

# **Towards a Stronger Legal Profession In the Russian Federation**

ICJ Mission Report 2015

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## I. Introduction

### 1. The Russian legal profession in context

This report addresses the role and independence of lawyers in the Russian Federation, and the organization and regulation of the Russian legal profession in law and in practice. A well-functioning, independent legal profession is essential to any justice system that upholds the rule of law. International standards recognize the importance of lawyers in protecting human rights and the contribution they make to maintaining the rule of law and the fair administration of justice.<sup>1</sup> Through their work, lawyers ensure the protection of human rights including the right to a fair trial,<sup>2</sup> guaranteed under international law, including under the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). In light of this, international principles<sup>3</sup> and standards have been developed to assist Member States in promoting and ensuring the proper role of lawyers, as well as defining their functions, code of ethics<sup>4</sup> and responsibilities.<sup>5</sup> Legal instruments which are related to the role and independence of lawyers include universal standards such as the UN Basic Principles on the Role of Lawyers as well a regional standards such as the Council of Europe Committee of Ministers' Recommendation No. R (2000) 21 on the freedom of exercise of the profession of lawyer.<sup>6</sup>

These standards and principles guide the application and development of national and international law. International human rights law itself, however, also embodies the notion of lawyers as "essential agents of justice",<sup>7</sup> who are called upon to protect human rights including procedural rights legal proceedings, and the right to an effective remedy for violations of human rights. Amongst other things, it enshrines the right of detainees to access to a lawyer, and establishes the right to an effective defence, lawyer-client confidentiality and equal access of lawyers to documents and witnesses, as elements of the right to a fair trial. The European Court of Human Rights has stressed that "...the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects

<sup>1</sup> Basic Principles on the Role of Lawyers, UN Doc. A/CONF.144/28/Rev. 1, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27—Sept. 7, 1990; Preamble; Recommendation No. R (2000) 21 of the Committee of Ministers to Member states on the freedom of exercise of the profession of lawyer, preamble.

<sup>2</sup> *Ibid.*

<sup>3</sup> Charter of Core Principles of the European Legal Profession sets principles as: "(a) The independence of the lawyer, and the freedom of the lawyer to pursue the client's case; (b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy; (c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; (e) loyalty to the client; (f) fair treatment of clients in relation to fees; (g) the lawyer's professional competence; (h) respect towards professional colleagues; (i) respect for the rule of law and the fair administration of justice; and (j) the self-regulation of the legal profession." Commentary on the Charter of Core Principles of the European Legal Profession, adopted by Council of Bars and Law Societies of Europe, 29 November 2008, p. 5. [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf).

<sup>4</sup> See for example, IBA International Principles on Conduct for the Legal Profession, Adopted by the International Bar Association on 28 May 2011.

<sup>5</sup> Basic Principles on the Role of Lawyers, *op. cit.*, Preamble.

<sup>6</sup> *International standards on the independence and accountability of judges, lawyers and prosecutors*, ICJ Practitioners Guide No. 1, <http://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/>.

<sup>7</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 12.

of that person's defence: discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention".<sup>8</sup>

The right to a fair trial requires not only effective representation by a lawyer, but also amongst other elements an independent judiciary and a judge who acts impartially, a prosecutor who acts according to law, and a legislative framework that is non-discriminatory and complies with human rights law. This report therefore addresses the role of the legal profession as one, but only one, essential pillar in the framework of a justice system that upholds the rule of law.

The role of lawyers must be considered in the context of the deeply ingrained problems in the Russian justice system. Previous ICJ reports addressed aspects of this, in particular problems related to judicial independence and judicial accountability through the disciplinary system.<sup>9</sup> They analysed how a weak judiciary, vulnerable to pressure both from powerful external actors and from within its own hierarchy, and a highly powerful prosecution service, combine to ensure that except in the small number of cases heard by a jury, prosecution is almost certain to lead to conviction.

The high conviction rate illustrates—among other things—the collective weakness of the legal profession, which has difficulty in asserting the central place of lawyers—in particular defence lawyers—in the criminal justice process. In the Russian Federation, there is a strong tradition of the profession of lawyer, generally known as "*advokatura*", dating back to the nineteenth century, with the independence of the profession guaranteed under law and its self-government assured through Chambers of Advocates, established at Federal and Regional levels. Nevertheless, these institutions are not always effective in protecting lawyers, in particular defence lawyers in criminal cases, from threats or harassment as a result of their work in defending the rights of their clients. In some regions, such as the North Caucasus, lawyers may even face physical attack. There are also widely acknowledged problems of uneven quality of legal representation by lawyers, and corruption amongst a section of the profession who often act in ways contrary to the interests of those they represent.

The Russian legal profession is also weakened by fragmentation, with a large majority of those providing legal advice and assistance operating outside of the "*advokatura*" and indeed outside of any regulatory framework. There are no precise statistics available for the number of lawyers who provide legal services outside of *advokatura*, but most estimates are between 80 and 90 per cent of all those practicing law. These figures are striking. If accurate, they mean that in the overwhelming majority of cases, legal assistance is provided by people who may not have qualified to join the profession, who do not have the rights and privileges of lawyers and to whom the code of lawyers' ethics does not apply. Furthermore, only lawyers who are members of *advokatura* benefit from the representation and protection of a professional association.

<sup>8</sup> *Daynan v. Turkey*, ECtHR, Application No. 7377/03 judgment, 13 October 2009, para. 32; ICJ, International standards on the independence and accountability of judges, lawyers and prosecutors, *op. cit.*

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

<sup>9</sup> ICJ, *Appointing the judges: Procedures for Selection of Judges in the Russian Federation*, (2014); *Securing Justice: the disciplinary system for judges in the Russian Federation*, (2012); *The State of the Judiciary in Russia* (2010).

All of these matters form the background to current discussions on the reform of the Russian legal profession, which is being considered as part of the “Justice” State Programme, a major roadmap for the reform of the justice system. An Interdepartmental Working Group has recently been created to elaborate a “concept” for the reform of the legal profession, although this work is still in its early stages.

## **2. Background to this report**

This report draws on the visit to the Russian Federation, in May 2015, of a mission of the International Commission of Jurists (ICJ). This was the ICJ’s fifth mission to the Russian Federation on questions related to the independence of the judiciary and the legal profession. Reports of those missions analysed aspects of the operation of the judiciary in the Russian Federation. The first report—“The State of the Judiciary in Russia”—published in 2010, included a general assessment of the judiciary and its independence. The selection and appointment of judges and judicial disciplinary system were described in ICJ reports “Appointing the judges: Procedures for Selection of Judges in the Russian Federation” (2014) and “Securing Justice: the disciplinary system for judges in the Russian Federation” (2012) respectively.

With its 2015 mission, and this report, the ICJ has turned its attention to the problem of the legal profession at a time when potentially significant changes in the profession are under discussion. It is hoped that this report will contribute to the national debate about the role of lawyers, and to the development of new legislative proposals in light of international law and standards, as well as examples of good practice from other jurisdictions.

The ICJ mission team was composed of Wilder Tayler, ICJ Secretary General, Alejandro Salinas, a lawyer practicing in Chile and a human rights adviser to the Ministry of Foreign Affairs, Róisín Pillay, Director of the ICJ Europe Programme, Temur Shakirov, Legal Adviser of the ICJ Europe Programme, Vidar Strømme, Chair of the ICJ section in Norway and Stine Langlete, a lawyer practicing in Norway. The mission benefited from the advice of Justice Tamara Morshakova, Former Judge of the Constitutional Court of the Russian Federation, who provided feedback in advance of the preparation of the mission as well as from the research of Irina Kuznetsova, who prepared a background paper which informed the experts in advance about the legal framework as well as practical issues of concern to the legal profession in the Russian Federation.

The mission held a joint round-table seminar with the Institute of Law and Public Policy involving a number of prominent legal scholars and researchers. It held highly informative meetings with officials of the Federal Bar Association, the Presidential Council on the development of the civil society and human rights, the Ombudsman of the Russian Federation as well as the Ministry of Justice of the Russian Federation. The mission met with individual lawyers who shared their own experiences and views and with NGOs and other experts. All these discussions have proven to be of great value for the ICJ’s understanding how the laws, standards and procedures related to the legal profession are applied in practice and what issues should be addressed through legal reforms. The widespread support for strengthening the role and independence of the legal profession was conspicuous to the mission. The ICJ expresses its gratitude to all those who met with the mission and who provided their views and information.



### **3. The scope of the mission**

The mission addressed a range of issues related to the legal profession. Mission members discussed with experts the role of the legal profession, its organization and self-governance and self-regulation, including qualification of lawyers and disciplinary proceedings. With lawyers and other experts the mission explored the issues related to the independence of lawyers in practice, and State-provided legal assistance. The mission heard about a range of problems related to legal representation in criminal proceedings, including free and unhindered communication with clients, access to case files, representation of their interests in court, equality of arms in judicial proceedings, as well as the physical security of lawyers and protection from harassment. Proposals for reform of the legal profession and the possible merger of various segments of the profession were at the centre of many of the discussions.

### **4. Structure of this report**

This report analyses the legal framework governing the legal profession in the Russian Federation, and discusses practical issues raised during the mission. It evaluates laws and practices in light of international law and standards on human rights, including the right to fair trial, as well as international standards on the independence of the legal profession. These standards address the organization and operation of the legal profession including regulation of the profession, qualification, ethics and discipline of lawyers, guarantees against interference with the work of lawyers and protections necessary for lawyers to defend the rights of clients. Though these standards may be broadly worded and leave room for differing approaches by national systems, they provide authoritative and widely accepted guidance which should inform national systems and practices.

Chapter II of the report briefly describes the history and current landscape of the legal profession in the Russian Federation. Chapter III addresses the organisation, bodies and procedures of the Federal and regional chambers, Chapter IV analyses questions related to the entry to the profession. Chapter V describes problems with ethics and disciplinary proceedings. Chapter VI is dedicated to the professional guarantees of lawyers and Chapter VII describes the main points of the ongoing reform of the legal profession.

Finally, in Chapter VIII, based on international law and standards, the report provides recommendations which propose legal and practical measures to be taken to advance the independence of the legal profession in the Russian Federation, and its effectiveness in upholding human rights.

## II. The landscape of legal services provision in Russia

### 1. Introduction

Although no official statistics are available, there are estimated to be in the region of several hundred thousand legal practitioners in the Russian Federation. Statistics are difficult to find, partly because the Russian legal profession is fragmented, and partly because significant elements of it are unregulated, with the result that there is no clear definition of what it means to be a “lawyer”.

At the core of the legal profession, although representing a minority of legal practitioners, is the “*advokatura*” or the profession of advocates. Members of the *advokatura* are recognized and regulated by law, subject to registration and qualification requirements, and governed by professional lawyers’ associations at federal and regional level. Advocates have the exclusive competence to represent defendants in criminal proceedings; however they have no such monopoly in civil and administrative cases.

In the absence of prohibition on non-advocates providing legal advice or providing legal representation in non-criminal cases in court, both private law firms and individual practitioners, with widely varying levels of qualification, have taken on a significant role in the profession. This is particularly the case in regard to civil, administrative and commercial cases. These lawyers operate outside of but in parallel to the profession of advocates, and represent the vast majority of those practicing law within the Russian Federation.

### 2. Historical development

The institution of *advokatura* celebrated its 150<sup>th</sup> anniversary in 2014.<sup>10</sup> This relatively new (compared to some other European states) institution came into existence as a result of the economic reform initiated by the Russian Emperor Alexander II in 1861. Amongst Russian lawyers, the period between 1861 and the 1917 revolution is still referred to as one of the most glorious chapters in the history of the Russian legal profession, which produced a number of renowned lawyers.<sup>11</sup> After the revolution of 1917, the profession underwent radical reforms, some of which weakened the profession. In 1917, the existing institutions of the legal profession and private legal practice were abolished,<sup>12</sup> but lawyers’ collegia were established under the State, and legal representation as such was preserved<sup>13</sup>. Structurally independent governance of the profession was re-established as a matter of law under the USSR Constitution of 1977, which declared collegia of advocates, which already operated in the country, to be independent of the state as “voluntary associations of individuals who carry out advocate activity.”<sup>14</sup> Thus the profession of advocates became, under law,

<sup>10</sup> See joint report of the Institute for Assessment of Companies and Markets, National Research University “Higher School of Economics”, and Research Institute for the Rule of Law under the European University in St. Petersburg, *Community of Lawyers*, March 2015.

<sup>11</sup> For example: Vladimir Danilovich Spasovich (1829–1906), Fyodor Nikiforovich Plevako (1842–1909), Nikolay Platonovich Karabchevsky (1851–1925), Anatoly Fedorovich Koni (1844–1927), Petr Akimovich Aleksandrov (1836–1893), Aleksandr Ivanovich Urusov (1843–1900) and many others.

<sup>12</sup> See Decree of the SNK (Council of People’s Commissars) RSFSR “On Courts”, published on 24 November 1917 // Official Gazette of the RSFSR, 1917, No. 4, p. 50.

<sup>13</sup> N.M. Kipnis, *Market-based evolution of advokatura and criminal procedure* // Comparative Constitutional Review, 2013, issue 2.

<sup>14</sup> The Law on Advokatura in the USSR, 30 November 1979, article 3.

institutionally independent, with oversight from state bodies.<sup>15</sup> The late Soviet period of *advokatura* is referred to by some experts and practicing lawyers as an era in which the legal profession was strong, managing to uphold high ethical standards and producing lawyers of high competence and integrity.

The Law "On Cooperation in the USSR" of 26 May 1988 N8998-XI allowed for the creation of private business. Under this law, individuals began establishing cooperatives, amongst which were a great number of "legal cooperatives" providing legal services. These later formed the basis for parallel or alternative collegia of lawyers, operating alongside already established collegia of advocates.<sup>16</sup> These parallel collegia did not have the right to tax reductions and were not subject to admission criteria, unlike the already-established collegia, nor were their members governed by a specific code of ethics.<sup>17</sup> Despite the initial plans to end registration of these "parallel" collegia in 1993, new parallel collegia continued to be registered until 1996, while those which had been registered already remained in operation.<sup>18</sup> It should be mentioned that in 1995 the Government made an attempt to license private legal services (Governmental Regulation of 15 April 1995 No. 344 "On Licensing the Activities Related to Provision of Paid Legal Services on the Territory of the Russian Federation") but already by 1998 the new Law "On Licensing Certain Types of Activities" did not include legal services in the list. It is suggested by some commentators that the existence of parallel collegia resulted in lowering the quality of legal services.<sup>19</sup>

After the fall of the USSR, no new legislation on *advokatura* was immediately adopted. Until 2002, the profession of advocates operated based on a Decree on *Advokatura* of 20 November 1980 of the Russian Soviet Federal Socialist Republic.<sup>20</sup> The delay in reforming the law is explained in part by disagreements among lawyers and experts "about almost every issue affecting the profession".<sup>21</sup> New legislation regulating the legal profession was introduced in 2002.<sup>22</sup> The 2002 law sought to unite the legal profession under a self-governed and independent structure, the Chamber of Advocates, composed of one chamber of advocates for each of the regions in Russia and one federal association, the Federal Chamber of Advocates. Members of both parallel forms of collegia were united as members of the Chamber of Lawyers, and preserved their status as lawyers without further qualification criteria.

The 2002 law introduced a limitation on representation in courts, specifying that, unless otherwise provided by federal law, only lawyers could act as "representatives of organizations, public authorities, municipal bodies in civil and administrative proceedings, and in proceedings on administrative offenses...

<sup>15</sup> *Ibid.*, article 16.

<sup>16</sup> Instructive letters of the Ministry of Justice of the Russian Federation, of 20 June 1995, No. 09-06-99-95 "On the operation of 'parallel' collegia of lawyers".

<sup>17</sup> The formation of the legal profession in the Russian Federation, Allpravo.ru, 2003, <http://www.allpravo.ru/library/doc75p/instrum103/>.

<sup>18</sup> *Law and Legal System of the Russian Federation*, Peter B. Maggs, Olga Schwartz, William Burnham, Sixth edition, Copyright 2015, pp. 198-199.

<sup>19</sup> *Ibid.*

<sup>20</sup> See G. M. Reznik, *The Law on Advokatura as a victim of collision of interests* // Russian Justice, 1998, issue 3, pp. 22-25, 23.

<sup>21</sup> *Law and Legal System of the Russian Federation*, Peter B. Maggs, Olga Schwartz, William Burnham, Sixth edition, *op. cit.*, citing Pamela A. Jordan, *Defending Rights in Russia: Lawyers, the State, and Legal Reforms in the Post-Soviet Era* (2005), p. 199.

<sup>22</sup> Federal Law No. 63-FZ of 31 May 2002 (as amended on 2 July 2013) "On lawyers' activities and *advokatura* in the Russian Federation".

except in cases where these functions are performed by the staff members of the mentioned organizations, government bodies and local authorities, unless otherwise provided by federal law.<sup>23</sup> Thus an attempt was made to impose a monopoly on legal representation except for cases where in-house lawyers acted as representatives.

However, following the 2002 law, history repeated itself in a brief time span. Despite the effort to unite the profession under the Chamber of Advocates, and the merger of the traditional and parallel collegia under the 2002 law, parallel structures that provided legal advice continued to operate, as the Civil Procedure Code adopted later in 2002 introduced a provision permitting legal representation in courts by “capable persons possessing powers officially registered in a due manner to conduct the case”.<sup>24</sup> Moreover, in 2004, the Constitutional Court found that limiting legal representation to advocates or full-time employees of relevant organizations was unconstitutional,<sup>25</sup> which led to an amendment of the Arbitration Procedure Code in 2005.<sup>26</sup> In criminal proceedings, a close relative or “another person” may represent someone in court, upon authorisation of the court, if they are supported in the proceedings by qualified lawyers.<sup>27</sup> These developments created a situation, which still persists, in which there is no prohibition under the law on provision of legal advice or representation in court in civil or administrative cases by individuals not qualified as lawyers, although restrictions apply in criminal cases (See further Chapter VII). The system introduced by the law of 2002 remains in place and is the main legislation that regulates the profession.

### 3. Current landscape of the legal profession

#### **Advokatura**

As of April 2015, there were an estimated 75,387 lawyers registered as qualified members of *advokatura* in the Russian Federation. Of those, 70,414 had an active status of a lawyer. Such lawyers are required to be members of the Chamber of Advocates, the self-governing association of the profession. Chambers of Lawyers are established at Federal level and in 85 regions of the Russian Federation.<sup>28</sup> All members of *advokatura* are subject to the Code of Professional Ethics of Lawyers, adopted on 22 April 2002, and to disciplinary sanctions for infringements of the code.

The Constitution and various laws vest lawyers who are members of *advokatura* with rights and privileges related to their work (described further in Chapter V), including the right to collect evidence, to have lawyer-client secrecy, to have access to a client in detention and various other rights. Under the Russian law,

<sup>23</sup> *Ibid.*, article 2(4).

<sup>24</sup> Civil Procedure Code of the Russian Federation “of 14 November 2002 No. 138-FZ” No. 46, article 49.

<sup>25</sup> Decision of the Constitutional Court of the Russian Federation of 16 July 2004 No. 15-P “On the case on the constitutionality of paragraph 5 of article 59 of the Arbitration Procedure Code of the Russian Federation in connection with the request of the State Assembly—Kurultai of the Republic of Bashkortostan, the Governor of the Yaroslavl Region Arbitration Court of Krasnoyarsk Krai, complaints of a number of organizations and individuals.

<sup>26</sup> The Federal Law of 31 March 2005 No. 25-FZ, “On amendments to the Arbitration Procedure Code of the Russian Federation and the Annulment of the Federal Law ‘On Amendments to article 59 of the Arbitration Procedure Code of the Russian Federation’”.

<sup>27</sup> Criminal Procedure Code of the Russian Federation, article 49(2). In Magistrates’ Courts representation may be carried out by a close relative or another person instead of a lawyer (article 49(2)).

<sup>28</sup> Chambers of Lawyers of the Subjects of the Russian Federation, [http://www.fparf.ru/FPA\\_RF/house/](http://www.fparf.ru/FPA_RF/house/).

it is specified that *advokatura* is a civil society institution<sup>29</sup> the activity of lawyer does not constitute an entrepreneurial one, but is classified as “non-profit activity”.<sup>30</sup> The conception of the profession of *advokatura* as based on the principle of non-profit activity is highly valued by many in the profession. It is seen as a fundamental ethical principle which enables members of *advokatura* to serve the interests of justice and defines the collegial spirit and ideals of advocates. The ICJ mission was repeatedly told that it is this “non-profit” principle which distinguishes *advokatura* from other lawyers, who may pursue profit. For example, the law specifies that the work of legal services of legal entities or State bodies, employers of organizations that provide legal services, notary services, and patent services does not constitute advocates’ activity.<sup>31</sup>

To those outside the Russian system, the significance of the distinction between “non-profit activity” by one group of lawyers and for-profit activity by others may be difficult to understand, since both groups of lawyers receive payment for their work, without particular restrictions on the fees they may be paid. Nevertheless, that distinction contributes to contradictions and divisions between the two main groups of lawyers, and may constitute an obstacle in coming to common terms in the process of unification of the legal profession.

*Advokatura* remains the only well organized group of legal professionals in the Russian Federation with a distinct hierarchy, institutions, procedures and agreed standards of ethics. The structures of governance of the profession of *advokatura* are described further in Chapter III, and qualification and disciplinary procedures regarding *advokatura* are addressed in Chapters IV and VI respectively.

### ***Lawyers practicing outside advokatura***

It has been reported that lawyers practicing outside *advokatura* are several times more than the total number of lawyers who provide legal advice or services in the country, which means that the number may reach several hundred thousand people.<sup>32</sup> There are no statistics on this point. Deputy Minister Elena Borisenko, at a joint session of the Federal Bar Association and the Presidential Council for Human Rights and Civil Society, could not provide an approximate estimate, saying: “their name is Legion”. During the mission, the ICJ was told by multiple sources that approximately 80 or 90 per cent of lawyers practice law without being members of a chamber.

Such lawyers are not subject to any regulation, either by the state or by their own institutions, nor are they represented by any professional body. Neither do they enjoy any of the rights and privileges that apply by law to advocates.

Within this group, there is wide variation. It includes, on the one hand, many large commercial law firms. The quality of legal advice and representation provided by these firms is generally considered to be high, and they have the financial means to recruit highly qualified Russian law graduates. Lawyers practicing at such law firms may include some who are members of *advokatura*, but the majority have law degrees but no professional qualification or membership.

<sup>29</sup> Federal Law “On lawyers’ activities and *advokatura* in the Russian Federation”, *op. cit.*, article 3.1.

<sup>30</sup> *Ibid.*, article 1.2.

<sup>31</sup> *Ibid.*, article 1.3.

<sup>32</sup> “Jurists will not be allowed in the court and there will be no more advocates there”, *Vedomosti*, 10 June 2015, <http://www.vedomosti.ru/opinion/articles/2015/06/11/596089-yuristov-v-sudi-nepustyat-a-advokatov-tam-ne-pribavitsya>.

Since such lawyers work outside the criminal field, their incentive to join the *advokatura* is relatively low. In some respects, it may sometimes be more convenient for them to avoid the constraints imposed by the membership of a chamber of lawyers. The mission was told that highly qualified lawyers may opt not to pass the examination to qualify as an advocate as they do not see any benefits in becoming a lawyer; in fact they may see it as a burden due to the obligation to pay membership fees to the regional and federal chambers.

