate independently and effectively, in a region where the protection of the rule of law and respect of human rights remain fragile, and where the legal profession has historically been weak and poorly regarded.

In this context, the ICJ has found that challenges faced by lawyers are daunting. The weakness of the legal profession continues to be deeply entrenched in the legal landscape and culture of the region, more than 20 years after the independence of the Central Asian states. This is all the more so given the weakness of lawyers' professional associations, in each of the countries of Central Asia, and their vulnerability to government influence or control.

In recent years there has been increased attention to the role and organization of the legal profession in Central Asia, and reforms of associations of lawyers are currently underway or have recently taken place in most of the Central Asian states. In some states, reforms have been retrogressive and have imposed government control over the legal profession; in others, they are aimed at strengthening the institutional framework of the organizations governing the legal profession by reforming post-Soviet laws. Even where they are intended to empower the governing bodies of lawyers' associations, the reforms have also tended to increase the role of the state institutions in the operation of these associations. Traditionally highly vulnerable, especially in the face of its powerful counterparts such as the public prosecution, the legal profession risks being further weakened, in contravention of the established international standards on the independence of lawyers.

In recent years the ICJ has received information about a significant number of cases in the countries of Central Asia in which lawyers have been subjected to pressure such as threats, intimidation, and physical attacks. Lawyers have also faced threats of, or the initiation of, disciplinary action, including disciplinary action leading to disbarment for conduct related to the legitimate exercise of their profession, in a manner consistent with recognized international standards on the role of lawyers. Such reprisals against lawyers are evidence of the continuing lack of understanding of the role of lawyers and lack of respect for the legal profession, and states' failure to meet their obligations, under national and international standards, to ensure fair trials and to protect lawyers against violations of their human rights, contrary to international law and standards. They also demonstrate the great difficulties faced by lawyers across the region in seeking to protect and defend the best interests and rights of their clients independently and effectively, in accordance with accepted professional standards.

Nevertheless, across Central Asia, dedicated and independent lawyers work every day to protect the rights of their clients, and without this important work, the human rights situation in the region would be considerably worse. With stronger institutions to govern the legal profession, and greater protection for their work and their independence, lawyers in Central Asia could contribute significantly to strengthening the rule of law in their countries, and implementing human rights protections enshrined in national law.

## Purpose and structure of this report

This report examines the organization of the legal profession and the challenges and obstacles lawyers face in their work in the Central Asia region, in the light of international standards guaranteeing the independence of lawyers. The report is written on the basis of analysis of relevant national legislation and regulations; information provided to the ICJ by its partner organiza-

<sup>5</sup> *Ibid.*, Principles 12–15, 25.

tions in the region; questionnaires developed by the ICJ and completed by practicing lawyers across Central Asia; and a seminar, held in Almaty, Kazakhstan in March 2013, which brought together lawyers from each of the five Central Asian states, and representatives of the governing bodies of lawyers' associations from three of the five countries. The report also draws on the ICJ's continuous monitoring of respect for the rule of law and, in particular, the situation of the lawyers in the region over recent years, and its analysis in particular cases in which the ICJ has intervened. Throughout the report, when describing the application of law and policy in practice, the ICJ principally relies on accounts provided by lawyers—in their responses to the questionnaire, discussions during the seminar or responses during interviews. The information provided by lawyers is supplemented by reference to other reliable sources, such as reports by United Nations human rights bodies and experts.

Those contributing to the report include: Zulfikor Zamonov, an independent expert, who conducted an initial analysis of law and practice; Róisín Pillay, Director of the Europe Programme and Temur Shakirov, Europe Programme Legal Adviser, who conducted further analysis for the report; Jill Heine, ICJ Senior Legal and Policy Adviser provided input on international law and standards. Almaza Osmanova facilitated research and the round table seminar, which was conducted in cooperation with the Central Asian League of Lawyers. The ICJ wishes to express its gratitude to all those who were consulted in the course of the research of this report and the partner organizations who supported this initiative.

In addition to this Introduction, the report is divided into four main parts, which address distinct though interlinked issues. The organization of the legal profession in Central Asian states, the institutional structures which govern the profession, their powers and their independence from the executive, are discussed in Chapter II. Chapter III addresses the rules governing access to the profession, including the procedure for granting licences to practice law, qualification exams and disciplinary proceedings against lawyers. Chapter IV addresses key hindrances faced by individual lawyers in their work in each of the Central Asian countries, including those arising from existing law. It describes the role and status of lawyers in the criminal justice system, and the challenges and obstacles they face in their work; the imbalances of power between lawyers and prosecutors in that process; the difficulties lawyers face in protecting the human rights of their clients including by gaining effective and confidential access to persons in detention, and in securing equality of arms in court. Chapter IV also considers problems of lack of independence of certain lawyers, who fail to represent the interests of their clients over those of the law enforcement authorities, and the consequent damage to the legal profession and to the protection of human rights. Finally, in Chapter V, the ICJ sets out conclusions and recommendations for governments, lawyers' associations and individual lawyers in the region, aimed at ensuring that the independence of the legal profession in each of the five Central Asian countries is strengthened and fostered and that lawyers are supported and protected in assuming and sustaining their role in ensuring respect for the rule of law, and the prevention and redress of human rights violations.

## II. INSTITUTIONAL INDEPENDENCE AND GOVERNANCE OF THE LEGAL PROFESSION

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### A) INTRODUCTION

#### Overview

This chapter discusses the issues related to the independent operation of associations of lawyers, in the light of international standards on the independence of lawyers. In regard to each of the Central Asian countries, it addresses structural questions relating to the organization of lawyers' associations, requirements for the establishment of an association (collegium), membership in lawyers' associations, and the functions of the association under national laws.

#### International Standards

The independence of the legal profession as a whole forms a basis for the rule of law and is an essential guarantee for the promotion and protection of human rights. The right of lawyers to form and maintain independent, self-governing professional associations to represent their interests, promote their training and protect their professional integrity is crucial to ensuring the independence of both the legal profession as a whole and individual lawyers. Such associations "have a vital role to play in upholding professional standards and ethics, protecting members from prosecution and improper restrictions and infringements [...]." <sup>6</sup> They also play an important role in maintaining the status of the legal profession, which should be equal to that of the prosecution and the investigating authorities.

While lawyers' associations may be organized differently in different countries, however organized, they must be institutionally independent from government, other executive agencies and outside private interests, and such independence must be protected both in law and in practice. 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."<sup>7</sup>

The independence of bar associations from government does not, however, mean that bar associations should not cooperate with governments. Indeed international standards recognize that such cooperation will often be necessary in order to enhance and ensure everyone has effective and equal access to legal services and that lawyers are able to advise and assist their clients in accordance with the law and recognized professional standards and ethics, without improper interference.<sup>8</sup>

Strong and independent associations of lawyers, working in accordance with procedures clearly prescribed in national law, are particularly important in transitional states, where the tradition of the rule of law is weak. In such environments, establishing 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,<sup>9</sup> 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. International standards state that 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."<sup>10</sup> This does not prejudice lawyers' right to form, in addition, other professional associations of lawyers as well as to join them.<sup>11</sup>

<sup>6</sup> *Ibid.*, Preamble.

<sup>7</sup> *Ibid.*, Principle 24.

<sup>8</sup> *Ibid.*, Principle 25.

<sup>9</sup> See, UN Human Rights Committee, Concluding Observations on Belarus, CCPR/C/79/Add. 86, para. 14.

<sup>10</sup> Singhvi Declaration, *op. cit.*, para. 97.

<sup>11</sup> *Ibid.*, para. 97.

In order to ensure the independent and effective functioning of the legal profession, and to truly “protect the professional integrity” of lawyers, self-governing professional associations of lawyers must also have sufficient competencies and powers relating to the legal profession to be able to protect and strengthen it. These include powers relating to entry into the profession, qualification and continuing education of lawyers, as well as competence in relation to disciplinary proceedings against lawyers.<sup>12</sup>

In many countries, the independence of lawyers’ associations from governmental structures, and their comprehensive powers for the self-governance of the profession, may be established in law; however, this may not necessarily be matched by practice. In other countries the law regulating the operation of the legal profession may itself run contrary to international standards. To meet international standards, and to ensure that the legal profession is able to effectively play its full role in protecting human rights within the justice system, independent self-governing professional organizations of lawyers must be established by law and their independence and functioning must be respected in practice.

### **Institutional independence of lawyers’ associations in Central Asia**

The independence of the legal profession is a principle guaranteed in the law of each of the five states of Central Asia. In practice however, there are some glaring institutional weaknesses in the legal profession in these states. They include both weaknesses in internal governance, and vulnerability to external pressures, in the face of which associations of lawyers may be passive or malleable. This is partly attributable to the poor tradition of respect for the rule of law, in particular criminal procedure, in the region. It is associated with the post-Soviet culture of hypertrophied powers of law enforcement bodies in all of the Central Asian countries, where the prosecution service remains a powerful force, preserving its quasi-military structure and the *modus operandi* of the past, and defence lawyers are seen as marginal, struggling to establish their role in the protection of the rule of law and the rights of their clients.

There are elaborate structures and detailed procedures for the governance of lawyers’ associations in a number of Central Asian countries (Kazakhstan, Tajikistan, Uzbekistan), but the impact of this in practice is varied. While it may be important that the bodies of self-governance of the profession have a well-developed structure, they must also have sufficient powers, and these powers must be deployed effectively to ensure the independence of the legal profession, to maintain the honour, dignity, integrity, competence, ethics, and standards of conduct of lawyers, and to defend the role of lawyers in society.<sup>13</sup>

Key pressure points for the independence of the legal profession in Central Asian countries are requirements for entrance into the profession and disciplinary action against lawyers. Too frequently, these processes are either implemented or controlled by the executive or with the participation of the executive. These issues are explored further in Chapter III.

The structure and degree of autonomy of lawyers’ associations varies across the countries of Central Asia. For example, in Kazakhstan the collegia of lawyers act as legal offices which provide legal services but also “express and defend” the interests of lawyers.<sup>14</sup> In Tajikistan the collegium of lawyers has similar functions,<sup>15</sup> and in Turkmenistan the collegia fulfil dual functions—providing legal services and having responsibility for the organization of the profession, including on issues of discipline. In contrast, in Uzbekistan, legal services are provided through a lawyer’s office (such as a law firm) and the main function of the Chamber of Lawyers is representation of the legal profession. The common feature of all these structures is an obligation for a lawyer to be a member of a lawyers’ association in order to maintain his or her professional status as a lawyer. In Kyrgyzstan, there are no professional organizations regulating the legal

<sup>12</sup> Singhvi Declaration, *op. cit.*, para. 99; UN Basic Principles on the Role of Lawyers, Principle 24.

<sup>13</sup> See: Singhvi Declaration, para. 99.

<sup>14</sup> Law of the Republic of Kazakhstan on Lawyers’ Activity, article 20.

<sup>15</sup> Law of the Republic of Tajikistan on Advokatura, article 17.

profession; after they have obtained a license from the Ministry of Justice, lawyers can practice law; they may also choose to become members of one of several lawyers' NGOs. The term "lawyers' association" therefore has different meanings across the region, leading to different issues regarding institutional independence.

The compatibility of laws and practices with the recognized international standards of independence of the legal profession, and the extent to which lawyers' associations are independent of the executive in practice vary across the region. An independent and relatively strong self-governing organization of lawyers, which takes autonomous decisions within its competence, has been established in Kazakhstan. In contrast, reform of the legal profession in Uzbekistan in 2008 led to the replacement of independent bar associations with an organization effectively controlled by the government.

In light of the developments in Uzbekistan, recent proposals for reform of the law regulating the legal profession in Tajikistan and certain initiatives for reform in Kyrgyzstan have been met with concern about possible attempts by the authorities to undermine the independence of the legal profession. In particular, there has been concern that institutional reform proposals in Tajikistan, would lessen the independent position of the legal profession vis-à-vis the State authorities, as one of the effects of the proposed reform is to deprive lawyers' collegia of the right to regulate or decide on access to the legal profession and disciplinary action against lawyers.<sup>16</sup> While this is not unusual in the region, Tajikistan currently stands out as a commendable exception to the rule of executive control of qualification, with the Tajikistan qualification commission composed entirely of lawyers. Turkmenistan has a similar structure for the association of lawyers in law, but in practice the significance of the association is undermined by the small number of practicing lawyers in the country, and the incapacity of the legal profession to address the lack of rule of law in the country.

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<sup>16</sup> NGO Coalition of Tajikistan, Report on the Republic of Tajikistan's implementation of the International Covenant on Civil and Political Rights, 2013, [http://www2.ohchr.org/English/bodies/hrc/docs/NGOs/NGOsCoalition\\_Tajikistan\\_En.pdf](http://www2.ohchr.org/English/bodies/hrc/docs/NGOs/NGOsCoalition_Tajikistan_En.pdf), p. 7.

## B) LAWS REGULATING THE ORGANIZATION OF THE LEGAL PROFESSION

### Republic of Kazakhstan<sup>17</sup>

*Number of lawyers:* 4,235<sup>18</sup>

*Number of lawyers per capita:* approximately one lawyer per 3,950 people<sup>19</sup>

*Licensing body:* Ministry of Justice

In Kazakhstan, lawyers may practice their profession through a legal advice office (a branch of a collegium of lawyers, which provides legal services), a law office (founded by one or several lawyers to provide legal services),<sup>20</sup> or individually, without registering a legal entity.<sup>21</sup>

Under the law of Kazakhstan, membership of a “collegium of lawyers” (a form of lawyers’ association or bar association) is mandatory for every lawyer.<sup>22</sup> A lawyer is required to be a member of a collegium operating in the territory of the relevant administrative subdivision in which he or she practices.<sup>23</sup> A collegium may be established and operate in the territory of one region or city, and must confine its operations to that area.<sup>24</sup>

Collegia of lawyers are non-profit, independent, self-governing and self-financed associations of lawyers.<sup>25</sup> A collegium can only be founded by lawyers, on the initiative of at least ten founders, for the purpose of providing qualified legal services to individuals and legal entities, as well as representing and protecting the rights and legitimate interests of lawyers, and their discharge of other functions in accordance with the laws on lawyers’ activities.<sup>26</sup>

Under the law of Kazakhstan, the principal goals of a collegium are assisting, and providing professional aid and protection of collegium members in the conduct of their profession; providing logistical and information support for the activities of the collegium members; putting in place a system of professional supervision over the lawyers’ practice and making arrangements to provide free legal advice and representation by lawyers appointed by the investigation authority or the courts.<sup>27</sup> In order to provide individuals with qualified legal services, the collegia are responsible for establishing legal advice offices.<sup>28</sup>

At the national level, local collegia form the Republican Collegium. The Republican Collegium is a non-profit, professional, self-governing, self-financed organization with mandatory membership of all other local collegia. It was founded by the delegates of the Republican Conference of Collegia and registered on 23 July 2012.<sup>29</sup> The principal functions of the Republican Collegium are: representation and protection of the interests of lawyers’ associations and lawyers

<sup>17</sup> Lawyers’ activities in the Republic of Kazakhstan are governed by the Law on Lawyer’s Activities which came into effect in 1997, as amended in 2007, 2009 and 2011.

<sup>18</sup> The official web-site of the Republican Collegium of Lawyers of the Republic of Kazakhstan, <http://www.advokatura.kz/index.php?page=144>, the (As of 1 July 2012).

<sup>19</sup> The Agency of Statistics of the Republic of Kazakhstan, the population of Kazakhstan is approximately 16.7 million as of 1 May, 2013, [http://www.stat.kz/news/Pages/15\\_06\\_2013\\_3.aspx](http://www.stat.kz/news/Pages/15_06_2013_3.aspx) [rus].

<sup>20</sup> A Legal advice office is founded by Presidium of collegium for ensuring access of citizens to qualified legal services. The Legal advice office is a branch of a collegium; it is governed by a head of office, who is appointed by the presidium of collegia. A Law office is non-profit organization and founded by member or members of collegium for ensuring material, legal and other conditions to provide legal services by lawyers.

<sup>21</sup> Law of the Republic of Kazakhstan on Lawyers’ Activity, article 19, para. 1: <http://www.advokatura.kz/index.php?page=144>, the official web-site of the Republican Bar Association of the Republic of Kazakhstan (As of 1 July 2012).

<sup>22</sup> *Ibid.*, article 7 (1).

<sup>23</sup> *Ibid.*, article 19.

<sup>24</sup> Law of the Republic of Kazakhstan on Lawyers’ Activity, article 20 (3).

<sup>25</sup> *Ibid.*, article 20 (2).

<sup>26</sup> *Ibid.*, article 20 (2, 3).

<sup>27</sup> *Ibid.*, article 20 (4).

<sup>28</sup> *Ibid.*, article 32, para (1).

<sup>29</sup> *Ibid.*, article 33–2 (3); <http://www.advokatura.kz>.

before the State and other entities in the Republic of Kazakhstan and abroad; coordination of the activities of collegia; and upholding a high level of provision of legal services by lawyers.<sup>30</sup> The decisions adopted by the Republican Collegium and its bodies within their competence are binding on other collegia.<sup>31</sup>

The overwhelming majority of lawyers with whom the ICJ communicated said that lawyers' associations in Kazakhstan were independent under the law but that the Ministry of Justice and other State agencies make regular attempts to exert pressure on lawyers, especially in cases of lawyers defending persons in high-profile cases.

## Kyrgyz Republic<sup>32</sup>

*Number of licensed lawyers:* approximately 3,000<sup>33</sup>

*Number of lawyers per capita:* approximately one lawyer per 1,800 people<sup>34</sup>

*Licensing body:* Ministry of Justice

Under the law of the Kyrgyz Republic, legal practice may be carried out through lawyers' entities or as individual entrepreneurial activity.<sup>35</sup> A lawyers' entity is an organization which provides legal services as its principal activity.<sup>36</sup> It may be established on the basis of any kind of ownership (as prescribed by law) and in any form of incorporation and may be founded by any legal entity or individual.<sup>37</sup> A lawyers' entity is permitted to pursue legal practice provided that it employs at least one lawyer and is headed by a lawyer.<sup>38</sup>

The current law governing legal practice in Kyrgyzstan does not establish or recognize a unified organization of lawyers nor an independent self-governing body. In the absence of a unified system of self-government of the legal profession, functions which should normally be carried out independently by the legal profession, such as disciplinary action, are carried out directly by the Ministry of Justice (See further Chapter III).

Lawyers may, in accordance with generally applicable civil law, create professional public organizations pursuant to the provisions of the Civil Code of the Kyrgyz Republic and the Law of the Kyrgyz Republic on Public Associations.<sup>39</sup> The UN Special Rapporteur on the Independence of Judges and Lawyers, in his report on his visit to Kyrgyzstan in 2005, noted that even though membership was not mandatory, most lawyers belonged to at least one of a number of existing professional associations; this is still the case. The UN Special Rapporteur raised concern that competition between a number of the associations may limit the ability of the legal profession to promote its interests and independence.<sup>40</sup>

Prior to 1999, Collegia of Lawyers operated in the Kyrgyz Republic as self-governing organizations, but these were abolished with the adoption of the Law on Lawyers' Activities.<sup>41</sup> Thus, the law enshrined the principle that a lawyer's membership in a professional public association of

<sup>30</sup> *Ibid.*, article 33-2 (2).

<sup>31</sup> *Ibid.*

<sup>32</sup> Lawyers' activity in the Kyrgyz Republic is governed by the Law on Lawyers' Activity adopted on 21 October 1999, as amended in 2004.

<sup>33</sup> [http://minjust.gov.kg/?page\\_id=1038](http://minjust.gov.kg/?page_id=1038), the official web-site of the Ministry of Justice of the Kyrgyz Republic.

<sup>34</sup> The National Statistics Committee of the Kyrgyz Republic, 5,362.8 thousand of 2009; [http://stat.kg/index.php?option=com\\_content&task=blogcategory&id=33&Itemid=93](http://stat.kg/index.php?option=com_content&task=blogcategory&id=33&Itemid=93).

<sup>35</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 19 (1).

<sup>36</sup> *Ibid.*, article 20 (1).

<sup>37</sup> *Ibid.*, article 20.

<sup>38</sup> *Ibid.*

<sup>39</sup> Law of the Kyrgyz Republic on Public Associations, No. 360-XII of 1 February 1991 was repealed following the adoption of the Law of the Kyrgyz Republic on Non-Profit Organizations, No. 111 of 15 October 1999.

<sup>40</sup> Special Rapporteur on the independence of judges and lawyers, Mission to Kyrgyzstan, E/CN.4/2006/52/Add. 3, 30 December 2005, para. 58.

<sup>41</sup> See Analysis of the legislation regulating legal profession in Central Asia states (English), p. 33, UNDP, <http://europeandcis.undp.org/news/show/09087583-F203-1EE9-B108E9745EA94DF8>.

lawyers was voluntary rather than required.<sup>42</sup> The Rules of Professional Ethics of Lawyers also affirm the principle of voluntary membership in professional organizations or associations.<sup>43</sup>

This approach to the organization of the legal profession may now be reconsidered. A Draft Law on the Legal Profession and Lawyers' Activities provides for the establishment of a unified professional association of lawyers, with mandatory membership<sup>44</sup> of all lawyers in Kyrgyzstan.<sup>45</sup>

Most lawyers consider the current lawyers' organizations to be independent, without any interference by the executive. However they are also considered to be powerless in defending lawyers and in representing the interests of the profession.

A range of sources have expressed concern to the ICJ about the creation, under the proposed law, of a single association, to which all lawyers would be required to belong, on the basis that the association could be used by the authorities or by powerful private interests to interfere with lawyer's independent exercise of their profession. The ICJ recalls that a self-governing, independent lawyers' association is a requisite for upholding the integrity of the legal profession as well as for the protection of human rights and maintaining the rule of law,<sup>46</sup> therefore creation of a self-governing association of lawyers independent from any state bodies is welcome in principle. However, the ICJ emphasises that such an association must have as its primary goal the maintenance of the independence of the profession and action in defence of individual lawyers. Safeguards must therefore be in place to protect against undue influence of the association by outside interests, and to ensure its democratic governance by the members of the legal profession.

## Republic of Turkmenistan

*Number of licenced lawyers:* approximately 200–300

*Number of lawyers per capita:* up to one lawyer per 17,100 people<sup>47</sup>

*Licensing body:* Ministry of Justice

In accordance with the law of Turkmenistan, legal practice may be carried out by a collegium of lawyers of a province, or city with a status of a province (there are 6 provinces),<sup>48</sup> a legal advice office, a lawyers' association, or by a lawyer operating independently.<sup>49</sup>

One collegium may be established and operate in each administrative subdivision (province) at the initiative of individuals holding licenses to provide legal services.<sup>50</sup> The law stipulates that a collegium is an independent, professional, self-governing and self-financed public association created for the purpose of providing qualified legal services to individuals and legal entities, securing and protecting the rights and legitimate interests of lawyers and discharging other functions as specified by the law.<sup>51</sup> Each collegium must be registered with the Ministry of Justice.<sup>52</sup>

The collegium may establish local legal advice offices (in administrative regions and cities with the status of administrative regions)<sup>53</sup> for the purpose of making arrangements to provide legal services.<sup>54</sup> Under the law, a legal advice office is a structural subdivision of the collegium

<sup>42</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 3.

<sup>43</sup> Rules of Professional Ethics of Lawyers approved by Decree No. 73 of 21 May 2003, of the Ministry of Justice of the Kyrgyz Republic.

<sup>44</sup> Draft Law on Advokatura of the Kyrgyz Republic, article 2.

<sup>45</sup> Special Rapporteur on the independence of judges and lawyers, Mission to Kyrgyzstan, E/CN.4/2006/52/Add. 3, 30 December 2005, para. 58.

<sup>46</sup> 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.

<sup>47</sup> Approximately 5,110,000 persons: UN Statistics, Department of Economic and Social Affairs Population Division (2009), [http://www.un.org/esa/population/publications/wpp2008/wpp2008\\_text\\_tables.pdf](http://www.un.org/esa/population/publications/wpp2008/wpp2008_text_tables.pdf).

<sup>48</sup> Lawyers' activities in the Republic of Turkmenistan are governed by the Law Advokatura and Lawyers' Activity in Turkmenistan, which came into effect on 1 July 2010.

<sup>49</sup> The Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 18.

<sup>50</sup> There are 5 Velayats and one city with a status of Velayat in Turkmenistan—the capital city of Ashgabat.

<sup>51</sup> The Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 19.

<sup>52</sup> *Ibid.*, article 19 (5).

<sup>53</sup> Etrap and city with a status of etrap are contemporary Turkmenistan's political subdivisions.

<sup>54</sup> Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, articles 19 (9) and 29 (1).



established in a province. A legal advice office operates on the basis of the Regulation adopted by the General Meeting of the collegium members.<sup>55</sup> Its office is headed by a director, who is appointed and removed by the presidium of the collegium of the province.<sup>56</sup>

Lawyers who do not work in legal advice offices of the collegium may establish their own association to provide legal services.<sup>57</sup> For instance, lawyers who pursue legal practice on their own may enter into an agreement with other lawyers to provide their services jointly in compliance with the requirements of the law.<sup>58</sup> A lawyer who operates on his or her own must furnish the presidium of the collegium with his or her relevant details.<sup>59</sup>

Under the law, lawyers may found a statewide community of lawyers<sup>60</sup> following a Conference of Lawyers in Turkmenistan,<sup>61</sup> for the purpose of improving lawyers' practice, upholding the independence and self-governing capacities of the legal profession, coordination and development of relations with the State agencies and public associations, representation of the interests of lawyers, protection of professional and social rights of lawyers, performing methodical work and contributing to the enhancement of professional aptitudes of lawyers.<sup>62</sup> No such organization of lawyers has been formed to date.

In practice, lawyers' associations in Turkmenistan are widely considered not to be independent of the State; rather they are considered to be under the control of the executive, in particular the Ministry of Justice. Such a situation is contrary to international standards on the legal profession which specify that the executive body of a lawyers' association shall exercise its functions without external influence.<sup>63</sup> Lawyers see the existing associations as inadequate guarantors of their independence and are concerned that the associations are unable to protect against the arbitrary withdrawal of a lawyer's licence (See further Chapter II).

## Republic of Tajikistan<sup>64</sup>

*Number of licenced lawyers:* approximately 800<sup>65</sup>

*Number of lawyers per capita:* approximately one lawyer per 9,200 people<sup>66</sup>

*Licensing body:* Ministry of Justice.

The law of Tajikistan provides for one form of lawyers' association—a Collegium of Lawyers. Under the law, the Collegium of Lawyers is an independent professional association securing the provision of legal services to individuals and legal entities.<sup>67</sup> In 1998, the concept of a lawyer-attorney was introduced, being defined as a business person providing legal services<sup>68</sup> on the basis of a license<sup>69</sup> issued by the Ministry of Justice. Thus, lawyers may practice their profession either as a member of a Collegium, or as an independent lawyer-attorney. There is no unified self-governing system of the profession as a whole.<sup>70</sup>

<sup>55</sup> *Ibid.*, article 29 (3).

<sup>56</sup> *Ibid.*, article 29 (4).

<sup>57</sup> *Ibid.*, article 30 (1).

<sup>58</sup> *Ibid.*, article 30 (2).

<sup>59</sup> *Ibid.*, article 31 (1).

<sup>60</sup> This law does not define the term "statewide community of lawyers".

<sup>61</sup> Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 46 (3).

<sup>62</sup> *Ibid.*, article 46 (2).

<sup>63</sup> UN Basic Principles on the Independence of Lawyers, principle 24; Singhvi Declaration, para. 97

<sup>64</sup> Lawyers' activity in the Republic of Tajikistan are governed by the Law on the Legal Profession adopted on 4 November 1995, as amended in 2001 and 2006.

<sup>65</sup> As of October, 2008, Legal Profession in Tajikistan, Makhira Usmanova, 2008, <http://www.osce.org/node/36314>, page 8.

<sup>66</sup> The Agency of Statistics under the President of Tajikistan estimated the population of Tajikistan at 8.0 million in April 2013, <http://stat.tj/ru/population-census/>.

<sup>67</sup> Law of the Republic of Tajikistan on Advokatura, article 1.

<sup>68</sup> *Ibid.*, article 2.

<sup>69</sup> *Ibid.*, article 29 (1).

<sup>70</sup> See: Legal profession in the countries of Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan), Legal Policy Research Centre, 2009, p. 100.

The law prescribes that a Collegium may be formed at the initiative of at least forty lawyers.<sup>71</sup> The founders must convene a General Meeting to adopt a Charter and to elect the governing bodies of the collegium.<sup>72</sup> The Collegium of the Republic of Tajikistan and regional collegia must be registered with the Ministry of Justice.<sup>73</sup>

The majority of lawyers with whom the ICJ consulted considered that at present, the independence of lawyers' associations is secured by practical safeguards. However, since a new law comprehensively reforming the organization of the legal profession is currently being discussed and is likely to be enacted soon, attention should be paid to this anticipated reform. In June 2013, a working group<sup>74</sup> concluded its work on a draft law, which provides for the formation of a self-governing organization—the Union of Lawyers of the Republic of Tajikistan, to be founded at the Conference of Lawyers. According to the draft law, The Union of Lawyers is expected to be a non-State, non-profit organization, and all lawyers will be required to be its members.<sup>75</sup> The stated purposes of this association, under the draft law are securing the provision of qualified legal services and their accessibility to the public, arranging for free legal services; representation and protection of the interests of lawyers, supervision over the professional training of individuals admitted to practice law and lawyers' compliance with the Code of Professional Ethics of Lawyers.<sup>76</sup> Only one Union of Lawyers will be established in the country; it may create offices in the political subdivisions of the country.<sup>77</sup> The decisions taken by the Union of Lawyers within its competence will be binding on all of its members.<sup>78</sup>

The Draft Law further provides for different structures within which a lawyer can work, such as lawyers' offices, lawyers' bureaux, collegia of lawyers and legal advice offices.<sup>79</sup> A lawyer may choose the form of incorporation and the place of his or her legal practice.<sup>80</sup> The lawyer must notify the local bodies of the Union in writing about the selected form of incorporation and place of practice within one month from his or her admission to practice law.<sup>81</sup> The Union of Lawyers and its local bodies must maintain the Unified Register of Lawyers' Associations.<sup>82</sup>

The new law defines the legal profession (*advocatura*) as an institution of civil society<sup>83</sup> and freedom and independence of the lawyer's professional activity is one of the principles specified in law.<sup>84</sup> In practical terms this means that under the draft law, only lawyers may form these self-governing bodies, without any involvement of the state. However, restrictions on the powers of the Union of Lawyers, and the extension of the powers of the Ministry of Justice over qualification of lawyers, have given rise to concerns over independence (discussed below in section C of this Chapter).

<sup>71</sup> Law of the Republic of Tajikistan on Advokatura, article 15 (1).

<sup>72</sup> *Ibid.*, article 15 (1).

<sup>73</sup> *Ibid.*, article 15 (2).

<sup>74</sup> The working group was established in 2012 to develop a Draft Law on Lawyers' Activities and the Legal Profession. The working group was comprised of representatives of the legal community, both bar associations and law enforcement agents, representatives of the Executive Office under the President of Tajikistan, the Supreme Court, the Council of Justice, the Prosecutor General's Office and the Ministry of Justice.

<sup>75</sup> Draft Law of the Republic of Tajikistan on Lawyers' Activities and Advokatura, article 37 (1) and (2).

<sup>76</sup> *Ibid.*, article 37 (3).

<sup>77</sup> *Ibid.*, article 37 (8).

<sup>78</sup> *Ibid.*, article 37 (9).

<sup>79</sup> *Ibid.*, article 25 (1).

<sup>80</sup> *Ibid.*, article 25 (2).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, article 25 (5).

<sup>83</sup> *Ibid.*, article 6 (1).

<sup>84</sup> *Ibid.*, article 5.

## Republic of Uzbekistan<sup>85</sup>

*Number of licenced lawyers:* 5,407<sup>86</sup>

*Number of lawyers per capita:* approximately one lawyer per 5,500 people<sup>87</sup>

*Licencing body:* Ministry of Justice.

Legal practice in Uzbekistan may be pursued both individually, by opening a lawyer's office; or by founding a law firm together with other lawyers (partners) of a law firm; as a member of a collegium of lawyers; by joining one of the existing lawyers' associations; or by practicing law in a legal advice office.<sup>88</sup> A lawyer may pursue his or her practice as a member of only one lawyers' association.<sup>89</sup> All lawyers' offices, law firms, lawyers' associations, and legal advice offices must be registered with the Ministry of Justice.<sup>90</sup>

Under the law, the Chamber of Lawyers together with its local offices, constitutes a unified system of self-government of the legal profession in the Republic of Uzbekistan.<sup>91</sup> The Chamber of Lawyers is a non-profit organization operating subject to the principle of prohibition of interference with lawyers' practice; all lawyers are required to be members of the Chamber of Lawyers.<sup>92</sup> The existing law does not allow for the forming of any other organizations with functions or powers similar to those of the Chamber of Lawyers.<sup>93</sup> The decisions of the Chamber of Lawyers and its local offices within their competence are binding on all lawyers' organizations and lawyers.<sup>94</sup>

According to the law, the principal functions of the Chamber of Lawyers are: centralized coordination of the operation of lawyers' associations; facilitating further development of the legal profession, enhancing its authority, strengthening the role of the legal profession in the protection of human rights and freedoms; taking steps towards legal advocacy aimed at propagating legal skills and legal culture among the general public; introducing proposals to improve the law and practice, ensure the constituency of legal regulations and their uniform application; participation in drafting laws governing the operation of the Bar, submitting proposals in this respect; representation and protection of rights and legitimate interests of lawyers, *inter alia*, in their relations with the State and economic authorities, as well as before the courts; taking steps to protect lawyers against persecution, restrictions and harassment on account of their professional activities; organizing the professional and additional training of lawyers; ensuring public access to legal services by founding legal advice offices in the districts and cities; collection and study of statistical data concerning the activities of the legal profession, promoting positive results of lawyers' practice, providing methodical guidance to lawyers' associations; exercising control over the lawyers' compliance with the law, Rules of Professional Ethics, lawyer-client confidentiality and the lawyer's oath.<sup>95</sup> Some of the above functions, including the protection of lawyers against persecution, restrictions and harassment for lawyers' professional activities, are important functions of a lawyers' association, which are not expressly provided for in the national law of other Central Asian states. Such

<sup>85</sup> Lawyers' activities in the Republic of Uzbekistan are governed by the Law on the Legal Profession adopted on 27 December 1996, as amended in 1997, 2003, 2004, 2005, 2008 and 2009, and the Law on Guarantees of Lawyers' Activities and Social Protection of Lawyers, adopted on 25 December 1998, as amended in 1999 and 2008.