Non-*advokatura* lawyers also include “in-house lawyers” who are employed by a company or organization to provide legal advice or services exclusively for that legal entity. In-house lawyers operate in a variety of fields, including commercial law, but they also include, for example, lawyers working in or with human rights NGOs. Such lawyers often represent clients in human rights cases which would not otherwise come before the courts, or in which clients would otherwise be unrepresented. They therefore perform a vital function within the criminal justice system. In the case of lawyers who are staff members of NGOs, they are prevented from becoming advocates because of the requirement that advocates must not receive remuneration from sources other than their legal practice.

Finally, lawyers practicing outside of *advokatura* also include many sole practitioners offering legal advice and representation in all fields of law. The ICJ mission was told that in this category, the quality, professionalism and ethics of lawyers varied very widely and was sometimes of significant concern. The absence of any regulation means that there is no assurance that someone calling themselves a lawyer has any law degree or legal qualification. The ICJ mission heard that many people simply set themselves up as lawyers and publicize their services to the general public, who have no means of verifying the credibility or quality of the legal advice they are given.

The reliance of the Russian legal system on lawyers that operate outside any self-regulatory system (whether that of *advokatura*, or an independent, parallel system) means that most of those providing legal services are not subject to any ethical code or disciplinary system. The many individuals who rely on such lawyers to provide them with access to justice, including redress for violations of their human rights, therefore have no recourse if they find their legal representative to be incompetent, careless or corrupt in his or her handling of their case.

The lack of limitation on rights of legal representation also means that, where an advocate is disbarred, there is nothing to prevent him or her from continuing to practice law, as a non-advocate lawyer. He or she may continue the same practice but without an obligation to pay membership fee to the Chamber of Lawyers. It may be more difficult to represent clients in criminal cases, but in all other types of cases disbarred lawyers are said to continue their practice unhindered.

One of the most serious consequences of the operation of lawyers outside the profession of advocates, is that, without any recognized professional status, they do not enjoy the rights and privileges normally accorded to lawyers (and accorded to advocates under Russian law) including access to documents and clients in detention, rights of confidential communication with their clients, lawyer-client privilege and confidentiality of legal documents. This leaves such

lawyers highly vulnerable to executive interference with their work, including searches of their premises, seizure of documents, and surveillance or interception of communications. Although the ICJ was not told that such actions occurred with regularity, they were clearly an ever-present threat.

The absence of lawyer-client privilege in respect of the majority of practicing lawyers in the Russian Federation raises significant concerns as to protection of the privacy rights of the lawyers themselves, but most significantly, endangers protection of the right to a fair hearing, as well as the right to privacy, of the lawyers' clients. The issue of rights and privileges of qualified lawyers is addressed in more detail in Chapter V.

#### **4. Conclusions**

It is a striking feature of the Russian legal system that most legal advice and representation in the Russian Federation is provided by people not formally considered to be lawyers, or at least not registered as such. The development of a parallel legal profession outside the officially-recognized structure of the *advokatura*, has led to an unstable situation where most legal advice is provided in a legal and regulatory vacuum.

Although some lawyers told the mission that the market could ensure sufficient quality in the work of such lawyers, some form of self-regulation is clearly necessary to uphold ethical standards and legal protection of the rights of such lawyers and thereby to ensure that they can uphold the rights of their clients.

The division in the legal profession also means that the vast majority of lawyers in Russia are operating in a situation of immense insecurity, with no legal protection, and no professional body to represent their interests. This is a worrying situation, which weakens the legal profession as an actor within the Russian justice system. As will be discussed further in subsequent chapters, the divisions and idiosyncrasies of the profession have spurred projects of reform, and calls to unify the legal profession. Whether and how this should be done, however, remains a highly contested question.

### III. The role of the chamber of lawyers in regulating the legal profession

#### 1. Introduction

This chapter describes the institutions and procedures for the self-regulation of the legal profession—or more specifically of those lawyers who have qualified and registered as members of *advokatura*. It is the Chamber of Lawyers and its constituent bodies, at federal and regional levels, which are responsible for the independent governance of *advokatura*. As described in the previous chapter, there are no governing institutions, standards or procedures in respect of persons providing legal advice or representation outside of *advokatura*. Although at present, therefore, the structures described in this chapter govern only one part of the profession, proposals for the merger of the legal profession may mean that they absorb or are adapted to apply to a much larger group of lawyers.

#### 2. International standards on the independence and role of lawyers' associations

International standards on the independence of lawyers recognize the role of self-governing institutions of the legal profession, such as bar associations, as being of utmost importance in “upholding professional standards and ethics, protecting members from prosecution and improper restrictions and infringements (...)”.<sup>33</sup> In addition to representing the interests of lawyers, bar associations are charged with functions including promoting continuous education, protection of lawyers' professional integrity<sup>34</sup> and strengthening the independence of the legal profession.<sup>35</sup>

The UN Basic Principles on the Role of Lawyers emphasize the importance of the independence of bar associations, which must be institutionally independent, both in law and in practice, from government, other executive agencies and outside private interests.

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>36</sup>

The principles also encourage co-operation between the bar association and the institutions of the State: “[p]rofessional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics”.<sup>37</sup> This places a direct obligation on States

<sup>33</sup> Basic Principles on the Role of Lawyers, *op. cit.*, para. 18.

<sup>34</sup> Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, Adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers' Deputies, principles V (3) and (4); Inter-American Court of Human Rights has established that professional associations constitute a means to regulate and control professional ethics, see its Consultative Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 68.

<sup>35</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 V (4).

<sup>36</sup> Basic Principles on the Role of Lawyers, principle 24. See also Draft Universal Declaration on the Independence of Justice («Singhvi Declaration»), prepared by Dr L. V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, para. 97.

<sup>37</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 25.



to not only abstain from any unlawful interference with the work of professional associations of the lawyers, but to encourage and support the establishment of the work of such associations.<sup>38</sup>

### 3. The structure of the Chamber of Lawyers

#### ***Federal Chamber of Lawyers of the Russian Federation***

The Chamber of Lawyers of the Russian Federation, the self-governing body of lawyers of *advokatura*, which is registered as a non-governmental organization,<sup>39</sup> has a federal structure. It consists of the Federal Chamber of Lawyers of the Russian Federation and regional chambers of lawyers established in each of the Regions ("Subjects of the Russian Federation"). The Federal Chamber of Lawyers of the Russian Federation is established under law as an all-Russian non-governmental non-profit organization<sup>40</sup> that brings together regional chambers of lawyers<sup>41</sup> on a mandatory basis.<sup>42</sup>

According to the law, the Federal Chamber of Lawyers provides representation and protection of the interests of lawyers before public and municipal authorities and coordinates the activities of regional chambers of lawyers.<sup>43</sup> On both federal and regional levels, chambers of lawyers have established commissions to protect rights of lawyers. However, it is clear from the concerns reported to the ICJ mission, that there is a need for the chambers of lawyers to continue and increase significantly their role in protecting the rights of individual lawyers when attempts are made to unduly interfere with their independent work.

Russian law further provides that the Federal Chamber of Lawyers is responsible for ensuring a high quality of legal assistance by lawyers.<sup>44</sup> It is also responsible for representing lawyers and regional chambers of lawyers before federal public authorities in relation to issues such as federal budget funds for state-funded criminal legal aid.<sup>45</sup> The Federal Chamber's decisions and those of its constituent bodies are binding on all lawyers and on regional chambers of lawyers.<sup>46</sup>

<sup>38</sup> Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc. A/64/181, 28 July 2009, para. 21.

<sup>39</sup> The Federal Chamber of Lawyers brings together 85 regional chambers, See the official website about the Federal Chamber of Lawyers: [http://www.fparf.ru/FPA\\_RF/about\\_FPA/](http://www.fparf.ru/FPA_RF/about_FPA/).

<sup>40</sup> Federal Law "On introducing amendments to Chapter 4 Part 1 of the Civil Code of the Russian Federation and on abolishing certain provisions of the laws of the Russian Federation" came into effect on 1 September 2014. It introduced an exhaustive list of NGOs, reduced their forms of incorporation, made a distinction between NGOs as corporations and non-corporate entities, and made it clear that the amended provisions of the Civil Code on associations (unions) apply to chambers of lawyers. At the same time, the law does not require re-registration of already operating legal entities following its entry into force. Founding documents and names of legal entities founded before the date on which the law comes into effect must be brought into compliance with Chapter 4 of the Civil Code when their founding documents are amended for the first time following such date. Changing the name of the legal entity for the purpose of bringing it into compliance with Chapter 4 of the Civil Code does not require any further amendments to other documents that refer to its previous name. Until the documents of such legal entities are brought into compliance with Chapter 4 of the Civil Code, they remain effective to the extent they are not contrary to the above provisions.

<sup>41</sup> The Federal Chamber of Lawyers brings together 85 chambers of lawyers. See [http://www.fparf.ru/FPA\\_RF/about\\_FPA/](http://www.fparf.ru/FPA_RF/about_FPA/).

<sup>42</sup> See Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 35 (1).

<sup>43</sup> *Ibid.*, article 35 (2).

<sup>44</sup> See Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 35 (2).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, article 35 (7).

An important guarantee of the independence of the Federal Chamber is that it is protected against any changes in its structure (so called "reorganization") or abolition once established, except pursuant to federal law.<sup>47</sup>

### **Regional chambers of lawyers**

At a regional level, chambers of lawyers are established as non-governmental non-profit organizations with mandatory membership of all lawyers qualified as *advokatura* who practice in that region.<sup>48</sup> A lawyer, once qualified, thus becomes a member of the Federal Chamber of Lawyers and of the relevant Regional Chamber.<sup>49</sup> Members of the Regional Chamber are bound by its decisions.<sup>50</sup>

According to the law, regional chambers of lawyers are responsible for ensuring access to qualified legal assistance across the relevant region;<sup>51</sup> organizing free legal assistance to Russian nationals;<sup>52</sup> representing and protecting the interests of lawyers before authorities and other entities;<sup>53</sup> and supervising professional training for lawyers and compliance with the Code of Professional Ethics of Lawyers<sup>54</sup>. Regional chambers adopt various documents governing their own operation and the work of lawyers in the region,<sup>55</sup> including the charter of the regional chamber;<sup>56</sup> programmes for advanced training of lawyers and training of trainee lawyers;<sup>57</sup> and procedures for providing legal aid by lawyers appointed by a court or investigator<sup>58</sup>.

Regional chambers may not serve as offices that provide legal advice.<sup>59</sup> This distinction is important to differentiate between the regional chambers and entities (*advokatskie obrazovaniya*), which provide legal services:<sup>60</sup> lawyers' offices,<sup>61</sup> collegia of lawyers,<sup>62</sup> lawyers' bureaux<sup>63</sup> or legal advice offices<sup>64</sup>.

<sup>47</sup> *Ibid.*, article 35 (6.1.).

<sup>48</sup> *Ibid.*, article 29 (1).

<sup>49</sup> *Ibid.*, articles 29, 35.

<sup>50</sup> *Ibid.*, article 29 (9).

<sup>51</sup> *Ibid.*, article 29 (4).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Decisions adopted by the bodies of the chamber of lawyers on matters within their competence are binding on every member of the chamber of lawyers.

<sup>56</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation" does not specify the body responsible for adopting the Charter of a regional chamber of lawyers. It seems however that, given that the meeting (conference) of lawyers is the highest authority of the chamber, the Charter of the chamber shall be adopted by it.

<sup>57</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 31 (3).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, article 29 (10).

<sup>60</sup> *Ibid.*, article 20.

<sup>61</sup> A lawyer who has opted to pursue lawyers' activities on his/her own must found a lawyer's office, which is not a legal entity. See Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", article 21 for more details.

<sup>62</sup> Two or more lawyers may found a collegium of lawyers, a non-profit organization consisting of its members and operating on the basis of its Charter approved by the founders, as well as the founders' agreement they make. See Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", article 22 for more details.

<sup>63</sup> Two or more lawyers may found a lawyers' bureau. The relations arising from the foundation of the lawyers' bureau and its activities are governed by the rules applicable to the collegium of lawyers. See Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", article 23 for more details.

<sup>64</sup> Pursuant to the proposal of the regional executive authority, the chamber of lawyers may found a legal advice office, a non-profit organization, where the total number of lawyers-members of all associations of lawyers located in the respective judicial circuit is less than 2 per 1 federal judge. See Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", article 24 for more details.

Lawyers choose freely between which of these types of lawyers' offices they should join<sup>65</sup> and choose their place of employment<sup>66</sup>. However, they may not pursue their professional activities outside of any such entity provided for by law.<sup>67</sup> Lawyers who wish to work independently may only do so by founding a lawyer's office.<sup>68</sup>

The law affords regional chambers of lawyers strong guarantees against interference with their governance. Once established, regional chambers are protected from the imposition of any changes in the way they are organized.<sup>69</sup> Moreover, they may only be liquidated pursuant to a federal constitutional law founding a new constituent entity as a member of the Russian Federation in accordance with the procedure established by a federal law.<sup>70</sup> Regional chambers are founded by a founding conference of lawyers of the respective region<sup>71</sup> and are subject to State registration pursuant to the relevant decision made by the founding conference of lawyers<sup>72</sup>. Despite these clear guarantees, there has been one instance in which a department of the Ministry of Justice threatened to liquidate a chamber of lawyers in one of the regions of Russia for not presenting certain documents.<sup>73</sup>

Only one regional chamber may be established within each region<sup>74</sup> apparently in order to prevent parallel structures for the organization of the profession. This intention is also evident from the ban on regional chambers founding subdivisions, branches or representative offices in other regions<sup>75</sup> or creating inter-regional or other inter-territorial chambers<sup>76</sup>.

Regional chambers of lawyers take independent decisions on two critical issues: entrance to the profession and disciplinary proceedings against lawyers, including disbarment (see further Chapters IV and VI). The Federal Chamber and its subordinate bodies do not serve as an appeal body for disciplinary decisions regarding individual lawyers or other decisions of the regional chambers. This gives regional chambers a great deal of autonomy from the Federal Chamber of Lawyers.

#### 4. Administration of chambers of lawyers

The Federal Chamber of Lawyers consists of the All-Russian Conference of Lawyers, the President, the Board and the Auditing Commission. The regional chambers have the same structure, with the addition of a qualification commission, which does not exist on the federal level.

<sup>65</sup> The Federal Chamber and regional chambers of lawyers are established for the purpose of representing the interests of the community of lawyers, while 'lawyers' units' are created (founded) for the purpose of exercising lawyers' activities. As of 1 January 2015, 25,193 'lawyers units' operated in Russia, including 2,796 collegia of lawyers, 747 lawyers' bureaux, 21,500 lawyers' offices and 150 legal advice offices. See: [http://www.fparf.ru/documents/council\\_documents/council\\_reports/13947/](http://www.fparf.ru/documents/council_documents/council_reports/13947/).

<sup>66</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 20 (2).

<sup>67</sup> The Lawyer's Desk Companion: Article-by-Article Commentary on the Federal Law "On lawyers' activities and advokatura in the Russian Federation", V. A. Vaypan, Yustitsinform, 2006 // Consultant-Plus.

<sup>68</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 21.

<sup>69</sup> *Ibid.*, article 29 (7.1.).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, article 29 (4).

<sup>72</sup> *Ibid.*, article 29 (7).

<sup>73</sup> A resolution of the All-Russian Congress of Lawyers on Violations of the Rights of Lawyers, 22 April 2013, [http://www.fparf.ru/documents/congress\\_documents/congress\\_resolutions/257/](http://www.fparf.ru/documents/congress_documents/congress_resolutions/257/).

<sup>74</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 29 (8).

<sup>75</sup> *Ibid.*, article 29 (8).

<sup>76</sup> *Ibid.*

## **Federal Chamber of Lawyers**

### *All-Russian Conference of Lawyers*

The highest body of the Federal Chamber is the All-Russian Conference of Lawyers which meets at least every two years,<sup>77</sup> with each regional chamber having one vote<sup>78</sup>. The Conference adopts or amends the Charter of the Federal Chamber and the Code of Professional Ethics of Lawyers and carries out other functions important for the regulation of the profession.<sup>79</sup> The All-Russian Conference has regularly adopted important public resolutions or statements concerning lawyers in Russia. In its resolution of 2013 it called "...on the heads of government agencies to comply with the principles of legality, independence, self-governance, corporatism, based on which the *advokatura* operates, as well as the guarantee of the independence of lawyers".<sup>80</sup>

### *Board of the Federal Chamber of Lawyers*

The Board of the Federal Chamber is the executive body of the Federal Chamber of Lawyers<sup>81</sup> elected by the All-Russian Conference by secret ballot. Its membership must not exceed thirty persons and must be renewed (rotated) by one third every two years<sup>82</sup>. Meetings of the Federal Chamber Board are convened by the President of the Federal Chamber at least every three months. Two thirds of the Board make a quorum.<sup>83</sup>

The Board of the Federal Chamber elects its President and Vice-President from among its members and determines their respective powers.<sup>84</sup> The Board has powers to coordinate the activities of the regional chambers as regards the provision of free legal advice and representation.<sup>85</sup> Amongst other responsibilities, it facilitates professional development of lawyers, develops unified approaches to professional training and retraining of lawyers, assistant lawyers and interns; and contributes to expert evaluation of drafts of federal laws on matters concerning the work of lawyers.<sup>86</sup>

An important function of the Board is analyzing and publishing disciplinary case-law developed by regional chambers and issuing recommendations related to this.<sup>87</sup> The mission heard that there was a lack of a unified disciplinary practice and approach to disciplinary misconduct of lawyers. Given its functions under the law, the Federal Chamber could play a greater role in ensuring that the application of disciplinary standards for lawyers becomes more coherent and universally applied across the country. This seems to be particularly important due to the complaints that some of the regional chambers have used their powers to disbar lawyers in an arbitrary manner.

<sup>77</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", article 36 (1).

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, article 36 (2).

<sup>80</sup> Resolution of the All-Russian Congress of Lawyers on Violations of the Rights of Lawyers *op. cit.*

<sup>81</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 37 (1).

<sup>82</sup> *Ibid.*, article 37 (2).

<sup>83</sup> *Ibid.*, article 37 (5).

<sup>84</sup> *Ibid.*, article 37 (3.1).

<sup>85</sup> *Ibid.*, article 37 (3.4).

<sup>86</sup> *Ibid.*, article 37 (3.9).

<sup>87</sup> *Ibid.*

### *President and Vice-President of the Federal Chamber of Lawyers*

The President of the Federal Chamber is elected by the Board for a term of four years.<sup>88</sup> A person can hold the office of President for a maximum of two consecutive terms.<sup>89</sup> The President of the Federal Chamber proposes one or more vice-presidents to be elected to the Board of the Federal Chamber for a term of two years;<sup>90</sup> represents the Federal Chamber; recruits and dismisses the staff; convenes meetings of its Board and oversees execution of decisions made by the Board and the All-Russian Conference of Lawyers<sup>91</sup>. The President and Vice-Presidents, as well as other members of the Board are remunerated.<sup>92</sup> The mission did not hear any concerns regarding the leadership of the Federal Chamber.

### *Auditing Commission*

The Auditing Commission is elected from among lawyers to supervise the financial and economic activities of the Federal Chamber of Lawyers and compliance with the decisions of the Board of the Federal Chamber.<sup>93</sup> Members of the Auditing Commission may combine their work in this Commission with their work as lawyers, receiving remuneration in the amount determined by the Council of the Federal Chamber.<sup>94</sup> The Commission carries out yearly audits, while also being able to initiate checks at any moment. Such checks can be carried out upon its own initiative in accordance with its rules and procedure, or on the decision of the Congress of Lawyers, the Council of the Federal Chamber of Lawyers or the President of the Federal Chamber of Lawyers.<sup>95</sup> In carrying out such checks the Auditing Commission may involve accountants of chambers of lawyers or other specialists. It reports to the All-Russian Congress of Lawyers.<sup>96</sup>

## **Regional chambers of lawyers**

### *Conference of lawyers*

The highest body of each regional chamber of lawyers is a conference of lawyers convened at least once a year.<sup>97</sup> Its functions include: forming the Board of the Regional Chamber; electing members of the Auditing Commission and electing members of the Qualifications Commission from among lawyers; determining the amount of lawyers' fees to the Regional Chamber<sup>98</sup> and establishing rewards and disciplinary measures in accordance with the Code of Professional

<sup>88</sup> *Ibid.*, article 37 (3).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, article 37 (7).

<sup>92</sup> *Ibid.*, article 37 (8).

<sup>93</sup> See the Charter of the All-Russian Non-Governmental Non-Profit Organization "Federal Chamber of Lawyers of the Russian Federation", article 41.

<sup>94</sup> *Ibid.*, article 41.

<sup>95</sup> *Ibid.*, article 42.

<sup>96</sup> *Ibid.*

<sup>97</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 30 (1).

<sup>98</sup> For instance, mandatory payments for members of the Moscow Regional Chamber of Lawyers amounted to RUR 650 per month in 2014 (including RUR 170 for the needs of the Federal Chamber of Lawyers). Mandatory lump-sum payments for members of the Chamber of Lawyers of the Moscow Region admitted to the bar after 24 January 2014 amount to RUR 50,000. Decisions of the XIII Conference of the Moscow Regional Chamber of Lawyers of 24 January 2014. [http://www.apmo.ru/?show=conferencing\\_solutions&PHPSESSID=15ek2in69t0t6vge0r45jl6ku4#XIII\\_conference](http://www.apmo.ru/?show=conferencing_solutions&PHPSESSID=15ek2in69t0t6vge0r45jl6ku4#XIII_conference).

Ethics of Lawyers<sup>99</sup>. The mission was told by some lawyers that the conferences failed to address the real problems of management or other corporate problems which emerge in a particular regional chambers.

### *Board of the Chamber of Lawyers*

The mission was told that it was the Boards of the regional chambers which ensured that lawyers could recognize themselves as a professional community. It is the executive body<sup>100</sup> of the chamber, elected (up to fifteen members) by a conference of lawyers through a secret ballot from among the members of the regional chambers. The membership is renewed (rotated) by one third once every two years.<sup>101</sup> The Board elects the President of the regional chamber (from among its members) and, pursuant to the proposal of the latter, one or more vice-presidents; outlining the powers of the President or Vice-President.<sup>102</sup>

One of the most important roles of the regional chamber is ensuring accessibility of free legal advice and assistance.<sup>103</sup> The Board may adopt a decision to create legal advice offices and delegate lawyers to work in them.<sup>104</sup> Furthermore, the Board determines the procedure for provision of free legal assistance by lawyers appointed to provide this service,<sup>105</sup> and supervises compliance of lawyers with the procedure<sup>106</sup>. Some of the regions use these powers effectively. However, many of the regional chambers have been criticized for not using all the opportunities that the law offers them in regard to organization of free legal aid. It is acknowledged, including by the Federal Chamber of Lawyers, that improvements are needed to regional chambers' supervision of the legal aid system, which can be achieved even without changes in the law. A working group is developing proposals to improve the system for providing legal aid.

Importantly, only regional chambers are empowered to examine complaints about acts or omissions of lawyers on the basis of the assessment by the Qualifications Commission.<sup>107</sup> These decisions may not be appealed to the Federal Chamber. (For more on the disciplinary system see Chapter V.)