<sup>86</sup> The State Committee on Statistics of the Republic of Uzbekistan: population of Uzbekistan 28.0 million as of 2011, [http://www.stat.uz/upload/iblock/f0f/Uzb\\_ru.pdf](http://www.stat.uz/upload/iblock/f0f/Uzb_ru.pdf).

<sup>87</sup> The population has reached 30 million in Uzbekistan in 2013, RIA Novosti, <http://ria.ru/world/20130220/923808843.html>.

<sup>88</sup> Law of the Republic of Uzbekistan on Advokatura, article 4 (2). A legal advice office is a lawyers' association, which is not a separate legal entity, established by the local office of the Chamber of Lawyers for the purpose of pursuing lawyers' activities. A legal advice office is established by a local office of the Chamber of Lawyers if the lawyers' organizations operating in the respective jurisdiction are insufficient to satisfy the need for legal services.

<sup>89</sup> Law of the Republic of Uzbekistan on Advokatura, article 4 (2).

<sup>90</sup> *Ibid.*, article 4 (3).

<sup>91</sup> *Ibid.*, article 12-1 (2).

<sup>92</sup> *Ibid.*, article 12-1 (1) and (3).

<sup>93</sup> *Ibid.*, article 12-1 (4).

<sup>94</sup> *Ibid.*, article 12-1 (6).

<sup>95</sup> *Ibid.*, article 12-2 (1).

provision is however, fatally undermined by the lack of independence of the Chamber of Lawyers, as discussed below.

Prior to the reform process of 2008, the legal profession operated under a legal regime similar to that of the Kyrgyz Republic. Upon the receipt of a license, lawyers were free to operate as individual lawyers, to open a lawyer's office or to voluntarily form, together with other lawyers (partners) associations or firms. The Association of Lawyers of Uzbekistan, a lawyers' NGO, acted as a public association and did not have any specific administrative functions over the profession, but acted as a representative organization with a well-organized structure and local branches in each of the regions united by one regional association.<sup>96</sup> However, in the reform of 2008 the independent legal profession was effectively abolished and a structure was established the head of which are appointed and dismissed directly by the Ministry of Justice, making the system an anomaly both in Central Asia and the broader CIS region.

Lawyers reported to the ICJ that, as a result of the reform of the Association of Lawyers of Uzbekistan,<sup>97</sup> the organization was, in their words, "governmentalized". The Chamber of Lawyers of Uzbekistan was created based on the bodies and membership of the Association, competent to nominate candidates for its President and Deputy President at the Conference of the Chamber of Lawyers, to be appointed by the Ministry of Justice.<sup>98</sup> In addition, the Ministry of Justice was accorded the right to terminate the powers of the President of the Chamber of Lawyers, while lawyers themselves do not have such a right.<sup>99</sup> The President of the Chamber has powers to appoint and remove the heads of the Chamber's local offices. Previously independent lawyers' organizations were transformed into structural subdivisions of the Chamber,<sup>100</sup> which was charged with centralized coordination of the operation of lawyers' organizations.

The Chamber of Lawyers of Uzbekistan clearly lacks independence, since its head is appointed and removed pursuant to a motion of the Ministry of Justice, which although subject to a vote of the Chamber in practice determines outcome. The ICJ is concerned that the involvement of the executive branch of government in the appointment of the leadership of the lawyers' association is inconsistent with international standards. In particular the UN Basic Principles state unequivocally that as a guarantee of independence of such institutions: "The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference."<sup>101</sup> The UN Human Rights Committee expressed concern regarding the 2008 reform, noting *inter alia*, that the reform of the regulations governing defence lawyers [had] increased the role of the Ministry of Justice in a range of matters related to the legal profession and in light of a range of concerns about the reforms and practice, recommended that "[t]he State party should review and amend its laws and practice, so as to ensure the independence of lawyers."<sup>102</sup>

Lawyers in Uzbekistan with whom the ICJ consulted were of the view that lawyers' associations are not independent in law and in practice and that the Ministry of Justice exercises control over all the activities of lawyers' associations. The UN Special Rapporteur on Independence of Judges and Lawyers stated on this matter that: "the competency of the Ministry of Justice to nominate the chairperson, who in turn designates the chairpersons of the regional chamber branches, and the deputy chairpersons of the Chamber of Lawyer was not in compliance with" the Basic Principles on the Role of Lawyers.<sup>103</sup>

<sup>96</sup> Analysis of the Decree of the President of the Republic of Uzbekistan on Advokatura, 20 August 2008, D.K. Kanafin.

<sup>97</sup> The reform followed the Decree of the President of the Republic on Steps towards Further Reforming of the Legal Profession in the Republic of Uzbekistan of 1 May 2008, and the Decision of the Cabinet of Ministers of the Republic of Uzbekistan of 27 May 2008, on Organization of the Lawyers' Chamber Activities in the Republic of Uzbekistan (Law of the Republic of Uzbekistan on Advokatura, article 4-4).

<sup>98</sup> See: The current state of the legal profession in the Republic of Uzbekistan, LPRC, Almaty, 2009, p. 40.

<sup>99</sup> Law of the Republic of Uzbekistan on Advokatura, article 12-3 (4).

<sup>100</sup> See: The current state of the legal profession in the Republic of Uzbekistan, LPRC, Almaty, 2009, p. 42.

<sup>101</sup> UN Basic Principles on the Role of Lawyers, Principle 24.

<sup>102</sup> UN Human Rights Committee, Concluding Observations on Uzbekistan, CCPR/C/UZB/CO/3, 7 April 2010, para. 17.

<sup>103</sup> Report of the Special Rapporteur on the independence of judges and lawyers, 28 July 2009, A/64/181, p. 7.

## C) LAWS REGULATING INTERNAL GOVERNANCE OF BAR ASSOCIATIONS

### Republic of Kazakhstan

The self-governing bodies of each of the 16 lawyers' collegia in the Republic of Kazakhstan are: the General Meeting (Conference) of the collegium members, the highest body; the Presidium, the executive body which manages day-to-day operations between the General Meetings of the collegia; and the supervising body, the Auditing Commission.<sup>104</sup>

The General Meeting (Conference) of the collegium members has exclusive competence to adopt the Charter of the collegium and to make decisions to amend the Charter; to elect the Presidium and the President of the Presidium, Auditing Commission and the President of the Auditing Commission; to elect other bodies stipulated by the Charter and their respective heads, and to approve the regulations concerning those bodies.<sup>105</sup>

The Presidium of the Collegium is elected by secret ballot of members at the General meeting; its members serve four-year terms.<sup>106</sup> Between the Collegium's General Meetings, the Presidium may:

- organize the operation of the Collegium aimed at providing legal services;
- arrange for implementation of the decisions adopted by the General Meeting (Conference), convene the General Meeting;
- protect the professional and other rights of lawyers;
- grant admission to practice law;
- decide on disbarment of lawyers;
- organize the training of legal interns; and
- submit quarterly summary reports of lawyers about their activities to the Republican Collegium.<sup>107</sup>

The President of the Collegium's Presidium is elected by secret ballot for the term of four years by the General Meeting.<sup>108</sup> A lawyer may be elected as its President if he or she has been a member of the Collegium for at least two years preceding the date of the election.<sup>109</sup> A person cannot hold the office of the President for more than two consecutive terms.<sup>110</sup>

The Auditing Commission of the Collegium and its President are elected by the General Meeting (Conference) of the Collegium members for the term of four years.<sup>111</sup> The Auditing Commission audits the financial and economic activities of the Collegium, legal advice offices, lawyer's offices and financial activities of lawyers who practice on their own.<sup>112</sup>

The highest self-governing body of the Republican Collegium is the Republican Conference of Collegium Delegates, which must be convened at least once every two years.<sup>113</sup> The Conference has exclusive competence to: adopt the Charter of the Republican Collegium and amend it; draft and approve the Code of Professional Ethics of Lawyers and amend it; draft and approve the Regulation on the Procedure for Credentialing of Lawyers; elect the

<sup>104</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 22 (1).

<sup>105</sup> *Ibid.*, article 23 (2).

<sup>106</sup> *Ibid.*, article 24 (1).

<sup>107</sup> *Ibid.*, article 24 (2).

<sup>108</sup> *Ibid.*, article 23.2.2.

<sup>109</sup> *Ibid.*, article 25 (1).

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, article 26 (2).

<sup>112</sup> *Ibid.*, article 26 (3).

<sup>113</sup> *Ibid.*, article 33-4 (1).

Presidium of the Republican Collegium; and elect the Auditing Commission of the Republican Collegium.<sup>114</sup>

The Presidium of the Republican Collegium is the collective executive body of the Republican Collegium. It is elected by the Conference of Collegium Delegates by secret ballot for the term of four years.<sup>115</sup> The number of its members is determined by the Republican Conference of Collegium Delegates;<sup>116</sup> members must include representatives of each Collegium of Lawyers.<sup>117</sup> The representatives of the State authorities may also attend, but, according to lawyers, do not have a right to vote. The Presidium elects the President of the Republican Collegium from among its members for the term of four years, by secret ballot.<sup>118</sup> The President can hold office for no more than two consecutive terms.<sup>119</sup> The decisions of the Republican Collegium and its bodies within their competence are binding on the collegia.<sup>120</sup>

## Kyrgyz Republic

As noted above, there is no unified self-governing professional association of lawyers in Kyrgyzstan at present. The existing associations of lawyers are organized as NGOs and lawyers reported to the ICJ that the bodies of lawyers' associations were elected freely without any external interference.

In the absence of an established lawyers' association in Kyrgyzstan, in this section we consider the provisions of the draft law, which if adopted would govern the procedure for the establishment and powers of the governing bodies of the Union of Lawyers of Kyrgyzstan.

The draft law provides for the formation of the following bodies of the Union of Lawyers: the Conference of Lawyers as the highest governing body, the Council of Lawyers as the executive body, as well as special Qualifications and Auditing Commissions.<sup>121</sup>

Under the draft law, the Conference of Lawyers would be convened once every three years at the discretion of the Council of Lawyers. The Conference would be chaired by the President of the Council of Lawyers or, in his or her absence, by the Deputy President who would set the date, time and place of the Conference.<sup>122</sup> An extraordinary conference of lawyers may be convened pursuant to the decision of the Council (at its sole discretion) or at the initiative of at least one third of all lawyers of the Kyrgyz Republic.<sup>123</sup> The Conference of Lawyers is deemed quorate if it was attended by one-half or more of the delegates elected from among members of the Union of Lawyers.<sup>124</sup>

The Conference would be competent, *inter alia*:

- to determine the principal fields of the Union's activities;
- approve the Union's Charter, adopt a decision to amend or restate the Charter;
- form the Council of Lawyers and decide on the termination of its members' powers;
- adopt the rules of professional ethics of lawyers;
- determine the representation quotas at the Conference of lawyers and the procedure for electing delegates;

<sup>114</sup> *Ibid.*, article 33–4 (2).

<sup>115</sup> *Ibid.*, article 33–5 (1, 2).

<sup>116</sup> *Ibid.*, article 33–5 (3).

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*, article 33–5 (4).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, article 33–2 (7).

<sup>121</sup> Draft Law on Advokatura in the Kyrgyz Republic and lawyers' activity, article 4 (1).

<sup>122</sup> *Ibid.*, article 5 (1, 2).

<sup>123</sup> *Ibid.*, article 5 (2).

<sup>124</sup> *Ibid.*

- elect members of the Qualifications Commission from among the lawyers;
- elect members of the Auditing Commission and approve its report about the results of financial and economic activities; and
- determine the amount of deductions to be made from the membership fees paid to be applied towards the common needs of the Union.<sup>125</sup>

The Council of Lawyers is expected to be a collective executive body of the Union, which will be elected at the conference of lawyers by secret ballot and will be composed of 9 lawyers or less.<sup>126</sup> The President of the Council would be elected from among the members of the Council of Lawyers. His or her Deputy would be elected pursuant to the President's motion.<sup>127</sup>

The Council of Lawyers would be competent to: represent the legal profession before the State authorities, municipal authorities, public associations and other entities; approve the regulations on the Qualifications Commission of the Bar; decide on the founding of local bar associations; determine and approve the amount of membership fees to be paid by the lawyers; approve the procedure for payment of membership fees; examine complaints against the actions or inaction of lawyers, with regard to the assessment delivered by the Qualifications Commission; facilitate the enhancement of lawyers' professional aptitudes, including by approving the programme of additional training for lawyers and training for legal interns and organizing professional training under those programmes; determine the amount of remuneration to be paid to the President and members of the Council of Lawyers; protect social and professional rights of lawyers; enter a motion with the Ministry of Justice of the Kyrgyz Republic to suspend or terminate a lawyer's license on the grounds stipulated by this Law; and would have other powers pursuant to the Charter.<sup>128</sup>

There are some concerns within the legal profession regarding the proposed procedures for qualification and disciplinary action under the new law, and in particular that the role of the Ministry of Justice in these procedures may undermine the independence of the legal profession (See further Chapter III).

## Republic of Turkmenistan

According to the law of Turkmenistan, the highest body of the lawyers association (Collegium) in the Republic of Turkmenistan is the General Meeting of its members, the governing executive body is the Presidium, and the supervising body is the Auditing Commission.<sup>129</sup>

The General Meeting has exclusive competence:

- to adopt the Charter of the Collegium and to amend it;
- to determine the number of the members of the Presidium and the Auditing Commission, to elect them and to hear their reports;
- to elect other bodies stipulated by the Charter and their heads;
- and to approve the regulations concerning those bodies.<sup>130</sup>

The Presidium of the Collegium is elected by secret ballot for the term of three years.<sup>131</sup> Lawyers who have been members of the association for five years or more may be elected to the Presidium.<sup>132</sup> The Presidium elects, by open ballot, the President of the Presidium and his Deputies from among its members.<sup>133</sup>

<sup>125</sup> *Ibid.*, article 5 (3).

<sup>126</sup> *Ibid.*, article 6 (1).

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*, article 6 (3).

<sup>129</sup> Law of the Republic of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 21 (1).

<sup>130</sup> *Ibid.*, article 22 (2).

<sup>131</sup> *Ibid.*, article 23 (1).

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, article 23 (3).

A lawyer who has been a member of the Collegium for at least five years preceding the day of his or her election may be elected President of the Collegium Presidium.<sup>134</sup>

The Presidium has competence to:

- organize the activities of the Collegium related to the provision of legal services to individuals and legal entities;
- convene the General Meeting, arrange for the implementation of the General Meeting's decisions;
- protect professional and other rights and interests of lawyers;
- admit to the Collegium those individuals who hold a license to provide legal services, in accordance with the procedure established by the laws of Turkmenistan;
- expel members of the Collegium;
- organize the training of legal interns;
- grant incentives to lawyers who are successful at work;
- organize the verification of complaints against the actions of a lawyer lodged by individuals or legal entities;
- examine materials concerning the disciplinary misconduct of lawyers and impose disciplinary sanctions;
- enter requests to revoke lawyers' licenses;
- organize additional training for lawyers; and
- conduct, in accordance with the procedure established by the law, professional accreditation of lawyers.<sup>135</sup>

The Auditing Commission is elected by the General Meeting of the Collegium members by secret ballot for the term of three years.<sup>136</sup> The Commission elects, by open ballot, its President from among its members.<sup>137</sup>

The ICJ has heard reports that the governing bodies of collegia established in Turkmenistan were elected by a vote of the lawyers' association members at the General Meeting, where the State authorities—representatives of local justice authorities—took part. If this is the case, it may raise concerns regarding international standards and the principle of the self-government of the legal profession whereby "[t]he executive body of the professional association shall be elected by its member and shall exercise its functions without external interference."<sup>138</sup>

## Republic of Tajikistan

The highest body of the Collegium of Lawyers in Tajikistan is the General Meeting (Conference) of the Collegium members.<sup>139</sup> The Presidium of the Collegium is its executive body.<sup>140</sup> The conference of the Collegium members elects: members of the Presidium and President of the Presidium; the Auditing Commission of the Collegium; and its Qualifications Commission.<sup>141</sup> The Deputy President is elected from among the members of the Presidium of the Collegium by open ballot, at the meeting of the Presidium.<sup>142</sup>

<sup>134</sup> *Ibid.*, article 24 (1).

<sup>135</sup> *Ibid.*, article 24 (2).

<sup>136</sup> *Ibid.*, article 25 (2).

<sup>137</sup> *Ibid.*, article 25 (3).

<sup>138</sup> UN Basic Principles on the Role of Lawyers, Principle 24.

<sup>139</sup> Law of the Republic of Tajikistan on Advokatura, article 17 (1).

<sup>140</sup> *Ibid.*, article 17 (1).

<sup>141</sup> *Ibid.*, article 17 (3).

<sup>142</sup> *Ibid.*, article 17 (2).



The Qualifications Commission of the Collegium makes arrangements to administer exams to those who wish to join the relevant collegium, examines matters related to professional ethics and delivers its assessment in that regard.<sup>143</sup> The applicable law provides for the right of the collegia to form and manage the Qualifications Commission. For instance, pursuant to the Regulation on the Qualifications Commission of the Sughd Regional Collegium of the Republic of Tajikistan, the Qualifications Commission is elected by the conference of the Collegium from among its members for the term of five years.<sup>144</sup> The number of its members is determined at the time of the election, with regard to the amount of work to be performed by the Qualifications Commission and the total number of lawyers in the region.<sup>145</sup> The Chairman of the Qualifications Commission and his or her Deputy are elected at the conference from among the members of the Qualifications Commission, by open ballot.<sup>146</sup> Thus currently Tajikistan is the only country of Central Asia where lawyers control access to the legal profession without any participation of the state bodies. However, the collegium has no role in qualification or disciplinary matters of lawyer-attorneys, where the Ministry of Justice has exclusive competence.

The Draft Law on Lawyers' Activities and Legal Profession, if adopted, would restructure the governance of the legal profession significantly. It provides for the formation of the following governing bodies of the Union of Lawyers: the highest governing body, the Conference of Lawyers, to be convened once every two years;<sup>147</sup> the executive body, the Board of the Union of Lawyers, which is a collective body operating on a permanent basis between the Conferences;<sup>148</sup> the Auditing Commission; the Disciplinary Commission and the Local Bodies of the Union of Lawyers.<sup>149</sup>

Local bodies of the Union of Lawyers would be non-public non-profit organizations with mandatory membership of lawyers in the relevant region.<sup>150</sup> Local bodies of the Union of Lawyers under the draft law would be required to be founded by the constitutive meeting of lawyers<sup>151</sup> and would be considered to be branches of the Union of Lawyers.<sup>152</sup> If adopted, the law would permit only one local body of the Union of Lawyers to be founded or to operate in any one region, and no inter-regional or other inter-territorial bodies of the Union of Lawyers would be permitted to

<sup>143</sup> *Ibid.*, article 17 (1).

<sup>144</sup> Regulation on the Qualifications Commission, para. 3.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> Draft Law of the Republic of Tajikistan on Lawyers' Activities and Advokatura, article 38 (3). It provides that the powers of the Conference would include the following: to adopt and amend the Charter of the Union of Lawyers; to adopt and amend the Code of Professional Ethics of Lawyers; to appoint the Board of the Union of Lawyers for the term of four years, as well as to terminate the powers of the Board's members; to elect, from among the members of the Union of Lawyers and by secret ballot, the President of the Union of Lawyers' Board for the term of four years; to elect members of the Auditing Commission of the Union of Lawyers for the term of two years; to elect members of the Disciplinary Commission of the Union of Lawyers; to approve the Regulation on Local Bodies of the Union of Lawyers; to approve the Regulation on the Disciplinary Commission and Auditing Commission of the Union of Lawyers.

<sup>148</sup> The Board of the Union of Lawyers would be elected by the Conference of Lawyers by secret ballot and would be composed of 9 persons elected from among the members of the Union of Lawyers for the term of four years. The powers of the Board would include the powers: to elect, from among its members, the Deputy President of the Union of Lawyers' Board for the term of two years (the President of the Union of Lawyer's Board and his or her Deputies could not be elected to more than two consecutive terms); to decide, between the Conferences of Lawyers, on termination of powers of the Board's members whose lawyer's powers have been suspended or terminated (subject to the approval to the ordinary Conference of Lawyers); to determine the representation quotas at the Conference and the procedure for electing delegates; to facilitate the enhancement of professional aptitudes of lawyers, including by approving unified methods of additional training of lawyers and training of legal interns, as well as organizing professional training under those programmes; to consider and decide on suspension of a lawyer's powers; to submit a motion to the Qualifications Commission for the termination of a lawyer's powers; to approve the rules of the Board and the Auditing Commission, and the staffing of the Union of Lawyers' Administration; to coordinate the activities of local bodies of lawyers in accordance with the approved standards of legal practice: Draft Law of the Republic of Tajikistan on Lawyers' Activity and Advokatura, articles 36 (2) and (3)

<sup>149</sup> Draft Law of the Republic of Tajikistan on Lawyers' Activity and Advokatura, article 38 (3).

<sup>150</sup> *Ibid.*, article 43 (1).

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*, article 43 (4).

be founded.<sup>153</sup> The decisions of the local bodies of the Union of Lawyers within their competence would, if the draft law was adopted as currently drafted, be binding on all the members of the local bodies of the Union of Lawyers.<sup>154</sup>

Concern has been raised that the draft law proposes changing the current good practice whereby the legal community controls access to the legal profession (with the exception of lawyer-attorneys) without any participation of the state bodies. It provides that the Qualifications Commission shall be founded under the State executive body of the Ministry of Justice, its head being a Deputy to the Minister of Justice.<sup>155</sup> This provision of the Draft Law is contrary to international standards on the legal profession designed to ensure that lawyers' associations have sufficient powers to be effective in protecting the independence of the profession. In particular, the Singhvi Declaration states that the functions of the Bar Association in ensuring the independence of the profession shall include ensuring free access to the profession for qualified persons, without discrimination<sup>156</sup> as well as competence in disciplinary matters.<sup>157</sup> Furthermore, the ICJ Congress in 1962 stated in particular that "[t]he Rule of Law requires an authority which has the powers to, and does in fact, exact proper standards for admission to the legal profession [ . . . ]. Those functions are best performed by self-governing bodies democratically organized lawyers' associations."<sup>158</sup>

The Draft Law also provides that a Disciplinary Commission, operating under the Union of Lawyers, would be established for the purpose of supervising the practice of lawyers who belong to the Union of Lawyers.<sup>159</sup> The Disciplinary Commission would act on the basis of the Draft Law, the Charter of the Union of Lawyers, the Code of Professional Ethics and the Regulation on the Disciplinary Commission, and would submit reports on its activities to the Conference.<sup>160</sup> An Auditing Commission, elected from among the members of the Union of Lawyers would supervise the financial and economic activities of the Union of Lawyers and its bodies.<sup>161</sup>

## Republic of Uzbekistan

The Conference of the Chamber of Lawyers of Uzbekistan is the highest body of the Chamber and must be convened at least once every five years.<sup>162</sup> The Board of the Chamber of Lawyers is an executive body of the Chamber, elected from among the lawyers, which manages the Chamber's day-to-day operations.<sup>163</sup> The President of the Chamber of Lawyers is elected by the Conference of the Chamber of Lawyers pursuant to the motion of the Ministry of Justice, for the term of five years from among the members of the Board elected by the Conference.<sup>164</sup> Early removal of the President of the Chamber of Lawyers may be ordered by the Conference of the Chamber of Lawyers pursuant to the motion of the Ministry of Justice in cases stipulated by the Charter of the Chamber of Lawyers.<sup>165</sup> The Auditing Commission is a financial control body of the Chamber of Lawyers elected from among the lawyers.<sup>166</sup>

Local bodies of the Chamber of Lawyers are legal entities operating on the basis of the regulations approved by the Chamber of Lawyers.<sup>167</sup> Heads of the local bodies are appointed (from

<sup>153</sup> *Ibid.*, article 43 (8).

<sup>154</sup> *Ibid.*, article 43 (9).

<sup>155</sup> *Ibid.*, article 13 (1) and (3).

<sup>156</sup> Singhvi Declaration, op cit, para. 99 (i).

<sup>157</sup> *Ibid.*, para. 103.

<sup>158</sup> ICJ Congress of Rio de Janeiro on Executive Action and the Rule of Law, 1962, Conclusions of the Committee on the Role of Lawyers in a Changing World, Clause IV.

<sup>159</sup> Draft Law of the Republic of Tajikistan on Lawyers' Activity and Advokatura, article 41 (1).

<sup>160</sup> *Ibid.*, article 41 (2).

<sup>161</sup> *Ibid.*, article 40 (1).

<sup>162</sup> Law of the Republic of Uzbekistan on Advokatura, article 12-3 (1).

<sup>163</sup> *Ibid.*, article 12-3 (2).

<sup>164</sup> *Ibid.*, article 12-3 (3).

<sup>165</sup> *Ibid.*, article 12-3 (4).

<sup>166</sup> *Ibid.*, article 12-3 (5).

<sup>167</sup> *Ibid.*, article 12-4 (1).

among the lawyers operating in the relevant jurisdiction) and removed by the President of the Chamber of Lawyers.<sup>168</sup>

In his report, the (former) UN Special Rapporteur on Independence of Judges and Lawyers found that the role which the Ministry of Justice in Uzbekistan played in the establishment of the Chamber of Lawyers and in its operation violated the UN Basic Principles on the Role of Lawyers. In particular, he noted that the supervisory role of the Ministry indicated “an overarching role of the executive branch in the establishment and functioning of the legal profession which violate the [...] provisions of the Basic Principles of Lawyers.”<sup>169</sup> Lawyers confirmed to the ICJ that the State executive authorities, represented by the Ministry of Justice, participated directly in the election of the head of the Chamber of Lawyers of the Republic of Uzbekistan. The ICJ notes with concern that this practice runs contrary to international standards whereby the executive body of the professional association of lawyers must be elected by its members without any external interference.<sup>170</sup> Furthermore the ICJ is concerned about reports received from lawyers which indicate that State authorities also intervened in the process of drafting internal regulations and rules of lawyers’ associations, further undermining their independence.

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<sup>168</sup> *Ibid.*, article 12–4 (2).

<sup>169</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum, Situation in Specific Countries Territories, A/HRC/11/41/Add. 1, 29 May 2009, para. 356.

<sup>170</sup> UN Basic Principles on the Role of Lawyers, Principle 24.

## III. ACCESS TO THE LEGAL PROFESSION: QUALIFICATION AND DISCIPLINARY ACTION

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### A) INTRODUCTION

#### Overview

This chapter examines some of the most important aspects of the operation of lawyers' associations, which may affect their independence, such as their roles in granting individuals access to the profession and in disciplinary action against lawyers, including disbarments. It outlines international standards related to entrance to the legal profession as well as those related to the discipline of lawyers, including standards requiring fair disciplinary proceedings. In the light of these standards, the chapter analyses relevant national laws and describes practices of concern in Central Asia, including weaknesses in the examination procedures, which may have an impact on the quality of the services provided by lawyers, as well as attitudes about professional ethics which are inconsistent with maintaining the integrity of the profession (the provisions of law related to permissible or required behaviour of lawyers are discussed in Chapter IV below). It also considers disciplinary measures and proceedings, including those involving disbarment, which may be inconsistent with ensuring the independence of lawyers.

#### International Standards

*Qualification of lawyers.* The conditions and process for entry to the legal profession must on the one hand aim at ensuring the quality and integrity of the legal profession and on the other must not compromise the independence of lawyers.

The UN Basic Principles on the Role of Lawyers provide that there must be no discrimination on any grounds with respect to entrance to the profession.<sup>171</sup> Every person who has the necessary qualifications and integrity should be able to practice as a lawyer.<sup>172</sup>

All necessary measures should be taken to ensure that a high standard of legal training and ethical qualities are prerequisites for becoming a lawyer.<sup>173</sup> Safeguards must therefore be in place to ensure that entry to the profession is not granted according to criteria other than knowledge, training and technical competence. Legal education and entry to the profession must be open to everyone who meets the required criteria and no discrimination regarding entry to the profession may take place on any grounds.<sup>174</sup> In addition, it should be ensured that legal education promotes awareness of the ethical duties and social responsibilities of lawyers and of international as well as national human rights law.<sup>175</sup> It is the duty of governments, lawyers' associations and educational institutions to ensure that training for prospective lawyers includes training on human rights law.<sup>176</sup> Entry examinations for the legal profession should, among other things, aim to test candidates' awareness of human rights, ethical obligations and social responsibilities.

*Codes of ethics.* Codes of ethics should be established by the legal profession itself or by legislation drafted in consultation with members of the profession, and should prescribe conduct in accordance with international standards safeguarding the independence and role of lawyers.<sup>177</sup>

<sup>171</sup> UN Basic Principles on the Role of Lawyers, principle 10; Singhvi Declaration, para. 77.

<sup>172</sup> Singhvi Declaration, para. 80.

<sup>173</sup> Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Principle II.2.

<sup>174</sup> Singhvi Declaration, para. 77; para. 80.

<sup>175</sup> *Ibid.*, paras 78, 79.

<sup>176</sup> Basic Principles on the Role of Lawyers, Principle 9.

<sup>177</sup> *Ibid.*, Principle 26; Singhvi Declaration, para. 102.

These codes can fulfil a dual function: in all cases, they serve to instil a common understanding of the high professional standards by which lawyers should abide; and they may also provide a basis for disciplinary action. The UN Basic Principles on the Role of Lawyers provide that “[a]ll disciplinary proceedings shall 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 [the UN Basic Principles on the Role of Lawyers].”<sup>178</sup>

The code of ethics must be written in a manner that is sufficiently clear and precise to allow lawyers to regulate their professional conduct in accordance with it. This reflects the principle of legality, which in international human rights law requires that any interference with rights, be clearly established by law, including where appropriate, regulations or professional codes of conduct.<sup>179</sup> In particular, the principle of legality requires that the law be sufficiently clear and foreseeable, since “a norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his [or her] conduct: he [or she] must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>180</sup> Although the professional code of conduct does not have to describe in detail every precise situation which may precipitate disciplinary action and incur disciplinary sanctions, it should at least broadly prescribe standards of professional and ethical behaviour in regard to maintaining independence of the profession, honesty, integrity and fairness of lawyers, prevention of conflict of interests, confidentiality, and acting in the interests of the client.<sup>181</sup>

*Accountability.* When a lawyer fails to discharge his or her professional functions in a manner consistent with recognized professional standards or engages in conduct that is contrary to the code of ethics and internationally recognized standards, such as acting against the interests of the client or failing to maintain the independence and dignity of the profession, upholding the integrity of the profession and the maintenance of professional standards requires that the lawyer be held accountable. Disciplinary action and sanctions applied should never be arbitrary. As noted above disciplinary action should be taken only for violations of accepted standards of profession conduct as reflected in international standards; consequent disciplinary sanctions should only be imposed following a fair procedure.<sup>182</sup>

Governments must ensure that the disciplinary system in the legal profession is not abused; it must not be used to intimidate or harass lawyers. The authorities must ensure that sufficient safeguards to prevent such abuse are put in place.<sup>183</sup> Any sanction imposed as a result of a disciplinary process must be of proportionate to the offence and the circumstances of the case.<sup>184</sup> Furthermore, a lawyer who is subject to disciplinary proceedings must be entitled to assistance from a lawyer of his or her choice.<sup>185</sup> A disciplinary hearing must be held by an independent and impartial authority or by a court,<sup>186</sup> which demands the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.<sup>187</sup> In a disciplinary hearing against lawyers, the right to a fair hearing under article 14 ICCPR, including the principle of equality of arms, must be protected. In accordance with this right, lawyers should be informed of the nature and cause of the charges against them; they

<sup>178</sup> Basic Principles on the Role of Lawyers, Principle 29.

<sup>179</sup> *Malone v. United Kingdom*, ECtHR, Application No. 8619/79, Judgment of 2 August 1984, para. 67; *Barthold v. Germany*, ECtHR, Application No. 8734/79, Judgment of 25 March 1985, paras. 46–49.

<sup>180</sup> *Malone v. United Kingdom*, *op. cit.*, para. 66.

<sup>181</sup> See: IBA International Principles on Conduct for the Legal Profession, adopted on 28 May 2011.

<sup>182</sup> Basic Principles on the Role of Lawyers, Principle 16 (c).

<sup>183</sup> *Ibid.*, Principles 16, 29.

<sup>184</sup> Recommendation No. R (2000) 21 of the Committee of Ministers to Member states on the freedom of exercise of the profession of lawyer, Principle VI.4.

<sup>185</sup> Basic Principles on the Role of Lawyers, Principle 27.

<sup>186</sup> *Ibid.*, Principle 28.