The Board also determines the amount of additional remuneration to be paid from the funds of the chamber to lawyers<sup>108</sup> to a lawyer appointed to provide free legal assistance under the public legal aid system and/or participating in the criminal proceedings or as a representative in civil proceedings following appointment by a court, as well as the procedure for paying additional remuneration<sup>109</sup>. Despite a very low rate of 550 roubles per "court day" the mission

<sup>99</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 30 (2).

<sup>100</sup> *Ibid.*, article 31 (1).

<sup>101</sup> *Ibid.*, article 31 (2).

<sup>102</sup> *Ibid.*, article 31 (3).

<sup>103</sup> *Ibid.*, article 31 (3).

<sup>104</sup> Pursuant to a proposal of the regional executive authority. In accordance with the procedure established by the Board of the regional chambers themselves. Federal Law "On lawyers' activities and advokatura in the Russian Federation", article 31 (3).

<sup>105</sup> Those who take part in criminal proceedings as defence counsel appointed by the bodies in charge of the inquiry, pre-trial investigation or the court.

<sup>106</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 31 (3).

<sup>107</sup> *Ibid.*, article 31 (9).

<sup>108</sup> Following the appointment by the bodies in charge of the inquiry or pre-trial investigation or the court.

<sup>109</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 31 (3).

did not hear of any precedents of allocating such additional remuneration in practice.<sup>110</sup>

Under the law, regional chambers of lawyers are responsible for advocating for the social and professional rights of lawyers.<sup>111</sup> This provides the possibility for important re-enforcement of the role of the Federal Chamber of Lawyers, in protecting lawyers under pressure or threat (see below). However, despite multiple cases of complaints of lawyers about violation of their rights, the mission heard that this mechanism is underused by lawyers and not many complaints are filed. At the same time, allegations are made by individual lawyers regarding the insufficient effort of chambers of lawyers to support lawyers in difficult situations and circumstances. Though these allegations are strongly refuted by representatives of the chambers of lawyers, discussions during the mission suggest that this mechanism could be used more actively. It could also be beneficial for lawyers to be made aware of the capacity of their respective regional chambers and the Federal Chamber to protect their rights, and encouraged to approach the relevant chambers where their rights are infringed.

The regional chambers' Boards promote professional training of lawyers. Amongst other things, they approve programmes of advanced training and training of trainee lawyers, and organize professional education under such programmes.<sup>112</sup>

#### *President and Vice-President of the Regional Chamber of Lawyers*

The President of a Regional Chamber is elected by the Board of the chamber for the term of four years.<sup>113</sup> No one can hold this office for more than two consecutive terms.<sup>114</sup> The President of the chamber proposes Vice-Presidents to be elected by the Board,<sup>115</sup> represents the Regional Chamber before public authorities and other actors, acts on behalf of the Regional Chamber, recruits and dismisses the staff of the chambers and convenes the meetings of the Board<sup>116</sup>. The President of the chamber opens disciplinary proceedings against a lawyer or lawyers<sup>117</sup> where there are permissible reasons for doing so, in accordance with the procedure established by the Code of Professional Ethics of Lawyers<sup>118</sup>.

It has been reported that presidents of certain regional chambers, despite a clear limitation prescribed by law, hold their positions longer than the maximum term. It was alleged that in some regions, chambers of lawyers have been turned into "family corporations" where the president does not change and senior positions at the chamber are held by relatives. Although the ICJ is not in a position to confirm these allegations, they may point to serious cases of misconduct or corruption that deserve greater examination. The openness with which the allegations are made in public, for example during the event organized by the Presidential Council on Civil Society and Human Rights, point

<sup>110</sup> The remuneration for provision of legal services is calculated not by hour of provision of legal assistance but by a so-called "court-day". The amount is paid regardless of the time spent by the lawyer in defending the client. This allows certain lawyers to earn significant amounts of money without actually spending any significant amount of time providing legal assistance.

<sup>111</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 31 (10).

<sup>112</sup> *Ibid.*, article 31 (8).

<sup>113</sup> *Ibid.*, article 31 (3).

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, article 31 (7).

<sup>117</sup> See Subsection 8 Section 1 below for more details.

<sup>118</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 31 (7).

to an unusual tolerance of the problem. A particular example mentioned was the case of one President of a regional chamber of lawyers who allegedly transferred the position to his son, after occupying it himself for more than ten years through a process that lacked transparency.<sup>119</sup>

Furthermore, in some cases it appears that arrangements are made to avoid the limitation of a maximum number of consecutive terms by electing another person for a very brief period of time—this person then agrees to step down so that the former President could be re-elected for the third term. In March 2015, a lawyer challenged the re-election of the president of the Moscow Region Chamber of Lawyers to be elected two months after another person had been elected as the president of the Chamber. Similar reshuffles of offices are said to have taken place in at least 15 other regions of Russia—including Mari El, Tatarstan, the Nizhniy Novgorod, Arkhangelsk and Saratov Regions.<sup>120</sup> The Guild of Lawyers described the problem in the following terms: “The basis of democracy in a corporation is first of all the principle of appointment by election which is fully absent during formation of the bodies of self-governance of *advokatura*”.<sup>121</sup>

Following the mission, the ICJ learned of a draft law to lift the limitations on the number of terms for which one person could hold the position of President of a Chamber of Lawyers. The explanatory note to the draft law says that its adoption will “allow members of the lawyers’ corporation to decide themselves who should be president of the regional or federal Chamber of Lawyers, removing the restrictions that infringe upon their rights”.<sup>122</sup> Regardless of whether the limitations should be lifted, it is difficult to agree with the reasoning. First, it is members of the lawyers’ corporation themselves who elect their leadership at the moment, moreover, it is unclear why the limitation for two terms is considered an infringement of rights. The document explains that “[t]his will allow to keep within the lawyers corporation the most experienced lawyers and prepared cadres with long experience as presidents of respective chambers and will facilitate better organization of work, the efficiency of the lawyers’ system.”<sup>123</sup> The ICJ has not heard any concerns regarding the rule that presidents of chambers of lawyers are not able to serve longer than two terms in a row. However concerns to the contrary—regarding the possibility of numerous consecutive terms—were indeed expressed to the ICJ mission. It is therefore, unclear how removing the existing limitations would improve the organization of chambers of lawyers—it may in fact have detrimental consequences for the effective regulation of the legal profession.

### *Auditing Commission*

The Auditing Commission is elected from among the lawyers registered in the Regional Register of the relevant region to supervise financial and economic

<sup>119</sup> Transcript of the Special Session of the Council of the President of the Russian Federation on Human Rights and Civil Society, “The Role of Advokatura in Human Rights Activity”, 29 April 2015, <http://president-sovet.ru/presscenter/news/read/2398/>.

<sup>120</sup> For more details, see: Medvedev and Kononov are asked to protect democratic principles of advokatura, Pavo.ru, 10 March 2015, <http://pravo.ru/review/view/116501/>.

<sup>121</sup> The Guild of Russian Lawyers, 18 August 2015, No. 01/130-ig, <http://president-sovet.ru/files/7d/19/7d19c05498b0ed394d2b5cb233420233.pdf>.

<sup>122</sup> Explanatory Note to the draft federal law “On Amendments to the Federal Law ‘On lawyers’ activity and advokatura in the Russian Federation’”, No. 838887-6.

<sup>123</sup> *Ibid.*



activities of the regional chambers and their constituent bodies.<sup>124</sup> The Auditing Commission submits performance reports to the Conference of Lawyers. The strength and independence of such auditing commissions has been questioned, and it has been suggested that auditing commissions are usually not in a position to challenge the work of the regional chambers.<sup>125</sup>

### *Qualifications Commission*

Qualifications commissions are bodies of regional chambers of lawyers, and are established at regional level only. Qualification commissions hold qualification exams for persons seeking access to the legal profession (*advokatura*), and examine complaints about acts or omissions of lawyers.<sup>126</sup>

A qualification commission consists of thirteen members and is established for the term of two years on the basis of the following representation quotas:<sup>127</sup>

- seven lawyers (with at least five years of professional experience), representing the regional chambers including the President of the regional chamber;
- two representatives of the regional body of the Ministry of Justice;
- two representatives of the regional legislature. Such representatives cannot be members of the legislature, State agents or municipal officers. The procedure for electing such representatives and the relevant requirements are governed by the regional law;
- one judge of the Supreme Court of the Republic, regional court, court of a city with federal status, court of the autonomous region or autonomous district;
- one judge of the Regional Arbitration Court.

The Qualification Commission is headed by the President of the Regional Chamber of Lawyers *ex officio*.<sup>128</sup>

The President of the commission convenes its meetings at least four times a year. The meeting is deemed quorate if it is attended by at least two thirds of its members.<sup>129</sup> The President also arranges for authentication of documents submitted by the candidates for qualification as a lawyer; sets the date and time for the exam; makes sure that examination cards and written tasks (to be approved by the relevant qualification commission) are developed in accordance with the list of questions proposed to the candidates; signs the minutes of the commission meeting and other documents pertaining to its operation; analyses performance of the commission and takes steps to improve the organization of its activities, informing the relevant conference of lawyers accordingly.<sup>130</sup>

<sup>124</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 32 (1).

<sup>125</sup> R. G. Melnichenko, "Usurpation of power as an independent professional violation of a lawyer" // Bulletin of the Volgograd Academy of State Service, No. 1/6. 2011, pp. 5–10.

<sup>126</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 33 (1).

<sup>127</sup> *Ibid.*, article 33 (2).

<sup>128</sup> *Ibid.*, article 33 (3).

<sup>129</sup> *Ibid.*, article 33 (5).

<sup>130</sup> See "Regulation on the procedure for passing the qualification exam to be admitted to the bar", of 25 April 2003 (as amended on 30 November 2010), article 1 (1.4.).

## 5. Conclusions

The structure of the institutions of the Russian *advokatura*, with a federal bar association (the Federal Chamber of Lawyers) and subordinate regional bar associations (the regional chambers of lawyers) reflects similar structures in other federal states.<sup>131</sup> The legislation governing *advokatura* in the Russian Federation establishes strong self-governing institutions, with legal protection for their independence from government and from other outside interests. In practice, it also appears that chambers of lawyers have been able to operate independently. The core documents related to the operation of the governing institutions are adopted by the profession itself, and this is often prescribed by law or by the profession's own regulations. For example, as described above, at a federal level, the All-Russian Conference of Lawyers adopts the Charter of the Federal Chamber of Lawyers;<sup>132</sup> the Code of Professional Ethics of Lawyers;<sup>133</sup> and Rules of Procedure of the All-Russian Conference of Lawyers<sup>134</sup>. This is also reflected at a regional level. Furthermore, as noted above, there are strong legislative guarantees against outside interference in the organization of both federal and regional chambers, and against their dissolution in line with international standards which guarantee that lawyers are entitled to form and join self-governing associations.<sup>135</sup>

Both Federal and regional chambers of lawyers have a wide scope of powers on issues relating to the regulation of the profession, including qualification, education and training of lawyers; the maintenance of ethical standards (and at regional level, disciplinary proceedings); provision of support for lawyers and advocacy for their interests. They also have significant powers in the administration of the system of free legal representation in criminal cases.

Under the law, the powers of both the federal and regional chambers are comprehensive and in line with international standards on the independence of the legal profession. It is less clear however that, in practice, these powers are used as effectively as could be the case. The ICJ considers that more active involvement of chambers of lawyers is needed, in line with their functions prescribed in law, to ensure promotion of ethical standards and enforcement of

<sup>131</sup> For example in Germany, there are 27 regional bar associations plus the bar association of the Federal Court of Justice which are united under the Federal Bar Association (Bundesrechtsanwaltskammer—BRAK). In the majority of the US states membership in the bar association of a state is compulsory and there is a federal American Bar Association where membership is not mandatory.

<sup>132</sup> Charter of the All-Russian Non-Governmental Non-Profit Organization "Federal Chamber of Lawyers of the Russian Federation", approved by I ARCL on 31 January 2003. The Charter of the Federal Chamber of Lawyers includes chapters governing its legal position, purposes of activities, rights and duties of its members, procedure for managing its activities, sources of assets, accounting and reporting at the Federal Chamber of Lawyers, procedure for introducing amendments to its Charter, as well as the procedure for application of assets in case of liquidation of the Federal Chamber of Lawyers, [http://www.fparf.ru/documents/normative\\_acts/1332/](http://www.fparf.ru/documents/normative_acts/1332/).

<sup>133</sup> Adopted [by lawyers] at the I ARCL on 31 January 2003 seeking to uphold professional integrity, foster the traditions of Russian legal profession (*advokatura*) and aware of their moral responsibility in front of the society. It establishes the rules of conduct that are binding on every lawyer in the conduct of lawyers' activities that are based on moral principles and customs of *advokatura*, international standards and rules of legal profession, as well as the reasons and procedure for prosecuting a lawyer. Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 36 (2).

<sup>134</sup> Approved by II ARCL on 8 April 2005. The Rules of Procedure outline the operational procedure of the ARCL. Federal Law of 31 May 2002, No. 63-FZ (as amended on 2 July 2013) "On lawyers' activities and *advokatura* in the Russian Federation", article 36 (2), [http://www.fparf.ru/documents/normative\\_acts/35/](http://www.fparf.ru/documents/normative_acts/35/).

<sup>135</sup> Basic Principles of the Role of Lawyers, *op. cit.*, principle 24; Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, *op. cit.*, principle V.1.

the Code of Ethics through the disciplinary system, and to promote consistent decisions, in accordance with international standards on the independence of lawyers, by qualification commissions in disciplinary cases. As will be discussed further in Chapter VI, more efforts are needed from chambers of lawyers to discharge their responsibilities under Russian law to protect the rights and interests of lawyers, which are threatened to varying degrees in many regions of the Russian Federation.

It is of concern that heads of regional chambers sometimes avoid restrictions on the number of terms during which they may hold their position. The reports of close relatives holding positions in the bodies of *advokatura* is also of concern. In the context of concerns about attempts to bypass the existing procedures, the intention to change the law without any plausible justification appears problematic. The legal profession in the Russian Federation at the current stage of its development needs to ensure that it is managed through democratic participation. A system based on rotation and a participatory culture for lawyers in their own profession's affairs should be fostered.

## IV. Entry to the profession

### 1. Introduction

Under law and in practice, regional chambers of lawyers, and qualification commissions established under them, are in charge of the qualification of lawyers as members of *advokatura*. This Chapter describes the qualification requirements and procedures they apply, and assesses the system's capacity to ensure a well-qualified profession, through fair procedures, in accordance with international standards. It should be noted that the system described in this Chapter applies only to membership of *advokatura*, and that these qualification rules do not prevent lawyers from providing legal assistance without passing through this qualification process.

### 2. International standards

The UN Basic Principles on the Role of Lawyers state that: “[g]overnments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory”.<sup>136</sup> It is equally important, as explained by authoritative international scholars, that entrants to the legal profession possesses “necessary qualifications, integrity and good character to become a lawyer and to continue to practise as a lawyer”.<sup>137</sup> European regional standards also underline the importance, in the process for qualification of lawyers, of non-discrimination by reason of race, sex, colour, religion, political or other opinion, ethnic or social origin, membership of a national minority, property, birth or physical disability when entering and exercising the legal profession.<sup>138</sup>

International standards stress the importance of legal education that raises awareness of prospective lawyers of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.<sup>139</sup> Thus, governments and professional associations of lawyers have a duty to make a high level of legal education available to the persons intending to access the legal profession. Recommendation No. R (2000) 21 of the Committee of Ministers emphasizes the importance of measures to ensure a high standard of legal training and ethics amongst entrants to the legal profession.<sup>140</sup> It emphasizes the importance of independence in the qualification process: “decisions concerning the authorisation to practise as a lawyer or to accede to the profession, should be taken by an independent body. Such decisions, whether or not taken by an independent

<sup>136</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 10; See also Singhvi Declaration, *op. cit.*, para. 77.

<sup>137</sup> Singhvi Declaration, *op. cit.*, para. 80.

<sup>138</sup> Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, Adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers' Deputies, principle II.1.

<sup>139</sup> Singhvi Declaration, *op. cit.*, para. 78.

<sup>140</sup> Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, *op. cit.*, principle II.2.

body, should be subject to review by an independent and impartial judicial authority.”<sup>141</sup>

### 3. Qualification requirements

Under Russian law, two requirements need to be met in order to satisfy the criteria to become a lawyer:<sup>142</sup> accredited higher legal education or a degree in law<sup>143</sup> and at least two years professional experience or professional training<sup>144</sup>. Professional experience may include different kinds of professional activities that require a degree in law.<sup>145</sup>

Unlike the system of qualification for judges,<sup>146</sup> foreign nationals or stateless persons may also be admitted to practice law if they meet the general requirements to be satisfied by Russian nationals<sup>147</sup>. In 2011–2012, the Qualification Commissions considered 11,854 (over the previous reporting period—12,981) applications to be admitted as a lawyer, allowed 11,504 (11,972 in the previous reporting period) candidates to take the exam and granted access to the bar to 8,030 (8,229) candidates (69.80%).<sup>148</sup>

### 4. Qualification examination

The qualification exam consists of written answers to questions and an oral interview.<sup>149</sup> The Qualification Commission has discretion in choosing between written answers to questions or multiple-choice testing depending on the number of candidates and other circumstances affecting the possibility of securing due course of the exam<sup>150</sup> though it is unclear why the amount of candidates may be of relevance for the testing<sup>151</sup>. The exam may not last less than 45 minutes.<sup>152</sup>

The regulations on the qualification exam and on evaluating candidates, as well as the list of questions to be offered to the candidates, are developed and approved by the Board of the Federal Chamber of Lawyers.<sup>153</sup> However, it is regional chambers of lawyers that decide on the substance of test tasks.<sup>154</sup>

<sup>141</sup> *Ibid.*, principle I.2.

<sup>142</sup> Federal Law “On lawyers’ activities and advokatura in the Russian Federation”, *op. cit.*, article 9 (1).

<sup>143</sup> Ruling of the Constitutional Court of Russia No. 1603-O of 24 September 2012 “On refusal to examine the complaint of Mr Sergey V. Butyrin about a violation of his constitutional rights by article 9, para. 1 of the Federal Law “On lawyers’ activities and advokatura in the Russian Federation.”

<sup>144</sup> Trainee lawyers must have a degree in law. Professional training must last from 1 to 2 years. Federal Law “On lawyers’ activities and advokatura in the Russian Federation”, *op. cit.*, article 28 (1).

<sup>145</sup> Federal Law “On lawyers’ activities and advokatura in the Russian Federation”, *op. cit.*, article 9 (3).

<sup>146</sup> Appointing the judges: Procedures for Selection of Judges in the Russian Federation, ICJ Mission Report 2014, p. 27.

<sup>147</sup> See Vaypan, *The Lawyers’ Desk-Companion. Article-by-Article Commentary on the Federal Law “On lawyers’ activities and advokatura in the Russian Federation”*, Moscow, Yustitsinform, 2006 // Consultant Plus.

<sup>148</sup> See Performance Report of the Board of the Federal Chamber of Lawyers of the Russian Federation, of 22 April 2013, for the period between April 2011 and April 2013, [http://www.fparf.ru/documents/council\\_documents/council\\_reports/256/](http://www.fparf.ru/documents/council_documents/council_reports/256/).

<sup>149</sup> Federal Law “On lawyers’ activities and advokatura in the Russian Federation”, *op. cit.*, article 11 (2).

<sup>150</sup> “Regulation on the procedure for passing qualification exam to be admitted to the bar” of 25 April 2003 (as amended on 30 November 2010), article 2 (2.2.).

<sup>151</sup> See R. G. Melnichenko, *Qualification Exam to Be Admitted as a Lawyer* // *Pravo i obrazovanie*, No. 11, 2010, [http://melnichenko.net/\\_p\\_name138.html](http://melnichenko.net/_p_name138.html).

<sup>152</sup> “Regulation on the procedure for passing qualification exam to be admitted to the bar, article 2 (2.4.).

<sup>153</sup> Federal “On lawyers’ activities and advokatura in the Russian Federation”, *op. cit.*, article 11 (1).

<sup>154</sup> For instance, para. 7.3 of the Rules of Procedure of the QC of the Novgorod Regional QC provides that testing shall be based on the list of questions developed by the QC to include at least 30 multiple-choice questions.

<http://www.apno.natm.ru/DocLib2/регламент%20Квалификационной%20комиссии.aspx>.

An oral interview is performed on the basis of examination cards including at least four questions from the list<sup>155</sup> approved by the Board of the Regional Chamber of Lawyers. Examination cards are renewed every year.<sup>156</sup>

If a candidate demonstrates unsatisfactory knowledge of at least in one of the examination questions or gives correct answers to less than 60% of questions in the written task or test, he or she fails the exam. Other (higher) criteria for evaluation of candidates may be introduced by the Board of the Federal Chamber of Lawyers.<sup>157</sup>

The mission heard that though some of the regional chambers have introduced rigorous testing of candidates to become lawyers, the practice is not universal and leaves much to be desired. The exam may not always be sufficiently complex or be free from bias when evaluating a candidate. For example, there is no well-developed system of evaluation of candidate's performance which could ensure a qualification of a candidate's high level of skills across the country. Besides, the exams in general seem not always to be free from corrupt practices and require improvement to guarantee that only highly qualified candidates may qualify.

One view the mission heard was that one of the reasons for the low standards of qualification is that regional chambers of lawyers are interested in securing the greatest possible number of members to ensure higher income for the Chamber. Whether this is true or not is a matter of discussion, however this is linked to the problem of high entrance fees discussed in the following section.

Even where the qualification is sufficiently rigorous, as for example is reported to be the case in Moscow, qualification commissions may depart from the minimum qualification requirement which they may seek to justify by the need to avoid being too formalistic.<sup>158</sup> However, there is obvious value in a strict adherence to the qualification requirement prescribed by the rules, which eventually ensures that no one may bypass the qualification and should have a sufficiently high level of legal expertise to meet the standards prescribed by law or regulations.

## 5. Qualification procedure

To take a qualification exam and to be admitted as a lawyer, a candidate must apply to the Qualification Commission<sup>159</sup> of the relevant region where (s)he is registered as a permanent resident or taxpayer.<sup>160</sup> Following a check on eligibility to sit the exam, the Commission decides (within two months) whether to admit a candidate to the exam.<sup>161</sup> Once it has been verified that a candidate

<sup>155</sup> Consists of a total of 445 questions, including: 289 for the 1<sup>st</sup> part of the exam, in different fields of law (civil, labor, housing and family law), procedural law (civil, administrative and commercial proceedings), as well as questions on history of Russian *advokatura*, principles of its operation, status of lawyers, legal technique of a lawyer etc.; questions 289–445 for the 2<sup>nd</sup> part of the exam in criminal, tax and internal law, criminal procedure, procedure before the Constitutional Court of the Russian Federation, ECtHR, as well as protection of selected constitutional rights and lawyer's responsibility at the stage of execution of sentences.

<sup>156</sup> "Regulation on the procedure for passing qualification exam to be admitted to the bar", *op. cit.*, article 2 (2.2.).

<sup>157</sup> *Ibid.*, article 2 (2.6.).

<sup>158</sup> M. Petelina. *Standards of quality* // *Novaya advokatskaya gazeta*, issue 15, 2010. <http://www.advgazeta.ru/rubrics/8/517>.

<sup>159</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 10 (1).

<sup>160</sup> See "Regulation on the procedure for passing qualification exam to be admitted to the bar, *op. cit.*, article 1 (1.2.).

<sup>161</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 10 (3 and 4).

is eligible to pass the test he or she is listed to take an exam.<sup>162</sup> Regulations provide that a candidate who has submitted the necessary documents and satisfies the requirements outlined in the law cannot be prevented from taking the exam.<sup>163</sup> In reality however, some chambers of lawyers introduce additional requirements to be met by candidates at their own discretion.<sup>164</sup>

Upon arrival and following identification,<sup>165</sup> a candidate is offered questions to be answered in writing, or multiple-choice questions (first part of the exam). Successful candidates take an oral interview.<sup>166</sup> During the interview, a candidate picks one of the examination cards presented at random. After that, the candidate answers them in the same room, during the time afforded to her/him by the commission.<sup>167</sup> In practice, written and oral parts of the exam are often merged to form one stage and written preparatory notes for the oral response are treated as a written part of the exam. Though this does not exactly reflect the terms of the law, this simplified procedure prevails in most regional systems.<sup>168</sup>

On the basis of the examinee's performance, Qualification Commission members make their decision in the absence of the candidate<sup>169</sup> by a simple majority of votes of those members who take part in the meeting, by casting a registered ballot (with their names on it).<sup>170</sup> The decision states if the candidate has passed or failed the exam.<sup>171</sup> The candidate is told of the outcome of the exam by the President of the Commission on the day of the exam.<sup>172</sup> Upon taking the lawyers' oath, the candidate is then considered to be qualified as a lawyer.<sup>173</sup>

The Qualification Commission cannot refuse to admit a candidate as a lawyer if (s)he has passed the qualification exam, unless certain circumstances are discovered following the qualification exam that precluded his/her access to the exam. In such cases, the decision refusing to grant access to the profession may be challenged before the courts.<sup>174</sup> The candidate is admitted as a lawyer for an indefinite period of time, without any restrictions related to age.<sup>175</sup> It is the Ministry of Justice which maintains the registry of lawyers. However, the Ministry may not refuse to add a name of a qualified candidate to the register, making its function purely technical.<sup>176</sup>

<sup>162</sup> Regulation on the procedure for passing qualification exam to be admitted to the bar", *op. cit.*, article 1 (1.5.).

<sup>163</sup> *Ibid.*

<sup>164</sup> See *Certain Problems of professional training of lawyers and qualification examination in the light of the market of legal services*, Ye. E. Makushkina, <http://www.eurasian-advocacy.ru/problemy-organizatsii-i-funktsionirovaniya-advokatury/1608-nekotorye-problemy-professionalnoj-podgotovki-advokatov-i-sdachi-kvalifikatsionnogo-ekzamena-v-svete-reformy-rynka-yuridicheskikh-uslug>.

<sup>165</sup> "Regulation on the procedure for passing qualification exam to be admitted to the bar", *op. cit.*, article 2 (2.3.).

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> R. G. Melnichenko, *Qualification Exam to be Admitted as a Lawyer*, *op. cit.*

<sup>169</sup> "Regulation on the procedure for passing qualification exam to be admitted to the bar", *op. cit.*, article 2 (2.6.).

<sup>170</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", article 33 (6); Regulation on the procedure for passing qualification exam to be admitted to the bar", *op. cit.*, article 2 (2.7.).

<sup>171</sup> "Regulation on the procedure for passing qualification exam to be admitted to the bar" of 25 April 2003 (as amended on 30 November 2010), article 2 (2.9.).

<sup>172</sup> *Ibid.*, article 2 (2.8.).

<sup>173</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 13 (1).

<sup>174</sup> *Ibid.*, article 12 (2).

<sup>175</sup> *Ibid.*, article 12 (3).

<sup>176</sup> *Ibid.*, article 15.

There is a practice of paying an admission fee when lawyers who have just qualified join a Regional Chamber of Lawyers. The level of such fees is high, and this may raise concerns especially in certain low-income regions.<sup>177</sup> For example, in 2013, in the Nizhny Novgorod region such fees were increased from 2,500 roubles to 50,000 roubles, and in Rostov the entrance fee constitutes 80,000 roubles.<sup>178</sup> In 2014, three lawyers successfully challenged the lawfulness of such fees before the courts.

## 6. Conclusions

The ICJ considers the system of qualification and entry to the profession to be independent, in line with international standards. The main bodies which decide on the examination belong to the chambers of lawyers and the prevalence of lawyers there means that the decision-making is governed by the profession itself. Participation of some others may indeed help the process to be more transparent and credible.

What is clear is that the examination process is not uniform across the Russian Federation regions and it does not always ensure the high quality of the profession. The examination fails to ensure a comprehensive evaluation of a candidate's legal knowledge. The legislative framework allows the chambers of lawyers to strengthen the examination procedure and the Federal Chamber of Lawyers may play a greater role in the standard setting process in this regard.

Introduction of extremely high fees is a newly emerged problem. Whilst it is justified for chambers of lawyers to collect membership fees, which are the basis for financial survival, these fees should be reasonable and fair, should not be arbitrary and should be based on clear, certain and objective criteria, that are in accordance with the economic situation in the region.

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<sup>177</sup> E. E. Makushkina, *Certain Problems of professional training of lawyers and qualification examination in the light of the market of legal services*, *op. cit.*, para. 23.

<sup>178</sup> *Ibid.*



## V. Duties of lawyers, ethics, and disciplinary procedures

### 1. Introduction

This chapter addresses ethical standards governing legal practice as prescribed by the Code of Ethics, and the disciplinary mechanism and procedures that apply to lawyers, both in law and in practice. Specific attention is paid to problems of corruption and instances where lawyers fail to discharge their functions in line with professional standards, in particular the problem of so-called “pocket lawyers”, who represent the interests of the prosecution, investigation or other powerful actors in the system, contrary to the interests of their clients.

### 2. International standards

International standards stipulate that lawyers’ professional duties must be carried out diligently in accordance with the law and recognized standards and ethics of the legal profession.<sup>179</sup> In this regard, particular attention is attached to personal values such as honour, honesty and integrity, considered as professional obligations for lawyers.<sup>180</sup> Lawyers must be able to act freely, diligently and fearlessly in accordance with the wishes of their clients, being guided by the established rules, standards and ethics of the profession.<sup>181</sup>

The UN Basic Principles on the Role of Lawyers identifies lawyers as “essential agents of the administration of justice” who “shall at all times maintain the honour and dignity of their profession.”<sup>182</sup> Article 1.1 of the Code of Conduct for European lawyers stipulates that “a lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyers duty not only to plead the client’s cause but to be the client’s adviser”.<sup>183</sup> It further emphasizes the respect for the lawyer’s professional function, as an essential condition for the rule of law and democracy in society.<sup>184</sup>

The UN Basic Principles provide that “lawyers shall always loyally respect the interests of their clients”<sup>185</sup>. They further specify that this duty and any other obligation towards the client should be carried out to the best of their ability, diligently and at all times remain independent.<sup>186</sup> Providing legal assistance to the best of their abilities includes: “(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.”<sup>187</sup>

<sup>179</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 14.

<sup>180</sup> Code of Conduct for European Lawyers, General Principles 2.2.

<sup>181</sup> Singhvi Declaration, *op. cit.*, para. 83.

<sup>182</sup> Basic Principles on the Role of Lawyers, *op. cit.*, article 12.

<sup>183</sup> Code of Conduct for European Lawyers was originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998, 6 December 2002 and 19 May 2006.

<sup>184</sup> *Ibid.*, principle 1.1.

<sup>185</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 15.

<sup>186</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 14.

<sup>187</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 13.

It is an important function of the lawyer's association "[t]o maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession".<sup>188</sup> The UN Basic Principles provide that codes of professional conduct for lawyers should be established by the organs of the profession, or by legislation.<sup>189</sup> A strong code of ethics is an essential tool in prescribing the conduct of lawyers in accordance with international standards, ensuring high professional standards and protecting the standing of the profession in society.<sup>190</sup> For example, the Code of Conduct for Lawyers before the International Criminal Court recognizes that misconduct of a lawyer can become a ground for disciplinary procedures,<sup>191</sup> and specifies that not abiding to it has serious consequences including temporary suspension or, for conduct "seriously prejudicing the interests of justice" a permanent ban on practising before the Court and striking off the list of counsel<sup>192</sup>.

According to the UN Basic Principles, disciplinary proceedings should be heard by an independent and impartial disciplinary body established by the legal profession, by an independent statutory body, or by a court, and should be subject to independent judicial review.<sup>193</sup> Such proceedings should be determined "in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles"<sup>194</sup> and must be processed expeditiously and fairly in accordance with the right to a fair hearing<sup>195</sup>. Recommendation No. R (2000) 21 of the Council of Europe Committee of Ministers prohibits arbitrariness of the disciplinary action and requires a system which "guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure threats or interference, direct or indirect, from any quarter or for any reason."<sup>196</sup>

### 3. Ethical standards and the Code of Ethics

The Code of Professional Ethics of Lawyers was adopted by the First All-Russian Congress of Lawyers on 31 January 2003. The Code, which applies to all lawyers who are members of *advokatura*, sets high standards of professional ethics of lawyers and its procedures provide strong guarantees for the independence of the legal profession. The Code specifically mentions that, in addition to the ethical standards set out in the Code, Russian lawyers may be guided by the Code of Conduct for European Lawyers.<sup>197</sup>

<sup>188</sup> Singhvi Declaration, *op. cit.*, para. 99(b).

<sup>189</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 26.

<sup>190</sup> Eastern partnership project report, Enhancing Judicial Reform in the Eastern Partnership Countries, working group "Professional Judicial Systems", Directorate General of Human Rights and Rule of Law, p. 68, Strasbourg, May 2012.

<sup>191</sup> Code of Professional Conduct for Counsel, ICC Resolution ICC-ASP/4/Res. 1 Adopted at the 3<sup>rd</sup> plenary meeting by consensus on 2 December 2005, article 31, specifies grounds constituting misconduct: namely, if counsel: (a) Violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her; (b) Knowingly assists or induces another person to commit any misconduct, referred to in paragraph (a) of this article, or does so through the acts of another person; or (c) Fails to comply with a disciplinary decision rendered pursuant to this chapter.

<sup>192</sup> *Ibid.*, article 39.

<sup>193</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 28.

<sup>194</sup> *Ibid.*, principle 29.

<sup>195</sup> *Ibid.*, principle 27.

<sup>196</sup> Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Council of Europe, *op. cit.*, Preamble.

<sup>197</sup> See: Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf).

According to the Code of Professional Ethics, it is the status of a lawyer (i.e. the status of *advokatura*) that imposes the rules of the legal profession upon an individual,<sup>198</sup> as a result of the oath of the lawyer taken following the qualification examination<sup>199</sup>. The Code provides that lawyers must be independent, honest and conscientious.<sup>200</sup> Lawyer-client secrecy is identified as an important principle that must be a priority for lawyers and is not subject to any period of limitation<sup>201</sup> and it is only the client who may release the lawyer from the duty of professional secrecy<sup>202</sup>. Not only any information obtained as a result of providing legal advice, but also the fact that the lawyer was consulted, must remain confidential.<sup>203</sup> A lawyer may not testify about circumstances known as a result of his or her professional duties.<sup>204</sup>

According to the Code, a lawyer must carry out duties in an “honest, reasonable, conscientious, qualified, prompt” way and must actively defend the rights, freedoms, and interests of clients.<sup>205</sup> A lawyer is prohibited from acting contrary to the interest of the client; from being guided by his or her own interests or acting under outside pressure<sup>206</sup> or from taking a position opposed to that of the client, except where the lawyer is convinced by acts of self-incrimination by the client<sup>207</sup>. Importantly given the environment in the Russian Federation, the Code contains a provision prohibiting the use of personal connections with the personnel of judicial or law enforcement bodies in order to influence their representation of clients.<sup>208</sup> The Code specifies that “cooperation with the bodies which carry out investigation as a result of carrying out lawyer’s activity is incompatible with the status of a lawyer”.<sup>209</sup>

The Code enshrines other important guarantees which aim to ensure that lawyers work independently and in the best interest of the client. For example, at the request of lawyers, regional chambers of lawyers should provide guidance based on the Code of Ethics, on what would constitute ethical conduct of lawyers in situations where ethics could be breached.<sup>210</sup>

Thus, overall, the Code of Professional Ethics is sufficiently elaborated to ensure compliance with international standards on the independence of lawyers and may be used as a solid basis for the independent work of lawyers and the operation of the profession as a whole. The contents and level of detail of the Russian Code of Ethics for lawyers compare favourably with Codes of Ethics in place in other jurisdictions. Its weakness lies in the failings in its implementation through the disciplinary system (considered further below).

#### 4. Disciplinary proceedings against lawyers

In accordance with the Code of Professional Ethics, an act of a lawyer which degrades his or her honour and dignity or diminishes the authority of *advokatura*,

<sup>198</sup> The Code of Professional Ethics of Lawyers, *op. cit.*, article 4.2.

<sup>199</sup> *Ibid.*, article 4.2.1.

<sup>200</sup> *Ibid.*, article 5.1.

<sup>201</sup> *Ibid.*, article 6.2.

<sup>202</sup> *Ibid.*, article 6.3.

<sup>203</sup> *Ibid.*, article 6.5.

<sup>204</sup> *Ibid.*, article 6.6.

<sup>205</sup> *Ibid.*, article 8.

<sup>206</sup> *Ibid.*, article 9.1.1.

<sup>207</sup> *Ibid.*, article 9.1.2.

<sup>208</sup> *Ibid.*, article 9.1.6.

<sup>209</sup> *Ibid.*, article 9.3.1.

<sup>210</sup> *Ibid.*, article 4.4.

non-execution or improper execution by a lawyer of his or her professional duties to a client, as well as contravention by the lawyer of decisions of the Chamber of Lawyers can be subject to disciplinary proceedings before the relevant Qualification Commission and the Chamber of Lawyers' Board.<sup>211</sup> Disciplinary proceedings are provided for in the Code of Ethics but their adoption depends on *advokatura* itself. The proceedings are well-elaborated and provide strong guarantees of an independent disciplinary process. They are administered by the qualification commissions of the regional chambers of lawyers; and proceedings before the boards of the regional chambers themselves.<sup>212</sup> Thus final decisions are made by the regional chamber of lawyers; such decisions may not be appealed before the Federal Chamber of Lawyers, though they can be appealed by the lawyer concerned through the courts.<sup>213</sup>

### **Initiation of the case**

Disciplinary proceedings are initiated by the President of the Regional Chamber, in accordance with the procedure established by the Code of Ethics.<sup>214</sup> They may be initiated following the complaint to the Chamber of Lawyers of another lawyer, of a lawyer's client or of someone to whom the lawyer refused to provide legal advice; or following a proposal of the Vice-President of the Chamber or his or her deputy; or by a relevant State agency; or following the application of a judge in a case in which the lawyer has acted.<sup>215</sup> Upon receipt of the relevant documents, the President of the Regional Chamber or a person acting in his or her capacity issues an order to open disciplinary proceedings within ten days (which period may be extended to up to one month). The Proceedings must be instituted within six months of the date on which the alleged misconduct was discovered, exclusive of any period in which the lawyer has been on leave.<sup>216</sup>

Parties to disciplinary proceedings are notified in advance about the time and place of the disciplinary hearing before the Qualification Commission. They are afforded an opportunity to study the entire file of the disciplinary case.<sup>217</sup> Notifications and other documents are sent to the affected lawyer.<sup>218</sup> The Code does not mention any other means of notification: in this context, notifying a lawyer by phone cannot be deemed appropriate.<sup>219</sup> Where the complaint, proposal or application cannot be deemed "permissible reason" for opening disciplinary proceedings,<sup>220</sup> or it was filed by actors who have no right to re-

<sup>211</sup> *Ibid.*, article 19.2.

<sup>212</sup> *Ibid.*, article 22.

<sup>213</sup> *Ibid.*, article 25.2.

<sup>214</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 31 (7).

<sup>215</sup> Code of Professional Ethics of Lawyers, *op. cit.*, article 20 (1).

<sup>216</sup> *Ibid.*, article 18 (5).

<sup>217</sup> *Ibid.*, article 21 (1).

<sup>218</sup> *Ibid.*

<sup>219</sup> See Judgment on appeal of the Supreme Court of Buryatia Republic of 19 February 2014, case No. 33-717.

<sup>220</sup> Code of Professional Ethics of Lawyers, article 20 (2): "A complaint, proposal or application shall be deemed a permissible reason for instituting disciplinary proceedings where it is in writing indicating the following: 1) name of the Chamber of Lawyers to which the complaint, proposal or application is addressed; 2) full name of the lawyer lodging a complaint against another lawyer, the Chamber of Lawyers and association of lawyers he/she belongs to; 3) full name of the lawyer's client, his/her address or the name of the institution or organization where they are applicants; their address, as well as the name of the representative and his/her address where such complaint is lodged by the representative; 4) name and address of the State agency, as well as full name of the official submitting the proposal or application; 5) family name and first name (initial letters) of the lawyer who the applicant asks to institute disciplinary proceedings against; 6) specific (in) action of the lawyer that allegedly amounted to a breach of his/her professional duties; 7) facts underlying the claims of the individual lodging the complaint, proposal or application, as well as evidence in support of such facts.

quest the initiation of disciplinary proceedings, or where certain circumstances are revealed that preclude the institution of disciplinary proceedings,<sup>221</sup> the President of the Chamber or the person acting in his or her capacity issues an order refusing to institute disciplinary proceedings and returns the documents to the applicant together with the reasons for his/her refusal<sup>222</sup>.

The order instituting or refusing to institute disciplinary proceedings must give relevant reasoning.<sup>223</sup> On the other hand, establishing the existence of grounds for imposing disciplinary penalties on a lawyer falls, under the law, within the competence of bodies of the community of lawyers which are not bound by the communication, interim decision or ruling of the court in this regard.<sup>224</sup>

### **Opinion of the Qualification Commission**

Following the examination of the complaint, the Qualification Commission considers the case. Once the disciplinary case has reached the Qualification Commission of the Regional Chamber, it must be examined within two months, exclusive of any period in which the disciplinary proceedings are adjourned for reasons deemed valid by the Qualification Commission.<sup>225</sup> The proceedings before the Qualification Commission are conducted orally. Before the beginning of the hearing, Commission members are warned about the prohibition on disclosure of information disclosed during the hearing that relates to the privacy of the parties, constitutes trade or other secrets or is covered by lawyer-client privilege.<sup>226</sup>

In all cases, the hearing before the Qualification Commission is closed, unless<sup>227</sup> the Commission and the Board decide otherwise, at the request of the applicant and subject to consent of other parties to the proceedings<sup>228</sup>. The opinion of the Commission must be well-reasoned and include an introduction, narrative, reasoning and operational provisions.<sup>229</sup>

The hearing before the Commission is confined to the scope of the complaint, proposal or application or the grounds stated therein. Moreover, it is not permissible at this stage to modify the substance or grounds of the complaint, proposal or application.<sup>230</sup> The burden should lie on the applicant to prove the circumstances relied on as the grounds for his or her claims.<sup>231</sup>

At the request of parties to disciplinary proceedings or on its own initiative, the Commission may request additional information and documents necessary for impartial examination of the disciplinary case.<sup>232</sup> The affected lawyer may take steps to reach a friendly settlement with the applicant before the Board makes

<sup>221</sup> Under article 21 (3) of the Code of Professional Ethics of Lawyers, *op. cit.*, such circumstances include: 1) earlier decision of the Board in disciplinary proceedings involving the same parties, the same subject and grounds; 2) earlier decision of the Board to discontinue disciplinary proceedings; 3) expiry of the statute of limitations for the disciplinary misconduct.

<sup>222</sup> Code of Professional Ethics of Lawyers, *op. cit.*, article 21 (2).

<sup>223</sup> *Ibid.*, article 21 (4).

<sup>224</sup> See Decision of the Constitutional Court of Russia No. 456-O-O of 15 July 2008 "Refusing to examine the complaints of Mr Igor V. Plotnikov and Mr Maksim A. Khyrkhyryan about a violation of their constitutional rights by article 29, para. 4 of the Criminal Procedural Code of Russia."

<sup>225</sup> Code of Professional Ethics of Lawyers, *op. cit.*, article 23 (1).

<sup>226</sup> *Ibid.*, article 23 (1).

<sup>227</sup> *Ibid.*, article 23 (10).

<sup>228</sup> *Ibid.*, article 19 (4).

<sup>229</sup> *Ibid.*, article 23 (14).

<sup>230</sup> *Ibid.*, article 23 (4).

<sup>231</sup> See, New Advocates' Gazette, The quality of advokatura depends on the work of qualification commissions, No. 16, 2010, <http://www.advgazeta.ru/rubrics/8/517>.

<sup>232</sup> Code of Professional Ethics of Lawyers, *op. cit.*, article 23 (6).

its decision. The lawyer and his/her representative are the last ones to make their submissions to the Commission.<sup>233</sup>

As a result of the proceedings, the Commission delivers its opinion as to whether the lawyer's action or inaction amounted to a violation of the Code, or whether the lawyer has failed to duly discharge his or her duties.<sup>234</sup>

### ***Examination by the Board of the Regional Chamber of Lawyers***

Following the issuing of the Qualification Commission's opinion, the case is sent to the Board of the Regional Chamber of Lawyers, who must examine it within two months of that date on which the opinion was issued.<sup>235</sup> Parties to disciplinary proceedings may submit an application in writing to the Board through the Secretary of the Chamber, stating their arguments in support of or contrary to the Qualification Commission opinion.<sup>236</sup> The Board is required to proceed from the facts established by the Qualification Commission.<sup>237</sup>

The hearing before the Board is closed, with some exceptions.<sup>238</sup> The decision of the Board must be well-reasoned and make specific reference to the rules of professional conduct of lawyers set forth in the laws on lawyers' activities and *advokatura* or the Code under which the lawyer's action or inaction is punishable.<sup>239</sup> Having regard to specific circumstances of the case, the Board may take steps to reach a friendly settlement between the lawyer and the applicant.<sup>240</sup>

The Board may impose three types of sanctions if a lawyer is found to have committed a misconduct, as specified by the Code of Ethics. These include a rebuke, a warning or disbarment.<sup>241</sup> The decision of the Board may be challenged by the lawyer concerned within one month of the date on which he or she became aware or should have become aware of the relevant decision.<sup>242</sup> The Board may quash or amend its decision in the light of new or newly discovered facts.<sup>243</sup> An important guarantee that ensures self-regulation of the profession is that no state body may challenge in court the decision of the Qualification Commission to disbar a lawyer. This decision may only be challenged by a lawyer who is the subject of the decision.<sup>244</sup>

### ***Certain practical issues in disciplinary proceedings***

Almost ten thousand cases are annually considered by the disciplinary bodies of the legal profession in the Russian Federation, more than half of which result in findings of responsibility for professional misconduct.<sup>245</sup> The number

<sup>233</sup> *Ibid.*, article 23 (7).

<sup>234</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 33 (7).

<sup>235</sup> Code of Professional Ethics of Lawyers, *op. cit.*, article 24 (1).