<sup>187</sup> UN HRC, General Comment 32, article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 25.

and their legal representatives should have adequate time and facilities to prepare and present a defence; they should have the opportunity to challenge the allegations and evidence against them, including by questioning witnesses, and should have the opportunity to present evidence, including through calling witnesses.<sup>188</sup> The decision should be in writing and reasoned on the basis of the law and code of professional ethics, which conform to international standards, as applied to the admissible evidence presented.<sup>189</sup> The lawyer should have the right to appeal the finding and the sanction before an independent and impartial judicial body, and receive a reasoned decision within a reasonable time.<sup>190</sup>

The 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.<sup>191</sup>

## Practice in Central Asia

### *Entry to the profession*

Contrary to international standards in this area, in most Central Asian states, qualification and issuing of a license to practice law involves either the participation of the Ministry of Justice, or is directly controlled by it. The only exception to this practice is in Tajikistan, where there are two ways to enter the legal profession, one of which is on the basis of decisions by a commission of the lawyers' collegia.<sup>192</sup> In other Central Asian countries, licenses to practice law are issued by the Ministry of Justice, although in some countries in the region, lawyers are involved in establishing the qualification examination, the passing of which is a pre-requisite to obtaining a license.

Throughout the region, the examination procedure suffers from weaknesses and flaws which mean that it fails to guarantee that only candidates with a high level of knowledge, skills and integrity enter the legal profession. The main problems in this regard include the insufficient rigour of examinations and the lack of transparency of the evaluation system. In general, the evaluation of the examination results is left at the discretion of the qualification commissions of the lawyers' association (Collegium or Chamber), which take decisions without fixed criteria, thereby opening a possibility for manipulation. According to lawyers in Uzbekistan, for example, the members of the Qualification Commission exercise full freedom over the evaluation of the candidates being examined by the Commission.

The one clear exception is with respect to one part of the examination in Kazakhstan which is digitalized; the candidate receives his or her results on that part of the exam immediately following completion of it. The promptness of the results and very strict criteria—the candidate must have more than 70 percent of correct answers—significantly decreases the possibility of manipulation of scores and the criteria for passing helps to bolster the quality of the exam and ultimately, the standards of the profession. The second part of the exam is an oral one; the qualifications board has full discretion to evaluate the results, as in other countries.

Across the region, discretion in evaluation coupled with lack of transparency about the criteria for evaluation has led to doubts about objectiveness of those who carry out the evaluation of qualifications exams for lawyers, and fails to provide sufficient protection against discrimination in the evaluation process. For example, the ICJ was informed about cases in Kyrgyzstan

<sup>188</sup> See IBA, Guide for Establishing and Maintaining Complaints and Discipline Procedures, paras. 7, 8.

<sup>189</sup> *Ibid.*, para. 17; Basic Principles on the Role of Lawyers, Principle 29.

<sup>190</sup> Basic Principles on the Role of Lawyers, Principles 28, 27.

<sup>191</sup> ICJ, Disciplinary action against lawyers in CIS countries: analysis of international law and standards, [http://icj.wpenet.netdna-cdn.com/wp-content/uploads/2013/06/icj\\_opinion\\_lawyers\\_discipline\\_law\\_ENG.pdf](http://icj.wpenet.netdna-cdn.com/wp-content/uploads/2013/06/icj_opinion_lawyers_discipline_law_ENG.pdf), 18 June 2013, p. 7.

<sup>192</sup> The other route—for lawyer-attorneys—is controlled exclusively by the Ministry of Justice.

in which those who took the exam contested the results of the exam, but were unsuccessful in their efforts to obtain their answer sheets to support an appeal against the results.

The ICJ has found insufficient awareness of the importance of the regulation of exams in order to ensure that only those with a high level of legal knowledge enter the profession. A common problem is supply of preparation materials which would facilitate preparation for exams and give guidance both to the candidates and the evaluators as to what should be expected from the candidate. Detailed materials to facilitate preparation of candidates are usually not published in sufficient quantity and quality. In Tajikistan some lawyers said that they did not know where or whether it would be possible to even obtain materials to assist candidates for preparation for the qualification exam.

A serious problem in Kazakhstan and Kyrgyzstan is the exemption of some categories of persons, especially former law enforcement officials, from the qualifying exam. Lawyers reported to the ICJ that that such procedures lead to a general degradation of the profession and of its independence and facilitate the creation of lawyers who are dependent on the law enforcement authorities or other powerful interests.

### *Professional ethics*

In the course of its research, the ICJ noted with concern that codes of ethics of the legal profession do not play an important role among the legal community in Central Asia. Although individual lawyers in the region may often have strong personal convictions of professional ethical behaviour, nevertheless these do not seem to stem from collectively accepted principles of the work of the profession, consistently applied and enforced. Unlike in countries with a longer tradition of a strong legal profession, the ethical codes or rules of behaviour are not seen as having a binding force or having the potential to improve the quality of the profession. The legal profession as a rule does not perceive itself as the collective bearer of special functions and responsibilities whose behaviour must always correspond to the rules of ethics developed by the profession; nor does it appear to accept that the profession itself must be responsible for upholding such rules among its members. Lawyers' associations in the region therefore have an important role to play in promoting codes of ethics and providing regular information and training to their members on the ethical standards of the profession.

### *Disciplinary action and termination of licenses*

The Ministry of Justice in each of the Central Asian countries (except in relation to one part of the profession Tajikistan), is involved in processes related to the revocation of the licence of an individual to practice law. However, the extent of their involvement as well as the procedure itself differs as between each country. In Kazakhstan, for example, the Ministry of Justice may not of its own motion revoke a licence but is required to submit a request to a court or the Collegium of Lawyers to revoke it; this mechanism provides - at least in law - procedural protection against arbitrariness.<sup>193</sup> However this does not always protect against abuse in practice: in two recent cases, judges issued decisions requiring the Ministry of Justice to revoke licences of defence lawyers acting for a human rights defender, where the lawyers were seen as have been excessively active in his defence.<sup>194</sup>

In Kyrgyzstan and in Tajikistan (in so far as lawyer-attorneys are concerned), a lawyer's licence to practice law may be revoked by the Qualifications Board, which in both countries is established under the Ministry of Justice. The Board may revoke the licence at its discretion, regardless of any grounds, with a possibility to challenge the lawfulness of such decision on appeal being open to the lawyer. In Turkmenistan, the license may be annulled by the Ministry of Justice or a court. In Uzbekistan, it is the Qualifications Board, one half of which is composed of representatives of the Ministry of Justice, which primarily decides to terminate the license,

<sup>193</sup> Law of the Republic of Kazakhstan on Lawyers' Activities, article 12 (4).

<sup>194</sup> ICJ Legal Opinion, Disbarment Proceedings against Lawyers in Kazakhstan, 13 February 2013, <http://www.icj.org/disbarment-proceedings-against-lawyers-in-kazakhstan/>.

its decision being subject to appeal to the courts. The license may be terminated pursuant to a court order, although the laws of Uzbekistan on lawyers' activities do not stipulate any grounds of such termination.

The apparent increasing trend in disciplinary action leading to termination of lawyers' licenses, for actions of lawyers which clearly constitute proper professional and ethical behaviour is of great concern to the ICJ.<sup>195</sup> Lawyers may be threatened with sanctions for loyally and rigorously defending their clients interests, within the bounds of the law, including for example in criminal cases by challenging the decisions and actions of law enforcement bodies and other authorities. In some cases the threats are verbal alone and in other cases formal disciplinary proceedings have been initiated.<sup>196</sup> Too often, pressure by means of a threat of disbarment of lawyers comes not only from law enforcement agents, but also from judges. This points to a lack of understanding by judges of the role that lawyers play in the criminal procedure, and may also indicate a lack of judicial independence from the prosecution. Sometimes law enforcement officials threaten lawyers with disbarment if they continue to maintain a legal challenge or an active position on a case.

In general, it is the most active lawyers who face threats of disciplinary action from a judge or law enforcement agents. It was said by a number of lawyers that if a lawyer challenges the judge, for example by filing multiple motions in the court, a judge may issue an "interim ruling"<sup>197</sup> to initiate disciplinary action against the lawyer, and that this is a risk of which lawyers are well aware. Such a tool in judges' hands is likely to create a chilling effect upon lawyers actively defending their clients in court. By encouraging lawyers to perform their professional functions less effectively, the threat of unjustified disciplinary action being initiated by a judge impedes the profession's capacity to defend human rights. Such practices may contradict international standards according to which in proceedings taken against a lawyer for failing to show proper respect to the court: "...sanction against him [or her] shall not be imposed by a judge or judges who participated in the proceedings which gave rise to the charge against the lawyer..."<sup>198</sup>

At the same time, those lawyers who violate professional ethics and undermine the integrity of the profession, by acting in the interests of law enforcement bodies or powerful private interests, contrary to the interests of their clients. Such lawyers, sometimes known in the region as "pocket lawyers", are a persistent problem throughout Central Asia. The problem arises in particular in regard to lawyers appointed by the courts or investigating authorities to represent defendants in criminal proceedings who could not otherwise afford a lawyer. Throughout the region, there are frequent reports of some such lawyers acting in the interests of the prosecution rather than in defence of their clients' rights. The phenomenon is recognized as one of the most serious problems of legal communities in Central Asia, however lawyers' associations have not taken, or have not been able to take, effective action to address it, including through the promotion and enforcement of disciplinary action and the application of disciplinary measures. This has had a detrimental effect on the quality and dignity, as well as prestige of the legal profession, and has significantly undermined its effectiveness in protecting human rights and the rule of law.

<sup>195</sup> ICJ, Disciplinary action against lawyers in CIS countries: analysis of international law and standards, 19 June 2013, <http://www.icj.org/disciplinary-action-against-lawyers-in-cis-countries-analysis-of-international-law-and-standards/>.

<sup>196</sup> Disbarment proceedings against lawyers in Kazakhstan, <http://www.icj.org/disbarment-proceedings-against-lawyers-in-kazakhstan>.

<sup>197</sup> "An interim decision" or "a particular decision"—a judicial decision which does not concern the merits of the case, but only lawyers or other parties to the case.

<sup>198</sup> Singhvi Declaration, *op. cit.*, para. 88.



## B) LAWS REGULATING ISSUING OF A LICENCE TO PRACTICE

### Republic of Kazakhstan

In Kazakhstan, entrance to the legal profession is granted to nationals of the Republic of Kazakhstan who have a degree in law and a license to pursue lawyers' activities, and belong to a collegium of lawyers.<sup>199</sup> The licence to practice law is issued by the Ministry of Justice,<sup>200</sup> following completion of an internship of between six months and one year, and an evaluation.<sup>201</sup> Former judges, prosecutors and investigators are, however, exempted from the evaluation requirement, provided that they have not been dismissed on "negative grounds".<sup>202</sup> In recent years, the legal community of Kazakhstan has strengthened the qualification system, by securing the equal application of the requirement for an internship in a collegium of lawyers for all applicants, including those with more than 10 years' professional experience in the law-enforcement agencies, and creating a two-level qualifying exam system (see section below on examination).

Most lawyers believe that the power of the Ministry of Justice to issue licenses on the basis of the decision made by the evaluation commission which also includes the representatives of other State bodies restricts their independence in acquiring the status of a lawyer. It must be noted however that Kazakhstan has a well regulated system of termination or suspension of a licence where the role of the Collegium of Lawyers is significant and greater than in other Central Asian states.

### Kyrgyz Republic

In Kyrgyzstan, only nationals of the Kyrgyz Republic who hold a license to do so may practice law.<sup>203</sup> Persons holding a degree in law and having at least one year of legal experience and having no criminal record are permitted to take an examination for entry to the profession.<sup>204</sup> Persons who have been dismissed from the law-enforcement or other State agencies under dishonourable circumstances, or who have been convicted of an intentional criminal offence, or have found legally incapable, are not permitted to practice as lawyers.<sup>205</sup> Lawyers may not act as civil servants.<sup>206</sup>

Granting, suspension and revocation of the licence to practice law are under the authority of the Ministry of Justice, with review by the courts. Legal practice licences are granted by the Ministry of Justice of the Kyrgyz Republic to those who have passed a qualifying exam. The license is issued for an unlimited period of time and is applicable throughout the Kyrgyz Republic.<sup>207</sup> A decision on an application for a licence to practice law must be made within one month following the submission of an application; a decision to refuse a licence must be accompanied by a statement of reasons for the refusal.<sup>208</sup> A decision to refuse to issue a licence to practice law may be appealed before the courts.<sup>209</sup>

<sup>199</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 7 (1). Article 7 further states that no access to the profession in Kazakhstan is granted to persons declared legally incapable or partially incapable, having a criminal record in view of intentional offences, dismissed from the Public Service or law-enforcement bodies, expelled from the collegiums of lawyers, or persons whose license to pursue lawyers' activities has been revoked.

<sup>200</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 9.

<sup>201</sup> *Ibid.*, articles 8 (6) and 9 (1).

<sup>202</sup> *Ibid.*, articles 8 and 8-1. The law does not specify what "the negative grounds" mean and does not contain a precise or approximate list of such grounds.

<sup>203</sup> Law of the Kyrgyz Republic on Lawyers' Activity, articles 4 (1) and 7 (1).

<sup>204</sup> *Ibid.*, article 8 (2).

<sup>205</sup> *Ibid.*, article 5; Legal practice is also excluded under this article for reasons of legal incapacity and for those who have been convicted of an intentional criminal offence.

<sup>206</sup> *Ibid.*, article 4.

<sup>207</sup> Chapter 32 of the Regulation "On licensing of certain types of business activities", approved by the Government of the Kyrgyz Republic on 31 May 2001.

<sup>208</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 9 (3).

<sup>209</sup> *Ibid.*, article 9 (4).

Certain categories of persons are entitled to obtain a license without having to pass a qualifying exam. These include those who have five years' professional experience as a lawyer or working for the prosecutor's office, the Ministry of the Interior, the Ministry of National Security, courts, legal departments of the Administration of the President of the Kyrgyz Republic, the Office of the Prime Minister of the Kyrgyz Republic, and the two chambers of the Parliament,<sup>210</sup> as well as members of the Parliament who are professional jurists.<sup>211</sup>

Lawyers reported to the ICJ that they find it problematic in terms of the integrity and independence of the legal profession that individuals with five years' work experience, in particular as civil servants, are granted exemptions from taking the examination to obtain a lawyer's licence. Under the existing law, for instance, a Ministry of Interior officer with five years' professional experience may procure a license without having to take an exam. Concern among the legal community included the fact that licencing of individuals to practice law, who do not have sufficient knowledge and skills is detrimental to the quality of legal services provided to clients. Furthermore, concern was expressed that many former State officials, including people who have been dismissed on the grounds of dishonourable conduct, have been granted licences to practice as lawyers. Lawyers see this system as undermining the integrity and independence of the legal profession. The matter is addressed in a draft law that includes mandatory examination requirements for the granting of licences to practice law for all individuals, regardless of prior professional experience or place of employment.<sup>212</sup>

## Republic of Turkmenistan

As a general rule, practicing lawyers in Turkmenistan must be nationals of Turkmenistan who are permanent residents of the country and have a degree in law.<sup>213</sup> A lawyer cannot be a civil servant and with limited exceptions, may not pursue any other paid activities.<sup>214</sup> Access to the legal profession is barred to those dismissed from the judicial or law-enforcement authorities on account of disciplinary misconduct for one year following their dismissal; individuals who have a criminal conviction which has not been removed from the official record; those declared legally incapable or partially incapable; those expelled from a collegium of lawyers for professional misconduct, or whose license to practice as a lawyer has been revoked.<sup>215</sup>

Licences to practice law, and their suspension and revocation, are under the control of the Ministry of Justice, which severely restricts access to the profession. There are approximately 200–300 lawyers in Turkmenistan according to the information available to the ICJ, which means a dramatic shortage of lawyers in the country, leaving tens of thousands of persons without any access to legal assistance. Licences to practice as a lawyer are issued by and registered with the Ministry of Justice; persons holding such licences are granted the status of lawyer once they have joined a collegium of lawyers.<sup>216</sup> A license may be granted to individuals who have a degree in law and who have continuous professional legal experience of at least two years, or have completed an internship of six to twelve months with a collegium of lawyers.<sup>217</sup>

Although the law provides that both decisions to refuse to issue a licence are subject to appeal before the courts,<sup>218</sup> the Law on Lawyers' Activities does not establish clear grounds or procedure for refusing to issue the license.

<sup>210</sup> *Jogorku Kenesh*—legislative body (Parliament) of the Kyrgyz Republic.

<sup>211</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 9 (2).

<sup>212</sup> Draft Law on Advokatura in the Kyrgyz Republic and Lawyers' Activity, article 2 (1).

<sup>213</sup> Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 8 (1).

<sup>214</sup> *Ibid.*, article 8 (3).

<sup>215</sup> *Ibid.*, article 8 (1).

<sup>216</sup> *Ibid.*, article 9 (1, 3).

<sup>217</sup> *Ibid.*, articles 9 (2) and 12 (2).

<sup>218</sup> *Ibid.*, article 10 (4).

## Republic of Tajikistan

Membership of the legal profession in the Republic of Tajikistan may be achieved in two ways: either by joining a collegium of lawyers or by receiving a license from the Ministry of Justice to provide paid legal services as a “lawyer-attorney”.<sup>219</sup> To join a collegium the candidate must:

- be a national of the Republic of Tajikistan;
- have a degree in law;
- either have two years’ professional legal experience or have completed an internship of six months to one year; and
- have passed an assessment of the qualifications board of the collegium of lawyers.<sup>220</sup>

Admission to a collegium of lawyers is granted by the presidium of the collegium, which decides to admit a person who meets the requirements.<sup>221</sup> The ICJ was told that the collegia often do not have developed criteria of objective evaluation of candidates and some of the collegia may not even have any examination which is used to evaluate candidates. The ICJ considers that while the qualification process through collegia ensures independence of the decision-making, it does not meet the requirement of ensuring of the high quality of the candidates who are qualified to practice law. To ensure this high standard, the rules and criteria for admission must be transparent, well developed and applied consistently in order to guarantee the integrity of the profession as well as prevent any possible manipulation or decisions regarding admission not based on having the necessary qualifications. In this regard the ICJ is concerned that several independent collegia of lawyers in Tajikistan use different approaches when their qualification bodies to make an assessment of the candidates to grant access to the profession.

There is also a special type of licenses for “lawyer-attorneys” issued directly by the Ministry of Justice. Under this system, a lawyer can be authorized to provide legal services as a “lawyer-attorney” by the Ministry of Justice, which grants a license.<sup>222</sup> Such a license may be issued to a national of the Republic who has:

- a degree in law;
- two years’ professional legal experience;
- no criminal record; and
- has obtained a positive decision from the Ministry of Justice’s Qualifications Board, which is composed of Ministry of Justice officials.<sup>223</sup> This Qualifications Board decides to grant or to refuse to issue a license on the receipt of applications and following an expert examination.<sup>224</sup>

The admission procedure suffers from serious flaws. It was reported that the examination is not well developed. There is a highly problematic practice of arbitrary evaluation, which is not based on objective, clear and established criteria which could ensure predictable evaluation. It was said by lawyers that if the Board for any reason not related to professional knowledge and skills does not want a candidate to pass the exam it can easily fail him or her and does so in practice. The same applies when the Board wishes someone to successfully pass it. Therefore there is potential for a biased decision which is facilitated by lack of regulation of the procedure and poor practices.

<sup>219</sup> Law of the Republic of Tajikistan on Advokatura, article 29 (1).

<sup>220</sup> *Ibid.*, article 18 (1) and (2).

<sup>221</sup> *Ibid.*, article 18 (2).

<sup>222</sup> *Ibid.*, article 29 (1); Chapter 47, Regulation “On licensing of certain types of activities”, approved by Resolution No. 172 of the Government of the Republic of Tajikistan on 3 April 2007.

<sup>223</sup> Chapter 47, Regulation “On licensing of certain types of activities”, approved by Resolution No. 172 of the Government of the Republic of Tajikistan on 3 April 2007.

<sup>224</sup> Regulation “On qualifications evaluation board responsible to conduct a qualifications evaluation for the purpose of granting a license to operate as a lawyer-attorney”, approved by the Minister of Justice of Tajikistan on 8 October 2007, No. 307.

It is reported that in practice, contrary to national law, individuals who have criminal records have been granted licenses by the Ministry of Justice to practice as lawyer-attorneys. These are said to include former law-enforcement officials who have committed serious criminal offences (such as torture or corruption) in the past. This undermines the standards of the legal profession, adversely affecting the reputation of the profession as a whole amongst the general public.

Furthermore, the current draft of the law to be adopted in Tajikistan will terminate the status of all lawyers after one year of the “transitional period”.<sup>225</sup> The draft law requires all lawyers in the country to re-sit an examination, organized by the Qualification Commission under the Ministry of Justice, to obtain the status of a lawyer.<sup>226</sup> This provision is of particular concern to the ICJ in the light of the reform in Uzbekistan described in the following section.

## Republic of Uzbekistan

As a general rule, licences to practice law in the Republic of Uzbekistan are granted to nationals of the Republic of Uzbekistan who have obtained degree in law.<sup>227</sup> Licences cannot be issued to persons declared legally incapable or partially incapable or those with a criminal record.<sup>228</sup> In order to procure a license, the candidate lawyer must have at least two years’ professional legal experience, including an internship with a lawyers’ association (lawyers’ bureau, lawyers’ firm, collegium of lawyers or legal advice office) for at least six months, and must take a qualifying examination.<sup>229</sup>

Licences to practice law are issued by the Ministry of Justice or its local bodies pursuant to the decisions of the competent qualifications boards.<sup>230</sup> Once the candidate has passed the qualifying examination held by the Qualifications Board, he or she applies for a license to the relevant body of the Ministry of Justice within three months.<sup>231</sup> A licenced lawyer may not pursue any other paid activities, with some exceptions.<sup>232</sup>

The ICJ considers that the independence of the procedure for obtaining a licence to practice as a lawyer in Uzbekistan is impaired by the fact that one half of the members of the Qualifications Board are representatives of the Ministry of Justice, and the fact that the role and discretion of the Qualifications Board is not limited by written, clear, objective standards in relation to the content or evaluation of in the exam. This can lead to situations where members of the Qualifications Board ask questions designed to ensure that a candidate fails in the license exam. The UN Special Rapporteur on the independence of judges and lawyers in this regard stated: “In this connection, it is important to grant the new Chamber of Lawyers the right to establish independent bodies regulating access to the legal profession, i.e. to the Chamber of Lawyers. Access to the legal profession should be granted on merit only, based on an objective qualification examination. Therefore, provisions related to the current licensing scheme under the Ministry of Justice taken together with the compulsory membership of the newly established Chamber of Lawyers require urgent reconsideration so as to secure compliance with international standards.”<sup>233</sup>

Within three months of being granted a licence, the lawyer must take the lawyer’s oath and either join or create, individually or together with other license holders, a law firm or collegium of lawyers.<sup>234</sup> Within three business days following the registration of the lawyers’ association or

<sup>225</sup> Draft Law of the Republic of Tajikistan on Lawyers’ Activities and Advokatura, article 45 (1).

<sup>226</sup> *Ibid.*

<sup>227</sup> Law of the Republic of Uzbekistan on Advokatura, article 3 (1).

<sup>228</sup> *Ibid.*, article 3 (2).

<sup>229</sup> *Ibid.*, article 3–1 (2).

<sup>230</sup> *Ibid.*, article 3–1 (1).

<sup>231</sup> *Ibid.*, article 3–1 (4).

<sup>232</sup> *Ibid.*, article 3 (3).

<sup>233</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Situation in specific countries and territories, A/HRC/11/41/Add. 1, 19 May 2009, para. 357.

<sup>234</sup> Law of the Republic of Uzbekistan on Advokatura, article 3–1.

the receipt by the justice authority of the documents confirming that the candidate has joined the existing lawyers' association, the latter shall be issued with a lawyer's certificate.<sup>235</sup>

The turning point for the legal profession's independence in Uzbekistan was the reform of 2008, described in Chapter II above. Following the reform, all lawyers were required to retake the qualifying exams. One effect of that wholesale re-examination was that the members of the Qualification Commission sometimes failed the "undesirable" lawyers in the exam, or warned a particular lawyer that he or she should be less active and, for example, should not too actively participate in NGO activities. The exam was therefore used as a tool to intimidate lawyers. As a result, the process of re-examination significantly restricted the independence of the profession and had a chilling effect on individual's lawyers independent work.

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<sup>235</sup> *Ibid.*, article 3-1 (7).

## C) LAWS REGULATING ORGANIZATION OF THE QUALIFICATION EXAMINATION

### Republic of Kazakhstan

In Kazakhstan, entry to the legal profession is the responsibility of the Qualifications Boards established under the local offices of the Ministry of Justice in the regions and cities. The Ministry of Justice approves the composition of these boards, as well as their rules of procedure,<sup>236</sup> and government rules determine the criteria and procedure for qualification.<sup>237</sup> Under the Law and the Rules,<sup>238</sup> each Qualification Board consists of seven members—three lawyers, two representatives of the justice authorities, a legal scholar and a member of the local representative body in the Republic of Kazakhstan.<sup>239</sup> Each Board is presided over by the deputy head of the local office of the Ministry of Justice in charge of Qualification Board matters.<sup>240</sup> The members who are lawyers are nominated by the Presidium of the collegium of lawyers, but are appointed by the local Ministry of Justice office.<sup>241</sup>

The qualification exam is open to all those who have completed a legal internship. The examination is in two parts: a multiple-choice examination and an oral exam.<sup>242</sup> The list of questions included in the multiple choice examination is approved at a very high level—by the decree of the Ministry of Justice,<sup>243</sup> which is not typical for Central Asia. Results are calculated automatically by computer program;<sup>244</sup> 70% or more correct answers are required to pass. The list of questions included in the oral examination of candidates (the second stage of the examination) must also be approved by the Ministry of Justice.<sup>245</sup> This part of the examination is graded on a five-point grading scale; each member of the Board grades the individual's performance individually, and the average of the grades is then calculated. An average of at least four points is required to pass.<sup>246</sup>

Following the examination, the Board delivers a reasoned evaluation decision.<sup>247</sup> The Board's decision may be challenged before the courts.<sup>248</sup> A candidate who has failed the evaluation may retake it one year later.<sup>249</sup>

### Kyrgyz Republic

Entry to the profession is the responsibility of the Qualifications Board, which is established under the Ministry of Justice of the Kyrgyz Republic.<sup>250</sup> The Qualification Board operates based on the regulations,<sup>251</sup> which are approved by the Ministry of Justice along with the list of branches of law

<sup>236</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 8–1 (1).

<sup>237</sup> *Ibid.*, Article 8–2 (1); and Decision No. 653 of the Government of the Republic of Kazakhstan of 22 May 2012, "To approve the Rules for conducting an evaluation of the individuals who have completed an internship and purport to pursue lawyers' activities or notarial activities" (hereinafter—"Rules for conducting an evaluation [of aptitude] to pursue lawyers' activities"), <http://www.adilet.zan.kz/rus/docs/P1200000653>.

<sup>238</sup> Rules for conducting an evaluation [of aptitude] to pursue lawyers' activities.

<sup>239</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 8–1 (1) and the Rules for an evaluation [of aptitude] to pursue lawyers' activities.

<sup>240</sup> Rules for conducting an evaluation [of aptitude] to pursue lawyers' activities, paras. 2–8.

<sup>241</sup> *Ibid.*, para. 2–4 and 2–11.

<sup>242</sup> *Ibid.*, para. 9.

<sup>243</sup> *Ibid.*, para. 10.

<sup>244</sup> *Ibid.*, para. 12.

<sup>245</sup> *Ibid.*, para. 14.

<sup>246</sup> *Ibid.*, para. 15.

<sup>247</sup> *Ibid.*, para. 16–1.

<sup>248</sup> *Ibid.*, para. 16–2.

<sup>249</sup> *Ibid.*, para. 16–4.

<sup>250</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 8 (4).

<sup>251</sup> The regulations on the Qualification Board adopted by the Ministry of Justice.

to be included in the examination, the procedure for taking the exam.<sup>252</sup> Under the Regulation on the Qualifications Board,<sup>253</sup> the Board consists of five people, which should include the Ministry of Justice officers and representatives of public associations of lawyers. The composition of the board is approved by a decree of the Ministry of Justice. Currently, the Qualifications Board consists of three Ministry of Justice officers and two representatives of lawyers' associations.<sup>254</sup>

The Qualifications Board's decisions on the qualifying exam are made on the basis of examination results, without a vote.<sup>255</sup> The qualifying examinations are multiple-choice tests in form,<sup>256</sup> at least 70 per cent correct answers being required to pass.<sup>257</sup> The secretary of the Qualifications Board keeps minutes indicating the time and place of the meeting, the composition of the board, full name of the examinee and the code of his or her test, as well as the amount of correct answers for the calculation of the test result.<sup>258</sup> However, unlike in Kazakhstan, where the results are scored and results are given by a computer instantly, the graded examination papers are not returned to the candidates in Kyrgyzstan, contributing to a perception that the system lacks transparency.

An individual who has passed the qualifying examination is issued with a license within one month from the application for the license.<sup>259</sup> An individual who has failed the qualifying examination may retake it one year later.<sup>260</sup> The decision of the Qualifications Board can be appealed to the courts within one month from the date when the examination results were announced.<sup>261</sup>

The ICJ heard that a new procedure for holding qualification exams is currently being developed. It was reported that the qualifications procedure will include several stages, including a written and oral examination and an interview.

## Republic of Turkmenistan

The procedure regulating entry to the profession is adopted by a decree of the Ministry of Justice of Turkmenistan.<sup>262</sup> However, there is a lack of available information about the rules and procedure of the examination for prospective lawyers in Turkmenistan. It follows from the small number of lawyers, which moreover has consistently declined over the years,<sup>263</sup> that the examination is not regularly organized, making access to the profession extremely difficult. This raises concern over the obligation of the state to guarantee that anyone possessing necessary qualifications is entitled to become a lawyer without discrimination.<sup>264</sup> This also restricts access to legal assistance to members of the public and raises concerns regarding access to justice and the protection of the right to a fair trial of accused persons, given the lack of lawyers available to defend them.

## Republic of Tajikistan

As mentioned above, there are two separate procedures for qualification as a lawyer in Tajikistan, reflecting the split in the profession between lawyers who are members of a collegium and "lawyer-attorneys".

<sup>252</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 8 (3) and (5).

<sup>253</sup> "Regulation on the Qualifications Board under the Ministry of Justice of the Kyrgyz Republic [responsible] for matters related to lawyers' activities", approved by Decision No. 79 of the Government of the Kyrgyz Republic on 28 February 2011 (hereinafter—the "Regulation on the Qualifications Board").

<sup>254</sup> See the composition on the Ministry of Justice website [rus]: [http://minjust.gov.kg/?page\\_id=4239](http://minjust.gov.kg/?page_id=4239).

<sup>255</sup> Regulation on the Qualifications Board, para. 8.

<sup>256</sup> *Ibid.*, para. 21.

<sup>257</sup> *Ibid.*, para. 22.

<sup>258</sup> *Ibid.*, para. 23.

<sup>259</sup> *Ibid.*, para. 26.

<sup>260</sup> *Ibid.*, para. 27.

<sup>261</sup> *Ibid.*, para. 25.

<sup>262</sup> The Order of the Minister of Justice "On Approving the Procedure of Qualification Examination for Candidates Seeking Admission to the Bar and Practicing Lawyers in Turkmenistan" of 6 April 2006 (No. 17OV).

<sup>263</sup> See Analysis of the legislation regulating legal profession in Central Asia states, *op. cit.*, p. 23.

<sup>264</sup> See Singhvi Declaration, *op. cit.*, para. 80.

The first procedure, for lawyers who are members of Collegia, is governed by the Collegia themselves. The Qualifications Board, an independent body of the Collegium of Lawyers, holds examinations for those wishing to join the Collegium.<sup>265</sup> Under the Regulation on the Qualifications Board,<sup>266</sup> the members of the Board are elected at the General Meeting for the term of five years, by secret or, alternatively, open ballot.<sup>267</sup> Their number is determined during the election, based on the workload and the total number of lawyers.

It is reported by lawyers that some collegia admit individuals who fail to meet the relevant requirements. This is seen as due to corruption, which is facilitated by the fact that qualifying examinations are oral for the most part. In many collegia, no written tests have been elaborated, and no methods or criteria for the assessment of the exams of these collegia are available.

The second procedure, the Ministry of Justice Board's procedure for issuing licenses to operate as a lawyer-attorney, is governed by the Regulation on the Qualifications Evaluation Board.<sup>268</sup> Under the regulation, a Qualifications Board for lawyer-attorneys is established under the Ministry of Justice pursuant to the Minister of Justice's decree, and consists of seven members.<sup>269</sup> All members of the Board are representatives of the Ministry of Justice. In accordance with the regulation, the Minister of Justice appoints the Board President from among heads and specialists of departments of the Ministry of Justice.<sup>270</sup> The regulation also specifies that the Head of the Individual Legal Aid and Legal Work Department serves as Deputy to the President of the Qualifications Evaluation Board and the secretary of the Board is one of the specialists of this Department.<sup>271</sup>

The qualification tests to become a lawyer-attorney are developed by the Qualifications Board of the Ministry of Justice and approved by the President of the Qualifications Board.<sup>272</sup> Candidates for lawyer-attorney licences must take a written test that includes different branches of law.<sup>273</sup> The Board also has the authority to interview each candidate and ask additional questions of legal substance during an interview, which is a mandatory part of the evaluation of candidates.<sup>274</sup> The Board's decisions to grant or refuse to grant a license to a candidate is made by the majority of the total number of the Board's members and is announced at once.<sup>275</sup> The candidate may appeal to the courts against the refusal to grant a license.<sup>276</sup>

There is therefore a clear division of the two parallel non-contiguous systems to become a lawyer. This is unique for the region. The fact that one means of access to the profession is within the control of the profession itself at least ensures control over and independence of a significant part of the profession. Yet, both systems fail to satisfy the requirement that only those who meet the necessary qualifications and integrity are qualified as lawyers. They have so far failed to ensure transparency, fairness and predictability of the selection procedure. The current reform attempts to strengthen the institutional capacity of the legal profession while imposing governmental control over questions of entry to the profession against lawyers (See Chapter II section C). By rejecting self-governance as a model but rather empowering the Ministry of Justice to decide on matters concerning entry to the profession, there is a risk that the

<sup>265</sup> Law of the Republic of Tajikistan on Advokatura, article 17.