<sup>236</sup> *Ibid.*, article 24 (3).

<sup>237</sup> *Ibid.*, article 24 (4).

<sup>238</sup> *Ibid.*, articles 24 (5) and 19 (4).

<sup>239</sup> *Ibid.*, article 24 (6).

<sup>240</sup> *Ibid.*, article 24 (7).

<sup>241</sup> *Ibid.*, article 18 (6).

<sup>242</sup> *Ibid.*, article 25 (2).

<sup>243</sup> *Ibid.*, article 25 (3).

<sup>244</sup> *Ibid.*, article 25 (2).

<sup>245</sup> In 2011–2012, qualification commissions considered 9,689 (during the previous reporting period—9,900) disciplinary cases and delivered the following opinions on them: in 5,541 (5,706) cases—that the lawyer's (in)action amounted to a violation of the laws on lawyers' activities and Code; decisions to terminate disciplinary proceedings—in 4,148 (4,194) cases (Performance Report of the Board of the Federal Chamber of Lawyers of the Russian Federation of 22 April 2013, for the period between April 2011 and April 2013). [http://www.fparf.ru/documents/council\\_documents/council\\_reports/256/](http://www.fparf.ru/documents/council_documents/council_reports/256/).

is significant, bearing in mind the total number of lawyers who are members of *advokatura*, which is less than 75,500.<sup>246</sup> While some of the decisions led to disbarment, most led to reprimands. For example, in the period of 2013–2014, out of 5,340 lawyers subjected to disciplinary sanctions, 722 were disbarred.<sup>247</sup> It was suggested by Deputy Minister of Justice during a recent discussion organized by the Presidential Council on Civil Society and Human Rights that an insufficient number of lawyers are subjected to disciplinary measures.<sup>248</sup> The ICJ mission was told that disciplinary penalties are not applied either rigorously or consistently, which may lead to a lack of consistency and an arbitrary interpretation of what behaviours constitute disciplinary misconduct.

The mission heard that at least some regional chambers of lawyers are able to act independently and are able to reject complaints that are unfounded. Lawyers told the ICJ that in this sense in general they feel protected by chambers of lawyers in these circumstances. Nevertheless, it is a matter of concern that abusive disciplinary claims seem to be appearing more frequently in recent times, creating a dangerous trend. For example, law enforcement bodies may file abusive complaints against lawyers, motivated by dissatisfaction at the lawyer taking effective and principled action to protect the interests of a client. Such actions constitute attacks on the independence of the legal profession contrary to international standards on the independence of lawyers, who must be able to carry out their functions in an atmosphere which is free of intimidation or harassment.

A separate problem is the effectiveness of the disbarment of lawyers due to the absence of any mechanism to prevent lawyers who have been disbarred from continuing their legal practice. As noted in Chapter II, lawyers registered as members of *advokatura* form only one part of the wider legal profession, and there is no legal prohibition on persons who are not registered as members of *advokatura* providing legal advice and representation, at least in civil or administrative cases. Although only those lawyers registered as members of *advokatura* can act in criminal cases, these make up only a small part of legal practice: in 2014, for example, the total number of criminal cases which reached the courts was less than a million (925,718) whereas there were almost fourteen million (13,903,999) civil cases.<sup>249</sup> Disbarred lawyers can continue with their civil practice without impediments, despite committing often serious ethical misconduct. Those who commit such misconduct are aware that the maximum consequences they may face are losing their lawyers' status and an obligation to pay membership fees. This indeed cannot be seen as a sufficient deterrent factor against violation of the Code of Ethics. A recent initiative of the Ministry of Justice to recommend legislative changes to ban those who have been disbarred from practicing law is therefore a positive development.<sup>250</sup>

<sup>246</sup> Report of the Federal Chamber of Lawyers of 2015, [http://www.fparf.ru/documents/council\\_documents/-council\\_reports/13947/](http://www.fparf.ru/documents/council_documents/-council_reports/13947/).

<sup>247</sup> *Ibid.*, para. 2.2.19.

<sup>248</sup> Transcript of the Special Session of the Council of the President of the Russian Federation on Human Rights and Civil Society, *op. cit.*

<sup>249</sup> Judicial Department under the Supreme Court of the Russian Federation, *Key statistical indicators of the courts of general jurisdiction for 2014*, <http://www.cdep.ru/index.php?id=79&item=3009>.

<sup>250</sup> "Those disbarred from *advokatura* may be prohibited to work as lawyers under criminal penalty", <http://pravo.ru/news/view/119366/>.

## 5. Compliance with the Code of Ethics in practice

The problem of corruption of lawyers, in particular lawyers appointed to provide State-funded legal aid to defendants in criminal cases, is widely recognized as one of the greatest challenges facing the legal profession in the Russian Federation. Such corruption facilitates violations of human rights of suspects and accused persons, including violations of the prohibition on torture or other ill-treatment, the right to liberty and the right to a fair trial.<sup>251</sup> It is widely recognized, that certain lawyers appointed to provide legal aid in criminal cases fail to act in accordance with the standards imposed by the Code of Ethics and do not provide a competent or effective defence to their clients. Instead, they routinely serve the interests of the investigator or the prosecutor in the case, seeking to secure a conviction and ignoring violations of their clients' human rights.

The term "pocket lawyers" is often used to refer to lawyers who serve the interests of the prosecution or other powerful actors rather than those of their clients. Often, "pocket lawyers" are those appointed to provide State funded defence, referred to in the Russian Federation as "appointed lawyers." The mission heard consistent accounts of such lawyers collaborating with the investigating authorities and encouraging their clients to confess, failing to attend the investigative activities, as well as reports of defence lawyers who in practice never meet their client and simply sign any paper required by the authorities.<sup>252</sup> The mission was told that, by appointing "pocket lawyers" as defence counsel, the investigating authorities create an appearance of complying with the right to defence, avoid the difficulties an independent lawyer would cause, and easily secure the evidence wanted by the investigatory authorities.<sup>253</sup>

One contributing factor to the phenomenon of "pocket lawyers" mentioned to the mission was that the obligation to ensure the presence of a defence lawyer lies with the investigation authorities as well as with the court. This creates the possibility that the investigator will invite lawyers who would tend to cooperate with investigation against the interests of the client. The income of the lawyer also depends on the investigator, who signs the document where the number of days work and tariffs of the lawyer are recorded. This is especially problematic in remote areas of the Russian Federation where State-funded legal defence may constitute the main income of lawyers.

The mission was also told that the problem of "pocket lawyers" could be partly attributed to the existence of parallel collegia before the reform of 2002, as discussed earlier in the report, that were ready to easily admit those dismissed from traditional collegia or bodies of investigation, the police etc. People who failed at their previous job for lack of integrity could easily continue their new career, which had a serious impact on the quality of representation both during investigation and in court. Though it may be true that these lawyers contributed to the overall problem of the existence of "pocket lawyers", this view fails to adequately acknowledge the responsibilities the current chambers of

<sup>251</sup> For a description of a similar phenomenon in the Kyrgyz Republic, see a detailed account on human rights violations with a participation of a lawyer documented by the ICJ in a trial observation report in a criminal case: *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/>.

<sup>252</sup> "A lawyer should be chosen like a doctor", Zoya Svetova, 27 March 2015, [http://echo.msk.ru/blog/zoya\\_svetova/1519210-echo/](http://echo.msk.ru/blog/zoya_svetova/1519210-echo/).

<sup>253</sup> Interview with a lawyer, 14 April 2015.



lawyers, which have failed to significantly improve the situation more than a decade after their creation.

A former investigator of the Investigative Committee of Russia, Mr Andrey Gritsov, has described the way the system works: “[e]very investigator would prefer an appointed lawyer, given that most of them never provide proactive legal representation (do not identify the line of defence, make no or as few as possible motions, do not challenge the conduct of the investigator, study the case-file fast, may study the case-file that has not been bound or numbered etc.) In practice, many investigators have their own pool of appointed lawyers they work with.”<sup>254</sup> Former judge Ms Elena Yarlykova agrees: “Investigators find it easier to work with their own lawyers: they keep silent during the investigative activities and sign transcripts without making any comments.” She described a recent case where she represented a client who in the early stages of the investigation was represented by a “pocket lawyer” as follows: “The lawyer signed all the transcripts without making a single comment. After that, during the trial, he gave testimony against his former client. The client however said he saw that lawyer for the first time.”<sup>255</sup>

The mission was told that “pocket lawyers” could have several different reasons for engaging in corrupt or unethical practices. For some lawyers, their interest is reportedly primarily financial, and is based on the fact that, especially in the regions of Russia state-funded criminal defence work is the only possibility of earning a living. The income of lawyers in such circumstances always depends on the investigation authorities and courts, and maintaining a relationship with these bodies therefore becomes essential. The mission was told that such lawyers are often on duty at courts and will attend hearings as the lawyer of the defence, but are usually poorly informed about the case or the person they represent. They are present in court merely as a formality. It was also said that such lawyers are often commissioned by the regional chambers of lawyers. These reports are worrying and may point to at least negligence on the part of some regional chambers of lawyers.

Other lawyers may, for financial reasons, develop close relationships with investigators. It was reported that there are many such lawyers ready to sign any paper, under any testimony, whether true or false, and put any date on it. One independent lawyer told the ICJ that although he is not able to see his client in a case, there are “pocket lawyers” on duty who represent her during interrogation. The attempts of the independent lawyer to see or speak to them have not been successful. The mission was told that the income of such “pocket lawyers” may be relatively high. Because the work of lawyers is paid not by hour but by day (a court-day rate), by simply by signing 20–30 investigation records or representing a person in several dozen court hearings, a lawyer may earn a significant amount of money.

A further group of “pocket lawyers” are former law enforcement agents, of whom there are many in the Russian legal profession. Some, though not all, of these lawyers retain the mentality of law enforcement agents and continue doing the same work they have done all their lives—attempting to ensure convictions. Such lawyers honestly believe that their role is to search for the truth in the case, protect the interests of the State, and in doing so assist investigators.

<sup>254</sup> “A lawyer should be chosen like a doctor”, Zoya Svetova, *op. cit.*

<sup>255</sup> *Ibid.*

They generally retain strong professional and personal connections with former law enforcement colleagues, and continue to cooperate with them.

Finally, the mission was told that there are a significant number of lawyers who, for reasons other than corruption, decide to “play the game” of the investigating authorities. They believe that in the highly accusatory system in which they operate, their best chance of helping their clients lies not in mounting a robust defence, but in co-operating closely with the law enforcement authorities. They consider that in these circumstances they can only try to minimize the sentence that their client will receive. They therefore try to convince their clients to accept the injustices of the system and reach a deal, to agree to a simplified procedure, and thus to at least ensure a lesser sentence. These lawyers should not properly be considered as “pocket lawyers” since they do not act from corrupt motives, but their actions remain problematic.

As noted above, many “pocket lawyers” are those appointed to provide State funded defence, referred to as “appointed lawyers.” The correlation between “pocket lawyers” and state funded defence has become so strong that during the ICJ mission, lawyers sometimes used the terms “pocket lawyers” and “appointed lawyers” interchangeably. Although there is no doubt that there are also independent and competent lawyers providing state-funded defence, the widespread perception of entrenched corruption and unethical behaviour within a legal aid service that is funded by the state and managed by independent regional lawyers associations is extremely worrying. Its significance to the profession can be seen from estimates that the income of around 80 or 90 per cent of lawyers depends<sup>256</sup> on State funded defence work. It raises serious questions of the effectiveness of the qualification processes for lawyers as well as the effectiveness of the implementation of the Code of Ethics and of the disciplinary system for lawyers. The mission’s attention was drawn to one recent case of disbarment of a lawyer who did not act in the interests of his client.<sup>257</sup> This story became known to the press, but it seems that it is rather an exception than the rule.

The problem of “pocket lawyers” is acknowledged by the authorities including the Federal Chamber of Lawyers and the Ministry of Justice, yet there is a certain level of tolerance towards the unethical or often criminal behaviour of the members of the profession who routinely engage in such corrupt practices. Some of the regional chambers of lawyers have made attempts to address the problem. In 2007–2008 many chambers officially announced to the investigation bodies and the courts that only the lawyers’ entities will provide legal service to the court of this district. These decisions of the chambers were challenged in the courts. In St. Petersburg, a challenge in the city court was decided in favour of the Regional Chamber of Lawyers.

Another successful initiative introduced in several regions, including Samara and Stavropol, has been the creation of call centres which distribute cases in a random order among the lawyers on duty. All the calls are recorded. In case a particular investigator asks for a particular lawyer to take part in the case such

<sup>256</sup> “Who should pay a free lawyer”, Ekaterina Khodjaeva, *Vedomosti*, 15 April 2015, <http://www.vedomosti.ru/opinion/articles/2015/04/16/kto-dolzhen-platit-besplatnomu-advokatu>; Federal Chamber of Lawyers Resolution On guaranteeing rights of lawyers to a compensation for the work of 22 April 2015, [http://www.fparf.ru/documents/congress\\_documents/congress\\_resolutions/13950/](http://www.fparf.ru/documents/congress_documents/congress_resolutions/13950/).

<sup>257</sup> RAPSİ, Ex-defender of Davydova formerly accused of high treason is deprived of his status of a lawyer, 15 April 2015, [http://rapsinews.ru/judicial\\_news/20150415/273560662.html](http://rapsinews.ru/judicial_news/20150415/273560662.html).

information is also recorded and may then be used in court. Such systems were introduced in a few other regions. The head of the Samara Chamber of Lawyers in an interview explained as follows: “[t]his method helps combat so-called “pocket lawyers”. For more than four years by now, cases have been allocated to lawyers by the special Centre under the Regional Chamber of Lawyers. All negotiations between coordinators on one hand and investigators and lawyers on the other hand are recorded, while lawyers’ performance is being checked. Moreover, the structure in question is not subordinate either to *advokatura* or investigation.<sup>258</sup> The head of the Samara Chamber of Lawyers in an interview explained: “The investigators were raging! They have lost their “pocket lawyers”. The latter even made attempts to challenge the new system before the court, but we’ve gone through all the stages and protected the system”.<sup>259</sup> The Centres operate in three major cities of the region—Samara, Tolyatti and Syzran.

## 6. Conclusions

The *advokatura* of the Russian Federation has a very well developed Code of Ethics which enshrines high ideals and principles of the profession. It is obvious that its authors were guided by the notion of a socially responsible profession which must be independent and able to defend clients with loyalty, diligence, independence and professionalism. Both institutionally and in substance the legal framework corresponds to the requirements of an independent legal profession as should be guaranteed under international law and standards.

However, in practice, the profession has failed to sufficiently address the problem of corruption within its ranks, and in particular the problem of “pocket lawyers”. There seems to be a certain level of tolerance or “understanding” of this phenomenon. The situation is different in different regions: and in some regions such as Moscow, St. Petersburg or Samara, the chambers are more aware of this issue and demonstrate less tolerance towards this phenomenon, whilst in others the neglect of the problem is more evident. In any event, there appears to be a lack of recognition that the integrity of the profession should be seen as one of the primary tasks of the chambers. The existence of “pocket lawyers” is highly problematic under international law and standards. In order to be effective in representing their client’s rights and interests, and to protect the right to a fair trial, lawyers must be independent and free from any external pressure and interference. The right to fair trial entails the right to an effective defence and to equality of arms between the parties (see Chapter VI below).<sup>260</sup> The Basic Principles on the Role of Lawyers emphasize that, due to the importance of the duties they perform, it is indispensable that lawyers avoid impairment of their independence and “maintain the honour and dignity of their profession as essential agents of justice”.<sup>261</sup> In this regard the Code of Ethics is an important tool against those lawyers who either fail to carry out their obligations in remedying violations of their clients’ rights, or are complicit in those violations. A shift towards an understanding of the appropriate role of the Chamber of Lawyers in this regard may be needed to end the damaging practices which continue to undermine and corrupt the profession.

<sup>258</sup> Pravo.ru, “The investigators were furious! They had lost ‘pocket lawyers’”, 25 April 2013, <http://pravo.ru/review/face/view/84675/>.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, mission to Maldives, A/HRC/23/43/Add. 3, 21 May 2013, para. 86; *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, A/HRC/26/32, 28 April 2014, para. 66.

<sup>261</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 12.

## VI. Professional guarantees of lawyers and their protection in practice

### 1. Introduction

This chapter addresses the rights guaranteed to lawyers in regard to the exercise of their professional duties and compliance with these rights in practice. In particular it addresses the guarantees afforded by law to lawyers (members of *advokatura*) who represent defendants in criminal proceedings, and the significant problems such lawyers experience in practice as they seek to protect the rights of defendants. It also considers the consequences of the absence of legal guarantees for lawyers practicing outside of *advokatura*. All of these matters are assessed in light of the Russian Federation's obligations under international human rights law, and of international standards on the independence of the legal profession.

### 2. International standards

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. The UN Basic Principles on the role of lawyers require governments to ensure that lawyers: "(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".<sup>262</sup> These protection measures are crucial to providing effective legal assistance to the clients.<sup>263</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>264</sup> Recommendation R (2000) 21 of the Council of Europe Committee of Ministers identifies the obligations of states take all necessary measures "(...) to respect, protect and promote the freedom of exercise of profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights".<sup>265</sup> Under international human rights law, including the European Convention on Human Rights, states must take measures to protect persons who the authorities know or ought to know are at risk of physical attack.<sup>266</sup> States must also ensure that a prompt and thorough investigation is undertaken, by an independent and impartial authority, into attacks that endanger lives or physical integrity of those within their jurisdiction, including lawyers.<sup>267</sup>

<sup>262</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 16.

<sup>263</sup> *Ibid.*, principles 16 (b), 22.

<sup>264</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>265</sup> Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, *op. cit.*, principle I.1.

<sup>266</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>267</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.

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>268</sup> or prevent the lawyer from challenging arbitrary detention,<sup>269</sup> or torture or other ill-treatment<sup>270</sup>. Specific human rights issues that arise due to impediments to the work of lawyers are discussed further below.

### 3. Professional guarantees of lawyers: law and practice

#### ***Access to clients in pre-trial detention***

The right of access to a lawyer in pre-trial detention is a constitutional right protected under article 48 of the Constitution of the Russian Federation.<sup>271</sup> The law guarantees meetings of lawyers and their detained clients.<sup>272</sup> Once the lawyer is admitted as defence counsel<sup>273</sup> in the criminal proceedings, (s)he may have meetings with the suspect or defendant<sup>274</sup> and these meetings may not be arbitrarily restricted in duration or in number<sup>275</sup>. The Constitutional Court of Russia has ruled that the federal authorities may “specify the substance of the right of access to a lawyer and introduce legal mechanisms of its exercise, conditions of and procedure for its realization, without however distorting the essence of this right, its very core, and introducing restrictions that would be incompatible with the objectives enshrined in the Constitution”.<sup>276</sup>

According to law, only two documents must be provided by a lawyer to be admitted to visit a client in detention: a lawyer’s certificate and a warrant.<sup>277</sup> The law forbids demands for any further documents from lawyers as a condition of a visit.<sup>278</sup> Furthermore, the Constitutional Court has clarified that the lawyer’s right to meet with clients may not depend on the discretion of an official or a body in charge of the criminal investigation.<sup>279</sup>

<sup>268</sup> Guaranteed, *inter alia*, under article 6 ECHR and article 14 ICCPR.

<sup>269</sup> Guaranteed, *inter alia*, under article 5 ECHR and article 9 ICCPR.

<sup>270</sup> Guaranteed, *inter alia*, under the UN Convention against Torture; article 3 ECHR and article 9 ICCPR.

<sup>271</sup> Every arrestee, detainee or person charged with a criminal offence shall have the right to obtain advice from a lawyer (defence counsel) from the moment of his/her arrest or detention or the moment when charges were brought against him/her respectively. See the Constitution of Russia, article 48 (2).

<sup>272</sup> See T. G. Dabizha, *Procedural Guarantees underlying the Exercise of Defence Lawyer’s Powers in Criminal Proceedings* // Journal of Russian Law, 2012, issue 7.

<sup>273</sup> Defence counsel is someone who protects the rights and interests of suspects or defendants and gives them legal advice during criminal proceedings in accordance with the procedure established by the Criminal Procedural Code. See Criminal Procedural Code of Russia of 18 December 2001, issue 174-FZ (as amended on 22 October 2014), article 49 (1).

<sup>274</sup> Criminal Procedural Code of the Russian Federation of 18 December 2001, issue 174-FZ (as amended on 22 October 2014), article 53 (1).

<sup>275</sup> Federal Law of 15 July 1995 No. 103-FZ (as amended on 28 June 2014) “On detention on remand of individuals suspected of or charged with criminal offences”, article 18; Criminal Procedural Code of the Russian Federation, article 47 (4.9).

<sup>276</sup> Decision of the Constitutional Court of Russia No. 14-P of 25 October 2001 “In the case concerning compatibility of articles 47 and 51 of the Criminal Procedural Code of the RSFSR and article 16, para. 2 (15) of the Federal Law “On detention on remand of individuals suspected of or charged with criminal offences” to the Constitution of Russia in view of the complaints lodged by Mr Golomidov, Mr Kislitsyn and Mr Moskvichev.”

<sup>277</sup> See Criminal Procedural Code of the Russian Federation, article 49 (4).

<sup>278</sup> Federal Law “On detention on remand of individuals suspected of or charged with criminal offences”, *op. cit.*, article 18.

<sup>279</sup> Decision of the Constitutional Court of Russia No. 14-P of 25 October 2001 “In the case concerning compatibility of articles 47 and 51 of the Criminal Procedural Code of the RSFSR and article 16, para. 2 (15) of the Federal Law ‘On detention on remand of individuals suspected of or charged with criminal offences’ to the Constitution of Russia in view of the complaints lodged by Mr A. P. Golomidov, V. G. Kislitsyn and I. V. Moskvichev”.

Despite this, the mission heard from many practicing lawyers and experts that lawyers are regularly prevented from meeting with their clients upon presentation of only the two documents: the certificate and the warrant. As a rule, a permit issued by an investigator or a judge is also required. The mission was told that this happens on a daily basis. No appeal to the law, including to the decisions of the Constitutional Court, have any effect on these demands. The law enforcement bodies, which have full control over the person in detention, deny access to lawyers if documents, which are not required by law, are not presented. Moreover, it was said that using such policies, investigators may avoid meeting or speaking to lawyers in order to delay or prevent them from obtaining permission to meet with clients. In addition, reportedly, the absence of a stamp of the relevant regional branch of the Ministry of Justice in a new type of advocate's ID may be used as an obstacle to visiting a client in detention.<sup>280</sup> Often lawyers are told that the "administration" who decides about access to a lawyer is absent and that lawyers may not meet clients outside of the administration's working hours because the police officer on duty may not decide. There is a practice of not admitting a lawyer on Friday evening or before a public holiday as law enforcement bodies do not work at those times. In these few days a defendant can be subjected to torture or other forms of ill treatment and on the first subsequent working day, when the lawyer may see the client, he or she may have already signed the self-incriminating statements. However denials of access to a lawyer can also be for very prolonged periods: the mission was told that, in certain cases, lawyers may not see their clients for several months.