<sup>266</sup> "Regulation on the Qualifications Board of the collegium of lawyers for the Sughd Region of the Republic of Tajikistan" approved by the General Meeting of the collegium of lawyers of the Sughd Region on 15 March 2003 (hereinafter—the "Regulation on the Qualifications Board of the collegium of lawyers for the Sughd Region").

<sup>267</sup> *Ibid.*

<sup>268</sup> Regulation on the Qualifications Evaluation Board responsible to conduct a qualifications evaluation for the purpose of granting a license to operate as a lawyer-attorney, approved by Resolution No. 307 of the Ministry of Justice of the Republic of Tajikistan on 8 October 2007 (hereinafter—the "Regulation on the Qualifications Evaluation Board").

<sup>269</sup> Regulation on the Qualifications Evaluation Board, para. 1.3.

<sup>270</sup> *Ibid.*, para. 1.3.

<sup>271</sup> *Ibid.*, para. 1.3.

<sup>272</sup> *Ibid.*, para. 3.4.

<sup>273</sup> *Ibid.*, para. 4.2.

<sup>274</sup> *Ibid.*, para. 4.2.

<sup>275</sup> *Ibid.*, para. 4.3.

<sup>276</sup> *Ibid.*, para. 5.2.



reform will undermine the independence of the profession, without tackling the problem of the quality of evaluation.

## Republic of Uzbekistan

The law of the Republic of Uzbekistan contains provisions for the establishment, composition and role of the Higher Qualifications Board as well as the local Qualifications Boards, which operate under the local offices of the Chamber of Lawyers.

Under the Regulation on the Higher Qualification Board,<sup>277</sup> the Higher Qualification Board is founded pursuant to a joint decision made by the Chamber of Lawyers and the Ministry of Justice. It is to be composed of an equal number of lawyers and officers of the Ministry of Justice. It examines appeals against the decisions of the Qualifications Boards and analyses the work of Qualifications Boards.

Under the Regulation on Qualification Boards,<sup>278</sup> Qualification Boards are founded pursuant to the joint decisions of the local offices of the Chamber of Lawyers and Ministry of Justice. The functions of the Qualification Boards include holding qualifications examinations for those wishing to obtain a lawyer's status, arranging for the lawyer's oath-taking, and examining disciplinary cases against lawyers. They are required to be composed of an equal number of lawyers and Ministry of Justice officers.

The composition of Qualification Boards is approved by the joint decisions of the heads of the local offices of the Chamber of Lawyers and the local justice authority. The number of their members may range from 8 to 10, including the co-presidents and other members of the qualifications boards, elected for the term of three years.<sup>279</sup> The lawyer members of the qualifications boards are nominated from among the lawyers listed in the National Register of Lawyers with at least three years' professional experience.<sup>280</sup> Lawyer members of the Higher Qualifications Board are nominated from among the lawyers with at least five years' professional lawyer's experience.<sup>281</sup>

A meeting of the Qualifications Board is deemed quorate if it is attended by at least two thirds of its members.<sup>282</sup> Decisions are made by a simple majority of votes cast with the President's vote being decisive in case of equally divided votes.<sup>283</sup>

The qualifying examination includes written and oral tests. The Chamber of Lawyers, together with the Ministry of Justice, approves questions for the written exam,<sup>284</sup> which consists of a maximum of five questions relating to the application of different aspects of the law in practice.<sup>285</sup> During the oral examination, members of the Qualifications Board may ask additional questions.<sup>286</sup>

The interested parties may appeal against the decisions of the qualifications boards to the Higher Qualifications Board within one month following the receipt of the extract from the qualifications board's minutes.<sup>287</sup> The decisions of the Qualifications Boards may also be challenged before the courts.<sup>288</sup>

<sup>277</sup> Regulation on the Higher Qualifications Board under the Chamber of Lawyers in the Republic of Uzbekistan, approved by decree No. 68 of the Minister of Justice of 14 March 2009 (hereinafter—the "Regulation on the Higher Qualifications Board").

<sup>278</sup> Regulation on the Qualifications Boards under the local offices of the Chamber of Lawyers of the Republic of Uzbekistan, approved by decree No. 69 of the Minister of Justice of 14 March 2009 (hereinafter—the "Regulation on Qualifications Boards").

<sup>279</sup> Regulation on Qualifications Board, para. 8.

<sup>280</sup> *Ibid.*, para. 9.

<sup>281</sup> Regulation on the Higher Qualification Board, para. 8.

<sup>282</sup> *Ibid.*, para. 9.

<sup>283</sup> *Ibid.*, para. 11.

<sup>284</sup> Regulation on Qualifications Board, para. 29–1.

<sup>285</sup> *Ibid.*, para. 29–2.

<sup>286</sup> *Ibid.*, para. 31.

<sup>287</sup> *Ibid.*, para. 55.

<sup>288</sup> *Ibid.*, para. 56.

The Higher Qualifications Board holds a qualifying exam under exceptional circumstances only, *inter alia*, when there are reasonable doubts about the objectiveness and impartiality of a qualifications board.<sup>289</sup> The qualifying examination is held by the Higher Qualifications Board in accordance with the Regulation on the Qualifications Boards under the local bodies of the Chamber of Lawyers.<sup>290</sup> The decisions of the Higher Qualifications Board may also be challenged before the court.<sup>291</sup>

The independence of the procedure for obtaining a licence to practice as a lawyer in Uzbekistan is impaired by the inclusion on the Qualifications Board of representatives of the Ministry of Justice (one half of its members) who can ask questions during the examination—which are not on the list—of any candidate who is “undesired,” so that he or she fails in the license exam. The (former) UN Special Rapporteur on the Independence of Judges and lawyers noted in his communication to the government of Uzbekistan in this regard that: “. . . in order to ensure the independence and self-governance of the legal profession, access to the profession must be governed by independent bodies established by the legal profession itself.”<sup>292</sup>

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<sup>289</sup> Regulation on the Higher Qualifications Board, para. 23–1.

<sup>290</sup> *Ibid.*, para. 23–2.

<sup>291</sup> *Ibid.*, para. 35.

<sup>292</sup> UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41/Add. 1, 29 May 2009, para. 357.

## D) LAWS REGULATING SUSPENSION, REVOCATION OF LICENCES AND DISCIPLINARY PROCEEDINGS

### Republic of Kazakhstan

Suspension and revocation. In Kazakhstan, the law distinguishes between grounds for suspending the licence which result in a prohibition to pursue lawyers' activities during the period of the suspension on the one hand, and those which result in a withdrawal and termination of the license to pursue lawyers' activities on the other hand. An individual's licence to practice law may be suspended on grounds such as discharging various functions incompatible with practice as a lawyer;<sup>293</sup> failure to pay membership fees<sup>294</sup> or criminal activity.<sup>295</sup> The license is suspended by the Ministry of Justice pursuant to the relevant request of the presidium of the collegium of lawyers or motion of the local justice authority, or, alternatively, pursuant to the lawyer's written request.<sup>296</sup> Where a licence is suspended, it may be renewed by (a decree of) the Ministry, issued upon request by the lawyer (in writing), within ten calendar days of the suspension.<sup>297</sup> The lawyer is entitled to appeal against the decision to suspend or to refuse to renew the license to the courts.<sup>298</sup>

The Ministry of Justice initiates the procedure for termination of the licence and the civil courts make the decision to terminate the licence.<sup>299</sup> Grounds for such termination include alleged gross or systematic violation of the laws or the principles governing the organization and activities of the legal profession; or inability to discharge professional functions as a result of insufficient qualifications.<sup>300</sup> In the latter context, the statement of claim requesting the termination of the license may be drafted on the basis of a request of the presidium of the collegium of lawyers (see section on discipline below). In the face of an allegation that a lawyer has committed a gross or systematic violation of the laws of Kazakhstan or the principles governing the organization and activities of the legal profession when discharging his or her professional functions, the statement of claim concerning the termination of the license may be drafted on the basis of a motion lodged by the local justice authority (local branch of the Ministry of Justice).<sup>301</sup>

If a (civil) court decision orders revocation of an individual's licence to practice law, the Ministry of Justice of Kazakhstan is required to terminate the individual's license to practice law. A copy of the certificate (order) of termination issued by the Ministry of Justice is delivered to the person concerned and the courts, law-enforcement authorities and the relevant collegium of lawyers are notified about the decision to terminate the license.<sup>302</sup>

Discipline. Disciplinary proceedings against lawyers in Kazakhstan fall within the competence of the Presidium of the Collegium of Lawyers.<sup>303</sup> In accordance with the Regulation on the Lawyers' Ethics and Disciplinary Proceedings Commission under the Almaty City Collegium of Lawyers (ACCL), disciplinary proceedings may be instituted on the basis of any of the following: complaints (applications) by individuals or legal entities; interlocutory decisions (resolutions) of the

<sup>293</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 11 (2).

<sup>294</sup> *Ibid.*, article 31 (2).

<sup>295</sup> *Ibid.*, article 11 (2-1).

<sup>296</sup> *Ibid.*, article 11 (2).

<sup>297</sup> *Ibid.*, article 11 (4).

<sup>298</sup> *Ibid.*, article 11 (5).

<sup>299</sup> *Ibid.*, article 12 (3).

<sup>300</sup> *Ibid.*, article 12 (3), item 1 and 2.

<sup>301</sup> *Ibid.*, article 12 (4).

<sup>302</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 12: The license may be terminated by the Ministry of Justice in a unilateral manner if: the lawyer has been declared legally incapable or partially incapable, deceased or missing by the final court decision; the lawyer is no longer a national of the Republic of Kazakhstan; the lawyer is exempted from criminal responsibility for the commission of an intentional offence on non-rehabilitating grounds; the lawyer's conviction of an intentional offence becomes final; or the court decision to subject the lawyer to involuntary medical treatment becomes final: Law of the Republic of Kazakhstan on Lawyers' Activity, article 12 (5).

<sup>303</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, Article 30 (2).

courts; motions of the competent State authorities; decisions of the General Meeting (Conference) of the Collegium, President of the Presidium or Presidium of the Collegium, motions of the heads of the legal advice offices, founders of the lawyers' offices; and mass media reports. They may also be initiated by a motion of the relevant local Ministry of Justice office, and where this is the case, a representative of the Ministry takes part in the examination of the complaint.<sup>304</sup>

Disciplinary proceedings may be instituted if there is information to show that the lawyer has violated the requirements of the law, the Code of Professional Ethics of Lawyers or the Charter of the collegium of lawyers.<sup>305</sup> The Regulation on the Lawyer's Ethics and Disciplinary Proceedings Commission under the ACCL specifies that complaints which are not related to the lawyer's professional activities cannot be a valid reason to initiate disciplinary proceedings.

Under the Law and the Regulation on the Lawyer's Ethics and Disciplinary Proceedings Commission under the ACCL, the disciplinary penalties that may be imposed on a lawyer or an intern who has committed a disciplinary offence are: reprimand; rebuke; severe rebuke; expulsion from the collegium of lawyers; and termination of the internship contract.<sup>306</sup> Under the Regulation, the Commission, in deciding on the penalty to impose, must have regard to the gravity of the offence, its effects, the circumstances in which it was committed, previous performance and conduct of the lawyer or intern.<sup>307</sup>

Only one disciplinary sanction may be imposed on a lawyer who has committed a disciplinary offence.<sup>308</sup> The decision of the Collegium of Lawyers' Presidium to impose the penalty may be challenged by the lawyer before the courts.<sup>309</sup> As a general rule, if no further disciplinary penalty is imposed on the lawyer during six months following the initial sanction, he or she shall be deemed to have incurred no disciplinary responsibility.<sup>310</sup>

The disciplinary procedure in Kazakhstan contains some structural and procedural guarantees of independence; therefore the ICJ considers that the system of disciplinary procedure against lawyers is in general balanced and has greater guarantees than those of other Central Asian countries. The ICJ is concerned however over a number of cases where the courts avoided the procedure established by law and avoided consideration of cases by the disciplinary bodies of the collegia in Kazakhstan. This has been done in several recent cases in regard to lawyers defending persons in high-profile criminal trials. The courts avoid the collegia disciplinary bodies and issue interim rulings on the basis of which the Ministry of Justice takes measures against the lawyers concerned.<sup>311</sup>

## Kyrgyz Republic

*Suspension and revocation.* In the Kyrgyz republic, suspension or revocation of a lawyer's licence is by decision of the Ministry of Justice.<sup>312</sup> Grounds for suspension of a licence include election to the Parliament or any other elective office, or appointment as a civil servant.<sup>313</sup> The licence must be revoked at the request of the lawyer, or if he or she ceases to be a national of the Kyrgyz Republic, or commits a gross violation of the law of the Kyrgyz Republic.<sup>314</sup> The decisions of the Ministry of Justice to suspend or revoke the license may be challenged before the

<sup>304</sup> *Ibid.*, article 30 (3).

<sup>305</sup> *Ibid.*, article 30 (4).

<sup>306</sup> *Ibid.*, article 30 (1).

<sup>307</sup> Extracts from Regulation on the Lawyer's Ethics and Disciplinary Proceedings Commission under the ACCL, <http://agka.kz/navigation/VHoksmoC.pdf>.

<sup>308</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 30 (5).

<sup>309</sup> *Ibid.*, article 30 (6).

<sup>310</sup> *Ibid.*, article 30 (7).

<sup>311</sup> E.g. ICJ Legal Opinion, Disbarment proceedings against lawyers in Kazakhstan, 13 February 2013, [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/Expert-legal-opinion\\_Nurmasheva\\_ENG.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/Expert-legal-opinion_Nurmasheva_ENG.pdf).

<sup>312</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 10 (1).

<sup>313</sup> *Ibid.*, article 10 (2).

<sup>314</sup> *Ibid.*, article 10 (3).

courts within one month following the decision.<sup>315</sup> A request to re-issue a licence may be made after three years have elapsed since its revocation.<sup>316</sup>

*Discipline.* In the Kyrgyz Republic disciplinary bodies are bodies of the Ministry of Justice therefore they are not independent. It is the Qualifications Board, established by and operating under the Ministry of Justice, which is responsible for disciplinary proceedings against lawyers. There is also significant direct involvement of the Ministry in the disciplinary process, contrary to the requirements of the independence of the legal profession.<sup>317</sup>

The Qualifications Board has the authority to examine complaints, applications and appeals against the actions or the inaction of lawyers. Complaints made regarding a violation of professional ethics by a lawyer who is a member of a public association of lawyers, are sent by the Ministry of Justice to the relevant public association for initial examination. If the public association concludes that the lawyer should be disciplined, it submits the relevant assessment to the Qualifications Board.<sup>318</sup> Complaints concerning a violation of professional ethics by a lawyer who operates on an individual basis are initially examined by the Ministry of Justice.<sup>319</sup>

A lawyer whose conduct is the subject of the complaint must, within ten days following notification from the Ministry of Justice, but in any event three or more days prior to the examination of the complaint by the Qualification Board, submit his or her written views on the merits of the case.<sup>320</sup> The lawyer also has the right to make oral and written submissions and to present evidence in his or her defence during the meeting of the Qualifications Board.<sup>321</sup>

In the discharge of its functions, the Qualifications Board is entitled to:

- demand all the necessary information from any State authority or official;
- invite any official or individual to its meeting, in order to establish the circumstances related to the merits of the complaint, application or appeal.<sup>322</sup>

The Qualifications Board (composed of three representatives of the Ministry of Justice and two lawyers) makes its decision on disciplinary matters by a simple majority of the attending members<sup>323</sup> with the President's vote being decisive in case of equally divided votes.<sup>324</sup>

Following its decision in the case, the Qualifications Board submits a request to the Minister of Justice to adopt measures in respect of the lawyer concerned.<sup>325</sup> The final decision on the disciplinary penalty to be imposed on a lawyer is made by the Minister of Justice on the basis of the record of the proceedings of the Qualifications Board.<sup>326</sup> The decision of the Ministry of Justice may be challenged before the courts within one month.<sup>327</sup>

In addition to the procedure before the Qualifications Board, the Ministry of Justice may open an internal investigation in order to assess allegations that a lawyer has violated the statutory

<sup>315</sup> *Ibid.*, article 10 (4).

<sup>316</sup> Regulation on the Qualifications Board under the Ministry of Justice of the Kyrgyz Republic [responsible] for matters related to lawyers' activities, approved by Resolution No. 79 of the Government of the Kyrgyz Republic of 28 February 2011, para. 28.

<sup>317</sup> Regulation on the Qualifications Board under the Ministry of Justice of the Kyrgyz Republic, *op. cit.*

<sup>318</sup> *Ibid.*, para. 13–1 and 13–2.

<sup>319</sup> *Ibid.*, para. 13–3.

<sup>320</sup> *Ibid.*, para. 15–1.

<sup>321</sup> *Ibid.*, para. 15–2.

<sup>322</sup> *Ibid.*, para. 6.

<sup>323</sup> *Ibid.*, para. 9.

<sup>324</sup> *Ibid.*, para. 9.

<sup>325</sup> *Ibid.*, para. 5.

<sup>326</sup> *Ibid.*, para. 16.

<sup>327</sup> *Ibid.*, para. 17.

requirements when providing legal services.<sup>328</sup> The decision to conduct an internal investigation is made pursuant to a decree of the Ministry of Justice; the Ministry appoints the President and members of the commission to investigate the case and indicates the timeframe for submitting the conclusions. Investigating Commissions are composed of Ministry of Justice officials and independent lawyers.<sup>329</sup> The reasons for this dual system are unclear.

The ICJ considers that the Ministry of Justice's role and powers in the disciplinary system for lawyers in the Kyrgyz Republic is inconsistent with the duty to ensure the independence of the legal profession and is contrary to principle 28 of the UN Basic Principles, which requires that disciplinary proceedings be brought before an impartial disciplinary committee established by the legal profession, an independent statutory authority, or a court. In the cases in which the Ministry both initiates a complaint and its officials are involved in assessing the merits of the complaint, the procedure itself is inconsistent with the requirement of that disciplinary complaints be determined in the context of fair procedures, by independent and impartial decision-makers. The ICJ is also concerned at the lack of independence of internal investigations by the Ministry of Justice, which functions in parallel to the ordinary disciplinary system.

## Republic of Turkmenistan

*Suspension and revocation.* The Law on Lawyers' Activities does not establish clear grounds or procedure for suspending or renewing the license. When the licence is suspended, it may be reinstated by the Ministry of Justice if there is a change of circumstances.<sup>330</sup> The license is subject to conversion if there is a change in the licensee's form of incorporation, name or registered address.<sup>331</sup> If a request for a licence to provide legal services has been refused, another application may be filed upon the expiry of six months from the refusal.<sup>332</sup> Decisions to suspend a license to practice law are subject to appeal before the courts.<sup>333</sup>

The law provides that a lawyer's license may be annulled by either a court or the Ministry of Justice if:

- the licensee has violated the terms and conditions of the license, provided that such violation has impaired the rights or legitimate interests, moral principles, life or health of individuals, national defence capability or security, or the environment;
- it has been established that the decision to issue the license was unlawful;
- the licensee violates the terms and conditions of the license two or more times during one calendar year;
- violations which resulted in the license suspension have not been remedied by the specified date;
- failure to pay the State duties by the specified date.<sup>334</sup>

While decisions by the Ministry of Justice or the court to annul the license on any of the above grounds may be challenged before the courts,<sup>335</sup> the ICJ considers that some of the grounds for annulment of a licence to practice law to be so broad and unclear, that they are inconsistent with the principle of legality. It would be difficult, for example, to predict what conduct may be deemed to constitute impairment of "moral principles".

<sup>328</sup> Regulation on the procedure for conducting an internal investigation against holders of a license to pursue lawyers' activities, Procedure for conducting an internal investigation against holders of a license to pursue lawyers' activities, approved by Decision No. 79 of the Government of the Kyrgyz Republic on 28 February 2011 (hereinafter—the "Internal Investigation Procedure").

<sup>329</sup> *Ibid.*, para 3.

<sup>330</sup> Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 10 (2).

<sup>331</sup> *Ibid.*, article 10 (3).

<sup>332</sup> *Ibid.*, article 10 (5).

<sup>333</sup> *Ibid.*, article 10 (4).

<sup>334</sup> *Ibid.*, article 11 (1).

<sup>335</sup> Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 11 (2).

*Discipline.* Disciplinary proceedings in Turkmenistan fall within the competence of the Collegium of Lawyers. Lawyers may be subject to disciplinary action within one month from the date when the alleged misconduct became known, or within six months from the date when it was committed, excluding the time when the lawyer was on a sick leave or on leave.<sup>336</sup> Disciplinary proceedings against a lawyer may be initiated by the general meeting of the collegium members, or the Presidium or President of the Collegium of Lawyers.<sup>337</sup> Prior to the examination of the disciplinary case, the President of the Collegium of Lawyers' Presidium must obtain an explanation in writing from the lawyer, check whether there are grounds to initiate disciplinary proceedings against him, and make the lawyer familiar with the disciplinary case-file.<sup>338</sup> If there is information showing that the misconduct of the lawyer may warrant his or her expulsion from the Collegium, the Presidium may, under exceptional circumstances and if there are valid reasons for such decision, suspend the lawyer from work pending a final resolution of his or her case.<sup>339</sup>

The disciplinary case is examined by the Presidium of the Collegium of Lawyers in the presence of the interested lawyer.<sup>340</sup> The lawyer's failure to appear, in the absence of good reason, does not prevent the examination of the disciplinary case.<sup>341</sup> The Presidium's decision is subject to appeal within one month.<sup>342</sup>

Instead of conducting such disciplinary proceedings, having regard to the nature of an alleged act of misconduct, the President of the Presidium of the Collegium of lawyers may forward the materials of the case to the general meeting of the relevant collegium of lawyers, a meeting of lawyers of a legal advice office or a meeting of members of any other association of lawyers with a view to their considering whether to impose 'measures of social influence' on the lawyer.<sup>343</sup>

The law authorizes the following types of disciplinary sanctions to be by the Presidium of the Collegium of Lawyers: reprimand; rebuke; severe rebuke; and expulsion from the collegium of lawyers.<sup>344</sup>

Following the imposition of a disciplinary sanction against a lawyer, if no further disciplinary penalty is imposed on him or her within one year, he or she shall be thereafter deemed to have incurred no disciplinary responsibility.<sup>345</sup> The Presidium of the relevant Collegium of Lawyers or general meeting of the Collegium may lift the disciplinary penalty imposed on a lawyer at an earlier stage if the lawyer has demonstrated good faith at work and irreproachable conduct,<sup>346</sup> The disciplinary penalty may further be lifted at an earlier stage pursuant to the request of the President of the Presidium of the Collegium of Lawyers, head of the legal advice office or head of any other association of lawyers.<sup>347</sup>

Given, as noted in Chapter II, that lawyers' collegia in Turkmenistan are not independent of government, due to strict de facto control from the Ministry of Justice and an insignificant number of lawyers in the country, the ICJ considers that the disciplinary process cannot be considered as independent, and this further re-enforces state control of the legal profession.

<sup>336</sup> *Ibid.*, article 35 (2); Disciplinary sanctions, the procedure for their imposing, lifting and appealing against as governed by this Law also applies to legal interns, article 40.

<sup>337</sup> *Ibid.*, article 37 (1).

<sup>338</sup> *Ibid.*, article 37 (2).

<sup>339</sup> *Ibid.*, article 37 (4).

<sup>340</sup> *Ibid.*, article 37 (3).

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*, article 38 (1).

<sup>343</sup> *Ibid.*, article 40.

<sup>344</sup> *Ibid.*, article 36 (1).

<sup>345</sup> *Ibid.*, article 39 (1).

<sup>346</sup> *Ibid.*, article 39 (2).

<sup>347</sup> *Ibid.*

## Republic of Tajikistan

There are two systems for suspension, revocation and discipline of lawyers in Tajikistan, reflecting the split in the profession between lawyers who are members of a collegium, and lawyer-attorney. For this reason each of the systems is considered separately below.

*Suspension and revocation of membership of collegia.* A lawyer ceases to be a member of the collegium either following his or her request, or if it is established that the lawyer is not able to discharge his or her functions in view of poor health, or if a lawyer pursues lawyers' activities outside of the collegium.<sup>348</sup> A lawyer will be excluded from a collegium of lawyers in cases of disciplinary misconduct incompatible with the status of a lawyer; repeated violation of the Law on the Legal Profession or of the rules of professional ethics, or discharge of professional duties in bad faith, provided that disciplinary sanctions have already been imposed on account of the violation in question.<sup>349</sup>

*Disciplinary system of collegia.* Under national law, disciplinary proceedings against the members of a collegium of lawyers may be initiated and examined by the Presidium of the Collegium of Lawyers.<sup>350</sup> Despite provision for this system in the law, however, according to the information available to the ICJ some of the collegia of lawyers in Tajikistan do not have a disciplinary board, with the result that many lawyers are not subject to a clear accountability system or procedure.

Disciplinary proceedings against a lawyer may be initiated pursuant to a request lodged by any agency or a complaint against the lawyer's conduct lodged by an interested party.<sup>351</sup>

Disciplinary proceedings may be initiated within six months of the alleged misconduct, or two years based on the findings of a financial audit or inspection, excluding any time when the lawyer was temporarily incapable of work, was on leave or the time during which the disciplinary proceedings were pending.<sup>352</sup> A lawyer against whom criminal proceedings have been opened may be suspended from the discharge of professional duties for up to one year.<sup>353</sup>

A disciplinary sanction against a lawyer may be challenged before the court within one month from the date when it was imposed.<sup>354</sup>

The sanctions that may be imposed on members of a collegium of lawyers are reprimand; rebuke; severe rebuke; and disbarment.<sup>355</sup> A lawyer who is a member of a collegium may be expelled from a collegium for repeated systematic violation of the laws on the legal profession, rules of professional ethics or for repeated discharge of his or her duties in bad faith.<sup>356</sup>

*Suspension and revocation of licences of lawyer-attorneys.* The Ministry of Justice Qualifications Board considers and decides on applications to suspend the activities of a lawyer-attorney for a certain period of time or to annul his or her license.<sup>357</sup>

Neither legislation nor the Regulation on the Qualifications Board establishes clear grounds or procedure for suspending or revoking the license of a lawyer-attorney. The license may be suspended by the Ministry of Justice upon the receipt of more than two complaints about negligence on the part of the lawyer-attorney.<sup>358</sup> The ICJ considers that such broad grounds for

<sup>348</sup> *Ibid.*, article 28 (2).

<sup>349</sup> *Ibid.*, article 28 (3).

<sup>350</sup> *Ibid.*, article 25 (1).

<sup>351</sup> *Ibid.*, article 25 (2).

<sup>352</sup> *Ibid.*, article 26 (1).

<sup>353</sup> *Ibid.*, article 25 (3).

<sup>354</sup> *Ibid.*, article 25 (4).

<sup>355</sup> *Ibid.*, article 24.

<sup>356</sup> *Ibid.*, article 28 (3).

<sup>357</sup> Regulation on the Qualifications Evaluation Board responsible to conduct a qualifications evaluation for the purpose of granting a license to operate as a lawyer-attorney, approved by the Minister of Justice of Tajikistan on 8 October 2007, No. 307 (hereinafter—the "Regulation on the Qualifications Evaluation Board").

<sup>358</sup> Regulation "On licensing of certain types of activities", approved by Resolution No. 172 of the Government of the Republic of Tajikistan on 3 April 2007, Chapter 47.



suspension or revocation, and the control of the process by the Ministry of Justice, weakens the position of lawyers-attorneys, making them vulnerable to manipulation, whether it happens in practice or not. Decisions by the Ministry of Justice to suspend or to refuse to grant the licence of a lawyer-attorney, may be appealed to the courts.<sup>359</sup>

*Discipline of lawyer-attorneys.* In the case of lawyer-attorneys, it is the Qualification Board under the Ministry of Justice which is the body responsible for considering disciplinary complaints against lawyers.<sup>360</sup> It may examine the findings of any inquiry into the applicants' complaints about the lawyer-attorney's acts, and may subsequently consider whether the lawyer-attorney's status should be revoked.<sup>361</sup> Depending on the outcome of the examination, the Qualifications Board may make one of the following decisions:

- to suspend the activities of the lawyer-attorney for a specified period;
- to annul the license.<sup>362</sup>

With a disciplinary system which is fragmented but one part of which is independent, the legal profession in Tajikistan has so far failed to establish a developed and well functioning system of discipline of lawyers based on clear and known rules of ethical behaviour. Regarding the disciplinary system of lawyer-attorneys, the ICJ considers that the fact that the Ministry of Justice bears exclusive responsibility both for discipline as well as appointment of this category of lawyers undermines the independence of such lawyers and fails to meet the standards of an independent disciplinary body established by the legal profession itself as required by the UN Basic Principles on the Role of Lawyers.<sup>363</sup>

The lack of disciplinary bodies in some of the collegia, raises concerns that many lawyers may not be held accountable for actions carried out in the course of their practice of law which are inconsistent with recognized professional standards. These include in particular, international standards requiring that lawyers assist their clients in every appropriate way and take legal action to protect their rights and interests.<sup>364</sup> Such gaps in accountability may foster the existence of lawyers who act contrary to the interests of their clients ("pocket lawyers").

## Republic of Uzbekistan

*Suspension and revocation.* A lawyer's licence may be suspended by the local office of the Ministry of Justice which issued the license, including for example, in cases of election or appointment to a permanent office, during military service, or if the lawyer goes missing, or does not belong to a lawyer's office as required by the law.<sup>365</sup> The license is suspended by the relevant Ministry of Justice office in cases of criminal liability or pursuant to the decision of the Qualification Board, violating the laws on the legal profession or the rules of professional ethics of lawyers, or failure to comply or unsatisfactory compliance with the decisions of the local bodies of the Chamber of Lawyers or a Ministry of Justice office.<sup>366</sup> The latter two grounds are highly problematic and raise serious concerns in regard to ensuring independence of lawyers. Such grounds place lawyers in a subordinate position vis-à-vis the Chamber and the Ministry of Justice.<sup>367</sup>

The licence may be suspended for six months.<sup>368</sup> During this period, the lawyer may take steps to resolve the situation which resulted in the suspension.<sup>369</sup> The suspension of the lawyer's status also results in a suspension of the lawyer's membership of the Chamber of Lawyers.<sup>370</sup>

<sup>359</sup> *Ibid.*, Chapters 11 and 12.

<sup>360</sup> Regulation on the Qualifications Evaluation Board, para. 2.2.

<sup>361</sup> *Ibid.*, para. 2.2.

<sup>362</sup> *Ibid.*, para. 2.2.

<sup>363</sup> UN Basic Principles on the Role of Lawyers, Principle 28.

<sup>364</sup> *Ibid.*, Principle 13.

<sup>365</sup> Law of the Republic of Uzbekistan on Advokatura, article 13-1 (1).

<sup>366</sup> *Ibid.*, article 15 (1).

<sup>367</sup> *Ibid.*

<sup>368</sup> *Ibid.*, article 15 (2).

<sup>369</sup> *Ibid.*, article 15 (2).

<sup>370</sup> *Ibid.*, article 13-1 (2).

The Ministry of Justice office which issued the lawyer with the licence may terminate the licence:

- upon the lawyer's request;
- if the lawyer fails to pay required fees;
- if the lawyer fails to create a lawyers' association or to join the existing lawyers' association as required by the law;
- if it has been established that the license was procured on the basis of counterfeit documents or that the decision to issue a license was unlawful;
- if the lawyer's legal capacity is limited or he or she is declared legally incapable;
- if the lawyer is convicted of a criminal offence; or
- on the death of the lawyer.<sup>371</sup>

The Qualification Board may also terminate the licence:

- if the lawyer fails to comply with his or her professional duties;
- if the lawyer commits a systematic or repeated gross violation of the requirements of the laws on the legal profession or the Rules of Professional Ethics of Lawyers; or
- if the lawyer has failed to address the circumstances which have given rise to the suspension of the licence.<sup>372</sup>

Those whose licenses have been terminated on the grounds of non-compliance with professional duties and gross violation of laws cannot practice as a lawyer for the following three years.<sup>373</sup> In all cases, the license termination results in a termination of the lawyer's status and membership in the Chamber of Lawyers.<sup>374</sup> The decision of a Ministry of Justice office<sup>375</sup> or of the Chamber of Lawyers<sup>376</sup> to suspend or terminate the license may be challenged before the courts. The license may also be terminated pursuant to a court order.<sup>377</sup>

The Law on the Legal Profession, together with a number of regulations, adopted as amendments to the Law, impose serious restrictions on the independence of lawyers in practice. The ICJ has received reports of abuses by judges or investigators to manipulate lawyers who are defending clients independently by making a resolution to revoke the license.<sup>378</sup>

*Discipline.* The Regulation on Qualification Boards provides that the Qualifications Board shall not only have the powers to organize qualifying examinations, but also to consider disciplinary cases concerning alleged violations of law and rules of professional ethics of lawyers, of lawyer-client confidentiality and of the lawyer's oath.

Disciplinary proceedings may be initiated by the competent local body of the Chamber of Lawyers or the justice authority which issued the lawyer with the lawyer's certificate.<sup>379</sup>

Disciplinary proceedings may be instituted if:

- the local body or the justice authority has found that the lawyer violated the requirements of the laws on the legal profession, rules of professional ethics of lawyers, lawyer-client confidentiality or the lawyer's oath;

<sup>371</sup> *Ibid.*, article 16 (1).

<sup>372</sup> *Ibid.*, article 14 (4).

<sup>373</sup> *Ibid.*, article 16 (6).

<sup>374</sup> *Ibid.*, article 16 (5).

<sup>375</sup> *Ibid.*, article 16.

<sup>376</sup> Regulation on Qualifications Boards, para. 56.

<sup>377</sup> *Ibid.*, article 16 (2).

<sup>378</sup> E.g. the "Regulation on licensing of lawyers' activities" approved by Decision No. 60 of the Cabinet of Ministers on 9 March 2009, states in para. 25 that, "once the lawyer has been found to violate the terms and conditions of the license, the supervising and law-enforcement agencies shall, within the scope of their powers, notify the justice authority which issued the lawyer with the certificate about the violations in question."

<sup>379</sup> Law of the Republic of Uzbekistan on Advokatura, article 14 (2).

- an individual or legal entity has complained about the unlawful conduct of the lawyer;
- a court has made an interlocutory order against the lawyer.<sup>380</sup>

In such cases, the head of the competent local body or justice authority may institute disciplinary proceedings against the lawyer by filing a reasoned request to examine the disciplinary case against the lawyer with the Qualifications Board.<sup>381</sup>

The lawyer facing disciplinary proceedings has the right to:

- study all the materials on the grounds of which the disciplinary proceedings have been initiated;
- provide an explanation in writing as regards the circumstances of the disciplinary case and make any further submissions;
- before the Qualifications Board or the Higher Qualifications Board (if it is competent to examine the matter) makes its decision, take steps to reach a settlement with the applicant on the basis of whose complaint the disciplinary proceedings were initiated.<sup>382</sup>

If the Qualifications Board concludes during the disciplinary proceedings that there is a need to study certain matters related thereto, it may decide to charge one of its members with such study.<sup>383</sup>

Following the examination of the disciplinary case against the lawyer, the Qualifications Board may decide as follows:

- to issue a reprimand;
- to suspend the license up to six months;
- to terminate the license;
- to refuse to impose any disciplinary sanction and to discontinue the disciplinary proceedings.<sup>384</sup>

When deciding on the form of disciplinary sanctions to impose on a lawyer, the Qualifications Board must have regard to the gravity of the offence, the circumstances under which it was committed and the previous activities and conduct of the lawyer.<sup>385</sup> The Board may decide not to impose a disciplinary penalty if it concludes, as a result of the examination, that the allegations against the lawyer have not been confirmed, or in view of a settlement reached by the lawyer with the applicant.<sup>386</sup>

In cases of suspension or termination of licence, the relevant local justice authority is notified of the Qualifications Board's decision and issues a decree to suspend or terminate the lawyer's licence pursuant to the decision of the Qualifications Board.<sup>387</sup>

Decisions of the Qualifications Board may be appealed to the Higher Qualifications Board which may quash the decision and discontinue the disciplinary proceedings against the lawyer, or leave the appeal without examination.<sup>388</sup>

<sup>380</sup> *Ibid.*, article 14 (3); and Regulation on the Qualifications Boards under the local bodies of the Chamber of Lawyers of the Republic of Uzbekistan, approved by decree No. 69 of the Ministry of Justice of 14 March 2009 (hereinafter—the "Regulation on Qualifications Boards").

<sup>381</sup> Regulation on Qualifications Boards, para. 38.

<sup>382</sup> *Ibid.*, para. 42.

<sup>383</sup> *Ibid.*, para. 44.

<sup>384</sup> *Ibid.*, para. 46.

<sup>385</sup> *Ibid.*, para. 45.

<sup>386</sup> *Ibid.*, para. 48.

<sup>387</sup> *Ibid.*, para. 47.

<sup>388</sup> *Ibid.*, para. 55; Regulation on the Higher Qualifications Board under the Chamber of Lawyers of the Republic of Uzbekistan, approved by decree No. 68 of the Minister of Justice on 14 March 2009 (hereinafter—the "Regulation on the Higher Qualifications Board"), para. 24.

The Qualifications Board's decision will be quashed if:

- there has been a violation of the Regulation on Qualifications Boards under local bodies of the Chamber of Lawyers, provided that such violation has influenced the decision made by the Qualifications Board;
- the Qualifications Board's decision being ill-founded.<sup>389</sup>

The Higher Qualifications Board may decide not to examine the appeal if:

- the Higher Qualifications Board receives a request from the appellant not to examine the appeal;
- civil proceedings relating to the same matter have been initiated before the courts, or if a court has already ruled on the case;
- the lawyer has reached a settlement with the applicant on the ground of whose complaint the disciplinary proceedings were initiated.<sup>390</sup>

The ICJ notes that the regulatory framework of Uzbekistan for disciplinary action against lawyers is the most elaborate in Central Asia, with detailed rules prescribing the grounds for disciplinary action, the disciplinary process, appeal and penalties. The law also enshrines certain guarantees aimed at ensuring fairness of the disciplinary proceedings against lawyers.

The ICJ is however concerned that the role of the Ministry of Justice and its local offices throughout disciplinary proceedings, and the dependence of the Chamber of Lawyers on the Ministry of Justice, both in law and in practice, undermine the independence of the disciplinary body and of the procedure itself, and are inconsistent with the establishment of and respect for the independence of lawyers, as enshrined in international standards.<sup>391</sup>

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<sup>389</sup> *Ibid.*, para. 27.

<sup>390</sup> *Ibid.*, para. 30.

<sup>391</sup> UN Basic Principles on the Role of Lawyers, Principles 27 and 28.

## IV. THE ROLE, STATUS AND INDEPENDENCE OF LAWYERS IN PRACTICE

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### A) INTRODUCTION

#### Overview

This chapter addresses the challenges lawyers face, in discharging their professional role effectively and independently, in each of the five Central Asian states. It includes a summary of the international standards related to the role and independence of lawyers, national legislation regulating the work of lawyers, their rights and duties; and a general overview of challenges faced by lawyers in the region and in respect of each state. The research and analysis considers how lawyers' roles may be impeded by laws governing criminal procedure in both the investigative stage and during trial, as well as problems caused by the policies, practices, and attitudes of other actors within the system, including the judiciary, prosecutors and law enforcement officials. It highlights the lack of independence of some lawyers, who fail to act in their clients' best interests. Finally, in respect of each state, the chapter addresses instances of threats, harassment, intimidation and violence against lawyers, by either state or private actors.

#### International Standards

Rights guaranteed under international law that are of particular importance to the role of lawyers in the criminal justice system include the right to liberty, which protects against arbitrary detention, and the right to a fair trial by a competent, independent and impartial tribunal established by law. In addition, it is the right of all persons to an effective remedy for the violation of these and other internationally protected rights. In this regard, the state has an obligation to ensure effective investigation of allegations that human rights have been violated, both as an obligation correlative to each and as a part of the right to an effective remedy.<sup>392</sup> It is important to note that, in regard to all internationally protected human rights, it is a well-established principle of international human rights law that rights must not be "theoretical or illusory" but must be "practical and effective".<sup>393</sup> States must therefore do more than protect rights in law; they must ensure that such laws are respected and applied in the everyday workings of the justice system.

#### *The right to liberty and rights of access to a lawyer in detention*

In accordance with the right to freedom from arbitrary detention and international standards on access to a lawyer, anyone who is arrested or detained has the right to be assisted by a lawyer without delay, and at the latest not more than 48 hours from the time of arrest or detention.<sup>394</sup> The right to be assisted by a lawyer includes the right to communicate and consult with him or her in full confidentiality. Pre-trial detention should be the exception rather than the general rule. Pre-trial detention is only permissible as a last resort, and for the shortest possible period of time. Even then, there must be objective proof, proffered by the authorities that there is a genuine public interest which, notwithstanding the presumption of innocence, outweighs the

<sup>392</sup> Among others see: UN HRC General Comment 32, CCPR/C/21/Rev.1/Add. 13 (2004), 15–16; See also ICJ The Right to a Remedy and to Reparation for Gross Human Rights Violations—A Practitioners' Guide, <http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf>.

<sup>393</sup> See among others *Eirey v. Ireland*, No. 6289/73, 9 October 1979, para. 24.

<sup>394</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 17 and 18; UN Basic Principles on the Role of Lawyers, Principle 7; Human Rights Committee: Concluding Observations of the Human Rights Committee: Georgia, CCPR/C.79/Add. 75.5, 5 May 1997, para. 27; Concluding Observations of the Human Rights Committee: Israel, CCPR/C/O/78/ISR, 23 August 2003, para. 13; EctHR, *Brannigan and McBride v. United Kingdom*, Application No. 14553/89 and 14554/89, para. 64.

right to personal liberty, and substantial reasons for believing that, if released, the individual would abscond, commit a serious offence, interfere with the investigation or the course of justice, or pose a serious threat to public order; and there are substantial reasons for believing that there is no possibility that alternative measures would address these concerns.<sup>395</sup>

### *The right to a fair trial*

The right to a fair trial by a competent, independent and impartial tribunal established by law constitutes a key element of human rights protection and a means to safeguard the rule of law.<sup>396</sup> An essential element of the right to a fair trial, as protected in international human rights law, including under article 14 of the ICCPR, is the guarantee of equality of arms between the parties to the case, which requires that the same procedural rights are to be provided to all the parties.<sup>397</sup> This, *inter alia*, means that “each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”<sup>398</sup> As a general principle, all the parties to the process must have “a reasonable opportunity to present his [or her] case—including evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”<sup>399</sup> In criminal cases, the right to a fair trial also requires *inter alia* that the defendant has the right to be represented by a lawyer of his or her own choosing, where necessary at the expense of the state;<sup>400</sup> that the defendant be afforded adequate time and facilities for the preparation of the defence, including through access to documents and materials related to the case<sup>401</sup> and adequate time and facilities to communicate with his or her lawyer, promptly and in confidence;<sup>402</sup> and that the defendant or his or her lawyer can call and cross-examine witnesses on the same conditions as the prosecution.<sup>403</sup>

Under international human rights law, a trial may be regarded as fair only in the “absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.”<sup>404</sup> When statements, including “confessions”, of guilt are made in violation of article 7 of the ICCPR, such information may not be used in court except in cases against perpetrators of torture to establish evidence of the torture itself.<sup>405</sup> In cases of allegations of the use of ill-treatment the burden of proof that the statements were not adduced under torture is on the state.<sup>406</sup>

### *International standards on the role of lawyers*

International standards on the role of lawyers recognize that lawyers are essential agents in the administration of justice<sup>407</sup> and the protection of human rights,<sup>408</sup> and as such they have a

<sup>395</sup> ICCPR, article 9 (3); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 36 (2); UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) Rule 6 (1); Human Rights Committee, General Comment No. 8, Right to Liberty and Security of Persons (article 9) 30 June 1982, para. 3; Human Rights Committee, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, para. 12.3.

<sup>396</sup> UN HRC General Comment 32, CCPR/C/GC/32, 23 August 2007, para. 2.

<sup>397</sup> *Ibid.*, para. 13.

<sup>398</sup> *Ibid.*

<sup>399</sup> Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4, ECtHR, *Dombo Beheer B.V. v. The Netherlands*, No. 14448/88, 27 October 1993, para. 33.

<sup>400</sup> ICCPR, article 14.3 (d); HRC, General Comment No. 32, *op. cit.*, para. 38; UN Basic Principles on the Role of Lawyers, Principles 1–3.

<sup>401</sup> ICCPR, article 14.3 (b); UN HRC, General Comment No. 32, *op. cit.*, paras. 32–34; UN Basic Principles on the Role of Lawyers, Principle 21.

<sup>402</sup> ICCPR article 14.3 (b); UN HRC, General Comment No. 32, *op. cit.*, paras. 32–34; UN Basic Principles on the Role of Lawyers, Principle 1, Principle 22; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18.

<sup>403</sup> ICCPR, article 14.3 (f); UN HRC General Comment No. 32, *op. cit.*, para. 39.

<sup>404</sup> UN HRC, General Comment 32, *op. cit.*, para. 41. See also, e.g. HRC, *Paul Kelly v. Jamaica*, 253/1987, 08 April 1991; *Glenford Campbell v. Jamaica*, 248/1987, 30 March 1992 and *Albert Berry v. Jamaica*, 330/1988, 7 April 1994; *Ruzmetov v. Uzbekistan*, 915/2000, 19 April 2006, para. 7.3; *Singarasa v. Sri Lanka*, 1033/2001, 21 July 2004, para. 7.4; *Deolall v. Guyana*, 912/2000, 11 November 2004, para. 5.1

<sup>405</sup> UN HRC, General Comment No. 32, *op. cit.*, para. 41.

<sup>406</sup> *Ibid.*, para. 41.

<sup>407</sup> International Commission of Jurists, Congress of New Delhi (1959).

<sup>408</sup> Singhvi Declaration, *op. cit.*, para. 74

duty, along with judges and prosecutors, to safeguard and uphold human rights and the rule of law.<sup>409</sup> According to international standards, it is the duty of a lawyer to “assist clients in every appropriate way, and take legal action to protect their interests” and every lawyer must “always loyally respect the interests of their clients.”<sup>410</sup> Furthermore in discharging their duties, lawyers “shall at all times act freely, diligently and fearlessly in accordance with the wishes of his [or her] client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.”<sup>411</sup>

In accordance with international standards, states must provide the conditions in which lawyers can discharge their professional duties and functions and ensure that their role is safeguarded and their rights are protected, along with those of other actors in the justice system. In such an environment, lawyers will be able to defend their clients in accordance with law, free from external pressures and interferences.<sup>412</sup> In particular, under international standards, governments must guarantee that lawyers:

- “(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- (b) are able to travel and to consult with their clients freely both within their own country and abroad; and
- (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”<sup>413</sup>

The state has a duty to safeguard lawyers where their security is threatened, and to ensure that lawyers are never identified with their clients or their clients’ causes as a result of discharging their professional functions.<sup>414</sup>

In addition to violating the rights of the lawyer, attacks on lawyers, or threats or harassment of lawyers, are likely to violate the rights of the clients they represent. Such acts may, for example, impede the lawyer in providing an effective defence, contrary to the right to a fair trial;<sup>415</sup> or prevent the lawyer from challenging arbitrary detention,<sup>416</sup> or torture or other ill-treatment.<sup>417</sup> Where the security of lawyers is threatened as a result of discharging their professional functions, the UN Basic Principles on the Role of Lawyers stipulate that states must take measures to adequately safeguard the lawyers concerned.<sup>418</sup> This principle is re-enforced by states’ obligations under international human rights law, which require the authorities to take measures to protect persons who the authorities know or ought to know are at risk of physical attack.<sup>419</sup> States must also ensure that a prompt and thorough investigation is undertaken, by an independent and impartial authority, into attacks that endanger the lives or physical integrity of lawyers.<sup>420</sup>

<sup>409</sup> 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).

<sup>410</sup> Basic Principles on the Role of Lawyers, Principle. 15.

<sup>411</sup> Singhvi Declaration, *op. cit.*, para. 83; see also Basic Principles on the Role of Lawyers, Principle 15.

<sup>412</sup> Report of the Special Rapporteur on the independence of judges and lawyers, 28 July 2009, para. 12.

<sup>413</sup> Basic Principles on the Role of Lawyers, Principle 16.

<sup>414</sup> *Ibid.*, Principle 18; Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1998/39, para. 179.

<sup>415</sup> Guaranteed, *inter alia*, under article 14 ICCPR and article 6 ECHR.

<sup>416</sup> Prohibited *inter alia* under article 9 ICCPR and article 5 ECHR.

<sup>417</sup> Prohibited, *inter alia*, under the UN Convention Against Torture; article 7 ICCPR; article 3 ECHR

<sup>418</sup> Basic Principles on the Role of Lawyers, Principle 17.

<sup>419</sup> UN HRC, General Comment No. 31, the Nature of the General Obligations Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 8; ECtHR, *Osman v. UK*, Application No. 23452/94, Judgment of 28 October 1998.

<sup>420</sup> Convention Against Torture, article 12; Human Rights Committee, General Comment No. 20 on article 7, HRI/GEN/1/Rev.7, para. 14 ; See generally, ICJ, The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioner’s Guide, Chapter IV.

## B) REGIONAL OVERVIEW: LAWYERS IN THE CRIMINAL JUSTICE PROCESS

### Powers of defence lawyers and prosecutors

The principle of equality of arms between the prosecution and the defence is enshrined in the criminal procedure code of each of the Central Asian states and is well known in the legal doctrine of the region. Yet, the criminal procedure laws of all of these states contain post-Soviet features, which place heavy reliance on the bodies of investigation and prosecution and provide only a rudimentary role for defence lawyers in the procedure. The prosecutor's office has remained a powerful institution since the Soviet era, preserving its dominant position vis-à-vis the defence and judges within the criminal process and elsewhere in the legal system.<sup>421</sup> In all the Central Asian states, the prosecutors' office has functions of supervision of executing laws as well as public prosecution.<sup>422</sup> Its role and status, as well as the pervading legal and institutional culture, mean that the prosecutor's office has particular links with and influence on the judiciary. In the criminal justice process, the prosecution has significant functions and powers, which are incomparably greater than those of defence lawyers. These features, which typified the Soviet system, are still deeply entrenched and show no signs of weakening; their pervasiveness indicates that to date the authorities in Central Asian states have yet to undertake a comprehensive reform of the criminal justice system, to equalise the roles of the prosecution and defence and to make fair trial a reality in the justice system.

Defence lawyers themselves have to varying extents come to accept these imbalances of power, discrepancies between law and practice, and even to expect that the inevitable outcome of their work is losing their clients' cases. Throughout the Central Asian region, the conviction rate is close to 100 percent in criminal proceedings.<sup>423</sup> Many of the lawyers the ICJ has spoken with in the region have never worked on a case where an accused has been acquitted, and in some countries they have not even heard of such a case.

### The role of defence lawyers and prosecutors at the investigative stage

In practical terms, the imbalance of power between prosecutors and defence lawyers has significant consequences at the investigative stage of the criminal justice process. For example, among other things, prosecutors often have an unrestricted access to documents, persons in detention, and official buildings relevant to the investigation, while lawyers need to request and receive permission for such access. Such permission often depends on the investigators or the personnel of the facilities where the person is detained. The fact that a defence lawyer's meetings with his or her detained client are at the discretion of law enforcement agents, violates international standards. Granting such discretion to law enforcement agents provides opportunities for law enforcement agents to prevent a suspect's access to his or her lawyer; it opens the door for arbitrariness and, according to the information available to the ICJ, the discretion is often abused. Lawyers in each country reported difficulties in obtaining private meetings with their detained clients, contrary to international human rights law and standards, including article 14 of the ICCPR.<sup>424</sup> Lawyers' constant struggle against such barriers to their work, which

<sup>421</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kazakhstan, E/CN.4/2005/60/Add. 2, 11 January 2005, p. 48.

<sup>422</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kyrgyzstan, E/CN.4/2006/52/Add. 3, 30 December 2005, para. 49.

<sup>423</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kazakhstan, E/CN.4/2005/60/Add. 2, 11 January 2005, para. 34; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Tajikistan, E/CN.4/2006/52/Add. 4, 30 December 2005, para. 42; Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted in accordance with Commission resolution 2002/38, Mission to Uzbekistan, para. 58.

<sup>424</sup> Inter alia see UN HRC: *Vladislav Kovalev v. Belarus*, No. 2120/2011, 27 November 2012, para. 11.5; also see: *Khomidov v. Tajikistan*, Communications No. 1117/2002, 29 July 2004, para. 6.4; *Siragev v. Uzbekistan*, No. 907/2000, 1 November 2005, para. 6.3; *Gridin v. Russian Federation*, No. 770/1997, 20 July 2000, para. 8.5: "Right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel 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."



are in many instances contrary to national as well as international law, is not only expected by lawyers, but have become a normal part of legal practice.

Difficulties in collecting evidence which supports the defence is a problem mentioned by lawyers from most countries in the region. In cases in which defence lawyers have succeeded in gathering exculpatory evidence, laws and practice grant discretion to the investigative authorities as to whether to include the evidence in the casefile or not. In contrast, the prosecution has no difficulties in collecting evidence.

Lawyers across the region mentioned that it is seemingly small details, such as requesting a case file and delays in responses to such requests, which make a great difference between the powers of the prosecution and lawyers to influence proceedings. While the prosecutor's office have unrestricted access to the case file at all stages, lawyers need to request permission, make copies etc, and these requirements are often applied to limit their access to the files. In each country of the region, lawyers reported that their access to documents in the case file (of the investigation) is also often restricted, including on the basis of the claim that the information in the case file is a state secret. This practice runs contrary to the fair trial guarantees under article 14 of the ICCPR, which obliges the states to ensure that the person has "adequate time and facilities for the preparation of his [or her] defence."<sup>425</sup> It is also contrary to the UN Basic Principles on the Role of Lawyers, which require that the authorities ensure lawyers' access to appropriate information, files and documents in their control, in sufficient time to allow for effective legal assistance to be provided.<sup>426</sup>

In Turkmenistan, the prosecution still issues arrest warrants, though this practice violates the right to liberty guaranteed under article 9(3) of the ICCPR as the UN Human Rights Committee clarified almost two decades ago.<sup>427</sup>

## The role of lawyers and prosecutors in court

The imbalances in the status and powers of defence lawyers and prosecutors are also starkly evident in court. Some of these inequalities arise under the law of criminal procedure; however these are compounded in practice by a criminal justice culture which is deeply intolerant of acquittals, and which perceives high rates of conviction as a prime indicator of a successful criminal justice system. The prevailing legal culture in the region fails to recognize that acquittals are an essential part of the function of any system of criminal justice, and necessary to ensure that all people accused of criminal offences are accorded a fair trial and that no one is convicted unless and until their guilt has been proved by the prosecution beyond a reasonable doubt.

Judges are central to this legal culture, and are subject to high expectations to deliver convictions in criminal trials. Lack of judicial independence, which has consistently been identified as a problem by authoritative commentators in regard to all countries in the region,<sup>428</sup> means that judges are rarely free to acquit people who have been charged with criminal offences, including for fear of retaliation, which may include an immediate disciplinary sanction<sup>429</sup> or even arrest.<sup>430</sup>

<sup>425</sup> E.g. see UN HRC General Comment No. 32, para. 33; See concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13; ECtHR *Borisova v. Bulgaria*, No. 56891/00, 21 December 2006, paras. 41–45.

<sup>426</sup> UN Basic Principles on the Role of Lawyers, Principle 21

<sup>427</sup> See *Kulomin v. Hungary*, Communication No. 521/1992, 22 March 1996, CCPR/C/50/D/521/1992, para. 11.3.

<sup>428</sup> UN HRC, Concluding Observations, Kazakhstan, CCPR/C/KAZ/CO/1, 19 August 2011, para. 21; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kyrgyzstan, E/CN.4/2006/52/Add. 3, 30 December 2005, para. 40; UN Committee Against Torture, Concluding observations, Tajikistan, adopted by the Committee at its forty-nine session (29 October to 23 November 2012), para. 17; Report of the Secretary General, Situation of human rights in Turkmenistan, A/61/489, 3 October 2006, para. 43; HRC, Concluding Observations, Uzbekistan, CCPR/C/UZB/CO/3, 7 April 2010, para. 16.

<sup>429</sup> ICJ: Kazakhstan: Disciplinary action against judge Zhumasheva is an attack on judicial independence, <http://www.icj.org/kazakhstan-disciplinary-action-against-judge-zhumasheva-is-an-attack-on-judicial-independence/>.

<sup>430</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Tajikistan, E/CN.4/2006/52/Add. 4, 30 December 2005, para. 40.

In these circumstances, it is extremely difficult for defence lawyers to successfully challenge the case of the prosecution in court. The overarching powers which the prosecution has according to law are even greater in practice. For example, while under the law of all countries in the region, the prosecution and defence have equal rights to bring motions before the court, in practice, the differences in granting these motions are significantly in favour of the prosecution: defence lawyers' motions are often not granted while the prosecution's motions normally are, sending a signal of lack of equality of arms.

## Preventing torture and other ill-treatment

One common feature of the criminal justice processes across Central Asia is heavy reliance on self-incriminatory statements made by accused persons during interrogation, often following or resulting from alleged ill-treatment, and which in practice are not allowed to be retracted and are admitted as evidence in court in the absence of impartial and thorough investigations of the allegations of ill-treatment. Judges are willing to give credence to such statements even where they are made in isolation and under suspicious circumstances, and consistently reject requests for retraction of such statements. Lawyers appear powerless against this reality.

Judicial reluctance to challenge ill-treatment places a significant limitation on the capacity of even the most vigorous of defence lawyers to protect their clients from such treatment, as well as from arbitrary detention and unfair trial. The Soviet-era criminal justice principle that: "confession is the queen of evidence" is still the rule and it is therefore not surprising that torture in the course of the investigation is supported by its use as evidence in courts. With the conviction rate of close to 100 percent,<sup>431</sup> this effectively means that once self-incrimination is obtained by whatever means, an accused is almost inevitably convicted. Independent lawyers and experts from all the countries of Central Asia affirmed to the ICJ that torture or ill-treatment is pervasive and is used as a matter of course in cases in which a suspect does not of their own violation make self-incriminatory statements following their arrest. This effectively means that torture and ill-treatment lie at the heart of the criminal justice process in Central Asia.

Prompt and regular access to a lawyer following deprivation of liberty is accepted in international human rights law as a key safeguard against torture and other ill-treatment. Lawyers throughout the region have reported that they are regularly prevented from obtaining access to their clients in the first hours or days of detention during which period torture or other ill-treatment is often applied and confession are extracted. The result is that the "administration of justice" in Central Asia countries effectively starts and finishes in the initial period of detention where torture and other forms of ill-treatment are likely to be used, since the subsequent trial and verdict will in the vast majority of cases be based on the "confession" extracted in that period. Based on this "confession", the prosecution builds its indictment and the "confession" is then used in court as evidence of guilt, often forming the main basis of the conviction. It is notable that torture and other forms of ill-treatment has become a normality to an extent that some lawyers consider it as part of their work to minimise rather than eradicate its use against their clients, and seeing it as a crime and taking steps to ensure that a criminal investigation is initiated. In one instance a lawyer said when asked if torture is used in his cases: "No torture is used. They just beat them up severely. So there is no torture." This points to a problem of acceptance by some lawyers of this state of affairs as a normality. Furthermore, torture and other ill-treatment will often not be reported either by the detainee or their lawyer or family given the risk of reprisals, including further torture or other ill-treatment of the detainee—and harassment against those who dare to step forward to lodge a complaint.

When ill-treatment is reported, judges normally ignore such allegations and fail to carry out an effective investigation into the allegations including by inviting witnesses, experts or doc-

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<sup>431</sup> See footnote 423 *supra*.

tors.<sup>432</sup> According to the information available to the ICJ, the investigations are usually token and judges may invite a police officer against whom a complaint is lodged and ask a question about his involvement. A negative answer would usually lead to a conclusion that the allegations have not been confirmed.

## Other impediments to the work of lawyers

Differences in treatment in the investigation phases and in court highlight the general problem of the differing status of defence lawyers and prosecutors, and the differing perceptions of the two groups. Lawyers reported their view that a range of actors in the criminal justice process, from law enforcement officials to judges, are much less responsive to lawyers than to the prosecution, which puts lawyers in an unprivileged position and impacts on the equality of arms before and at the trial.

On the basis of information available to the ICJ, typically lawyers throughout the region neither see themselves nor are they seen as equal actors in the justice system. To the contrary, the ICJ has witnessed an endemic problem of lack of respect for the legal profession on behalf of the investigatory authorities, prosecutors' office, judges as well as other state bodies. Contrary to the situation in many other countries, the legal profession in Central Asia is often seen as the "poor relative" in the justice system.

Particularly grave manifestations of the legal profession's vulnerability throughout the region are threats, harassment, intimidation and physical attacks against lawyers. Such incidents are not unknown in any of the Central Asian states, but their frequency and severity vary, as does the degree of fear of lawyers of such attacks, and the extent to which the threat of violence affects the way in which lawyers do their work. It is striking that, in some countries in the region, lawyers consider such hindrances, intimidation, insults, even threats or attacks as a routine part of their professional work, rather than as criminal acts or violations of their rights. Indeed, some lawyers are reluctant to even discuss or to complain of harassment or threats falling short of actual physical violence; a situation which says much about the routine nature of the difficulties lawyers face in their work.

One issue that arises in all countries of the region is the so called "state defence" whereby lawyers are appointed by the court or by investigators to represent accused persons otherwise unable to afford a lawyer. In practice, the implementation of this system may affect the profession negatively by undermining its independence, lowering the quality of the legal service provided. Many lawyers who provide state defence are not independent and do not provide effective legal advice and representation to accused persons, contrary to the UN Basic Principles on the Role of Lawyers.<sup>433</sup> In some countries it was said that the state defence service could lead to exacerbation of the problem of the so called "pocket lawyers" in particular because state defence is often provided by the same lawyers on a regular basis, and these tend to be less experienced lawyers who are more susceptible to manipulation. Problems in the state defence system pose a challenge for lawyers' associations in upholding the independence and integrity of the profession, as well as fulfilling the obligation to ensure that all arrested and accused persons have access to effective legal advice and representation.

<sup>432</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, para. 49; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kazakhstan, E/CN.4/2005/60/Add. 2, 11 January 2005, p. 52.

<sup>433</sup> Basic Principles on the Role of Lawyers, Preamble.

## C) COUNTRY SITUATIONS

### Republic of Kazakhstan

General Principles regarding the independence, role and duties of lawyers are established in Kazakhstan law, and in general conform to international standards on the role of lawyers. However, according to information available to the ICJ, in practice, the independence of lawyers, is routinely compromised. A situation of inequality of arms is prevalent in criminal investigations and trials and in pre-trial detention hearings, which impedes lawyers in discharging their duties to provide effective defence to their clients. To some extent this situation is facilitated by a deficient legal framework, but the larger problem consists in the actual general practice of legal professionals.

#### *Legal framework related to the role of lawyers*

The laws relating to legal profession in Kazakhstan incorporate principles guaranteeing the independence of lawyers. They set out standards of professional conduct in a Code of Ethics, which lawyers are accountable for upholding.<sup>434</sup> The law includes a range of provisions that require state officials and others to respect the roles of lawyers and that prohibit and criminalize the obstruction of lawyers' exercise of professional activities.<sup>435</sup>

The law specifies that, acting in the capacity of counsel or representative, a lawyer has the right to protect the rights and represent the interests of individuals before any courts, State agencies or organizations.<sup>436</sup> The right of free access to the premises of the courts and law-enforcement agencies may be exercised by a lawyer upon the presentation of his or her certificate.<sup>437</sup> A lawyer has the right to have private meetings with his or her client without any restrictions on the number or duration of the meetings, under conditions securing their confidentiality; however a lawyer's access to penitentiary facilities (including to meet detained clients) is subject to the relevant access regulations.<sup>438</sup>

A lawyer also has the right to request and obtain any necessary information; collect factual information and submit evidence; study the case-file, including procedural documents, investigative and judicial case-files, and have the necessary information recorded therein in a lawful manner.<sup>439</sup> This includes the right to study information that constitutes a State secret, including any military, commercial, official or other secrets protected by the law (subject to special permission and to an undertaking not to disclose). The law requires civil servants and heads of non-governmental organizations to respond to a lawyer's request for information, related to a specific case, within ten days.<sup>440</sup> A lawyer may request any expert assessment related to a case from specialists; submit motions or lodge complaints against the actions of State officials or the court; as well as to take any other action which is not contrary to the law.<sup>441</sup>

The law also specifies certain duties and responsibilities of lawyers. The lawyer must pursue his or her professional activities in compliance with the laws of the Republic of Kazakhstan and the Code of Professional Ethics of Lawyers; must follow the principles of organization and operation of the legal profession; continuously improve his or her professional qualifications; maintain confidentiality of any information obtained when providing legal assistance and refrain from disclosing it without the consent of the individual concerned.<sup>442</sup> Lawyers are also obliged

<sup>434</sup> Law of the Republic of Kazakhstan on Lawyers' Activity, article 3.

<sup>435</sup> *Ibid.*, article 17.

<sup>436</sup> *Ibid.*, article 14 (3).

<sup>437</sup> *Ibid.*, article 14 (5).

<sup>438</sup> *Ibid.*

<sup>439</sup> *Ibid.*, article 14 (2-4).

<sup>440</sup> *Ibid.*, article 17 (9).

<sup>441</sup> *Ibid.*, article 14 (3), (4)

<sup>442</sup> *Ibid.*, article 15 (1).

to place in trust any shares in the charter capital of any for-profit organizations or other assets the use of which brings profit.<sup>443</sup>

The lawyer must provide legal assistance in compliance with the professional standards of conduct prescribed in legislation. These include the obligation to display care and diligence, and specify that the lawyer shall not fail to perform the necessary actions even if they are burdensome or time consuming; shall maintain a civil attitude toward all agencies and officials which deal with the matters of law; shall not cause unjustified delays in the proceedings, use any unlawful means when providing legal assistance or commit fraud; shall subject his or her professional behaviour to the rights and legitimate interests of the individual seeking legal advice; and shall stand by the interests of the individual seeking legal advice and refrain from taking any action which is adverse to his or her interests.<sup>444</sup>

A lawyer is required to refuse to provide legal assistance whenever he or she has a personal interest in the outcome of the proceedings, which is contrary to the interests of the individual concerned.<sup>445</sup> A lawyer has no right, however, to relinquish the representation of a client in criminal proceedings once the lawyer has undertaken to defend the accused.<sup>446</sup> If the judgment delivered by the court is deemed unfair by the defendant or the lawyer, the latter must appeal from it in accordance with the applicable procedure.<sup>447</sup> The lawyer is prohibited from defending a legal position that is detrimental for the client or from using his or her powers to the detriment of the client.<sup>448</sup>

The law also protects the principle of lawyer-client privilege. Lawyers, their assistants and interns, staff of the presidium of a collegium of lawyers, legal advice office or lawyers' office have no right to disclose or use - in their own interests or in the interests of a third party - any information received when providing legal assistance.<sup>449</sup> Under the law, lawyer-client privilege covers the very fact of seeking legal advice from a lawyer, as well as any information concerning the contents of oral or written negotiations with the individual seeking legal advice or other persons.<sup>450</sup>

However the law "On counteracting legalization (laundering) of illicit gains and funding of terrorism", makes clear that disclosure of data and information to the agency responsible for financial monitoring shall not amount to a breach of lawyer-client privilege.<sup>451</sup>

Under the law, a lawyer's records, any materials or documents related thereto, as well as a lawyer's property, including mobile devices, audio equipment and computer devices, cannot be searched, inspected, forfeited, seized or verified.<sup>452</sup> The inquiring and investigating authorities must notify the lawyer, if he or she is required to take part in investigative procedures, such as searches or crime scene reconstructions, within a timeframe to be agreed with the lawyer.<sup>453</sup>

The law also prohibits:

- interfering with or obstructing lawyers' activities by any means;
- identifying lawyers with their clients or their clients' causes;
- interrogating a lawyer as a witness in relation to circumstances known to the lawyer as a result of his or her professional activities;

<sup>443</sup> *Ibid.*, article 15 (1-5).