The mission was told that lawyers may have other practical difficulties of accessing clients in places of detention. For example it was said that in Lefortovo remand prison lawyers who want to meet with clients have to queue from four o'clock in the morning, otherwise access to the client will not be secured. But even waiting for long periods does not guarantee that the lawyer will be able to meet the client. If the meeting is granted it is usually very brief and may sometimes last no longer than ten minutes. The practice of impediments of access to clients is not in line with the procedure clearly prescribed by the Russian criminal procedure, which guarantees that a client has a right to a lawyer from the moment of factual apprehension.<sup>281</sup>

Under international law, an accused person must be granted prompt access to counsel in accordance with the right to communicate with counsel<sup>282</sup> and as part of the right to a fair trial<sup>283</sup>. Such access may serve as a preventive measure against ill-treatment, coerced self-incriminations and confessions or other violations of the rights of the suspect.<sup>284</sup> Moreover, the European Court of Human Rights has held that "a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial".<sup>285</sup> Therefore, not only do practices of impeding access of lawyers to clients run contrary to the international

<sup>280</sup> Pravo.ru legal news agency: "The Ministry is asked to address the regulation of the Federal System of Execution of Penalty, which deprived 5000 lawyers of access to places of detention", 18 August 2015, <http://pravo.ru/news/view/121167/>.

<sup>281</sup> Criminal Procedure Code of the Russian Federation, *op. cit.*, article 49.3.3.

<sup>282</sup> General Comment 32, para. 34; UN Basic Principles on the Role of Lawyers, principle 1.

<sup>283</sup> ECtHR, *Salduz v. Turkey*, *op. cit.*, paras. 54–55.

<sup>284</sup> General Comment 20, para. 11; ECtHR, *Salduz v. Turkey*, *op. cit.*, para. 54.

<sup>285</sup> *Al-Moayad v. Germany*, Application No.35865/03, (inadmissibility) Decision of the European Court (2007), para. 101.

law and standards, but they also lead to violations of human rights, which may not necessarily be remedied at future stages in the proceedings.<sup>286</sup>

### **Confidentiality of lawyers' meetings with clients**

Under Russian law, any information<sup>287</sup> related to a lawyer's representation of his or her client<sup>288</sup> is protected by lawyer-client privilege. Meetings of lawyers with their clients held in detention may take place within the sight of remand prison officers, but must be out of their hearing<sup>289</sup>.

Lawyers told the mission that the law is routinely disregarded in practice and that they have to work with the presumption that every conversation with a detainee is overheard by the law enforcement agents. While some said they have to use "the birds' language", in other words to use a code or signs, to communicate with their clients. Others said that they have to write text to their clients on a piece of paper while hiding the paper with the other hand from cameras. One almost comic situation was reported where the lawyer and the client were asked to speak in Russian as the guards did not understand the language they were using to communicate. The testimony that the ICJ has received from multiple sources suggests a systemic and often blatant violation of this right. It is a well-established principle that rights should not be "theoretical or illusory" but must be "practical and effective".<sup>290</sup> Under international law, States have an obligation to ensure full confidentiality of communication between a lawyer and a client.<sup>291</sup>

### **Right to collect information and question witnesses**

The law provides that lawyers shall have the right<sup>292</sup> to collect information that is necessary for legal representation, including to request documents from various bodies and institutions; to question, subject to their consent, individuals who may have information related to the case in the context of which legal representation is provided, to collect and present exhibits and documents<sup>293</sup>. The law does not establish any legal consequences for a failure to comply with defence lawyers' requests for information.<sup>294</sup> Confidential information may only be obtained by a lawyer pursuant to a motion lodged with the body in charge of the inquiry or investigation, or the court.<sup>295</sup>

<sup>286</sup> ECtHR, *Salduz v. Turkey*, *op. cit.*, para. 62.

<sup>287</sup> The lawyer-client privilege covers the very fact of seeking advice from a lawyer, including the names of the clients, all evidence and documents collected by the lawyer at the preparatory stage; any information obtained by the lawyer from clients and documents, if they make part of the proceedings; information about the client that became known to the lawyer when providing legal representation; substance of legal advice provided immediately to the client or meant for him/her; lawyer's file pertaining to the case; terms of legal representation, including money arrangements between the lawyer and his/her client; any other information related to legal representation. See Code of Professional Ethics of Lawyer, article 6 (5).

<sup>288</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 8 (1).

<sup>289</sup> See Ministry of Justice Decree No. 189 of 14 October 2005 (as amended on 27 December 2010) "On approval of Internal Regulations in remand prisons of the penitentiary system", item 145.

<sup>290</sup> See among others *Airey v. Ireland*, ECtHR, Application No. 6289/73, Judgment of 9 October 1979, para. 24.

<sup>291</sup> Human Rights Committee, General Comment 32, *op. cit.*, para. 34; UN Basic Principles on the Role of Lawyers, principle 8, 22.

<sup>292</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 6 (3).

<sup>293</sup> Criminal Procedure Code of the Russian Federation, articles 86 (3) and 53 (2).

<sup>294</sup> Korobitsyn, *Non-compliance with the lawyer's query*, *Advokat*, 2008, issue 3.

<sup>295</sup> See Explanatory note to the Draft Federal Law "On introducing amendments to certain laws of Russia concerning the guarantees of the lawyer's right to collect information necessary for qualified legal representation."

In practice, lawyers encounter refusals to reply to their requests for information.<sup>296</sup> A researcher told the mission that two thirds of lawyers have reported that they did not get a response to their request, which they link to the absence of legal obligation to comply with such a request. One lawyer reported: "anyone may just throw such a request into a garbage bin and not react. It is true that a request of an investigator has the same status according to the law but we know that in practice any organization would not dare to ignore a request from an investigator and they are usually carried out". Moreover, according to research, 65 per cent of lawyers reported lengthy periods of waiting for responses, and 20 per cent written refusal to provide information.<sup>297</sup>

Ignoring lawyers' requests for information while investigators' requests are treated as compulsory leads in reality to an inequality of arms between lawyers and the investigation. The right enshrined in law loses much of its practical meaning. The Ministry of Justice of Russia has drafted a proposed law on securing the right of lawyers to collect information necessary for qualified legal representation.<sup>298</sup> The draft law provides that lawyers should be put on the list of actors who may obtain information that qualifies as trade, bank, tax, medical or other secrets, as well as to extend the application of the procedure for submitting such information to lawyers. Furthermore, the draft law introduces administrative liability for refusal to provide information, its non-provision or provision of knowingly false information pursuant to a lawyer's query.

### **Admission of evidence gathered by defence lawyers**

Under the law, lawyers have the right to collect evidence in criminal cases in which they represent clients.<sup>299</sup> However, this language of the law seems to be misleading as evidence obtained by lawyers is not included in the file as evidence without the authorization of the investigator (or the court, but judicial authorisation does not raise any issue). The list of evidence to be assessed by the pre-trial investigation authorities, the prosecutor and the judge does not mention evidence adduced by the defence.<sup>300</sup> The Constitutional Court attempted to strengthen this guarantee, holding that "the criminal procedural law precludes an arbitrary refusal of the official or body in charge of pre-trial investigation to collect evidence requested by the defence or to include the evidence presented by the defence in the criminal case-file. ...In any case, the decision made on this matter must rely on specific arguments supporting the inadmissibility of evidence that the defence has requested to obtain or to examine."<sup>301</sup>

Nevertheless, neither in law nor in practice does this ensure an equal opportunity for lawyers to collect evidence. Lawyers depend on the investigation or the courts whether the evidence they collected is included in the case file. According to lawyers and experts the mission met the investigator regularly

<sup>296</sup> A. V. Ivanov. *Lawyer's Query: essence and implementation challenges*, Advokat, 2014, issue 4.

<sup>297</sup> A. V. Ragulin, *Some concerns regarding regulation and practical exercise of the right of the defence counsel to obtain a response to query*, Yuridicheskii Mir, 2012, issue 8, pp. 14–18.

<sup>298</sup> "Ministry of Justice increases the power of a lawyer's request", Pravo.ru, 15 October 2015, <http://pravo.ru/review/view/111009/>.

<sup>299</sup> See Section III Subsection 6 above for more details.

<sup>300</sup> Criminal Procedure Code of the Russian Federation, article 87; See N. A. Kolokolov. *Concurrent Lawyer's Investigation*, EZh-Jurist, 2005, issue 21.

<sup>301</sup> Ruling of the Constitutional Court of the Russian Federation of 21 December 2004 No. 467-O "On complaint of Mr Petr Pyatnichuk about a violation of his constitutional rights by articles 46, 86 and 161 of the Code of Criminal Procedure of Russia."



refuses to include in the case-files evidence obtained by the defence. It was said that even if lawyers manage to obtain evidence, the real problem that emerges is to include it in the materials of the case. Many lawyers report that they had never been able to succeed in including evidence in the materials of the case in criminal matters.

Once the investigation is over and the defendant and his or her lawyer have had access to the criminal case-file, the investigator must ask them if they have any motions or statements to make.<sup>302</sup> The defendant and his or her counsel are requested to identify the witnesses, experts and specialists to be summoned to the hearing for interrogation to support the position of the defence.<sup>303</sup> A survey of lawyers has shown that "motions lodged at the above stage are often (in 89% cases) rejected by the investigator without any reason or due to the fact that the criminal investigation has to be completed by the established deadline which is normally looming close when the defendant and his/her counsel are made familiar with the criminal case-file."<sup>304</sup>

An essential element of the right to a fair trial, as protected in international human rights law, including under article 6 of the ECHR and 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>305</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>306</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>307</sup> Furthermore, the ECtHR has held that, in order to comply with the right to a fair trial "...counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."<sup>308</sup>

The inability of lawyers to include materials in the case-file is one of the most serious problems which undermines equality of arms between the prosecution and the defence during the investigation. Bearing in mind the reliance of judges on the casefile they receive from the investigator, the equality of arms principle may be already nullified before the case reaches the court. In the case of *Mirilashvili v. Russia*, the European Court of Human Rights addressed this issue.<sup>309</sup> It held that: "...whatever the system of criminal investigation, if the accused chooses an active defence, he should be entitled to seek and

<sup>302</sup> Criminal Procedure Code of the Russian Federation, article 217 (4).

<sup>303</sup> *Ibid.*

<sup>304</sup> A. V. Ragulin. *Right of defence counsel to study criminal case-file once pre-trial investigation has been completed: Concerns about statutory framework and practical implementation*, *Advokat*, 2012, No. 4, pp. 16–25.

<sup>305</sup> HRC General Comment 32, *op. cit.*, para. 13.

<sup>306</sup> *Ibid.*

<sup>307</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>308</sup> ECtHR, *Dayanan v. Turkey*, para. 32.

<sup>309</sup> Human Rights, 2009, issue 4; Decision of the Presidium of the Supreme Court of Russia to reopen criminal proceedings in view of new facts, of 20 January 2010, No. 1PK10. (See judgment of the European Court of Human Rights of 11 December 2008 in the case of *Mirilashvili v. Russia*, No. 6293/04 (summary available in the Bulletin of the European Court of Human Rights, 2009, issue 4); Decision of the Presidium of the Supreme Court of Russia to reopen criminal proceedings in view of new facts, of 20 January 2010, No. 1PK10.)

produce evidence “under the same conditions” as the prosecution”.<sup>310</sup> Since the applicant in that case had been unable to examine several key witnesses in court or at the pre-trial stage, the European Court held that the refusal to admit their written testimonies and statements collected by the defence was not justified, and led to a violation of the right to a fair trial.<sup>311</sup> However the Supreme Court of Russia subsequently decided that the refusals to include the testimony obtained by lawyers as evidence should not lead to changing or quashing the decision of a lower court.<sup>312</sup>

The ICJ considers that, in the Russian Federation, the current system as well as its application in practice systemically fails to ensure equality of arms and an effective defence.

### **Access to the case-file**

According to the Criminal Procedure Code, upon the completion of the pre-trial investigation, a lawyer representing a defendant in a criminal case may study the entire case-file, take notes from it, and make copies at his or her own expense, including with the use of technical devices.<sup>313</sup> Upon notification of completion of the investigative activities, the investigator must present to the defendant and his or her lawyer<sup>314</sup> the materials of the criminal case-file, bound and numbered<sup>315</sup>. The statutory requirement to number the case materials is meant as a guarantee against arbitrary change of page numbers or future substitution of materials.<sup>316</sup>

In practice, lawyers are often not given an opportunity to fully familiarize themselves with the materials of the case. One of the most serious obstacles experienced by defence lawyers is unjustified restrictions on the possibility to make a copy of the criminal case file.<sup>317</sup> Lawyers are often refused access to lists of case materials, or discover that certain documents that had not been presented to them upon finishing the investigation have been added or those that were previously there have been removed from the case-file at a later stage. An academic survey showed that 100% of lawyers encountered numbering case materials with a pencil, which permits easy adding or taking out of documents. Furthermore, an analysis of more than 1,500 criminal case-files has shown that 98.5% were numbered with a pencil only.<sup>318</sup>

Despite the right of access to the “entire” criminal case-file,<sup>319</sup> lawyers are often refused access to material evidence of the case. The information is supported by an academic study which demonstrates that 48% of lawyers interviewed

<sup>310</sup> *Mirilashvili v. Russia*, *op. cit.*, para. 225.

<sup>311</sup> *Ibid.*, paras. 227–228.

<sup>312</sup> Decision of the Presidium of the Supreme Court of Russia to reopen criminal proceedings in view of new facts, of 20 January 2010, No. 1PK10.

<sup>313</sup> Criminal Procedure Code of the Russian Federation, article 53 (1).

<sup>314</sup> The defence counsel is only unable to review personal information of the victim, his/her representative, witness or their immediate family, family and close friends if a decision has been made to protect their privacy under Criminal Procedure Code, article 166, para. 9. Consequently, the defence counsel is not able to study the decision to protect the privacy of those persons as classified information.

<sup>315</sup> Criminal Procedure Code of the Russian Federation, article 217 (1).

<sup>316</sup> A. V. Ragulin, *Involvement of professional defence counsel at the pre-trial stage in criminal proceedings*, pp. 154–164.

<sup>317</sup> A. V. Ragulin, *Right of defence counsel to study criminal case-file once pre-trial investigation has been completed: Concerns about statutory framework and practical implementation* // *Advokat*, 2012, No. 4, pp. 16–25.

<sup>318</sup> *Ibid.*

<sup>319</sup> Criminal Procedure Code of the Russian Federation, article 53 (1).

encountered refusals to allow them access to pieces of material evidence.<sup>320</sup> One excuse that is sometimes given is that such exhibits are at the storage depot and cannot be removed.<sup>321</sup> In certain cases the investigation may arbitrarily classify documents as confidential<sup>322</sup> so that lawyers can only have access to them during the trial<sup>323</sup>.

These practices, which are systemic in nature, are not in line with the Russian legislation, nor with the Russian Federation's international obligations. The European Court of Human Rights has established that authorities must disclose to the defence all the material evidence for or against the accused,<sup>324</sup> which is a prerequisite for the defence to comment on the evidence<sup>325</sup>. Although it has accepted that access to the case-file may legitimately be restricted in certain cases including for the purposes of protection of national security,<sup>326</sup> such restrictions must be "strictly necessary" and must be remedied in the courts of subsequent proceedings<sup>327</sup>. Equality of arms is also not ensured "if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention".<sup>328</sup> In the Russian Federation, access to files is regularly impeded, undermining equality of arms and preventing effective challenge in court to various irregularities or violations of the law which occur during investigation. Bearing in mind the formalistic approach of the courts, and the tendency to trust papers obtained before trial rather than evidence obtained during the trial, such practices are highly problematic and require effective measures of reform.

#### 4. Equality of arms and the rights of the defence in court

##### ***Equality of arms during examination of witnesses***

The Code of Criminal Procedure guarantees lawyers for the defence the right to collect and present evidence necessary for legal representation and to submit motions, including to obtain the attendance of witnesses.<sup>329</sup> When preparing for the hearing, the judge makes a decision scheduling the hearing where he or she decides to obtain the attendance of the individuals indicated in the lists submitted by both parties.<sup>330</sup> During the preparatory part of the hearing, the presiding judge is required to ask the parties whether they have any motions to summon new witnesses.<sup>331</sup> The court may not reject a motion to examine a specialist as a witness if such specialist appears before the court on the initiative of the parties,<sup>332</sup> which suggests that courts' discretion in dealing with

<sup>320</sup> A. V. Ragulin. *Right of defence counsel to study criminal case-file once pre-trial investigation has been completed: Concerns about statutory framework and practical implementation*, *op. cit.*, pp. 16–25.

<sup>321</sup> *Ibid.*

<sup>322</sup> Yu. P. Garmayev, *Unlawful activities of lawyers in criminal proceedings. Prevention and neutralization modalities*, Moscow, Yurlitinform, 2010, pp. 38, 39.

<sup>323</sup> Criminal Procedure Code of the Russian Federation, article 217 (2).

<sup>324</sup> ECtHR, *Edwards v. United Kingdom*, Application No. 13071/87, Judgment of 16 December 1992, para. 36.

<sup>325</sup> ECtHR, *Brandstretter v. Austria*, Application Nos. 11170/84, 12876/87, 13468/87, Judgment of 28 August 1991, para. 66.

<sup>326</sup> ECtHR, *Jasper v. United Kingdom*, Application No. 27052/95, 16 February 2000, para. 43; ECtHR, *Dowsett v. United Kingdom*, Application No. 39482/98, Judgment of 24 June 2003, para. 42.

<sup>327</sup> *Jasper v. United Kingdom*, *op. cit.*, para. 43.

<sup>328</sup> ECtHR, *Mooren v. Germany*, Application No. 11364/03, Judgment of 9 July 2009, para. 124.

<sup>329</sup> Criminal Procedure Code of the Russian Federation, article 53 (1).

<sup>330</sup> Criminal Procedure of the Russian Federation, article 231 (2).

<sup>331</sup> *Ibid.*, article 271 (1).

<sup>332</sup> *Ibid.*, article 271 (2).

such motions is narrower than that of investigators, which can reject a motion during the investigation phase<sup>333</sup>. Rulings of the court or decisions of the judge, prosecutor, investigator or officer in charge of the inquiry must be lawful, well-founded and well-reasoned.<sup>334</sup> In addition, apparently to prevent arbitrary dismissals of the motions to summon witnesses, the Code of Criminal Procedure requires the court to discuss every motion made and to grant it whenever the facts to be established by the attendance of the witness are relevant for the case.<sup>335</sup>

While courts enjoy discretion in deciding on whether to call witnesses, lawyers complained that witnesses whose testimony may be decisive for the outcome of the case are regularly not called. Motions for the examination of witnesses are frequently dismissed on the grounds that it is up to the parties to ensure the presence of witnesses, which plays in favour of the prosecution whose witnesses are generally secured.<sup>336</sup> The mission was also told that courts do not insist on the attendance of witnesses. After several subpoenas, the court says that it "has exhausted all the means" to obtain their attendance, and simply uses their testimony given at the preliminary investigation stage. Individuals interrogated during the pre-trial investigation often, and increasingly, refuse to give testimony before the court, which precludes the defence from putting additional questions, challenging statements etc.<sup>337</sup>

Inequalities of arms regarding calling of witnesses may also arise in civil cases where state bodies are involved. In a recent trial observation report on civil proceedings, the ICJ described a case in which the person whose written complaint initiated the legal proceedings and resulted in the court hearing was never invited to the court to testify as a witness despite multiple requests of the defence to do so. This did not prevent the court from later founding its decision on the statements of that witness. The ICJ found the hearing to be inconsistent with the principle of equality of arms and the right to a fair hearing.<sup>338</sup>

The right of the accused to call witnesses is a fundamental element of equality of arms.<sup>339</sup> It guarantees defendants the right "to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them".<sup>340</sup> The European Court of Human Rights has stated that the admission of evidence from an absent witness, whom the defence has not had an opportunity to question, should be a measure of last resort.<sup>341</sup> In cases where evidence which is decisive for the outcome of the proceedings is admitted, it will be a violation of the right to a fair hearing if the witness is not cross-examined in court since "[s]uch untested evidence weighs heavily in the balance and re-

<sup>333</sup> See O. A. Maksimov, *Motions and complaints as a way of exercising the right to adversarial criminal proceedings*, Russian Justice, 2013, issue 7, pp. 28–31.

<sup>334</sup> Criminal Procedure Code of the Russian Federation, article 7 (4).

<sup>335</sup> *Ibid.*, article 271 (2).

<sup>336</sup> Interview with a lawyer of 14 April 2015.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Russian Federation: Court Proceedings in "Foreign Agents" Cases*, Trial observation report, 2015, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/Russian-Federation-NGO-Foreign-Agents-Publications-Trial-Observation-Report-2015-ENG.pdf>, p. 22.

<sup>339</sup> *Nahimana et al. v. The Prosecutor* (ICTR-99-52-A), ICTR Appeals Chamber (28 November 2007) para. 181; See "...the concept of a fair trial includes equal opportunity to present one's case and the fundamental right that criminal proceedings should be adversarial in nature".

<sup>340</sup> General Comment 32, *op. cit.*, para. 39.

<sup>341</sup> ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, [GC] Application Nos. 26766/05 and 22228/06, Judgment of 15 December 2011, para. 125.

quires sufficient counterbalancing factors to compensate for the consequential difficulties caused to the defence by its admission".<sup>342</sup>

Lawyers in the Russian Federation are often placed in a disadvantaged position due to a heavy reliance on the statements made outside of court, including statements of the accused or the witnesses. It is the normal practice that greater trust will be accorded by the court to the statements made behind closed doors to another person rather than in a public hearing made to the judge. This is not only a matter of legal culture but also one of convenience, as it may ensure the necessary conviction. A move towards a greater level of equality of arms may of itself bring significant improvements to the justice system and increase the level of acquittals.

### ***Treatment of evidence presented by the defence***

Where motions of the defence to question witnesses, conduct forensic expertise or another investigative action are relevant for the criminal case under examination, they may not be rejected.<sup>343</sup> However, there are serious concerns in criminal procedural practice regarding refusals of officers in charge of the inquiry, investigators or courts to grant the defence lawyer's motion to admit certain exhibits, documents or other information in evidence. According to one research about half of 743 lawyers surveyed confirmed that their motions are often rejected, including motions of utmost importance for the defence such as those which may provide an alibi to the defendant.

Throughout the mission the ICJ heard of the highly accusatory stance of judges who are ready to accept even very dubious evidence adduced by the prosecution or law enforcement agents. The partiality of courts towards the investigatory authorities is well known and is expected by the prosecution and investigatory authorities.<sup>344</sup> Lawyers report that "law-enforcement and judicial authorities treat the evidence presented by the defence with greater scrutiny..., removing it from the evidence admitted in the case, while, in assessing the evidence of the prosecution, even serious breaches of law... are accounted for as a 'clerical error'",<sup>345</sup> and such evidence is declared admissible.

A lawyer from the North Caucasus told the mission: "[In the criminal trial], every motion of a defence lawyer is dismissed by the court whereas the motions of the prosecution are granted. The judge supports the prosecution in every respect. All the complaints of the lawyer are dismissed while the judge's role is to save the law enforcement agents who committed wrongful acts against the defendant. Everything is justified. In order to avoid a possible inquiry into allegations, a judge who sees obvious problems that happened during the investigation would opt to impose a short sentence but still there would be a conviction. And any claims of the defence would be disregarded even if there was a forensic opinion on the marks of beatings on the body of the defendant." Reportedly, judges tend to be highly credulous when it comes to the statements of the police, yet when it comes to medical examination reports, complaints of the defence lawyer, and allegations of the defendant, they are most likely to be highly suspicious.