<sup>444</sup> *Ibid.*, article 16.

<sup>445</sup> *Ibid.*, article 15 (2).

<sup>446</sup> *Ibid.*, article 15 (4).

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*, article 15 (3).

<sup>449</sup> *Ibid.*, article 18 (2).

<sup>450</sup> *Ibid.*, article 18 (1).

<sup>451</sup> *Ibid.*, article 18 (4).

<sup>452</sup> *Ibid.*, article 17 (5).

<sup>453</sup> *Ibid.*, article 17 (8).

- requiring lawyers, their assistants or interns, the heads or staff of the Presidium of the collegium of lawyers, legal advice office or lawyers' office to provide any information related to the provision of legal assistance to any particular individual, unless otherwise stipulated by the law;
- refusing to grant a lawyer a private meeting with a client under conditions securing confidentiality, or restricting the quantity or duration of such meetings.<sup>454</sup>

Those who have committed an unlawful interference with lawyers' activities or obstructed such activities<sup>455</sup> may be held criminally responsible.<sup>456</sup>

### *Independence of lawyers and undue influence*

In criminal cases, if a suspect or an accused has insufficient financial means, he or she has the right to be represented by a State-appointed lawyer.<sup>457</sup> However, in violation of international standards, executive control of defence lawyers is a common phenomenon in those criminal cases in which the defence lawyer is appointed by the investigating authorities or courts to represent the suspect or the accused and whose services are paid through the State budget.

It is well documented that investigators will, as a rule, seek to appoint those legal aid lawyers who are seen by them as compliant, in order to achieve their objectives in a criminal case, including when the objectives involve breaches of the Criminal Procedure Code and violations of the rights of the suspect.<sup>458</sup> Lawyers appointed under these circumstances do not, as a rule, act as they are required to do under the law and international standards, to provide independent legal advice and protect the human rights and the interests of their clients ("pocket lawyers").

Lawyers in Kazakhstan have expressed their views to the ICJ that the low fees paid by the state to "legal-aid" lawyers taking on representation of a suspect or an accused, contribute to the poor quality and lack of independence of the legal representation that is sometimes provided by such appointed lawyers.

### *Equality of arms and unequal treatment of lawyers in court*

The responses received from lawyers to the ICJ's survey indicated that lawyers perceive that, although there may be exceptions in specific cases, the overall attitude of prosecutors and most judges to defence lawyers is one of disrespect or "suspicion." The ICJ received reports of aggression towards defence lawyers and other participants in the proceedings. The reported behaviour of judges includes insults and humiliation, arrogant behaviour or shouting at the parties to the case, particularly young and inexperienced lawyers. It was reported that judges have prevented the defence from setting forth its position or substantiating its objections to the prosecution's case; not allowed defence lawyers to finish their pleadings, or interrupted or argued with defence lawyers in a manner which supports the prosecution. It was noted that judges have an effective retributive mechanism against lawyers at their disposal: they may threaten and have threatened lawyers with, and in some cases have imposed, an "interim order" against the lawyers themselves in the course of the proceedings; such orders provide a basis

<sup>454</sup> *Ibid.*, article 17 (1-4, 6).

<sup>455</sup> *Ibid.*, article 17 (10).

<sup>456</sup> Under article 365 of the Criminal Code of Kazakhstan, obstructing the lawful activities of lawyers and other persons aimed at representing individuals in criminal proceedings or providing legal assistance to individuals or legal entities, or any other interference with the autonomy and independence of such activities shall be punished with a fine in the amount of up to five hundred monthly calculation indices or in the amount of the convict's salary or other income for up to five months, or restriction of liberty for up to three years, provided that the offences in question have caused material damage to rights or legitimate interests of individuals or organizations or the interests of the public or the State which are protected by the law.

<sup>457</sup> Criminal Procedure Code of the Republic of Kazakhstan, article 72.

<sup>458</sup> Report of human-rights NGOs of Kazakhstan on compliance of the Republic of Kazakhstan with the International Covenant on Civil and Political Rights, Almaty, 2011.

for disciplinary action against the lawyer. Such orders have led to the initiation of disciplinary action against lawyers in some cases simply for discharging the normal duties of a defence lawyer, as prescribed within the law. For example a recent interim order by a judge was lodged against a defence lawyer for filing motions or making attempts to influence the jury, which are the essence of lawyers' work in the court.<sup>459</sup>

In criminal cases, the defence and the prosecution do not enjoy the same opportunities to prepare their case or to make their case in court,<sup>460</sup> contrary to the principle of equality of arms, an element of the right to fair trial. This is due not only to the law, which accords prosecutors in criminal proceedings more powers, but also to the relationships between prosecutors and judges that put lawyers at a considerable disadvantage. Among the practical advantages the public prosecutor enjoys in criminal cases are: free access to the entire criminal case-file, which is not easily available to the lawyer; and free access to the administrative premises of the law-enforcement agencies, penitentiary facilities, courts and even judges. For example, the ICJ was informed that it is not an uncommon practice for a prosecutor to meet informally in private with a judge to discuss an aspect of a case, immediately before a hearing.

The responses to the ICJ survey indicated that witnesses for the prosecution are almost always summoned to the court, but that there are many instances in which defence requests to summon witnesses are not granted. This practice violates the right of the accused to call and question witnesses under the same conditions as the prosecution, guaranteed under international standards.<sup>461</sup> Defence lawyers often face difficulties collecting evidence and presenting it before the court. Many of their requests to collect evidence are reportedly disregarded by judges. These practices raise concerns in regard to the right to adequate time and facilities for the preparation of a defence,<sup>462</sup> and the right to equality of arms.

Lawyers consider that, during the examination of evidence in the proceedings, judges are biased in favour of the prosecution and often mistrustful of the evidence presented by the defence.<sup>463</sup> In those relatively rare instances in which defence witnesses are summoned and heard, lawyers report that the testimony of defence witnesses is often disregarded. Moreover, it was reported that the courts have regard to evidence of innocence on very rare occasions only and would usually disregard or dismiss it completely.

It was also reported that during trials, defence lawyers' requests and motions receive much more unfavourable treatment than the requests and motions lodged by the public prosecution, contrary to the principles of equality of arms. Reportedly, between 20 and 30 percent of defence lawyers' requests during the proceedings are granted or accepted by the judge, while the percentage of the prosecutor's filings granted amounts to 80-90 percent.<sup>464</sup>

It was reported by lawyers that the rate of success in defence challenges to orders for pre-trial detention, is very low. Lawyers report that a serious obstacle to securing equality of arms and protecting the right to liberty of their clients is the lack of a clear and unambiguous requirement in criminal procedural law that the detainee be represented by a lawyer in any *habeas corpus* hearing, in which the legality of the detention is challenged.

These inequalities are not only of concern in relation to the role of lawyers, but also, most significantly, in relation to the respect for the rights of accused persons in criminal proceedings,

<sup>459</sup> ICJ, Disbarment proceedings against lawyers in Kazakhstan, <http://www.icj.org/disbarment-proceedings-against-lawyers-in-kazakhstan/>.

<sup>460</sup> See, generally, Report of human rights NGOs of Kazakhstan on compliance of the Republic of Kazakhstan with the International Covenant on Civil and Political Rights, Almaty, 2011.

<sup>461</sup> ICCPR, article 14.3 (e).

<sup>462</sup> *Ibid.*, article 14.3 (b).

<sup>463</sup> Report of human rights NGOs of Kazakhstan on compliance of the Republic of Kazakhstan with the International Covenant on Civil and Political Rights, Almaty, 2011, p. 24.

<sup>464</sup> As an example of such inequality, see, e.g. ICJ Report on the Appeal Hearing of the Case of Evgeniy Zhovtis, <http://www.icj.org/19650/>, 2010.

including the right to fair trial and the right to liberty. For example, the failure to order the release of an accused person may violate the right to liberty, guaranteed under international standards. The right to liberty requires that detention pending trial should be the exception rather than the rule—ordered only when there is reasonable suspicion that the accused has committed an offence which is punishable by imprisonment and when detention is necessary and proportionate.<sup>465</sup> Without a lawyer present to represent the detained person at a *habeas corpus* hearing, the likelihood of compliance with this standard is reduced.

### *Restrictions on the work of lawyers by law enforcement agents*

While lawyers acknowledged that instances of respectful attitudes towards defence lawyers on the part of the prosecution and law-enforcement authorities do exist, they described the general attitudes towards them as negative and arrogant. It appears that defence lawyers are seen to “interfere with the work” of law enforcement agents and the prosecution. It was reported that, in the course of their professional activities, lawyers regularly experience abuse of power on the part of officials responsible for the investigation.

For example, some lawyers reported that a defence lawyer’s access to his or her detained clients, to the evidence and to the case-file are regularly restricted or impeded by the investigating authorities. As a result, it is typically the case that defence lawyers are left with only inadequate and incomplete information and materials, in violation of the right of the defence to adequate time and facilities to prepare the defence. Lawyers have reported that they face restrictions on access to the criminal case-file and other sources of information, including materials attached to the prosecutor’s request to remand the client in custody. Materials of the criminal case are often provided to the lawyer at the end of the investigation, sometimes even after the judgment has been pronounced.<sup>466</sup>

Lawyers in Kazakhstan face impediments to accessing their clients in detention, contrary to the internationally recognized right of detained persons to prompt access to a lawyer.<sup>467</sup> The official in charge of the investigation in practice exercises discretion on whether to grant a defence lawyer access to their client who is held in custody. Obtaining documents in order to have the first meeting with a detained client requires among other things getting hold of the relevant investigator or a judge, which is often abused and results in delays. Even when the necessary approvals have been obtained, although the law guarantees lawyers free access to their clients,<sup>468</sup> investigators often impede such meetings.<sup>469</sup> Furthermore, lawyers said that the duration of their meetings with their detained clients was restricted by investigators under the pretext of

<sup>465</sup> ICCPR, article 9; UN Human Rights Committee, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, para. 12.3

<sup>466</sup> Report of human-rights NGOs of Kazakhstan on compliance of the Republic of Kazakhstan with the International Covenant on Civil and Political Rights, Almaty, 2011: “(t)he body responsible for the conduct of criminal proceedings often restricts the access of the defendant to the evidence at the stage of pre-trial investigation. Under articles 273 and 275 of the CCrP, the defendant and his lawyer shall be familiarized with all the materials of the criminal case after the investigative activities related to the case have been declared terminated, before the case-file is remitted to the court. After the end of the investigative activities however there is no practical possibility to hold the activities requested by the defense, although the CCrP does not prohibit extending the pre-trial investigation or making other decisions in the case.

<sup>467</sup> UN Basic Principles on the Role of Lawyers, Principle 7; Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, Principles 17 and 18.

<sup>468</sup> Law of the Republic of Kazakhstan on Lawyers’ Activities, article 14 (3) and Criminal Procedure Code of the Republic of Kazakhstan, article 74.

<sup>469</sup> See further, Report of human-rights NGOs of Kazakhstan on compliance of the Republic of Kazakhstan with the International Covenant on Civil and Political Rights, Almaty, 2011, “(c)ontrary to article 26 of the CCrP which guarantees the right of any suspect or accused to defence, violation of the right to defence is among most common infractions in Kazakhstan. Violations of this right are facilitated by the fact that, before an individual is notified of his rights of an accused, he is interrogated as a witness. Quite often, the authorities mislead the defendants, forcing them to confess to an offence or waive legal representation. They backdate procedural documents in the absence of a lawyer. Sometimes defendants have to put their signature on a blank sheet of paper, etc.”



the need to conduct investigative activities.<sup>470</sup> Therefore the guarantee in the law of Kazakhstan of an unlimited number of meetings unrestricted in duration is rarely fulfilled in practice.

The ICJ was also informed that defence lawyers in criminal cases have difficulty meeting with their detained clients confidentially, contrary to national criminal procedure and international standards.<sup>471</sup> They have said that in most places of detention, there are no rooms where a lawyer and his or her client can meet alone. Lawyers have reported having to conduct their first meeting with a detainee, before the interrogation, or other meetings in which they discuss the line of the defence, in the investigator's room or in the lobby, in the presence of an escort officer. They have also said that such meetings may also be secretly audio-recorded, and telephone calls between a detainee and his or her lawyer may be intercepted.

With regard to impediments to confidentiality of lawyer-client communications, lawyers also raised the issues about being subject to search upon admission to the courthouse, premises of the law-enforcement agencies or prosecutor's office; being required to hand in their mobile phones, video- and audio-recording devices and data storage devices; as well as unlawful screening and searches of lawyers.

The requirement that a lawyer have security clearance if representing an individual in a case in which there are documents in the case-file that are or become classified is an additional challenge. In practice, if at least one document is classified, access to the whole case file becomes restricted. If the lawyer representing the accused does not have the requisite security clearance, he or she then has to be replaced by a lawyer who has such clearance. This requirement interferes with the right of an accused person to have counsel of his or her choice represent them, a right guaranteed both in the law of Kazakhstan, and under international standards.<sup>472</sup> Concerns were raised about manipulation of the status of documents to restrict access to a lawyer of choice. It was said that, once a lawyer is security cleared for secret documents, a document classified with a higher secrecy may appear in the case-file, which requires a higher level of clearance, and the lawyer may be prevented even from being provided with a copy of the final judgment.

Another problem is responses to lawyers' requests for evidence from other state bodies, which in practice is different to the response to requests of prosecutors. While a response to a lawyer's request is often given within the time limits prescribed by law, prosecutors or judicial authorities may get a response immediately or much sooner than defence lawyers would usually do, putting defence lawyers in a less favourable position vis-à-vis the public prosecution.

As in court, lawyers often have difficulties with including evidence into the case file at the investigation stage, and have to lodge appeals with the prosecutor's office challenging the lawfulness of the refusal to accept the lawyer's information request. This practice is not compatible with the principle of the equality of arms, and creates significant barriers in ensuring fairness of the trial.

### *Harassment, threats and violence against lawyers*

The responses received to the ICJ survey worryingly indicate that, during the investigation and trial phases of criminal proceedings, defence lawyers are regularly subjected to insults and

<sup>470</sup> Shadow report of human-rights NGOs of Kazakhstan on compliance of the Republic of Kazakhstan with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Almaty, 2008: "(i)t is not rare for the confidentiality of meetings between the defendant and his lawyer (counsel) to be breached. The officers of penitentiary facilities may attend such discussions for operative and search purposes. The discussions may be audio recorded, while telephone calls between the lawyer and his client may be intercepted. Moreover, such information may be used as evidence in criminal proceedings. Although it is quite complicated to prove such interception, there was a case in the City of Pavlodar when the lawyer discovered a verbatim report of her conversation with the client in the investigation room of the remand prison when she was studying the file of the criminal case investigated by the financial police. The Presidium of the Pavlodar Regional Collegium of Lawyers informed the Union of Lawyers of Kazakhstan about that flagrant violation of the lawyer and client's right to confidential communication."

<sup>471</sup> UN Basic Principles on the Role of Lawyers Principles 8, 22; Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle 18 (3).

<sup>472</sup> UN Basic Principles on the Role of Lawyers, Principle 1

intimidation, including beatings, and threats of physical violence against the lawyer and or his or her family members by law enforcement officials and relatives of victim . Reports include accounts of lawyers being beaten on law-enforcement premises or in the courtroom during the trial. According to the information received such targeting typically is aimed at lawyers who are not known by the investigators; the risk of such targeting apparently is reduced if the lawyer has developed relationships with the law enforcement officials or investigating authorities involved in the case.

There were also reports that judges have threatened lawyers with “interim orders” that can form the basis for initiating disciplinary action against a lawyer, in cases in which the lawyer has raised procedural irregularities in a case.

The ICJ is concerned that the authorities in Kazakhstan have yet to take effective measures, required by international standards,<sup>473</sup> to ensure that lawyers are not identified with their clients or their clients’ causes, and that lawyers are able to perform all of their professional functions without intimidation, harassment or improper interference, including threats of sanctions for action taken in accordance with recognized professional duties.

## Kyrgyz Republic

The law of the Kyrgyz Republic contains many provisions essential to safeguard the role of lawyers, including when representing clients suspected or accused of criminal offences, and enshrines guarantees aimed to ensure respect for the rights of the lawyer. In practice, however, lawyers typically face serious obstacles in representing their clients effectively in criminal proceedings, and state appointed defence lawyers do not always represent their clients independently. Most seriously, in particular in criminal proceedings related to the 2010 ethnic violence, the authorities have failed to protect lawyers from harassment and physical attack.

### Legal Framework

The law of Kyrgyzstan includes guarantees of the constitutional right to a defence to all persons accused of criminal offences, as well as guarantees that lawyers enjoy freedom and autonomy, guarantees of the democratic and collective character of inter-lawyer relationships, and freedom of membership in professional public associations of lawyers. The law also includes provisions relating to ensuring the integrity and accountability of the legal profession, including rules of professional ethics.<sup>474</sup>

The law prescribes that, in the course of his or her professional activities, a lawyer has the right to: represent and defend the rights and legitimate interests of individuals before any State agencies or organizations, regardless of their form of incorporation; collect factual information which may be used as evidence; collect written statements from witnesses, draft private scene inspection reports; and demand and obtain documents or copies thereof from any State agencies or organizations, regardless of their form of incorporation, as well as from individuals with their consent.<sup>475</sup>

The law states that lawyers have the right to study all the documents and materials necessary for the purposes of legal representation, other than information protected by the law (such as information that is classified as a state secret) and take written assessments from specialists.<sup>476</sup> A lawyer may be present and participate in the examination by the prosecutor of the investigator’s request (decision) to place his or her client in custody, or to extend the term of the client’s pre-trial detention. A lawyer is authorized by law to make oral or written motions; submit information requests or complaints to officials and obtain their written responses as provided by the law; attend the proceedings in which requests or complaints made on behalf of his or

<sup>473</sup> Basic Principles on the Role of Lawyers, Principles 16 (a) and 18.

<sup>474</sup> Law of the Kyrgyz Republic on Lawyers’ Activity, article 3.

<sup>475</sup> *Ibid.*, article 12 (1), and Criminal Procedure Code, article 48.

<sup>476</sup> Law of the Kyrgyz Republic on Lawyers’ Activity, article 12 (1).

her client are examined and make comments on the merits of the requests or complaints; and have unimpeded private meetings with his or her client in custody, without any restrictions on their duration or number.<sup>477</sup> The lawyer has the right to take part in criminal proceedings starting from the first interrogation of the suspect, or, if the latter is arrested, from the point when the client is brought before the inquiring authority. The law states that a lawyer may collect any materials containing evidence in favour of his or her client who is a suspect or accused; demand information references, letters of reference or any other documents; present evidence during the trial or investigation; lodge requests and file motions for recusals; and take the necessary notes from the case-file or make a copy thereof.<sup>478</sup> A lawyer also has the authority to lodge complaints against the conduct of the officer in charge of an inquiry, and the conduct and decisions of the investigator, prosecutor, judge or court, and may attend the examination of such complaints.<sup>479</sup> The law also authorizes lawyers to record the testimony during court hearings by means of audio-recording and or other devices.<sup>480</sup>

If he or she obtains the investigator's consent, a lawyer who participates in an investigative activity may ask questions of those being interrogated.<sup>481</sup> While an investigator may object to questions posed by a lawyer in the course of the investigation and ensure that they are not answered, the investigator must ensure that the question is recorded in the relevant report.<sup>482</sup> A lawyer may also make written comments in the investigative activity report concerning its accuracy or completeness.<sup>483</sup> Finally, the law authorizes lawyers acting on behalf of people charged with criminal offences to use any other ways and means of defence which are not contrary to the law.<sup>484</sup>

The law enshrines the principle that there must be no interference with lawyers' activities from any agencies or officials.<sup>485</sup> Importantly, the law prohibits disciplinary, civil, administrative or criminal action against a lawyer for any opinion expressed in his or her professional capacity, any statement made before a court or any law-enforcement agency, or any action taken in the course of his or her professional activities and in compliance with ethical standards.<sup>486</sup>

Criminal proceedings against a lawyer may be initiated (and his or her arrest authorized) for unlawful conduct related to the lawyer's professional activities by the Prosecutor General for the Republic of Kyrgyzstan or his or her deputy.<sup>487</sup> A lawyer may be subject to arrest or detention by order of the Prosecutor or a court. The highest body of the professional public association of lawyers of the Kyrgyz Republic must be promptly notified of the arrest or detention of any lawyer and any criminal proceedings initiated against a lawyer.<sup>488</sup>

The law states that a lawyer cannot in any circumstances be subjected to a personal search or screening in the discharge of his or her professional duties.<sup>489</sup> Nevertheless, a prosecutor or the court may authorize the entry into the lawyer's house or working premises or a vehicle used by the lawyer and a survey, search thereof and seizure of property, inspection or seizure of his or her mail and telegrams, interception of telephone calls and other communications.<sup>490</sup>

The statutory guarantees for lawyers prohibit any interference with the lawyer's freedom of movement related to the provision of legal assistance; requiring any special permit or creating

<sup>477</sup> *Ibid.*, article 12 (1).

<sup>478</sup> *Ibid.*, article 12 (1), Criminal Procedure Code, article 48.

<sup>479</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 12 (1); Criminal Procedure Code, article 48.

<sup>480</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 12.

<sup>481</sup> *Ibid.* 12 (2); Criminal Procedure Code, article 48.

<sup>482</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 12 (2); Criminal Procedure Code, article 48.

<sup>483</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 12 (2); Criminal Procedure Code, article 48

<sup>484</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 12 (1); Criminal Procedure Code, article 48.

<sup>485</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 17 (6).

<sup>486</sup> *Ibid.*, article 16 (4).

<sup>487</sup> *Ibid.*, article 16 (2).

<sup>488</sup> *Ibid.*, article 16 (3).

<sup>489</sup> *Ibid.*, article 16(1).

<sup>490</sup> *Ibid.*, article 16.

other unlawful obstacles to lawyers' activities; and interfering with lawyers' activities.<sup>491</sup> The law also criminalizes lack of respect towards the lawyer, threats against the lawyer, insulting or libelling him or her, or violence or attack on the lawyer's life,<sup>492</sup> health or property.<sup>493</sup>

Documents related to legal assistance may only be required from a lawyer, seized, inspected, verified or copied, and information related to legal assistance may only be collected and used with the consent of the client, or if the lawyer him or herself becomes a defendant in criminal proceedings.<sup>494</sup>

Under the law, a lawyer cannot be summoned or examined as a witness in relation to any circumstances covered by the lawyer-client privilege.<sup>495</sup> A lawyer cannot make any depositions or statements about such circumstances or provide any materials in respect of them to be used in the course of operative and search activities, court proceedings, or administrative or other proceedings before any law-enforcement agencies.<sup>496</sup> No depositions, statements or materials received from a lawyer in relation to the legal assistance may be admitted as evidence.<sup>497</sup>

As to the duties of a lawyer, the law prescribes that a lawyer must provide legal assistance in conformity with the applicable laws and rules of professional ethics; use all statutory means and methods to protect the rights and legitimate interests of individuals.<sup>498</sup> He or she must maintain confidentiality in respect of those seeking his or her legal advice, unless the individual in question agrees to disclosure of information following a consultation with the lawyer; or if the information is disclosed to prevent the individual seeking legal advice from conduct likely to cause death or severe bodily injuries.<sup>499</sup>

A lawyer cannot act as counsel for a party to the proceedings if he or she has earlier acted as counsel or representative for the other party to the same proceedings.<sup>500</sup> One lawyer cannot act as counsel on behalf of two or more persons during the investigation or trial if there is a conflict of interests between the defendants.<sup>501</sup> A lawyer may not refuse to represent an accused

<sup>491</sup> Under article 318–1 of the Criminal Code of the Kyrgyz Republic ("*CC of the KR*"), interference with any form of exercise of rights or discharge of duties of counsel under article 48 of the Code of Criminal Procedure of the Kyrgyz Republic shall be punishable with a fine in the amount of one hundred to two hundred minimum monthly wages or detention for three to six months. The offence punishable by the first paragraph of this article, when committed by an individual in his official capacity, shall be punishable with a fine in the amount of five hundred to one thousand minimum monthly wages or deprivation of liberty up to five years, with a deprivation of right to occupy certain offices or to pursue certain activities for up to three years.

<sup>492</sup> Under article 319 of the CC of the KR, an attack on the life of a judge, juror or any other person who participates in the administration of justice, prosecutor, investigator or inquirer, counsel, expert, court bailiff as well as their relatives, committed in the context of the examination of cases or materials before the court, pre-trial investigation or enforcement of the judgment, court decision or any other judicial act, committed in order to impede the legitimate activities of the above persons or out of revenge for such activities, shall be punishable with a term of imprisonment of twelve to twenty years. Furthermore, under article 320 of the CC of the KR, a threat of death, health damage, destruction of or damage to property made against a judge, juror or any other person who participates in the administration of justice, as well as their relatives in the context of the examination of cases or materials before the court shall be punishable with a fine in the amount of five hundred to seven hundred minimum monthly wages or deprivation of liberty for up to three years. The above offence, when committed against a prosecutor, investigator or inquirer, counsel, expert, court bailiff as well as their relatives, committed in the context of pre-trial investigation, examination of cases or materials before the court or enforcement of the judgment, court decision or any other judicial act, shall be punishable with a fine in the amount of two hundred to five hundred minimum monthly wages or arrest for three to six months, or deprivation of liberty for up to two years. The offences punishable under the first and second paragraphs of this article, if they involve the use of violence which is not dangerous for life or health, shall be punishable with a deprivation of liberty for up to five years. The offences punishable under the first and second paragraphs of this article, if they involve the use of violence which is dangerous for life or health, shall be punishable with a deprivation of liberty for five to ten years.

<sup>493</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 17 (3).

<sup>494</sup> *Ibid.*, article 17 (4).

<sup>495</sup> *Ibid.*, article 17 (5).

<sup>496</sup> *Ibid.*, article 17 (5).

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*, article 13 (1).

<sup>499</sup> *Ibid.*, article 13 (6).

<sup>500</sup> *Ibid.*, article 13 (2).

<sup>501</sup> *Ibid.*, article 13 (3).

person once he or she has undertaken the defence.<sup>502</sup> One lawyer may only be replaced with another pursuant to the request or with the consent of the defendant.<sup>503</sup>

### *Independence of lawyers and undue influence*

Concern was expressed to the ICJ by lawyers that the fact that former officers of the investigating authorities, Ministry of the Interior, or the intelligence services, may be authorized to practice law without having to take a qualifying examination, undermines the independence and integrity of the legal profession as a whole. Lawyers expressed concern to the ICJ that such former officials, when they are appointed to represent individuals in criminal cases, are likely to co-operate with the investigating or inquiring authorities in inappropriate ways, for example by signing procedural documents without taking part in the relevant investigative activities, notwithstanding that such action would be contrary to the interests of their clients.

Co-operation of some state-appointed defence lawyers with the investigating authorities, against the interests of their clients, is evidenced by cases before international human rights bodies in which it is alleged that lawyers, who were assigned by the investigators to represent individuals accused of criminal offences, were present while their clients were beaten and accepted rather than complained against such treatment.<sup>504</sup> In his recent preliminary findings following a visit to Kyrgyzstan the UN Special Rapporteur on Torture noted that: "*the State-appointed lawyers and judges were seen [by the detainees as] formally present to rubberstamp decisions of the investigative officer rather than to undertake ex officio investigations or even routinely to ask persons brought from police custody how they have been treated.*"<sup>505</sup>

### *Equality of arms and treatment of lawyers in court*

Despite the guarantees in legislation described above, in practice, lawyers face obstacles in representing their clients effectively in criminal trials. Although they report that the attitudes of judges towards lawyers vary and sometimes depend on personal relationships, lawyers have described the general attitude of judges or court staff towards defence lawyers as disrespectful. Among other things it was reported that judges have limited the time afforded to the defence for making submissions and pleading and interrupt defence lawyers when they are making such submissions. One lawyer reported that the judge ordered a police convoy to escort the lawyer out of the courtroom, in response to the lawyer's attempt to read a recusal motion aloud. This kind of hostility tends to be directed primarily towards defence lawyers and not prosecutors, leading to a situation of inequality of arms between the prosecution and defence, in violation of the right to fair trial of the accused. This can be seen, for example, in regular instances where the number of requests to obtain the attendance of witnesses for the defence and for the prosecution granted by judges is not equal.<sup>506</sup> Equality of arms and the right to a defence are therefore extremely poorly protected in practice.

In practice, lawyers' ability to represent their clients effectively is also hampered by difficulties in collecting evidence, for many State authorities refuse to respond to their information requests, although the law guarantees the right of the defence to request and obtain information.<sup>507</sup> This is especially so in cases of allegations of torture where the courts may refuse to consider the evidence presented by the accused or his or her lawyer.<sup>508</sup>

<sup>502</sup> *Ibid.*, article 13 (5).

<sup>503</sup> *Ibid.*, article 13 (4).

<sup>504</sup> E.g. see UN Human Rights Committee, *Ahmet Gunan v. Kyrgyzstan*, Communication No. 1545/2007, CCPR/C/102/D/1545/2007, para. 2.6; *Otabek Akhadov v. Kyrgyzstan*, Communication No. 1503/2006, CCPR/C/101/D/1503/2006, para. 2.3. See further, ICJ Report on the arrest, detention and trial of Azimzhan Askarov, para. 52.

<sup>505</sup> UN Special Rapporteur on Torture presents preliminary findings on his country visit to the Kyrgyz Republic, 13 December 2011, <http://www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=11712&LangID=R>.

<sup>506</sup> E.g. see UN Human Rights Committee: *Rustam Latifulin v. Kyrgyzstan*, Communication No. 1312/2004, CCPR/C/98/D/1312/2004, para. 3.4;

<sup>507</sup> Law of the Kyrgyz Republic on Lawyers' Activity, article 12 (1): Criminal Procedure Code of the Kyrgyz Republic, article 48.

<sup>508</sup> UN HRC, *Otabek Akhadov v. Kyrgyzstan*, Communication No. 1503/2006, CCPR/C/101/D/1503/2006, para. 5.2.

The role of the defence in criminal proceedings, and the ability of defence lawyers to represent their clients effectively, was significantly affected by the ethnic clashes of 2010 and the severe ethnic tensions and abuses that marred subsequent prosecutions. In cases related to the conflict, members of the public or relatives of victims have regularly threatened and attacked people charged with crimes and the lawyers who represent them.<sup>509</sup>

In cases related to the 2010 events, when witnesses are called they sometimes fear to attend the hearing due to the real risk it poses to their safety and lives.<sup>510</sup> It was also reported by lawyers that in some cases the prosecution may obtain contact information of a witness “to verify if the witness should be summoned” and after a phone call, the witness would refuse to attend the hearing. Similarly, lawyers in such proceedings are effectively prevented from defending their clients to the best of their capacity due to the constant risk of attacks from relatives or supporters of the victims. Although these problems have been most acute in regard to prosecutions following the 2010 ethnic clashes, cases where lawyers fear taking action in defence of their clients due to possible reprisals go beyond the 2010 events, and indeed the problem predates these events.<sup>511</sup>

### *Restrictions on the work of lawyers by law enforcement agents*

According to the information received by the ICJ, lawyers, particularly those who represent clients in criminal proceedings, are often exposed to pressure, threats and harassment from public officials.

Defence lawyers face barriers to providing effective defence of their clients during the investigatory stage of the criminal process, where the public prosecutor retains considerable powers and influence. During the pre-trial investigation, the lawyer’s requests to obtain the attendance of witnesses for the defence before the law-enforcement authorities are often dismissed by the investigators who have discretion to invite or not invite such witnesses.<sup>512</sup> Lawyers’ access to documents may also be restricted.<sup>513</sup> This may impede the exercise of or violate the right of an accused person to adequate time and facilities to prepare their defence, contrary to the right to fair trial of the accused person and to Principle 21 of the UN Basic Principles on the Role of Lawyers. It also impacts on the perception of the role and effectiveness of lawyers who represent individuals charged with criminal offences. Lawyers also point out that prosecutors have much better facilities to carry out their functions in criminal cases, than those available to the defence.

The ICJ received reports that confidential lawyer-client contacts have been impeded by the police authorities, in particular investigators or operative officers, contrary to international standards.<sup>514</sup> This is a particular concern in cases related to the 2010 conflict.<sup>515</sup>

Reports received by the ICJ indicate that lawyers are regularly identified with their clients by law-enforcement agents, contrary to Principle 18 of the UN Basic Principles on the Role of Lawyers. One lawyer referred to a police officer who issued him with a certificate indicating that the lawyer belonged to a criminal group due to the fact that he had represented persons alleged to be members of a criminal group. Such practices, which can take a variety of forms, seriously undermine guarantees afforded to lawyers under national legislation as well as international law in Kyrgyzstan.

<sup>509</sup> ICJ Report on the arrest, detention and trial of Azimzhan Askarov, <http://www.icj.org/icj-report-kyrgyz-human-rights-defender-azimzhan-askarov-victim-of-severe-ill-treatment-and-unfair-trial/>; “Kyrgyzstan: measures to end attacks on lawyers and defendants urgently needed”, press-release of the International Commission of Jurists of 15 October 2010, <http://www.icj.org/kyrgyzstan-measures-to-end-attacks-on-lawyers-and-defendants-urgently-needed/>; “Kyrgyzstan: ICJ condemns assaults on lawyers in Supreme Court”, press release issued by the International Commission of Jurists on 2 April 2013, <http://www.icj.org/kyrgyzstan-icj-condemns-assaults-on-lawyers-in-supreme-court/>.