<sup>342</sup> *Al-Khawaja and Tahery v. United Kingdom*, *op. cit.*, paras. 159–165.

<sup>343</sup> Criminal Procedure Code of the Russian Federation, article 159 (2).

<sup>344</sup> See Statistical analysis "Accusatory slant in criminal procedure: prosecutor's factor." [http://www.enforce.spb.ru/images/analit\\_zapiski/pm\\_3\\_prok\\_final\\_site.pdf](http://www.enforce.spb.ru/images/analit_zapiski/pm_3_prok_final_site.pdf).

<sup>345</sup> Interview with a lawyer of 14 April 2015.

Lawyers consistently confirmed to the ICJ mission that judges routinely refuse to hear evidence in favour of the defence. This is exemplified by judgments of the European Court of Human Rights which demonstrate the tendency of courts to avoid consideration of exculpatory evidence.<sup>346</sup> The mission was told that this may be attributed to lawyers having a "*déformation professionnelle*" which means that they always feel themselves to be in an unprivileged position. Nevertheless, the practical impossibility of achieving an acquittal indicates that defence lawyers, whatever tendency they may have to complain of irregularities, do not exaggerate when they say that there is little they may do to achieve an acquittal. Clearly, this situation means that protection of the right to a fair trial, as well as of other human rights in the criminal justice process, is seriously undermined.

### **Expert reports of the defence**

Where the investigator deems it appropriate to assign a forensic examination, he or she issues a decision to that effect.<sup>347</sup> Forensic examination must be conducted by the public forensic examination agency pursuant to a ruling of the court, the decision of the judge, officers in charge of the inquiry or investigator. As clarified by the Constitutional Court of Russia, "forensic examination shall be conducted by a public forensic examination agency pursuant to the decision issued by the body in charge of the inquiry or pre-trial investigation, prosecutor or the court, rather than at the request of the defendant or his/her defence counsel. At the same time, criminal procedural law provides for a certain procedural mechanism aimed at the exercise of the defendant's right to defence against charges when a decision is made as to the need to assign and conduct a forensic examination. The defendant and his/her lawyer may exercise their right to present evidence by lodging motions to assign and conduct a forensic examination."<sup>348</sup>

It is widely known among lawyers in Russia that alternative expert reports to those of the prosecution are often ignored. The best description of the problem was provided by the then Ombudsman of the Russian Federation, Vladimir Lukin, whose analysis reflects the testimonies heard by the ICJ during the mission: "...as a rule, judges opt for the findings of the expert examination conducted on the initiative of the prosecution, that was called to serve as the evidence of guilt. In such cases, the judicial decisions note that there are no reasons to question the findings of the expert examination presented by the prosecution. On the other hand, expert findings presented by the defence are declared to have been obtained as a result of an unduly assigned examination which raises certain doubts about their accuracy. The courts however disregard the important fact that prosecution and defence are not equal from the outset: while the prosecutor may assign an expert examination without the consent of the defence, the defence can only do so subject to the consent of the prosecutor. ...In the opinion of the Ombudsman, the above approach is an outright violation of the procedural principle of equality of arms which is an inherent part of the constitutional right to a fair trial."<sup>349</sup>

<sup>346</sup> See for example, ECtHR, *Aleksandr Zaichenko v. Russia*, Application No. 39660/02, Judgment of 18 February 2010, paras. 58–59.

<sup>347</sup> Code of Criminal Procedure of the Russian Federation, article 195 (1).

<sup>348</sup> Ruling of the Constitutional Court of the Russian Federation, No. 145-O of 4 March 2004 "On refusal to examine the complaint of Mr Aleksandr Pronya about a violation of his procedural rights by article 47, para. 4 (4), article 53, para. 1 (2) and articles 74, 85 and 86 of the Code of Criminal Procedure of Russia."

<sup>349</sup> See for example: Rossiyskaya Gazeta, "The law is stronger than power", 6 March 2012, <http://www.rg.ru/2012/03/06/doklad-dok.html>.

## 5. Obstruction of the work of lawyers

### *Interrogations of lawyers*

The Criminal Procedure Code (CPC) provides that the “defence counsel of a suspect/defendant shall not be subject to interrogation as a witness in relation to the facts that became known to him/her in view of a client’s seeking legal advice or in view of his/her providing such legal advice”.<sup>350</sup> Under the Federal Law “On advocates’ activities and *advokatura* in the Russian Federation”, a lawyer cannot be summoned or interrogated as a witness in relation to facts that became known to him or her due to a client’s seeking legal advice or as a result of the lawyer providing such legal advice.<sup>351</sup> Furthermore, the Code of Professional Ethics of Lawyers states that a lawyer cannot make witness statements about any facts known to him or her in the context of professional activities.<sup>352</sup> Violation of these provisions by a lawyer is subject to disciplinary penalties, which may include disbarment.<sup>353</sup> However, in 2003, the Constitutional Court decided that, where the lawyer and the person or persons whose rights are affected agree to disclose information, it may be disclosed.<sup>354</sup>

In practice, the calling of lawyers as witnesses is one of the most significant obstacles to the work of Russian lawyers. Once a lawyer becomes a witness, he or she is prevented from representing a party to the case. For investigators, calling a lawyer as a witness can therefore be used as a strategy to disrupt the defence. The Federal Chamber of Lawyers has reported that “it’s a common practice in Russia to remove the lawyer unwanted by the investigator from the proceedings by summoning him/her for interrogation as a witness. In 2012, attempts to interrogate and/or interrogations of lawyers were recorded in 29 regions of Russia, most of all in Moscow (38 instances), Sverdlovsk Region (18), Moscow Region (12), Kaluga Region (6) and Stavropol Kray (5), which amounted to 36% of total recorded violations under consideration”.<sup>355</sup> According to the information of the Federal Chamber, between April 2011 and April 2013, 315 unlawful interrogation or attempts of an unlawful interrogation occurred (compared to 253 in 2009–2011).<sup>356</sup> In 2013–2014, there were 224 such cases

<sup>350</sup> Criminal Procedure Code of the Russian Federation, article 56 (3).

<sup>351</sup> Federal Law “On lawyers’ activities and *advokatura* in the Russian Federation”, *op. cit.*, article 8 (2).

<sup>352</sup> Code of Professional Ethics of Lawyer, article 6 (6).

<sup>353</sup> See Federal Chamber of Lawyers Report *Constitution of Russia and Protection of Rights of Citizens (View of Russian Advokatura)*.

<sup>354</sup> Decision No. 108-O of the Constitutional Court of Russia of 6 March 2003 “On complaint of Mr Tsitskishvili about a violation of his constitutional rights by article 56, para. 3 (2) of the Code of Criminal Procedure of Russia”: “The CPC of Russia does not preclude lawyers from giving the necessary testimony where lawyers themselves and their clients are interested in such disclosure. Furthermore, the provision in question shall not obstruct the lawyer’s exercise of his/her right to act as a witness in the case provided that his/her legal status has changed and he/she respects the rights and legitimate interests of the individuals who entrusted information to him/her. In such cases, courts cannot prevent the persons listed in article 56, para. 3 of the CPC (including defence counsel of the defendant or suspect) from making witness depositions, provided they have lodged a motion to that effect (*Right to such examination may only arise pursuant to the motion of the defence rather than prosecution—added ICJ*). Inability to examine defence counsel—subject to his/her consent to give testimony, as well as subject to the consent of those whose rights and legitimate interests are immediately affected by the confidential information obtained by the lawyer—would amount to a breach of the constitutional right to judicial protection and corrupt the very essence of this right.”

<sup>355</sup> Federal Chamber of Lawyers, Report the *Constitution of Russia and Protection of Rights of Citizens (View of the Russian Advokatura)*, <http://www.advgazeta.ru/rubrics/9/1245>.

<sup>356</sup> Performance Report of the Federal Chamber of Lawyers, Board for the period of April 2011 and April 2013. [http://www.fparf.ru/documents/council\\_documents/council\\_reports/256/, 2.2.22](http://www.fparf.ru/documents/council_documents/council_reports/256/, 2.2.22).

across the Russian Federation.<sup>357</sup> These statistics, even if they do not include all cases, present a highly problematic picture.

The 2010 Report of the Russian Federation Ombudsman Mr Lukin noted: "concerns regarding unending attempts to interrogate a lawyer as a witness in criminal proceedings. It is well-known that the applicable law precludes the same person from combining the procedural status of a witness and defence counsel. For this reason, interrogation of a lawyer as a witness results in his/her removal from the proceedings as defence counsel. Importantly enough, this dubious legal trick never fails, even where the lawyer refuses to make witness statements relying on the lawyer-client privilege and the interests of his/her client. In this case, the transcript of interrogation of witness is filled in all the same, indicating that the lawyer refused to make statements or to sign the document in question. Immediately thereafter, decision is made to remove the counsel from the case, as (s)he 'is involved in the proceedings as a witness'."<sup>358</sup> In 2011, the problem was also recognized by President Medvedev who commented that "I cannot but agree that cases of interrogation of lawyers in those cases where the lawyers act as a defenders are absolutely odious."<sup>359</sup>

The ICJ heard concern regarding this practice during this mission. In the course of its previous work in the Russian Federation, the ICJ has also regularly encountered cases of interrogations of lawyers in order to exclude them from representing a party to the proceedings. This often happens to "inconvenient" lawyers, those who strongly defend the interests of their clients, with independence and in accordance with the Code of Ethics. These practices are not prevented by their clear prohibition in Russian law.

Interrogation of a lawyer as a witness constitutes a serious interference with the work of lawyers in clear contradiction to Russian legislation and international standards on the role and independence of lawyers. The ICJ stresses that, in accordance with international obligations on the right to fair hearing and international standards on the independence of lawyers, states are obliged to protect lawyers against any form of harassment or improper interference<sup>360</sup>, including harassment through initiation of formal proceedings against lawyers in connection to the execution of their functions. Furthermore, this practice runs contrary to the right to a confidential communication with a lawyer which is guaranteed under international law and standards.<sup>361</sup>

### ***Personal threats, harassment, attacks and acts of revenge***

Although the Federal Law "On Police" that governs the responsibilities of police officers does not mention lawyers among the protected groups,<sup>362</sup> a lawyer, his or her family members and their belongings are protected by the State under the Federal Law on Lawyers' Activities and *Advokatura*.<sup>363</sup> That law provides, among other guarantees, that "any interference with lawyers' activities pursued in accor-

<sup>357</sup> Performance Report of the Federal Chamber of Lawyers, Board for the period of April 2013 and April 2015, para. 2.2.21.

<sup>358</sup> See 2010 Report of the Russian Federation Ombudsman.

<sup>359</sup> Transcript of the session of the Council for Civil Society Institutions and Human Rights, <http://kremlin.ru/catalog/persons/208/events/10194/work>.

<sup>360</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 16(a).

<sup>361</sup> Among other documents see: UN HRC General Comment 32, *op. cit.*, para. 34; UN Basic Principles on the Role of Lawyers, *op. cit.*, principles 8 and 22.

<sup>362</sup> Federal Law of 7 February 2011 No. 3-FZ "On the Police", article 12 (28).

<sup>363</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 18 (4).



dance with the law, or obstructing such activities in any way shall be prohibited.”<sup>364</sup> It proclaims that any pressure on lawyers by third parties who pursue their own interests is prohibited but does not impose any sanction for such behaviour.<sup>365</sup>

Threats, physical attacks or even killings of lawyers are problems which are particularly acute in the North Caucasus, but also exist elsewhere in the Russian Federation. The ICJ regularly encounters cases of threats, beatings, and sometimes killings of Russian lawyers.<sup>366</sup> According to the Federal Chamber of Lawyers, between 2011 and 2012, twenty-four cases of violence against lawyers, as well as nineteen cases of violence resulting in physical injury occurred.<sup>367</sup> During the reporting period, five lawyers were killed on account of their professional activities (four during the previous reporting period).<sup>368</sup> In the period of 2013–2014, there were 5 killings of lawyers and one attempt to kill and 23 cases of physical injury to lawyers.<sup>369</sup> The UN Human Rights Committee in its Concluding Observations of 2015 expressed concern over reports regarding harassment, death threats, intimidation, violence against and killings of lawyers.<sup>370</sup> On 23 September 2014, lawyer Tatyana Akimtseva was killed in front of her flat in Moscow.<sup>371</sup> Only a month later lawyer Vitaliy Moiseyev and his wife were killed in the Moscow region.<sup>372</sup> According to the Federal Chamber of Lawyers, “40 lawyers were killed during the last 13 years; only 9 offences against lawyers have been detected.”<sup>373</sup> Other sources give an even greater figure: more than seventy killings and serious offences were committed against lawyers in Russia in 2000–2014.<sup>374</sup>

<sup>364</sup> *Ibid.*, article 18 (1).

<sup>365</sup> Criminal Code of the Russian Federation, article 296, “Threats or violence on account of administration of justice or pre-trial investigation”, or article 295, “Encroachments on the life of a person administering justice or pre-trial investigation”; See: I. Trunov, *Even Defence Counsel Needs Defence*, *Domashniy Advokat*, 2006, issue 2 (334). <http://www.law.edu.ru/doc/document.asp?docID=1231917>.

<sup>366</sup> Russian Federation: ICJ urges protection for security of lawyers, following attack on Murad Magomedov, 5 February 2015, <http://www.icj.org/russian-federation-icj-urges-protection-for-security-of-lawyers-following-attack-on-murad-magomedov/>; Russian Federation: ICJ calls for prompt and effective investigation into killing of lawyer Vitaliy Moiseyev, 24 October 2014, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Russia-Murder-of-lawyer-Moiseyev-News-web-stories-2014-RUS.pdf>; Russia: lawyers threatened with death in Dagestan need urgent protection, 7 June 2013, <http://www.icj.org/the-russian-federation-lawyers-threatened-with-death-in-dagestan-need-urgent-protection/>; Lawyer killed in Dagestan: the ICJ calls for full and independent investigation, 23 January 2013, <http://www.icj.org/lawyer-killed-in-dagestan-the-icj-calls-for-full-and-independent-investigation/>; ICJ urges the Russian authorities to investigate an attack against lawyer, 19 May 2011, <http://www.icj.org/russian-federation-icj-urges-the-russian-authorities-to-investigate-an-attack-against-lawyer/>; ICJ observes hearing in prosecution of Dagestan lawyer, 29 November 2010, <http://www.icj.org/russian-federation-icj-observes-hearing-in-prosecution-of-dagestan-lawyer/>; ICJ calls for investigation and accountability following murder of Stanislav Markelov, 20 January 2009, <http://www.icj.org/icj-calls-for-investigation-and-accountability-following-murder-of-stanislav-markelov/>.

<sup>367</sup> Performance Report of the Board of the Federal Chamber of Lawyers for the period of April 2011 and April 2013, [http://www.fparf.ru/documents/council\\_documents/council\\_reports/256/](http://www.fparf.ru/documents/council_documents/council_reports/256/), para. 2.2.22.

<sup>368</sup> *Ibid.*

<sup>369</sup> Performance Report of the Board of the Federal Chamber of Lawyers for the period of April 2013 and April 2015, [http://www.fparf.ru/documents/council\\_documents/council\\_reports/13947/](http://www.fparf.ru/documents/council_documents/council_reports/13947/), para. 2.2.22.

<sup>370</sup> See Concluding observations on the seventh periodic report of the Russian Federation, Adopted by the Committee at its 113<sup>th</sup> session (16 March–2 April 2015).

<sup>371</sup> See, *Russian Federation: ICJ calls for prompt and effective investigation into killing of lawyer Vitaliy Moiseyev*, 24 October 2014, <http://www.icj.org/russian-federation-icj-calls-for-prompt-and-effective-investigation-into-killing-of-lawyer-vitaliy-moiseyev/>.

<sup>372</sup> *Ibid.*

<sup>373</sup> Performance Report of the Federal Chamber of Lawyers Board for the period between April 2013 and April 2015, *op. cit.*

<sup>374</sup> I. L. Trunov, *Concerns regarding killing of Russian lawyers in terms of law-making and law-enforcement* // *Eurasian Advokatura*, issue 6 (13) 2014, pp. 51–56.

Many other lawyers are reported to have been killed on account of their professional activities.<sup>375</sup>

Lawyers in the North Caucasus, in particular, often face threats and pressure on the part of the law-enforcement officers.<sup>376</sup> Lawyers who work on “sensitive” cases are particularly vulnerable to such threats.<sup>377</sup> In 2010, four lawyers were subject to physical attacks in Dagestan. In the centre of Makhachkala, the capital of Dagestan, lawyer Sergey Kvasov was severely beaten by unknown individuals who were driving two cars with tinted windows. Criminal proceedings were instituted in view of the offence, but the perpetrators were not identified and no criminal charges were brought. Three women lawyers were also victims of violence that year: Sapiyat Magomedova, Jamilya Tagirova<sup>378</sup> and Zinfira Mirzaeva. Each of them was subject to violence by police officers acting in their official capacity; each of the attacks took place when the lawyers were discharging their professional duties subject to the instructions of their clients. In addition, lawyer Irina Kodzayeva was subjected to a physical attack by an investigator, and faced criminal prosecution on account of that incident.<sup>379</sup>

Serious concerns exist regarding the nature of the investigation undertaken pursuant to the lawyers’ complaints of threats or violence, their effectiveness and impartiality.<sup>380</sup>

Under the UN Basic Principles on the Role of Lawyers, where the security of lawyers is threatened as a result of discharging their professional functions, states are obliged to take measures to adequately safeguard the lawyers concerned.<sup>381</sup> As noted above, under international human rights law, there is also a general positive obligation on the state to take measures to protect persons who the authorities know or ought to know are at risk of physical attack.<sup>382</sup> The Russian Federation’s international human rights obligations also require it to 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>383</sup>

### ***Criminal prosecution of lawyers and searches of their premises***

A system of safeguards under Russian law that required a judicial opinion for criminal proceedings to be instituted against a lawyer was abolished in 2008.<sup>384</sup> In 2009, amendments to the law were introduced pursuant to which criminal proceedings against lawyers may be instituted by high-ranking officials—heads of the investigative body of the Investigative Committee under the Prosecutor

<sup>375</sup> *Ibid.*

<sup>376</sup> *Confronting the circle of injustice: Threats and pressure faced by lawyers in the North Caucasus*, <https://www.amnesty.org/download/Documents/12000/eur460032013en.pdf>.

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

<sup>381</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 17.

<sup>382</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>383</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.

<sup>384</sup> See T. G. Dabizha, *Particular procedural aspects of prosecuting a lawyer // Advokat*, 2012, issue 9, pp. 11–19.

of Russia [responsible] for the constituent entity of Russia.<sup>385</sup> Following the separation of the Investigative Committee from the Prosecutor's Office in 2010, the applicable provision reads as follows: "[t]he decision to institute criminal proceedings against a lawyer shall be made by the head of the investigative body under the Investigative Committee of Russia [responsible] for the constituent entity of Russia."<sup>386</sup> A lawyer cannot be subject to prosecution (including after his/her status as a lawyer was suspended or terminated) on account of an opinion expressed in the course of his or her professional activities, unless he or she has been convicted and the judgment has become final.<sup>387</sup> However, the provision seems to create a logical paradox as prosecution of a lawyer that is allowed by law can only be initiated following a final judgment of the court establishing "a criminal omission."<sup>388</sup> It logically follows that such an investigation may never be initiated, but in practice it may lead to an absence of protection.

It is generally considered by lawyers that fact that only the head of the investigative body may initiate criminal proceedings against a lawyer does not provide any special protection.<sup>389</sup> If a lawyer appeals against this decision, the court may declare the investigator's conduct unlawful,<sup>390</sup> yet the provision does not afford sufficient protection, as the power to initiate the appeal rests with the investigative body—the authority which is acting against the lawyer in the proceedings. The ICJ has heard of cases where lawyers face criminal investigation after they made allegations that their clients had been ill-treated by investigators. In such cases, the heads of law enforcement bodies would side with their personnel, which puts lawyers at risk of arbitrary prosecution for making public information about abuse of their clients.

In the two-year period from April 2013 to April 2015, 1159 cases of interference with lawyers' work were registered the Federal Chamber of Lawyers.<sup>391</sup> Between April 2011 and April 2013 452 infringements of the rights of lawyers (against 441 during the previous two year period), were registered by the Federal Chamber of Lawyers.<sup>392</sup>

According to the law, "conducting search operations and investigative actions against a lawyer (including residential and office premises used by them to carry out advocate's activity) is allowed only by a court decision."<sup>393</sup> However searches in violation of the law are regularly carried out. The Federal Chamber has reported that from April 2013 to April 2015 such unlawful searches were registered in 44 cases.<sup>394</sup> In the previous reporting period 40 such cases were

<sup>385</sup> *Ibid.*

<sup>386</sup> Criminal Procedure Code of the Russian Federation, article 448 (1).

<sup>387</sup> Federal Law "On lawyers' activities and advokatura in the Russian Federation", *op. cit.*, article 18 (2).

<sup>388</sup> I. Trunov, *Even Defence Counsel Needs Defence*, Domashniy Advokat, 2006, issue 2 (334). <http://www.law.edu.ru/doc/document.asp?docID=1231917>.

<sup>389</sup> See Ye. V. Semenyako, *Lawyer facing prosecution* // Rossiyskaya Gazeta, 2009, issue 4928 (104).

<sup>390</sup> Ruling No. 673-O-O of the Constitutional Court of Russia of 21 October 2008 "On refusal to examine the complaint of Mr Viktor Kryukov and Mr Nikolay Zabelin about a violation of their constitutional rights by articles 7, 29, 176, 177 and 450 of the Code of Criminal Procedure of Russia."

<sup>391</sup> Report of the Board of the Federal Chamber of Lawyers of the Russian Federation, from April 2013 to April 2015, *op. cit.*

<sup>392</sup> Performance Report of the Board of the Federal Chamber of Lawyers Board for the period of April 2011 and April 2013, *op. cit.*

<sup>393</sup> Federal Law on "On Advocates Activity and Advokatura", article 8.3.

<sup>394</sup> Performance Report of the Board of the Federal Chamber of Lawyers of the Russian Federation, from April 2013 to April 2015, i.

registered (both office and home)—(as compared to 32 in 2009–2011).<sup>395</sup> Such searches take place not only in the North Caucasus<sup>396</sup> but in other parts of Russia as well<sup>397</sup>. Such searches raise issues of lawyer-client confidentiality, protected under international law and standards.<sup>398</sup>

## 6. Conclusions

Defence lawyers in the Russian Federation remain a particularly weak and vulnerable actor in the criminal justice system, with significant consequences for protection of the right to a fair trial, the right to liberty, and other human rights protection in the criminal justice process. The law does not provide for equal opportunities in collecting evidence and making it a part of the case-file, and defence lawyers are dependant on the investigatory authorities for key aspects of their work, including access to clients in detention. They may often not have private conversations with detained clients, contrary to international law and standards, and they often encounter manipulation of the case documents or case-files, which are under the complete control of the investigatory authorities.