<sup>510</sup> E.g. see ICJ Report on the arrest, detention and trial of Azimzhan Askarov, <http://www.icj.org/icj-report-kyrgyz-human-rights-defender-azimzhan-askarov-victim-of-severe-ill-treatment-and-unfair-trial/>, para. 52.

<sup>511</sup> UN HRC, *Otabek Akhadov v. Kyrgyzstan*, Communication No. 1503/2006, CCPR/C/101/D/1503/2006, para. 2.3.

<sup>512</sup> Law of the Kyrgyz Republic on Lawyers’ Activity, article 12 (1); Criminal Procedure Code, article 48.

<sup>513</sup> E.g. see UN HRC, *Ahmet Gunan v. Kyrgyzstan*, Communication No. 1545/2007, CCPR/C/102/D/1545/2007, para. 3.5.

<sup>514</sup> UN Basic Principles on the Role of Lawyers, Principles 8, 22.

<sup>515</sup> See further, ICJ Report on the arrest, detention and trial of Azimzhan Askarov, *op. cit.*, para. 59.

### *Harassment, threats and violence against lawyers*

There are widespread reports of harassment of lawyers, and attacks against lawyers in Kyrgyzstan. According to these reports, since the ethnic conflict in the south of the country, accused ethnic Uzbeks and lawyers representing them, as well as witnesses for the defence, have been and continue to be subject to attack. There is evidence that law enforcement agents usually fail to intervene to stop such attacks, which have taken place both outside and inside court premises.<sup>516</sup> Most lawyers said they were not aware of any response on the part of the lawyers' organizations to the assaults on members of the profession.

Such attacks on lawyers were most frequent in the immediate aftermath of the ethnic conflict, when a large number of prosecutions came before the courts in the south of the country. Violence against defendants and their lawyers still continues, however. For example, recently, during the appeal of a criminal conviction related to the 2010 conflict, lawyers were reportedly physically attacked inside the Supreme Court building, apparently by supporters of the victim in the case. No immediate steps were taken by the Court to prevent the beatings, which continued for several minutes before security officers intervened.<sup>517</sup> Despite such incidents, lawyers with whom the ICJ consulted were not aware of any instances of investigation into assaults on lawyers.

The ICJ considers that the failure of the authorities to take adequate steps to prevent threats and assaults against defendants, witnesses and lawyers in cases in which there has been a demonstrable pattern of such threats and assault well known to the authorities, breaches the obligation of the state to take measures within its powers to prevent violations of the human rights of those whom they knew or ought to have known were at such risk.<sup>518</sup> Furthermore, the lack of investigation into these serious and well documented allegations, is in violation of the State's obligation under international human rights law, including the ICCPR, to ensure prompt, thorough and independent investigation of such allegations, capable of leading to the identification and prosecution of the perpetrators.<sup>519</sup>

The failure of the authorities to protect and guarantee the safety of lawyers who have provided legal assistance to individuals charged in connection with the ethnic violence in Osh, has reportedly had a chilling effect upon other lawyers: many say they have been discouraged from representing persons in criminal cases out of fear of reprisals. This is likely to have further impeded the right to fair trial of persons accused of crimes related to the ethnic violence of 2010.

## **Republic of Turkmenistan**

The law of Turkmenistan enshrines guarantees for the role and functioning of lawyers which in themselves largely comply with international standards, although sweeping exceptions to lawyer-client privilege in regard to state secrets and national security are a cause for serious concern. In practice, however, executive control of the judicial system leaves the very small number of lawyers in Turkmenistan unable to defend their clients' interests or to protect their human rights and in particular prevents defence lawyers from protecting clients from torture and other ill-treatment in pre-trial detention, from arbitrary detention and from unfair trial.

### *Legal Framework*

According to the law, lawyers' activities in Turkmenistan are governed by the principles of the rule of law, independence, self-government and equality; by the individual's constitutional right

<sup>516</sup> "Kyrgyzstan: measures to end attacks on lawyers and defendants urgently needed", press-release of the International Commission of Jurists of 15 October 2010, <http://www.icj.org/kyrgyzstan-measures-to-end-attacks-on-lawyers-and-defendants-urgently-needed/>.

<sup>517</sup> "Kyrgyzstan: ICJ condemns assaults on lawyers in Supreme Court", press release issued by the International Commission of Jurists on 2 April 2013, <http://www.icj.org/kyrgyzstan-icj-condemns-assaults-on-lawyers-in-supreme-court/>.

<sup>518</sup> Human Rights Committee, General Comment No.31, the Nature of the General Obligations Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 8; ECtHR, *Osman v. UK*, Application No. 23452/94, Judgment of 28 October 1998.

<sup>519</sup> ICCPR, articles 6, 7; UN Human Rights Committee, General Comment No 20 on Article 7, 13 March 1992, HRI/GEN/1/Rev.7, para. 14; Human Rights Committee, *Hugo Rodriguez v. Uruguay*, 19 July 1994, CCPR/C/51/D.322/1988.

to receive professional legal assistance and to have access to the administration of justice on the basis of the principle of equality of arms and adversarial proceedings; accessibility for everyone of legal assistance provided by the lawyer; pursuit of lawyers' activities by lawful means and methods; prohibition of interference with the exercise of the lawyer's activities: as well as pursuit of lawyers' activities in conformity with moral standards, securing compliance with lawyer's ethics and the lawyer-client privilege.<sup>520</sup>

The law provides that lawyers must protect the rights and legitimate interests of their clients honestly and in good faith, by any legitimate means; that they must participate in criminal proceedings in which they act as counsel, and must contribute to provision of free legal assistance to the nationals of Turkmenistan.<sup>521</sup>

In so far as the exercise of their professional activities is concerned, the law protects lawyers from any restrictions on their freedom of movement for the purpose of providing legal assistance; from being required by the State authorities to make any written or oral statements about the circumstances known to them in connection with the discharge of their professional duties; and from being held administratively or criminally liable on account of an opinion expressed by the lawyer when discharging his or her professional functions, a statement made before the court or any law-enforcement agency, or any other acts.<sup>522</sup> Interference with lawyers' activities or any kind of impediments to such activities, showing lack of respect towards the lawyer or compromising the lawyer in the discharge of his or her professional functions entails criminal responsibility under the law of Turkmenistan.<sup>523</sup>

The lawyer and his or her family members enjoy the protection of the State which, under the laws of Turkmenistan, must take all steps necessary to secure their safety.<sup>524</sup>

To protect the rights of his or her clients, the lawyer has the right to: collect information necessary to provide legal assistance (other than information which constitutes State or other secrets); to collect and present items and documents which may be admitted as evidence and to contract specialists.<sup>525</sup> He or she has the right to meet clients in private, under conditions which guarantee confidentiality, including during the client's detention in custody, without any restrictions on the duration or number of such meetings and to study the case-file and take notes.<sup>526</sup> The law stipulates that lawyers may practice law across Turkmenistan and abroad; and take any other action which is not contrary to the laws of Turkmenistan.<sup>527</sup>

Lawyers have the duty to improve, on a regular basis, their knowledge and qualifications; comply with the laws of Turkmenistan, with standards of professional conduct and lawyer-client privilege; to show a high standard of civility when working and communicating with clients; and to comply with the ethical standards of the profession.<sup>528</sup>

When exercising their professional activities, lawyers may not accept any instructions from a person seeking legal advice which they know to be unlawful. Furthermore, a lawyer may not provide legal assistance to anyone if he or she has a particular interest in the subject matter of the contract with the client which is different from the client's interests; if the lawyer has participated in the case as a judge, prosecutor, investigator, inquirer, expert, specialist or translator, or is a victim or a witness in the same proceedings; or if he or she is an official who was competent to make a decision affecting such person, a relative of the victim, an official who took or takes part in the investigation or examination of the client's case; or if he or she earlier

<sup>520</sup> Law of Turkmenistan on Advokatura and Lawyers' Activity in Turkmenistan, article 3.

<sup>521</sup> *Ibid.*, article 14 (2).

<sup>522</sup> *Ibid.*, article 17 (2-4).

<sup>523</sup> *Ibid.*, article 17 (5).

<sup>524</sup> *Ibid.*, article 17 (6).

<sup>525</sup> *Ibid.*, article 14 (1).

<sup>526</sup> *Ibid.*

<sup>527</sup> *Ibid.*

<sup>528</sup> *Ibid.*, article 14 (2).



provided or currently provides legal advice to another client in the same proceedings whose interests are contrary to the interests of the person in question.<sup>529</sup>

Lawyers are prohibited from pleading a case contrary to the will of their clients, unless a lawyer is convinced that the client has falsely incriminated him or herself; from making public statements to the effect that the client's guilt has been proven if the latter pleads innocent; from disclosing, without the client's consent, any information received from the client in connection with provision of legal assistance by the lawyer; or refusing to represent the client once the lawyer has undertaken the defence, unless there is a conflict between the interests of the client and those of another client, or if there is conflict between their respective statements.<sup>530</sup>

Lawyers have the duty to exercise professional activities in conformity with principles of ethics of the profession, by discharging their duties in good faith.<sup>531</sup> Lawyers must refrain from any abuse of lawyer-client privilege in their own interests or in lucrative or other interests of any third party; and must not take any action which is incompatible with their professional activities related to legal representation; or make any offensive or insulting statements of a humiliating or degrading nature. Lawyers must behave with civility when acting pursuant to the client's instructions and must comply with the rules of the lawyer's ethics established by the Regulation on Rules of Conduct of Lawyers as adopted by the general meeting of the collegium of lawyers.<sup>532</sup>

According to the law, lawyer-client privilege covers any information received by the lawyer when providing legal advice to a client, the disclosure of which is unfavourable for the client. There is a significant and broad-ranging exception to lawyer-client privilege, however: it does not cover any information which constitutes a State secret or concerns the interests of national security or public safety.<sup>533</sup> Lawyers have no right to disclose, or to use in their own interests or in the interests of any other persons, any information known to them in connection with the provision of legal assistance, which is covered by the lawyer-client privilege.<sup>534</sup>

### *Independence of lawyers and undue influence*

As noted by the European Court of Human Rights in its ruling in the case of *Ryabikin v. Russia*, "accurate information about the human rights situation in Turkmenistan . . . is scarce and difficult to verify, in view of the exceptionally restrictive nature of the prevailing political regime, described as 'one of the world's most repressive and closed countries'."<sup>535</sup> It is not surprising that in this context, the ICJ has had difficulty in obtaining information about the position of lawyers in the legal system of the country and their treatment.

The ICJ is not aware of any recent attempts to exert undue influence on lawyers in Turkmenistan. However, although the law of Turkmenistan recognizes the role and affords a high degree of protection for lawyers exercising their professional role in the defence of their clients' rights and interests, the prevalence of executive control over all aspects of the legal and judicial system in Turkmenistan, makes it extremely difficult for lawyers to operate independently. Attempts to do so are likely to lead to the disbarment of the lawyer, and potentially to other sanctions. In these circumstances, it is most likely for this reason that the ICJ was informed that most lawyers do not attempt to challenge the flaws that exist in the system in practice, or human rights violations that arise within or because of it.

### *Equality of arms and treatment of lawyers in court*

It is clear that, with only just two or three hundred lawyers in the country, the legal profession in Turkmenistan plays a marginal role in the judicial process, which suffers from serious irregularities.

<sup>529</sup> *Ibid.*, article 13 (1).

<sup>530</sup> *Ibid.*, article 13 (3).

<sup>531</sup> *Ibid.*, article 14 (2).

<sup>532</sup> *Ibid.*, article 15.

<sup>533</sup> *Ibid.*, article 16 (1, 3).

<sup>534</sup> *Ibid.*, article 16 (2).

<sup>535</sup> European Court of Human Rights, *Ryabikin v. Russia*, Application No. 8320/04, para. 116.

Lawyers function in a system where the judiciary is dependent on the executive, and where the right to fair trial and the principle of equality of arms are consistently disregarded, leading to a conviction rate of 100 percent. In his recent statement of 2013, the Assistant UN Secretary General said that in Turkmenistan "...there is no independence of the judiciary and... court proceedings are still subject to an oversight of legality by the Office of the Prosecutor General."<sup>536</sup> Lack of an independent judiciary was a concern of the UN Human Rights Committee in its concluding observations on Turkmenistan in 2012.<sup>537</sup>

Given the high degree of executive control over the justice system, including the judiciary, it appears that defence lawyers have minimal expectations of being able to represent the rights of their clients in the course of the criminal proceedings. In this context, lawyers do not focus on challenging practices of the executive or rulings of courts, and in particular, do not challenge convictions through appeals, which are seen as redundant and unnecessary. Rather they concentrate their energies on obtaining pardons for their clients, as the most practical means of serving their clients' interests. Lawyers are therefore unable to protect the rights and interests of their clients at all stages of the criminal process, in accordance with international standards on the role of lawyers, with the rule of law and with the internationally guaranteed right to a fair trial.<sup>538</sup>

### *Restrictions on the work of lawyers by law enforcement agents*

Equality of lawyers and prosecutors is enshrined in law.<sup>539</sup> In practice however the prosecutor enjoys greater advantages and the attitude of the prosecution towards lawyers is described by lawyers as "underestimating." It is reported, for example, that state authorities adopt different attitudes to requests lodged by defence lawyers and those of the law-enforcement agents, and are slow in dealing with defence lawyers' requests. The absence of any acquittals in criminal trials signals that the system is dominated by the prosecution, and renders the role of defence lawyers, at the investigatory stage as well as at trial, virtually meaningless.

The rights of detained persons to have access<sup>540</sup> to a lawyer are frequently denied, in contravention to international standards, including the right to liberty under article 9 of the ICCPR, and to principle 7 of the UN Basic Principles on the Role of Lawyers. Access to a client in detention is generally granted upon the written consent of the investigator, although this is reportedly not required in every case. The denial of access to a lawyer in detention not only facilitates arbitrary detention and impedes the provision of an effective defence in criminal proceedings, but also prevents lawyers from protecting their clients from torture or other ill-treatment, which is routinely used against arrested persons in Turkmenistan.<sup>541</sup>

It was reported that in certain instances, when lawyers meet with their clients, an escort officer nominated by the head of the temporary holding facility or prison is present. This practice is inconsistent with the right of the accused person to confidential communications with his or her lawyer guaranteed both in national law and international standards and the duty of the state to protect the confidential nature of lawyer-client communications.<sup>542</sup>

<sup>536</sup> Statement of the Assistant UN Secretary General for Human Rights, 26 May 2013, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13361>.

<sup>537</sup> UN HRC, Concluding Observations, Turkmenistan, 19 April 2012, CCPR/C/TKM/CO/1, para. 13.

<sup>538</sup> UN Basic Principles on the Role of Lawyers, Principles 1, 14.

<sup>539</sup> Criminal Procedure Code of Turkmenistan, article 22.

<sup>540</sup> Concluding observations of the UN Committee Against Torture following the consideration of the initial report submitted by Turkmenistan in May 2011, CAT/C/TKM/CO/1, para. 9, "[...] The Committee is concerned that the Criminal Code allows police officers to detain a person without the authorization of the prosecutor general for 72 hours and without presentation to a judge for up to one year. It is reported that detainees are frequently denied access to a lawyer and that violence is inflicted by police officers to extract confessions during that period of time."

<sup>541</sup> ECtHR, Soldatenko v Ukraine, Application No. 2440/07, judgement of 23 October 2008, para. 73.

<sup>542</sup> The Human Rights Committee has explained that the guarantee of the right of an accused individual to communicate with their counsel enshrined in article 14 (3) (b) of the ICCPR, to which Turkmenistan is a party, means that counsel 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. Human Rights Committee General Comment 32, para. 32; see also Principle 8 of the Basic Principles on the Role of lawyers, which enshrines the right of detained people to meet and communicate with a lawyer, without delay, interception and censorship, in full confidentiality.

## *Harassment, threats and attacks on lawyers*

The ICJ is not aware of reports of lawyers in Turkmenistan representing individuals suspected and accused of crimes being subject to insults, intimidation or attack in the course of the pre-trial investigation or trial.

## **Republic of Tajikistan**

Although Tajikistan law provides for the independence of lawyers and establishes guarantees for their functioning in accordance with international standards, this is undermined in regard to criminal prosecutions by provisions of criminal procedure law, which enshrine inequalities between the prosecution and defence, and by practices which impede lawyers in providing an effective defence to their clients. Defence lawyers also face threats or harassment in their work.

### *Legal Framework*

When exercising his or her professional activities, the law provides that a lawyer in the Republic of Tajikistan must be independent and subject to law alone, and that lawyers enjoy freedom of speech, both orally and in writing.<sup>543</sup>

When providing legal assistance, the lawyer has the right to :

- represent the rights and legitimate interests of individuals before any State agencies and non-governmental entities;
- collect information, request information references, letters of reference and other documents; request assessments from specialists;
- have unimpeded private contacts with the client in confidentiality and without any restrictions on the duration of the meeting, including with a client who is kept in custody; and
- use audio-recording devices and other technical equipment during the inquiry, pre-trial investigation and trial.<sup>544</sup>

State authorities and officials must provide the lawyer with an opportunity to provide legal assistance and shall respect the lawyer's rights.<sup>545</sup> No one shall restrict the lawyer's freedom of movement, require any special permit or create unlawful obstacles to the lawyers' activities.<sup>546</sup> Any interference with the lawyers' activities or lack of respect towards a lawyer entails legal responsibility,<sup>547</sup> including criminal liability.<sup>548</sup>

A lawyer's statements which affect the honour and dignity of a party to the proceedings, the party's representative, prosecutors or defence lawyers, witnesses, victims, experts or translators, which are not contrary to the rules of professional ethics of lawyers, cannot be subject to prosecution.<sup>549</sup>

<sup>543</sup> Law of the Republic of Tajikistan on Advokatura, article 12 (1, 2).

<sup>544</sup> *Ibid.*, article 10 (1).

<sup>545</sup> *Ibid.*, article 13 (1).

<sup>546</sup> *Ibid.*, article 13 (2, 3).

<sup>547</sup> *Ibid.*

<sup>548</sup> Under article 356 of the Criminal Code of the Republic of Tajikistan, a threat of death, health damage, damage to or destruction of property, made against a judge, lay assessor, prosecutor, investigator, officer in charge of inquiry, lawyer, expert, translator, process server or court clerk, court bailiff, as well as their relatives in the context of inquiry, pre-trial investigation, examination of the case-file before the court or enforcement of the judgment, court decision or any other judicial act, shall be punished with a fine in the amount of five hundred to one thousand calculation indices, or corrective labor for up to two years or deprivation of liberty for the same term. The use of violence which is not dangerous for life or health against the persons referred to in the first paragraph of this article in the context of inquiry, pre-trial investigation, examination of the case-file before the court or enforcement of the judgment, court decision or any other judicial act, shall be punished with deprivation of liberty for two to five years. The offences punishable under the first or second paragraphs of this article with the use of violence which is dangerous for life or health shall be punished with deprivation of liberty for five to ten years.

<sup>549</sup> Law of the Republic of Tajikistan on Advokatura, article 12 (3).

In the course of his or her professional activities, the lawyer must strictly comply with the applicable laws, use lawful means and methods to protect rights, and uphold the prestige of the profession on a continuous basis as a participant of the administration of justice and public cause.<sup>550</sup>

Lawyers must exercise their professional activities in strict compliance with the ethical requirements recognized by the professional community, improve their knowledge on a continuous basis and comply with the lawyer-client privilege.<sup>551</sup>

In particular, a lawyer may not render legal assistance if: the lawyer provides or earlier provided legal assistance to individuals whose interests are contrary to those of the person asking the lawyer for legal representation; the lawyer took part in the proceedings as a judge, prosecutor, investigator, officer in charge of inquiry, expert, specialist, translator, witness or attending witness; or a public official taking part in the investigation or examination of the case is a relative of the lawyer.<sup>552</sup>

A lawyer may not give up legal representation, or adopt a legal position which is in conflict with the interests of his or her client, unless there is false self-incrimination in criminal proceedings, and shall always defend the legitimate interests of his or her client.<sup>553</sup>

Furthermore, a lawyer may not “admit that his [client’s] guilt has been proven if the latter denies it.”<sup>554</sup> If the client pleads guilty, the lawyer may still challenge such plea or ask for an acquittal arguing that guilt has not been proven.<sup>555</sup>

Under the law, lawyers appointed to provide free legal assistance (funded through the State budget) may only be relieved of such duties by the authority that made the relevant appointment.<sup>556</sup>

Lawyers are prohibited from buying or otherwise acquiring any property which is the subject of dispute or involves any rights of individuals or legal entities seeking legal advice from the lawyer, whether on the lawyer’s own account or under the pretext of making such acquisition for the account of any third parties.<sup>557</sup>

Lawyer-client privilege is established by law and covers the fact that legal advice has been sought or given by the lawyer, information about the substance of any oral or written negotiations with the client and other persons, as well as any other information known to the lawyer in connection with the discharge of his or her professional duties.<sup>558</sup> The lawyer may not disclose, or use in his or her interests or in the interests of any third party, any information covered by the lawyer-client privilege.<sup>559</sup>

A lawyer may not be summoned or questioned as a witness in relation to the circumstances covered by lawyer-client privilege. He or she may not make depositions or statements about those circumstances or present any materials in respect of them to be used in the course of operative and search activities, court proceedings, administrative or other proceedings before any law-enforcement agency.<sup>560</sup> No statements, depositions or materials received from a lawyer in the context of providing legal assistance may be admitted as evidence against the lawyer.<sup>561</sup>

### *Independence of lawyers and undue influence*

Whether a lawyer may be considered institutionally independent or not depends on the way a lawyer enters the profession and is subject to further procedures such as discipline. Some

<sup>550</sup> *Ibid.*, article 11 (1, 2).

<sup>551</sup> *Ibid.*, article 7.

<sup>552</sup> *Ibid.*, article 8 (2).

<sup>553</sup> *Ibid.*, article 8 (3).

<sup>554</sup> *Ibid.*, article 8 (5).

<sup>555</sup> *Ibid.*

<sup>556</sup> *Ibid.*, article 11 (3).

<sup>557</sup> *Ibid.*, article 11 (4).

<sup>558</sup> *Ibid.*, article 9 (1).

<sup>559</sup> *Ibid.*, article 9 (2).

<sup>560</sup> *Ibid.*, article 13 (4).

<sup>561</sup> *Ibid.*

of the issues with the independence of lawyers in Tajikistan, are derived from the split in the profession with one part of it (lawyers belonging to collegia) being self-regulated and the other (lawyer-attorneys) being controlled by the Ministry of Justice without any participation of independent lawyers. But while institutional independence is a prerequisite for an effective functioning of the profession and compliance with international standards it is not sufficient in and of itself to guarantee independence of lawyers. Lawyers told the ICJ that the profession suffers from uneven quality due to lack of sufficiently rigorous qualification procedures of both parts of the profession. An extremely low threshold for qualifying to become a lawyer—either as a lawyer-attorney or as a lawyer-member of a collegium—impedes the quality of the profession, its integrity and independence (See Chapter III).

The reform underway may aim to address this problem, however, the solutions proposed undermines the independence of the profession and dismantles the system of independent governance of entry to the profession as discussed in chapters II and III. As in Uzbekistan, lawyers under the new law would be under an obligation to re-sit a qualifying examination. The reason for a blanket countrywide re-qualification of lawyers is unclear. Yet the procedure would risk cleansing the profession of independent lawyers and leading to domination by the Ministry of Justice of the legal profession, through the proposed new association of lawyers.

### *Equality of arms and treatment of lawyers in court*

The attitudes of judges and prosecutors towards lawyers who represent individuals suspected or accused of criminal offences are described by lawyers as aggressive and lacking respect. Defence lawyers complain of being subjected to verbal attacks and disrespectful treatment during court proceedings.

Defence lawyers do not in practice have a position equal to the prosecution in criminal trials which impedes them in providing an effective defence to their clients. For example, the percentage of the requests lodged by defence lawyers during the trial which are granted by the court is much lower than in case of prosecutors' requests. According to the approximate estimates of lawyers, in practice, 90 percent of prosecutor's requests are granted, whereas only 10 percent of lawyer's requests are accepted. It was reported that judges sometimes manipulate procedures such as adjournment of hearings in order to avoid hearing a witness. In cases reported to the ICJ by one defence lawyer, it was alleged that when the defence requested summoning of witnesses, the judge would always find a pretext to adjourn the hearing. Following the adjournment, the defence witnesses who had been summoned would fail to appear before the court. The lawyer later learned that after being summoned, the witness had been subjected to pressure not to appear. Unequal rights of the defence to present evidence and summon witness violate the accused's right to a fair trial, in particular the right to equality of arms and the right to call and cross-examine witnesses, under the same conditions as the prosecution.<sup>562</sup>

Lawyers further noted that success in gaining access to the case-file during the pre-trial investigation depends on the nature of the case. Since the entry into force of the new Code of Criminal Procedure, access to the case-file is normally granted in all but sensitive cases, and lawyers are allowed to make a copy thereof. If however a case is a "contracted" one (a case which is controlled by the executive or another powerful interest) or is politically motivated, it is very hard for a lawyer to obtain any access to the case-file. This situation is contrary to the principle of equality of arms, and the right of the accused to adequate time and facilities to prepare and present a defence require that a defence lawyer be granted timely access to relevant exculpatory and inculpatory information and evidence.

The effectiveness of the lawyer acting for the defence is dependent on access to relevant information and documents and timely examination of his or her applications for such access. Still, lawyers report that the authorities are much slower to respond to a lawyer's requests for information than to requests by the prosecution. Relevant time-limits are reportedly often

<sup>562</sup> ICCPR, articles 14.1, 14.3.e.

disregarded or violated in practice. Prosecutors however do receive an immediate response to their requests for the necessary information.

Some provisions of the law are not conducive to ensuring equality of arms, or an effective defence for accused persons in criminal proceedings. For example, the prosecutor is required to attend the court proceedings except in cases of private prosecution,<sup>563</sup> while the defence lawyer is only required to take part in criminal proceedings in five kinds of cases: when the suspect or defendant makes a relevant request; when the suspect or defendant is a minor; when the suspect or defendant cannot exercise their self-defence in view of a physical or mental disability; when a suspect or defendant have no command of the language of the proceedings; or when the individual is charged with an offence which may be punished with a sentence of life imprisonment or death penalty.<sup>564</sup> Furthermore, the Code of Criminal Procedure requires the prosecutor to take part in criminal proceedings at the stage of appeal and to deliver his or her assessment in relation to the case.<sup>565</sup> As regards the defence lawyer, the law provides that he or she "*may be granted access*" to the appeal hearing. State-appointed lawyers reportedly hardly ever take part in the appeal proceedings.<sup>566</sup>

Courts often fail to independently and impartially consider the evidence presented at trial in a manner that is consistent with the presumption of innocence.<sup>567</sup> Evidence that is admitted is often based on the statements of the defendant alone which were made during the pre-trial investigation, and which is often the result of ill-treatment in detention. Therefore, as in other countries in Central Asia, it is often the self-incriminatory statements which are used as basis for convictions. Once a self-incriminatory statement is obtained, in practice the accused person has difficulties in retracting it, as the courts typically disregard any subsequent applications of the defendant to retract the confession. This practice is contrary to the international human rights law right not to be compelled to confess guilt or to testify against oneself.<sup>568</sup>

In practice, courts disregard the lawyers' complaints about torture alleged to have taken place during the investigation. Lawyers see this as a particular problem in cases related to the National Security Committee (NSC), where the NSC officers attend the court hearing until the judgment is pronounced.

Lawyers' ability to protect against arbitrary deprivation of liberty as well as ill-treatment in detention is impeded in law and in practice. The prosecutor is required to attend a habeas hearing, while a defence lawyer must only be present where the lawyer has already been hired by the accused or appointed by the state, which will not be so in every case at this stage in the proceedings.<sup>569</sup> Another impediment to an effective legal representation in habeas hearings is that there is no mechanism for notifying the lawyer about the time and place of the habeas hearing. It is also a matter of concern that the Criminal Procedure Code enables the judge at a habeas hearing to extend the time-limit for the prosecutor to submit well-reasoned arguments for the arrest by 72 hours, without the presence of a lawyer for the detained person.<sup>570</sup>

Furthermore lawyers report that, if the client who is brought to a habeas hearing shows signs of ill-treatment, the judge fails to take any action to investigate the allegations. Reportedly, judges often suggest that the lawyer to appeal against the conduct of the relevant officers within the framework of separate proceedings.

<sup>563</sup> Criminal Procedure Code of Tajikistan, article 279 (1).

<sup>564</sup> *Ibid.*, article 51.

<sup>565</sup> *Ibid.*, article 369 (3).

<sup>566</sup> See: Legal Aid Monitoring, Bureau of Human Rights and Rule of Law, 2009 [Rus, Taj], <http://www.humanrts.tj/ru/index/index/pageId/434/>.

<sup>567</sup> ICCPR, article 14.2; UN Human Rights Committee, General Comment No. 29, para. 11

<sup>568</sup> ICCPR, article 14 (3) (g); UN Human Rights Committee, General Comment No. 32, para. 41.

<sup>569</sup> Criminal Procedure Code of the Republic of Tajikistan, article 111 (3).

<sup>570</sup> *Ibid.*, article 111 (5).

### *Restrictions on the work of lawyers by law enforcement agents*

Attitudes towards defence lawyers on the part of the prosecution and law-enforcement agencies are described by lawyers as “disdainful”. In the course of their professional activities, lawyers reportedly continuously face lack of respect and intimidation by law-enforcement agents. According to some lawyers, they are treated as people who “*impede the investigation*” and as “*intermediaries*”, rather than being viewed as a key pillar of the system, with a function of ensuring the respect for the rule of law and the rights of the accused. In practice, the lack of respect towards lawyers is widespread, especially when a lawyer represents a person in camera.

Although the domestic law provides that a lawyer shall have access to a detained client,<sup>571</sup> this provision is not respected in practice, contrary to the right to liberty and to the international standards on the role of lawyers.<sup>572</sup> It is particularly difficult for lawyers to gain access to their clients in the first hours following apprehension, when the person is not yet formally registered as arrested. This is also the time when ill-treatment is most common. Impediments to access to lawyers are described by lawyers as being most acute in security or counter-terrorism cases. Lawyers’ ability to gain access to their clients who are deprived of their liberty is entirely subject to the discretion of the law-enforcement agencies. Lawyers informed the ICJ that due to the unrestricted discretion the police have in practice, lawyers often have to argue or entreat officials to obtain access to their clients. Although the Criminal Procedural Code contains no requirement that a lawyer must obtain permission from the investigator for a meeting with his or her client prior to every meeting, this is reportedly the rule in practice. The absence of clarity of the rules on access to a lawyer and the discretion granted to law enforcement agents creates room for abuse and arbitrariness in decisions on whether and when to grant access. The restrictions that apply in practice to the right to access to a lawyer in detention fall short of principles 7 and 8 of the UN Basic Principles on the Role of Lawyers, which stipulate that all detained persons shall have prompt access to a lawyer and adequate time and facilities to consult with their lawyer.

Lawyers reported to the ICJ that the duration of their meetings with their detained clients may also be limited and the effectiveness of their assistance and the rights of the accused to prepare their defence and present evidence may be undermined, by decisions to deny the lawyer the opportunity to use audio-, photo- and video-equipment in pre-trial detention facilities.

Lawyers further highlighted the difficulties of meeting with clients in detention while the case is pending before the court. It was reported that judges sometimes refuse to grant a meeting prior to the first appearance before the court. According to one lawyer, such refusal is based on the fact that accused people often retract their statements following a meeting with their lawyer. Such denial of access violates the right to have adequate time and facilities for the preparation of the defence as well as to the right not to be compelled to testify against oneself,<sup>573</sup> and is contrary to Principle 16 of the UN Basic Principles on the Role of Lawyers.

Confidentiality of meetings between lawyers and clients in detention is not always respected in practice, contrary to Principle 8 of the UN Basic Principles on the Role of Lawyers. In practice, the officers of temporary holding facilities attend the meetings between the lawyer and his or her client, preventing confidentiality of communication. Lawyers stressed the particular difficulties faced in this regard in national security cases, where meetings are held on the premises of the NSC. In such cases, lawyers are concerned that, if they are left alone in a room with a client, this may mean that their conversation is being recorded. If a lawyer does obtain access for a meeting on NSC premises, it is reported that he or she will be accompanied at least by two officers so that one of them would watch the lawyer, the other the client.

Under the law, the defence lawyer only has access to the case-file after the investigation has been terminated, undermining the ability of the lawyer to provide an effective defence to the

<sup>571</sup> Criminal Procedure Code of the Republic of Tajikistan, articles 22 (1), 46 (3), 47 (4) (8) and 49 (2).

<sup>572</sup> UN Basic Principles on the Role of Lawyers, Principle 7

<sup>573</sup> ICCPR, article 14.3 (b) and (g).

client. Lawyers' applications and requests for access to documents are often left without an answer.

### *Threats, harassment and attacks against lawyers*

According to information received by the ICJ, lawyers in Tajikistan are routinely identified with their clients or their clients' causes, contrary to international standards,<sup>574</sup> especially by law-enforcement agencies and the relatives or supporters of victims of crime. Lawyers who take on the role and responsibility of representing people suspected or accused of committing a crime reportedly receive frequent threats on account of what is seen by law enforcement officials as their "*intransigence*", in particular where they allege or represent victims of torture or other ill-treatment. For example, among others, lawyers who raised concerns about the use of torture by law enforcement officials with the UN Special Rapporteur on Torture, were subject to harassment and intimidation.<sup>575</sup>

## **Republic of Uzbekistan**

Guarantees in Uzbek law that define and protect the role of lawyers are undermined in practice by State control of the governing institutions of the legal profession, which impedes lawyers' independent and effective discharge of their professional functions. Lawyers face threats, in particular the threat of arbitrary or retaliatory disciplinary action, and there is inequality of arms in practice between the prosecution and the defence in criminal trials.

### *Legal Framework*

Uzbekistan law provides that lawyers and their professional activities are under the protection of the State.<sup>576</sup> The State is required to secure lawyers' ability to discharge their professional duties and to advise individuals seeking legal assistance, both in the Republic of Uzbekistan and abroad, and to ensure the necessary protection if there is a risk to lawyers' life or health on account of their professional activities.<sup>577</sup> The law guarantees the integrity of lawyers,<sup>578</sup> protecting the lawyer's house, office premises, vehicles and means of communication, correspondence, belongings and documents.<sup>579</sup>

Violation of a lawyer's professional rights by the State or other agencies or officials<sup>580</sup> or individuals entails responsibility under the law.<sup>581</sup>

The State also has legal obligations to:

- establish the procedure for access to, suspension or termination of lawyers' activities;
- ensure the integrity of lawyers;
- ensure that information covered by lawyer-client privilege is not disclosed;
- ensure that a lawyer is not required to disclose information protected by lawyer-client privilege;
- make provision for guarantees in respect of lawyers' activities and social welfare;
- refrain from interfering with the cases pleaded by the lawyer; and
- refrain from violating a lawyer's integrity.<sup>582</sup>

<sup>574</sup> UN Basic Principles on the Role of Lawyers, Principle 18.

<sup>575</sup> Concluding observations on the second periodic report of Tajikistan, adopted by the Committee at its forty-nine session (29 October–23 November 2012), para. 15.

<sup>576</sup> Law of the Republic of Uzbekistan on the Guarantees of Lawyers' Activity and Social Security of Lawyers, article 8 (1).

<sup>577</sup> *Ibid.*, article 8 (4).

<sup>578</sup> *Ibid.*, article 6 (1).

<sup>579</sup> *Ibid.*

<sup>580</sup> Articles 205 and 206 of the Criminal Code of the Republic of Uzbekistan penalize abuse or excess of authority or official powers.

<sup>581</sup> Law of the Republic of Uzbekistan on the Guarantees of Lawyers' Activity and Social Security of Lawyers, article 8 (5).

<sup>582</sup> *Ibid.*, article 5.



Under the law, lawyers enjoy a number of rights in the exercise of their professional activities. These include rights:

- to represent the interests and defend the rights of individuals before any State authorities or non-governmental entities;
- to collect any factual information which may be used as evidence before the courts and other bodies dealing with administrative offences;<sup>583</sup>
- to request and obtain information references, letters of reference and other documents from State authorities or non-governmental entities;<sup>584</sup>
- to obtain, with the consent of the client, written assessments from experts;
- to question individuals in possession of any information related to the case, and to obtain their written statements, with their consent;
- to submit the materials collected by the expert to the courts and other State authorities;<sup>585</sup>
- to hold meetings with clients in private, in conditions of confidentiality (including during the client's detention on remand), without any restrictions on the amount of such meetings or their duration, including upon the client's arrest ;<sup>586</sup>
- to lodge requests or complaints with State officials and receive their written responses containing proper reasoning; and
- to take out professional liability insurance policies, as well as to take other action under the law.<sup>587</sup>

Lawyers may make, at their own expense, copies of any materials or documents and may record, with the use of technical devices, any information from the case-file, although this right applies only provided that it does not involve disclosing information which constitutes State secrets, or commercial or other secrets.<sup>588</sup> Lawyers may however take cognizance of any information which constitutes State secrets, commercial or other secrets whenever it is necessary for providing legal assistance or legal representation in criminal proceedings, as well as in civil, commercial or administrative proceedings.<sup>589</sup>

A lawyer cannot be held criminally or financially responsible or threatened with such responsibility as a consequence of the legal assistance he or she provides.<sup>590</sup> Nor can an inquiring authority, investigator or prosecutor make a motion, nor a court make an interim order in so far as the lawyer's legal position in the case is concerned.<sup>591</sup>

Criminal proceedings against a lawyer may be instituted only by the highest level officials: the Prosecutor General of the Republic of Uzbekistan, prosecutor of the Republic of Karakalpakstan, prosecutor of the region, the city of Tashkent or other prosecutors with the same status.<sup>592</sup> Only these prosecutors may authorize an entry, search or seizure of a lawyer's house, office premises or vehicle; or interception of the lawyer's communications, personal search or screening of the lawyer, or inspection or seizure of his or her mail, possessions or documents. Arrest or detention of a lawyer, including detention on remand, must also be authorized by one of these high level officials.<sup>593</sup>

<sup>583</sup> *Ibid.*, article 6.

<sup>584</sup> *Ibid.*

<sup>585</sup> *Ibid.*, article 6.

<sup>586</sup> *Ibid.*, article 4 (4).

<sup>587</sup> *Ibid.*, article 6.

<sup>588</sup> *Ibid.*

<sup>589</sup> *Ibid.*, article 4 (4).

<sup>590</sup> Law of the Republic of Uzbekistan on the Guarantees of Lawyers' Activity and Social Security of Lawyers, article 6 (6); Law of the Republic of Uzbekistan on Advokatura, Article 10 (4).

<sup>591</sup> Law of the Republic of Uzbekistan on the Guarantees of Lawyers' Activity and Social Security of Lawyers, article 6 (6).

<sup>592</sup> *Ibid.*, article 6 (2).

<sup>593</sup> *Ibid.*, article 6 (4).

Any form of undue influence on the lawyer during the discharge of his or her professional duties is prohibited.<sup>594</sup> The law also prohibits:

- interfering with the professional activities of lawyers;
- requiring lawyers, or officials of lawyers' associations to disclose any information received in the discharge of lawyers' professional duties;
- requiring a lawyer, his or her assistant or intern to make any statements or depositions concerning the circumstances<sup>595</sup> covered by lawyer-client privilege, or requiring any such materials to be used in searches, or criminal, administrative or other proceedings;<sup>596</sup>
- influencing a lawyer in any manner in order to prevent the lawyer from studying a particular case-file or forcing a lawyer into a position which is contrary to the legitimate interests of the client;<sup>597</sup>
- requiring any special permit (other than credentials or lawyer's certificate) or otherwise impeding the exercise of lawyers' activities;<sup>598</sup> or
- impeding private meetings between the lawyer and his or her client, preventing the lawyer from studying the case-file in its entirety or taking the necessary notes.<sup>599</sup>

Subjecting the lawyer to threats, insults, libel, violence or attacks on his life, health or property entails responsibility under the law.<sup>600</sup>

A lawyer may not be interrogated as a witness in relation to the circumstances known to the lawyer as a result of the discharge of his or her duties as a defence lawyer or representative. No files or documents received in the course of a lawyer's professional activities may be seized from the lawyer or inspected, nor may his or her rights to have meetings with clients be limited.<sup>601</sup>

Any information related to legal assistance may only be required, seized, inspected, verified, copied, collected or used if a lawyer becomes a defendant, or otherwise—in criminal, civil, commercial, disciplinary or administrative proceedings—with the consent of the individual who sought legal advice from the lawyer.<sup>602</sup>

The law requires that in his or her professional activities, a lawyer must comply with the requirements of the applicable laws, rules of professional ethics of lawyers, lawyer-client privilege and the lawyer's oath; use any statutory means and methods to defend the rights and legitimate interests of individuals; as well as continuously improve his or her knowledge, by taking advanced professional training at least once every three years.<sup>603</sup>

The lawyer must also advise any legal entities or individuals who seek legal assistance from him or her on their rights and responsibilities; must not adopt any professional position to the detriment of the individual seeking legal advice; and if a decision has been made which is deemed unlawful by the client, must appeal it in accordance with the procedure established by law.<sup>604</sup>

A lawyer may not accept a request for legal assistance if he or she provides or earlier provided legal assistance in the same case to individuals whose interests are contrary to those of the

<sup>594</sup> *Ibid.*, article 7 (1).

<sup>595</sup> *Ibid.*, article 10 (1).

<sup>596</sup> *Ibid.*, article 7 (2)

<sup>597</sup> *Ibid.*, article 7 (4).

<sup>598</sup> *Ibid.*, article 7 (3).

<sup>599</sup> *Ibid.*, article 8 (2)

<sup>600</sup> *Ibid.*, article 7 (4).

<sup>601</sup> Law of the Republic of Uzbekistan on Advokatura, article 10 (2).

<sup>602</sup> Law of the Republic of Uzbekistan on the Guarantees of Lawyers' Activity and Social Security of Lawyers, article 8 (3).

<sup>603</sup> Law of the Republic of Uzbekistan on Advokatura, article 7 (1, 4).

<sup>604</sup> Law of the Republic of Uzbekistan on the Guarantees of Lawyers' Activity and Social Security of Lawyers, article 4 (4)

person asking for legal representation, or took part in the proceedings in any capacity other than as a representative of the person concerned, or if a relative of the lawyer took part in the pre-trial investigation or trial, or if the lawyer has direct or indirect interests which are contrary to those of the client.<sup>605</sup>

A lawyer may not use his or her powers to the detriment of the person whose request for legal assistance he or she has accepted, or give up the representation of the suspect or defendant unless the lawyer is relieved from his relevant obligations by the client.<sup>606</sup> A lawyer who has been appointed by the State to take part in criminal proceedings cannot refuse to provide legal assistance in view of the individual's inability to pay.<sup>607</sup>

When supporting or conducting transactions involving monetary or other assets on behalf of individuals or legal entities, lawyers must submit any information related to anti-money laundering or funding of terrorism to the designated State authority in accordance with the procedure established by law.<sup>608</sup>

Lawyer-client privilege is protected by law and covers the fact of the client's addressing the lawyer for legal advice, matters raised by the client, the substance of any advice, recommendation or explanation provided to the client by the lawyer, as well as any other information related to the contents of any discussion between the lawyer and the client.<sup>609</sup> A lawyer, assistant lawyer or legal intern, officials or technical staff of lawyers' bureau, collegia or firms, may not disclose any information covered by lawyer-client privilege or use such information in their own interests or in the interests of any third parties.<sup>610</sup>

### *Independence of lawyers and undue influence*

Independence of lawyers in Uzbekistan is undermined by the lack of independence of the governing body of the profession, the Chamber of Lawyers. The reform of the legal profession of 2008 (See above Chapter II) brought about a radical distortion of the understanding of the legal profession and the principles of its operation. Lawyers from Uzbekistan told the ICJ that the current Chamber of Lawyers performs the role of a quasi-ministry or a department at the Ministry of Justice on lawyers' affairs rather than serving as an independent professional organization of and for lawyers. The Chamber of Lawyers is seen by some executive bodies as a tool to put pressure on lawyers engaged in actively defending the rights of their clients, and lawyers have reported that they have recently started receiving threats like "we will report on you to the Chamber." The extent of control exercised over lawyers by the Chamber of Lawyers can be seen from reports to the ICJ that each lawyer now has to submit personal information to the Chamber of Lawyers on their family members, including their place of residence, dates of birth, place of birth.

In this context, lawyers face challenges in working independently to represent the interests of their clients and to protect their human rights, in accordance with the duties of lawyers prescribed in international standards.<sup>611</sup>

Lawyers have raised particular concerns regarding the independence of State-appointed, publicly-funded lawyers for criminal defence. Currently, it is the investigator who has discretion to order the payment of fees to the State-appointed lawyer. This system may be abused by investigators: for example there are reports of investigators artificially increasing the number of lawyer's court days, so as to increase payment. The system appears to facilitate dependence of lawyers on the executive and thereby undermines the right to a fair trial, and in particular, the right to a defence, of legally-aided defendants in criminal cases.

<sup>605</sup> Law of the Republic of Uzbekistan on Advokatura, article 7 (2).

<sup>606</sup> *Ibid.*, article 7 (3).

<sup>607</sup> *Ibid.*, article 7 (5).

<sup>608</sup> *Ibid.*, article 7 (7).

<sup>609</sup> *Ibid.*, article 9 (1).

<sup>610</sup> *Ibid.*, article 9 (2).

<sup>611</sup> UN Basic Principles on the Role of Lawyers, Principles 14 and 15.

### *Equality of arms and treatment of lawyers in court*

Lawyers describe the general attitudes of judges to the role played by defence lawyers and to the defence lawyers themselves as both negative and lacking due respect. “The Provision on the order of licensing of lawyer’s activity” enshrines that any law enforcement body or a court may submit a written proposal to Ministry of Justice or the Chamber of Lawyers for withdrawal or suspension of a license of a lawyer. Though such action was taken prior to the 2008 reform, this provision of the law is perceived by lawyers as encouragement for the measures which should be taken if a lawyer is “too active” in defending clients. This has a tremendous chilling effect on the profession and opens doors for abuse against lawyers.

Equality of arms is not guaranteed in practice, and defence lawyers thus face considerable constraints when attempting to protect and ensure their clients interests and rights in the course of criminal proceedings. The discretion that the investigating authorities have in deciding whether to summon witnesses or not puts lawyers in a position where equality of arms is not guaranteed at an early stage of the process. Due to the discretion, quite often, those requests are not examined by the investigating authority but rather included in the case-file and considered by the court.

Lawyers face further difficulties in collecting evidence. The law does not provide for any procedure or time-limits for dealing with the defence lawyer’s information requests to state bodies.<sup>612</sup> The information requests of any law-enforcement agency are dealt with as soon as practicable, within three days. On the other hand, the defence lawyer is only likely to receive a response to his or her information requests 2–3 weeks later, and often such requests receive no response at all.

It was reported to the ICJ that, where a prosecutor submits a motion for pre-trial detention, such motions are almost always granted by the courts, and in such cases alternative measures to detention are hardly ever chosen.<sup>613</sup> Lawyers have pointed to the lack of a statutory requirement for a lawyer’s compulsory participation in the habeas hearing, which leads to an inequality of arms in the hearing, and is contrary to the general provision in the Uzbek Criminal Procedure Code that in any hearings in which the participation of the public prosecution is mandatory, the lawyers for the defence must also participate.<sup>614</sup> This situation prevents lawyers from adequately fulfilling their duty to protect the interests of their clients, including to protect against arbitrary deprivation of liberty and torture or other ill-treatment in detention.

### *Restrictions on the work of lawyers by law enforcement agents*

Defence lawyers are faced with many restrictions while exercising their role to protect the rights and interests of their clients suspected or accused of criminal offences during the investigatory stage of the criminal process, in contravention of the Basic Principles on the Role of Lawyers, as well as the right of their clients to a fair trial, in particular the right to an effective defence. The restrictions on the defence stand in stark contrast to the powers of prosecutors.

Most lawyers experience restrictions on the duration of meetings with their clients. In practice, if a lawyer meets his or her client in the presence of the investigator, the duration of the meeting may be restricted under the pretext of having to conduct certain investigative activities. Therefore conditions do not exist in practice to ensure the meetings are unrestricted in number and duration as provided by national law<sup>615</sup> or to meet the standard of the UN Basic Principles on the Role of Lawyers that all persons arrested or detained have adequate time and facilities

<sup>612</sup> Law of the Republic of Uzbekistan on Advokatura, article 10; Law of the Republic of Uzbekistan on the Guarantees of Lawyers’ Activity and Social Security of Lawyers, article 9.

<sup>613</sup> See further, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Geneva, 2013, A/HRC/WG.6/16/UZB/3.

<sup>614</sup> Criminal Procedure Code of the Republic of Uzbekistan, article 243.

<sup>615</sup> Concluding observations of the Human Rights Committee following the consideration of the third periodic report submitted on 24 March 2010, CCPR/C/UZB/CO/3.

to communicate with a lawyer, without delay.<sup>616</sup> This situation increases the risk of violations of internationally-protected human rights, which may include violations of the right to freedom from torture or other ill-treatment, the right to liberty, and the right to an effective defence which forms part of the right to fair trial. Sometimes law enforcement agents try to justify such restrictions on grounds of lack of facilities for private meetings. Indeed, lawyers mention the lack of private rooms for lawyers to meet clients without any limitations on the duration of such meetings, and the problem of decrees of the Ministry of the Interior, National Security Council, Prosecutor General's Office, Supreme Court and Customs Committee providing that the lawyer may only be granted access to his or her client subject to an approval by the official in charge of the criminal investigation or trial.

A defence lawyer's access to the materials of the case and the case file depends on the discretion of the investigators and is often restricted during investigation and even afterwards, while the Prosecutor's Office has unrestricted access to such materials. The normal practice is that a lawyer only has access to the case-file at the end of the pre-trial investigation. This puts the defence in an unequal position to the prosecutor, who has access to the case file throughout the period of investigation. This practice, undermines the equality of arms between the defence and the prosecution and the overall fairness of the trial, and is contrary to principle 21 of the UN Basic Principles on the Role of Lawyers.

### *Threats, harassment and attacks against lawyers*

Lawyers in Uzbekistan who provided information to the ICJ perceive that the biggest threat to the independent work of individual lawyers comes from the Chamber of Lawyers itself. Lawyers said that they would often receive threats from investigators or even from judges in court that a decision would be adopted to consider disbarment or suspension of the lawyers' license—the implication being that the Chamber of Lawyers could be counted on to adopt such a decision at the investigator's or judge's request. Such threats or statements have been made in particular when a lawyer is very actively defending the client or, for instance, is requesting to meet with a client in detention while such a request is being hampered.

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<sup>616</sup> UN Basic Principles on the Role of Lawyers, Principle 8.

## V. CONCLUSIONS AND RECOMMENDATIONS

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### Institutional independence

More than 20 years after independence of the Central Asian states, the self-governing institutions of the legal profession remain, to varying degrees, weak throughout the region. Lawyers' associations are often ill equipped to defend the independence of lawyers, and have not succeeded in effectively discharging their responsibilities to uphold the high professional standards and integrity of the profession.

At the same time, governments have, to varying degrees, undermined the institutional independence of lawyers' associations, to deprive them of self-governance and independence through legislative "reforms" or through inappropriate influence. In those countries where the government or other bodies of the executive do not have control over the profession institutionally, individual lawyers nevertheless face threats to their independence through informal threats or harassment, or through formal disciplinary proceedings against them. Harassment and reprisals against lawyers for activities carried out in the course of diligently representing their clients' interests and protecting their rights, has a serious chilling effect on the profession and undermines its independence. In the face of such threats, associations of lawyers have proven unable to defend their members either due to lack of institutional capacity to withstand the pressure from the executive or its agents, or because executive bodies bypass the jurisdiction of the associations of lawyers. In other countries, associations of lawyers are unwilling to support their members because the associations lack independence and in fact are arms of the executive branches of government who are often the source of the threat.

**With regard to ensuring or bolstering the institutional independence of the associations of lawyers the ICJ recommends as follows.**

- In states where a unified structure of lawyers' associations does not already exist, steps should be taken to establish such a structure, that is independent of government and other executive bodies, and is mandated, empowered and adequately resourced to ensure the quality, integrity and accountability of the profession.
- In all states, lawyers' associations should enjoy full independence from government and other executive bodies. Such independence should be protected both under the law and in practice.
- Any direct involvement of the executive in the governing institutions of the profession should be discontinued, in order to ensure independence of the profession in accordance with international law and standards; safeguards against informal, indirect and undue influence should also be put in place;
- Lawyers' associations in each state should be accorded full powers over the regulation of the profession, including in regard to matters of education, qualification and training requirements and the licencing of lawyers. They should ensure that there is no discrimination with respect to the entry into or continued practice within the profession.
- Lawyers' associations should establish or at a minimum be involved in the establishment of codes of professional conduct and ethics to govern the profession. Such codes must be consistent with international standards and norms as well as national law.
- Lawyers' associations should establish transparent procedures for the management of the association, which ensure fair participation of lawyers, and which provide for the election of the executive body of the association by its members.
- Membership in lawyers' associations must not be used to undermine the independence of individual lawyers, but rather to uphold their professional integrity, accountability and independence.

- The law should ensure that lawyers enjoy freedom of association, and in particular that they may form and join independent professional associations, in addition to those already established.
- Lawyers' associations should take all steps available to them to ensure that the need for legal services is satisfied in their countries; that there is a sufficient number of lawyers per capita; and that there is sufficient and easy access to legal services throughout the state, including in remote areas.
- Lawyers' associations should initiate and participate in debates on the role of the legal profession and should advise on any legislative initiatives which are related to the functioning of the legal profession, judicial reform or other areas of operation of lawyers.
- Since the status and strength of the profession to a great extent depend on its institutions and representatives, individual lawyers should play an active role in the governance of the legal profession, through participation in debates on its operation, reform, institutional development and ability to contribute to the fair administration of justice and protection of human rights.

## Qualification of lawyers

As analysed in Chapter III, in most of the countries of Central Asia, the governing bodies of the legal profession have little control over examination procedures for entry to the profession or over the issuing of licenses to practice law. In almost every country of the region, it is the Ministry of Justice that decides on these matters; in Tajikistan, which is partially an exception, a proposed reform of the law aims to change this good practice.

The manner in which the content of the examination is determined in most of the countries of the region and the way that a candidate's performance is evaluated, lacks transparency; there are few objective systems of evaluation. Thus qualifications boards are left with considerable discretion when reviewing a candidate's performance.

Provisions permitting the waiver of examination requirements specifically for persons with previous experience of work in law enforcement or other state bodies, undermines the appearance if not the actual independence and integrity of the profession, including among the public.

### **With regard to the qualification of lawyers the ICJ recommends as follows.**

- Access to the profession should be a matter decided by independent associations of lawyers; states therefore should consider amending their laws to transfer the functions of licensing lawyers exclusively to the associations of lawyers themselves.
- The examination body should be independent from the executive in its composition and institutionally; the systems for appointing the members of the bodies responsible for granting access to the profession, must be decided and implemented exclusively by the associations of lawyers with no involvement of the executive; and the regulation and monitoring of such bodies should be carried out exclusively by the associations of lawyers within the country.
- Where members of the executive participate in the qualification bodies, they should be a minority of the body; the significant majority of those members should be independent lawyers; members of the executive should not have ex officio privileged positions in such bodies.
- Where the executive reserves the symbolic function or functions of registering lawyers or issuing lawyers' documents confirming their authority to practice law, such registration or licensing must be automatic, based on the positive assessment of the independent qualifications body that an individual has successfully fulfilled the qualification requirements.
- The structure, content and marking process of examinations should be reviewed with a view to ensuring transparency, objectivity, credibility and rigour. The requirements for

entry into the profession must be clear and transparent, as must be the criteria against which a candidate's qualifications will be measured in order to ensure consistence, foreseeability, credibility and objectivity of the evaluation system.

- Candidates for entry into the legal profession should have access to adequate materials to enable them to prepare for any mandatory qualification examinations.
- The examination itself should test whether each candidate possesses adequate knowledge and has sufficient training and integrity to engage in practice of law. The content of the examination and the qualifications procedures should be designed to ensure that qualified candidates can access the profession, without discrimination, and that any person who does not meet the criteria for qualification is disqualified on objective grounds, which are relevant to ensuring the quality and integrity of the members of the profession.
- Guidelines for assessment should be developed for the members of the qualification bodies who should consistently apply an objective evaluation system which prevents abuse, bias or corrupt decisions.
- The results of examinations should be accessible to candidates in a manner that will allow candidates to familiarize themselves with the grading system applied, and so as to enable them to take measures with a view to improving their performance or appealing against the decisions of the examining bodies.
- The ICJ considers that waivers of particular requirements to enter into the legal profession, applied without discrimination, which have objectively reasonable purposes related to the advancement of the administration of justice, and do not undermine the need to ensure that legal professionals possess the requisite knowledge, skills and integrity may be consistent with the independence of the legal profession. However the organization is concerned that provisions permitting the waiver of examination requirements specifically for persons with previous experience of work in law enforcement or other state bodies, undermine the appearance if not the actual independence and integrity of the profession, including among the public.

## Disciplinary bodies and procedures

Lawyers' associations should play a major role in ensuring the accountability of members of the profession for misconduct. In Central Asia, however, representatives of the executive take part in disciplinary procedures against lawyers. In some countries, disciplinary bodies are run by the Ministries of Justice; in some others, a significant number of their members are employees or officials of the executive.

Codes of Conduct and/or Ethics should guide all members of the profession and the public regarding the role and expected conduct of lawyers. While there are Codes of Ethics in most of the countries in the region, some of which are enshrined in law, the rules of ethics are usually not well known and in some cases are regarded as non-binding guidelines for lawyers' work. This situation is at odds with international standards, which specify that disciplinary proceedings against lawyers should be determined in accordance with and in the light of the code of professional conduct and other recognized standards and ethics of the legal profession.

Both among lawyers themselves and among the broader society, there are concerns over the quality and overall integrity of the profession. The perception that certain lawyers, in particular some lawyers who are appointed and paid by the state to represent individuals suspected or charged with a criminal offence with insufficient means, act to further the interests of the state rather than their client, undermines the integrity of the profession.

It is of concern that, within the region, lawyers who fail to act in the interest of their clients, but rather act in the interest of the executive or other powerful interests, are not subject to disciplinary action. It is equally a matter of concern that lawyers who diligently carry out their roles in representing their clients interests and protecting their rights in a manner consistent with



recognized professional standards, have been threatened with or subjected to disciplinary measures. In the face of such measures, lawyers' associations in some countries have been unable to protect their members against arbitrary discipline. In other countries, lawyers' associations have themselves been the instruments of such arbitrary measures.

Ignoring misconduct and the abusive use of disciplinary measures both deform the notions of what is professional conduct or ethical behaviour, and undermine the effective discharge of the duties of the legal profession, contrary to international law and principles.

**In regard to disciplinary bodies and procedures the ICJ recommends as follows.**

- Clear rules of professional ethics and codes of conduct that are consistent with international standards should be developed by, or at a minimum in conjunction with, the associations of lawyers and members of the legal profession; training on the content of the codes should be part of the required training for all members of the profession. In addition the codes should be promoted among the legal community and the public. They should serve as a basis for foreseeable and proportionate disciplinary sanctions in appropriate cases. Such codes should be interpreted and applied consistently.
- Disciplinary bodies must be independent of the executive, including the Ministry of Justice and other governmental agencies; these bodies should be composed—at least in major part—of members of the profession; where the disciplinary bodies are currently under the executive or where there is significant representation of the executive in such bodies, laws should be amended to guarantee their full institutional independence and predominant membership of the legal profession in those bodies.
- The sole purpose of disciplinary proceedings must be maintaining the independence of lawyers, the high quality of service delivered by legal professionals and the ethical principles guiding the profession; under no circumstances may disciplinary proceedings be used as a means of intimidation, harassment, retaliation against lawyers for exercising their functions freely and diligently in accordance with internationally recognized professional standards and ethics. Sanctions imposed as a result of disciplinary action must be proportionate and not arbitrary.
- Lawyers' associations and their disciplinary bodies should take all steps in their power to ensure that disciplinary action is promptly and consistently applied through fair procedures where there is reliable evidence that a lawyer does not act in the interests of his or her client, or is subject to undue influence by law enforcement or other interests. Lawyers' associations have a primary responsibility to prevent such unethical or illegal behaviour.
- Lawyers' associations should do all within their power to ensure that any disciplinary proceedings against a lawyer are processed expeditiously and fairly, including that the complaint is heard by an independent and impartial body, established by the profession, or court. Decisions to apply disciplinary sanctions should be subject to independent judicial review. In the course of the examination of a complaint, the lawyer concerned should have the right to be assisted and represented by a lawyer of his or her choice and the right to a fair hearing.

## **The role, status and independence of lawyers in practice**

Lack of independence of the judiciary in Central Asian states, and the lack of respect for the presumption of innocence in the justice systems, leaves little space for lawyers to defend their clients' rights and interests in a manner that is consistent with internationally recognized rights of fair trial and international standards on the role of the legal profession. The deficiencies in the criminal justice systems of the region are evidenced by near 100 per cent conviction rates and by the fact that lawyers are regularly subjected to harassment and intimidation and disciplinary measures when they act in accordance with internationally

recognized standards and national laws in an effort to protect the interests and rights of their clients.

The very high conviction rates in Central Asian states give the impression that judges and defence lawyers play decorative roles in the criminal justice system. In a system which does not tolerate acquittals and is tuned for one outcome—conviction—the role of the Prosecutor’s Office remains dominant with overreaching powers radically greater than those of defence lawyers.

Prosecutors have unequal powers in accessing persons in detention, including the suspect or accused, gathering evidence and ensuring that it is included in the case file, and accessing the case file. With these differences at the investigative stage and the decisive influence of prosecutors at court, including in having witnesses summonsed and martialing the evidence, respect for the fundamental fair trial principle of equality of arms between the defence and the prosecutor is illusory.

Defence lawyers experience significant barriers in their efforts to protect their clients from or even to limit the use of torture and other ill-treatment. Confessions remain the cornerstone of proof in the criminal justice systems of the five Central Asian states and are routinely used in courts to convict persons. Law enforcement and investigative officials therefore are under pressure to obtain confessions—and regularly use torture and other ill-treatment to do so. It is widely accepted that respect for the rights of suspects and accused persons to prompt access to their lawyer and to the rights to have their lawyer present and assist them during questioning, are key safeguards against torture and other ill-treatment, safeguards that are often lacking in practice in the region.

Furthermore judges, under pressure to impose convictions, generally turn a blind eye to allegations of torture or other ill-treatment, admit statements adduced by alleged torture or other ill-treatment into evidence and are generally willing to base their verdict on such statements. In this context, judges are often hostile to defence lawyers who attempt to draw their attention to allegations of ill-treatment and request investigation into the allegations.

Hostile or disrespectful attitudes towards or poor treatment of lawyers from prosecutors, law enforcement bodies and judges is a problem throughout the region. It impedes the ability of lawyers to protect the rights of their clients in accordance with the duties of lawyers recognized under international standards. Defence lawyers, for example, routinely face impediments to meeting with their clients in detention, and to accessing case materials. In many cases this is contrary to clear guarantees that exist in national law, but are not followed in practice: for example national laws criminalizing torture, and granting access of detainees to their lawyer are routinely violated. It is a matter of concern that such impediments have come to be regarded as an “occupational hazard”, even amongst some lawyers themselves. Overcoming the present distorted roles of lawyers in the criminal justice systems require changes not only to law, but also to practice.

**In regard to the role, status and independence of individual lawyers, the ICJ recommends as follows.**

- Reforms should be undertaken to ensure that, both in law and in practice, the principle of equality of arms between the defence and prosecution is respected throughout the investigation and at trial.
- All persons who are arrested or detained should have a right to see a lawyer as soon as they are deprived of their liberty. Lawyers should have prompt, regular and unrestricted access to their clients in detention, without any discretion of prosecutors or investigators in allowing or preventing such access.
- Meetings of clients and lawyers must be conducted in accordance with international law and national legislation. In particular, the authorities must respect that communications between an individual and their lawyer are confidential. They must therefore provide facilities which ensure the confidentiality of such communications, including those that

take place over the telephone. Law enforcement officials, investigators, prison authorities or prosecutors may only be within sight—but not within hearing during such communications. In order to ensure the right of the accused to adequate time and facilities to prepare his or her defence, the duration and number of meetings between a lawyer and a detainee should not be limited by state agents under any pretext.

- Pre-trial detention must, as provided by article 9 (3) of the ICCPR, be an exception rather than a rule. In view of the right to liberty and the presumption of innocence, the law and the courts must ensure that no person is detained in the absence of reasonable suspicion that the individual has committed an offence that is punishable by imprisonment, and in the absence of objective proof, proffered by the authorities that there is:
  - a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to personal liberty, and
  - substantial reasons for believing that, if released, the individual would:
    - abscond,
    - commit a serious offence,
    - interfere with the investigation or the course of justice ,or
    - pose a serious threat to public order ; and
  - there are substantial reasons for believing that there is no possibility that alternative measures would address these concerns.
- When deciding on release or detention, judges should thoroughly consider allegations of torture or other ill-treatment.
- The law should require an independent, impartial, prompt and thorough investigation to be initiated whenever there are allegations or other grounds to believe that torture or other ill-treatment has occurred. Criminal proceedings should be opened whenever there are reasonable grounds to believe that an act of torture or other ill-treatment has occurred, and those responsible for such acts must be brought to justice in fair proceedings.
- Lawyers acting on behalf of an accused must be given adequate time and facilities to gather evidence. Such evidence gathered should be entered in the case file without investigators' or prosecutors' discretion.
- At the trial stage, in order to ensure respect for the right to a fair trial, lawyers and prosecutors must both be treated with respect, and the court must respect the right of the defence to examine prosecution witnesses or have them examined and to call and examine witnesses on behalf of the accused under the same conditions as prosecution witnesses.
- The law and guidance to judges must make clear that the admission of statements, including "confessions" and other evidence obtained as a result of torture or other ill-treatment is prohibited. No confession or self-incriminatory statement of the accused should be admitted in court in the absence of proof by the prosecution that it was given freely and voluntarily; the prosecutor should be required to prove this beyond a reasonable doubt. Every judge must ensure that the defence is given the opportunity to challenge the voluntariness of any self-incriminatory statement or "confession" by the accused. Furthermore "confessions" and other statements made by people in custody should only be admissible as evidence if they are recorded, made in the presence of a competent and independent defence lawyer and are confirmed before a judge. They should never be the sole basis for a conviction.
- The lives and physical integrity of lawyers must be protected by law and in practice; whenever lawyers face risk to their lives or well-being, states must take all necessary measures to guarantee effective protection of lawyers. Any allegations of attacks, threats, or harassment of lawyers must be promptly and thoroughly investigated by an independent and impartial authority and those responsible brought to justice.

- Lawyers' associations should play an active role in ensuring effective protection of their members, including by communicating directly with the relevant law enforcement and other state bodies, providing assistance to the individual and participating as interested parties in court proceedings, raising public and international awareness of these issues and taking other measures necessary to increase security of lawyers when and where necessary.





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**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00

**f** +41 22 979 38 01

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