At trial, court hearings generally fail to remedy the shortcomings of the investigative stage. As a result of the obstacles to their work, neither in law nor in practice do defence lawyers enjoy equal rights or status with the prosecution. The extremely high conviction rate in the Russian Federation is a logical consequence of this situation. The obstacles faced by defence lawyers in discharging their responsibilities, recognized under international standards, to uphold the human rights and represent the interests of their clients, illustrates the need for urgent attention to the criminal justice system's intolerance of acquittals. A shift in attitudes on the part of all actors in the criminal justice system, to give real effect to the presumption of innocence, and to recognize that acquittals and convictions may be equally legitimate outcomes of a fair criminal justice process, will result in a greater trust not only in the legal profession but in the justice system as a whole. The reform of the profession (as discussed in the following chapter) presents an important opportunity to develop and implement such changes.

Defence lawyers in the Russian Federation are very vulnerable to pressures and harassment, which regularly occur. The rights guaranteed by law are regularly ignored or directly violated. Greater attention to the protection of lawyers is therefore urgently required, on the part of both government authorities, and chambers of lawyers.

<sup>395</sup> Performance Report of the Board of the Federal Chamber of Lawyers for the period of April 2011 and April 2013, *op. cit.*

<sup>396</sup> Confronting the Circle of Injustice Threats and Pressure Faced by Lawyers in the North Caucasus, <https://www.amnesty.org/download/Documents/12000/eur460032013en.pdf>, pp. 32–34.

<sup>397</sup> Russian Federation: ICJ concerned at prosecution of lawyer Georgy Antonov, <http://www.icj.org/russian-federation-icj-concerned-at-prosecution-of-lawyer-georgy-antonov/>.

<sup>398</sup> Basic Principles on the Role of Lawyers, *op. cit.*, principle 22; Special Rapporteur on the independence of judges and lawyers, UN Doc. A/64/181, para. 110; ECtHR, *Zagaria v. Italy*, Application No. 58295/00, Judgment of 27 November 2007.

## VII. The reform of the legal profession

### 1. Introduction

The ICJ mission noted an understanding from all relevant actors that there is a need for reform of the legal profession in the Russian Federation. At no meeting—be it with lawyers or independent experts or government officials—did any one assume that the current state of the legal profession was satisfactory. Lawyers from different parts of the profession held differing views on the nature of the problems and the solutions that should be adopted, but all considered that reforms of some kind were necessary to bring substantial change to the quality of the profession.

Reforms to the legal profession have been discussed for many years. However, the “Justice” National Programme, within which wide-ranging reforms to the justice system are being developed, has provided a framework for development of new legislation. Under the Programme,<sup>399</sup> the legal profession is likely to undergo potentially significant changes<sup>400</sup>. The Programme obliges the Ministry of Justice of the Russian Federation to approve a “concept” or framework for regulation of legal services to ensure access to qualified legal advice, and submit to the Government of the Russian Federation a draft law on professional legal assistance, which would regulate the procedure for access to the profession and standardize the market for legal services.<sup>401</sup> The part of the programme concerning the reform of the legal profession aims (1) to create a unified market of legal services accessible to all; (2) to achieve the fullest possible protection of property and other lawful rights and interests; (3) to increase the level of protection of rights and lawful interests of citizens and organizations.<sup>402</sup> The programme among other things aims to improve legal assistance by increasing the number of lawyers twofold (from 0.05 to 0.1 per capita) by 2020.<sup>403</sup>

One of the main problems the reform aims to address is the fact that, as discussed in Chapter II, much of the legal profession in the Russian Federation is largely unregulated and remains outside of the legal framework applicable to lawyers. The legal profession, or rather those who provide legal services, may be divided into three groups: 1) lawyers who are registered as members of *advocatura*, 2) lawyers (so-called jurists) practicing outside of *advocatura*, including in law firms or as individuals, and 3) in-house lawyers who are employees of companies or organizations including NGOs. Though not every non-*advocatura*

<sup>399</sup> See Ruling of the Government of Russia of 15 April 2014 No. 312 “On approving the Justice National Program of the Russian Federation”.

<sup>400</sup> See Ministry of Justice, “The “Justice” State Programme is Approved”, <http://minjust.ru/ru/press/news/utverzhdjena-gosudarstvennaya-programma-yusticiya/>.

<sup>401</sup> Annex 3 to the “Justice” State Programme of the Russian Federation. Information on legal regulation in the sphere of emphasizes of the “Justice” State Programme of the Russian Federation; Sub-programme 1 “Ensuring the protection of the public interest, the rights of citizens and organizations”; 1. The Order of the Ministry of Justice of the Russian Federation on the approval of the Concept of regulating the market of professional legal assistance, providing access of citizens and legal persons to qualified legal assistance; Executive in charge—the Ministry of Justice of the Russian Federation, 2014. Federal Law on professional legal assistance in the Russian Federation, aimed at streamlining the procedure for admission to the legal profession and the standardization of the market of professional legal assistance submitted to the Government of the Russian Federation. Executive in charge—the Ministry of Justice of the Russian Federation, 2015, <http://minjust.ru/ru/node/104914>.

<sup>402</sup> Government Decree of 15 April 2014, No. 312 “On approval of the ‘Justice’ State Program of the Russian Federation Passport of the Sub-programme 1, “Ensuring the protection of the public interest, the rights of citizens and organizations”, “Justice” State Program of the Russian Federation.

<sup>403</sup> *Ibid.*

lawyer would necessarily have a law degree, nothing in Russian law or jurisprudence prevents them from claiming they provide legal services. Lawyers who are members of *advokatura*, as was mentioned earlier, are said to constitute perhaps only about ten or twenty per cent of the total number of those who provide legal services.

As discussed in Chapter II, the lack of regulation of large numbers of those providing legal services has negative consequences for the quality of such services, for standards of professional ethics, and for the protections afforded to fair trial and privacy rights by legal rights and privileges that normally accord to lawyers. For example, it means that there are almost no consequences for those lawyers who have been disbarred (with the exception of those who specialize in criminal cases). Lawyers may and do continue their practice after their disbarment. At least for lawyers who do not specialize in criminal defence, this may turn disbarment into a mainly symbolic act, and undermine the effectiveness of the Code of Ethics.

Although the reform of the profession is still in the early stages of discussion, it is likely that one of its main outcomes will be the unification of all those who provide legal services under one umbrella organization, most likely the Chamber of Lawyers. Legal services would then be provided exclusively by this larger group of legal professionals.

The ICJ visit coincided with the intensification of the discussion of the reform. A working group to develop legislative proposals had been established only a few weeks prior to the mission. The first meeting of the working group, which includes representatives of the Ministry of Justice, current and former Presidents the Federal Chamber of Lawyers, the Parliament, a number of other state bodies, academics and experts, took place on 16 April 2015.<sup>404</sup>

## 2. Unification of the bar and its monopoly over legal services

The main aim of the planned reform is generally understood to be the unification of all or most of those providing legal services, with compulsory membership of the Federal Bar Association required for all those providing legal advice, or legal representation in court. This system is not unusual internationally. In a number of jurisdictions, members of the bar association have a monopoly on the provision of legal advice and/or legal representation in court.<sup>405</sup> However, in other jurisdictions lawyers enjoy monopoly only over representation in courts, or there could be no monopoly at all.<sup>406</sup>

Supporters of a unified legal profession with a monopoly on the provision of legal services argue that its main outcome should be to ensure that the quality of legal services provided is improved and that those who provide legal advice and representation do so in accordance with the Code of Ethics. The mission noticed that many lawyers mentioned the idea of a monopoly on legal services or representation with a certain degree of embarrassment. While provision of legal services by lay people is not prohibited under international law, the

<sup>404</sup> The Russian Ministry of Justice held the first meeting of the interdepartmental working group on preparation of the concept of the regulation of the market of professional legal assistance, <http://minjust.ru/ru/press/news/v-minyuste-rossii-sostoyalos-pervoe-zasedanie-mezhvedomstvennoy-rabochey-gruppy-po/>.

<sup>405</sup> Eastern Partnership Enhancing Judicial Reform in the Eastern Partnership Countries Working Group "Professional Judicial Systems", The Profession of Lawyer Directorate, pp. 21–22.

<sup>406</sup> *Ibid.*

common practice across European States<sup>407</sup> and many other countries around the world<sup>408</sup> is that legal advice and representation may only be provided by persons who are qualified to do so and are bound by ethical standards in this regard. In the Russian Federation, the majority of those who provide legal assistance are not members of a Chamber of Lawyers. This is partly explained by historical reasons described earlier in this report.

Proponents of a monopoly on legal service provision by a new unified profession, point to the very low quality of services that has resulted from the current unregulated situation. However, it should be noted that there are also serious questions of quality and ethical standards within the current *advokatura*. Imposing a monopoly on the provision of legal services will not in itself, for example, address the problem of “pocket lawyers”, who practice within and despite the regulatory framework of the Chamber of Lawyers.

A related question is whether “in-house lawyers” (those who are employed as staff members to provide legal advice to companies and organizations) should be admitted to a unified legal profession. One of the main reasons for not admitting this category of lawyers to the profession has been their status as employees. Under Russian law, the profession of lawyer presupposes that a lawyer must only be bound by the ethics of the legal profession, not by a contract of employment.<sup>409</sup> It is therefore perceived as ethically problematic for a lawyer to be employed by another entity, such as, for example, an NGO. However, the risk of a further split in the profession, between in-house lawyers and members of *advokatura*, should be taken into account.

### 3. Conditions for transition

The conditions under which the transition to a unified profession would be carried out is another issue discussed by the expert community as well as the Working Group. Of particular concern is how lawyers currently practicing outside of *advokatura* (for example, in law firms) would qualify for membership of the Chamber of Lawyers, once such membership became mandatory in order to practice law. The two main options discussed are (a) application of general rules of qualification or (b) development of a special procedure. It should be noted that if the goal of the reform is to ensure that those who are unified under one organisation provide qualified legal services, there must be a set of criteria and a process that ensures that the candidates do meet these standards of quality. Since the number of those who would need to be qualified is significant it may be reasonable to allocate a specific period and possibly a special procedure of qualification through which the candidates would need to pass. Such a period should be as long as necessary to ensure that everyone who meets the criteria may have a chance to be qualified. It is also possible to ensure that during a specific period of time the qualification commissions of the regional chambers work more intensively so that more candidates are able to be qualified.

In any event, given the current problems of quality in all sectors of the profession it must be ensured that the professional level of new lawyers entering the

<sup>407</sup> *Ibid.*

<sup>408</sup> For example the USA. Admission to the Bar in the United States is the granting of permission by a particular court system to a lawyer to practice law in that system. In the canonical case, lawyers seeking admission must obtain a Juris Doctor degree from a law school approved by the jurisdiction, and then pass a bar exam administered by it. Typically, there is also a character and fitness evaluation, which includes a background check.

<sup>409</sup> Federal Law “On lawyers’ activities and *advokatura* in the Russian Federation”, *op. cit.*, article 2 (1).

profession is high and that the quality of legal advice provided by members of the Chamber of Lawyers is not only maintained but significantly improved as a result of the reform. This must be done through transitional procedures for lawyers currently practicing outside *advokatura*, and on a more permanent basis, through a separate procedure, for newly-qualifying lawyers. The ICJ believes that the reform does afford this opportunity.

In particular the rigour of the qualification during the transition is an issue discussed by lawyers and experts. As mentioned above, the possible solutions include a merger through a simplified qualification process or qualification through a regular procedure. One simplified procedure that has been suggested foresees that the person applying for membership of a Chamber should have at least five years of professional experience since obtaining his or her law degree and should pass a simplified examination which would cover only the Law on Advocates' Activity and the Code of Ethics.

The question arises not only due to the fact that those who are not members of the chambers are interested in a simplified procedure, which is understandable. The significant number of non-members of *advokatura* may be too burdensome for a regular procedure unless it is sufficiently extended in time. At the same time, lawyers and experts are concerned that a lack of a sufficiently rigorous qualification process will result in the new professional association being flooded with incompetent new members. While it may be easier to establish with a necessary level of certainty the professional experience of those working with law firms, it may be more difficult if not impossible to make such an assessment of individuals who provide legal services on an independent basis, who may have widely varying levels of qualification. Even if such an assessment were possible, the question of a qualification examination based solely on knowledge of the Law on *Advokatura* and Advocate's Activity and the Code of Ethics remains outstanding.

It is unclear how knowledge of only one piece of legislation may help evaluate legal skills and knowledge of lawyers. The question is not a trivial one, bearing in mind the allegations that the majority of those who provide legal advice are not members of a chamber. The number of members may grow significantly and if the criteria for qualification are knowing only one law as well as the Code of Ethics, the majority of the lawyers will have only passed a very low qualification threshold. If the intention of those who design the reform is to have a stronger profession, qualification standards in the transitional process need to be high. Moreover, it would not be sufficient to say that the qualification examination may extend to another one or two pieces of legislation. The qualification system applied during the transition should ensure a sufficiently high level of legal knowledge that these professionals in whose competence the destiny of many individuals is entrusted, can fulfil their duty and justify the trust of those whose rights, freedoms and often life depends on them.

#### **4. Enhancing and maintaining the quality of legal advice and representation**

Lawyers expressed concerns to the ICJ mission that the quality of the legal service may decrease as a result of the merger of the profession, as it happened as a result of the merger of 2002 as described above. Not everyone agrees with this assertion. The peculiarity of the situation is that some ele-



ments of the legal profession that operate outside of *advokatura* include some of the strongest legal professionals in the country. The ICJ heard that law firms tend to hire graduates of some of the top law schools in Russia. These lawyers are often not members of any of the Chambers of Lawyers and opt not to join them. Were membership of a Chamber of Advocates to become mandatory for all those practicing law under a unified system, such lawyers could be expected to uphold high professional standards, and perhaps even to raise the standards of the profession.

The other parts of the profession are not homogeneous either. There are those who provide legal services on a high professional level, including human rights defenders, who opt not to be members of a bar association. The ICJ has met many of these professionals, and it is clear that their inclusion in a unified profession would be able to contribute to high standards of quality, and strengthen the independence of the unified legal profession. There may also be others who provide legal services on a professional basis who are highly qualified but for one or another reason decided not to join a Chamber.

However, there is a large group of lawyers providing legal advice who have been disbarred, or disqualified from professions such as law enforcement officials, or as judges. There are others who are simply not qualified to provide legal advice but continue to do so, in the absence of any legal prohibition. It is for this reason that a rigorous examination procedure should be applied in order to effectively guarantee that such individuals are excluded. The criteria developed must ensure that those who have previously been disciplined for violation of the code of ethics, including those who previously worked not only as lawyers but as State officials or law enforcement agents, are not able to use the unification process as an opportunity to bypass the disqualification and resume legal practice.

## 5. Profit-making by lawyers

Despite a general understanding of the need for some measures of legislative reform, the plans have already given rise to criticism on the part of some lawyers,<sup>410</sup> who are concerned that the independence of the legal profession may be at risk if law firms become part of the legal profession<sup>411</sup>. They believe that *advokatura* is a special institution called to protect rights and freedoms.<sup>412</sup> In the opinion of some reputable lawyers, merger of non-profit *advokatura* (chambers of lawyers) as a self-governing organization with commercial law firms is unacceptable.<sup>413</sup> Some of the highest officials of the Federal Chamber of Lawyers and chambers of lawyers have however welcomed the reform of the current Law on *Advokatura*.

During its mission to the Russian Federation the ICJ was struck by the importance in the debate on the reform of the profession, of the ban on "profit-making" by lawyers. *Advokatura* is by law "a civil society institute" which by definition under Russian law, excludes the aim of making a profit.<sup>414</sup> The law

<sup>410</sup> Report of B. F. Abushakhmin for the Presidential Council on Human Rights and Development of the Civil Society.

<sup>411</sup> Federal Law "On lawyer's activities and *advokatura* in the Russian Federation", *op. cit.*, article 3.

<sup>412</sup> Report of B.F. Abushakhmin for the Human Rights Council, *op. cit.*

<sup>413</sup> See Human Rights Council will defend rights of lawyers and facilitate President's right to pardon, 5 December 2014, <http://old.president-sovet.ru/events/7631/>.

<sup>414</sup> Federal Law "On lawyers' activities and *advokatura* in the Russian Federation", *op. cit.*, article 3.1.

also specifies that chambers of lawyers<sup>415</sup> and various forms of organization of *advokatura* such as a collegium,<sup>416</sup> bureau,<sup>417</sup> consultation,<sup>418</sup> are non-commercial organizations and a cabinet of lawyers is not an organization at all<sup>419</sup>. It seems to be a matter of principle for lawyers including prominent academics that *advokatura* preserves its tradition of not pursuing commercial purposes. This principle does not however place any particular constraint on lawyers in receiving payment for their work, or on the level of payments they may receive. By contrast, law firms, especially those who work in arbitration and in commercial disputes, are not shy to admit that their goal is to provide services in exchange for the financial benefits they gain. Those in favour of the social role of advocates argue that if profit is perceived to be the main objective, lawyers may refuse non-profitable cases or may provide unnecessary services to the rich and try to win profitable cases by all means.

It is commendable that there is strong support amongst lawyers in Russia for the principle of a legal profession that places social responsibility before profit. This is consistent with international standards on the role of lawyers, which stress the role and responsibilities of lawyers in protecting human rights and ensuring access to justice for all.

According to the UN Basic Principles on the Role of Lawyers, it is a vital role of professional associations of lawyers to provide "legal services to all in need of them".<sup>420</sup> It should be taken into account however, that while serving an important social role, lawyers must be able to benefit financially from the services they provide, without which the profession would not be able to operate. Moreover, whether profit is one of the goals of the profession or not, those who provide legal services gain material benefits in exchange for time and resources spent. Whatever comes first as a matter of principle, lawyers do need to earn a decent income. This is not to say that it is purely a semantic issue, but to highlight the need for reconciling the social role of the legal profession with the realities of lawyers' practice, which may serve as drivers for further development. In fact, it may be the case that more could be demanded from a lawyer who pursues commercial benefit and is thereby motivated to excel in his or her work, to avoid a situation cited by one lawyer in Russia: "they pretend they pay—we pretend we work". It may also be the case that unification of the profession could provide an opportunity to imbue the wider legal profession with the ideal of social responsibility which is one of the greatest strengths of the tradition of *advokatura*.

## 6. Independence of the profession

As described in previous chapters, the current Chamber of Lawyers operates under a legal framework that provides strong guarantees of independence, in accordance with international standards on the independence of the legal profession. However, one of the concerns raised by lawyers in discussions with the ICJ mission was the ability of the profession to ensure that lawyers are able to act independently to defend their clients, including in cases where law enforcement bodies make attempts to put undue pressure on them by attempting to

<sup>415</sup> *Ibid.*, article 29.

<sup>416</sup> *Ibid.*, article 22.2.

<sup>417</sup> *Ibid.*, article 23.2.

<sup>418</sup> *Ibid.*, article 24.2.

<sup>419</sup> *Ibid.*, article 21.3.

<sup>420</sup> Basic Principles on the Role of lawyers, *op. cit.*, Preamble.

initiate disciplinary proceedings (See further Chapter V). Although chambers of lawyers have been successful in defending the independence of lawyers in key cases of this kind, there remain significant concerns about threats to the independence of lawyers in practice.

One of the concerns that the ICJ mission heard about the reform process, is that amendment of the current legislative framework for the legal profession may lead to a dilution of the independence of its institutions of governance. Although the ICJ's meetings with the Ministry of Justice and the Federal Chamber of Lawyers did not suggest that any measures to erode the principle of self-governance were under consideration, it will be crucial that the reform measures are carefully scrutinized to ensure that they do not, whether by accident or design, restrict the independence of the profession.

The influx of a significant number of new members to the Chamber of Lawyers may have an impact on the culture of the bodies of self-governance of the profession. Over time, a certain culture has emerged within these bodies that has meant they are relatively successful in ensuring the independence of lawyers. As the balance of members of the profession shifts, it is likely that in some cases new candidates for offices in the Chamber of Lawyers, with backgrounds outside of *advokatura*, will be elected. Whether the profession will be better protected or worse as a result of this, depends to a large extent on how the selection of new candidates will be conducted. Rigorous testing, a well thought-through procedure which is in practice free of corrupt influences across the chambers in Russia, and transparent process may help in achieving the result that will strengthen the profession. In any event, the reform presents a good opportunity to infuse fresh blood in the governance of the profession, which may help to strengthen it and resolve some of its long-standing problems—such as corruption and “pocket lawyers”—which it has so far failed to address.

## 7. Rights of lawyers

The ICJ mission found it highly problematic that lawyers working outside of *advokatura*, including all lawyers working in law firms who are not members of *advokatura*, do not enjoy any of the guarantees which are provided to lawyers by law, including lawyer-client privilege, guarantees against questioning in court etc. For example, law firms which may hold information vital for the individuals or legal entities they represent, do not enjoy legal professional privilege, so that the confidentiality of the information is not in any way protected by law. These lawyers are completely vulnerable before any acts of State agents who may search their premises, demand or withdraw information, and may have access to electronic information especially bearing in mind the recent legislative changes that require electronic information to be kept physically on the servers based on the territory of the Russian Federation.<sup>421</sup> They may also compel the lawyers to testify before court or during investigation. Nothing in law would prevent such action notwithstanding the role that these lawyers play as legal representatives of their client, including representation in the courts. Such lack of protection of an important part of the profession is of serious concern and the reform presents a genuine opportunity to address

<sup>421</sup> Ministry of Telecom and Mass Communications of the Russian Federation, Processing and storage of data in the Russian Federation, changes of 1 September 2015, <http://www.minsvyaz.ru/en/personaldata/>.

the problem and afford the necessary protection to such lawyers as members of the chambers of lawyers.

## 8. Length of the transition period

Bearing in mind the above issues it is important that the transition period allows for a sufficient time for all actors to go through the process of qualification. The capacity of the qualification commissions should also be taken into account. Since the procedure of qualification should ensure sufficient complexity of the examination rather than an automatic entrance into the profession, sufficient time will need to be allowed for preparation as well as for organizing the additional work of the commissions who will assess the candidates for qualification. While it would be speculative to propose any precise time limit for the transition period, it should be sufficient to ensure a smooth transition which takes account of the fact that non-members of *advokatura* make up the vast majority of the profession, and should ensure that the process is conducted under as little time pressure as possible.

## 9. Conclusions

The Russian legal profession is currently at a junction and much will depend on how the reform will be designed and implemented. However, the merger of the profession will only be capable of solving some of its problems. *Advokatura* also has had its own internal difficulties which it has not been able to resolve so far. On issues that are key to the role and functioning of *advokatura*, such as corruption, "pocket lawyers" and the protection from harassment and attack of independent lawyers, there is also an urgent need for reform. These problems should not be confused with the issue of unification, which should not be seen as a magical solution to every problem.

Nevertheless, it is crucial that the legal profession should begin to operate under unified ethical standards and qualification criteria, and that the legal rights of lawyers should be extended to all those who provide legal services. As was mentioned before, the Code of Ethics of Lawyers provides strong guarantees of independence to lawyers and if along with the reform this Code will be consistently enforced this should have a generally positive effect on the profession. It may also lead to more protection for a wider range of lawyers. The unusual and obviously flawed situation of vulnerability of those who provide legal services outside of *advokatura* may finally be resolved.

Questions need to be answered as to what criteria should be developed for this procedure, who should be eligible to join the new corporation, how long the process should last. Such elements may eventually determine the success or failure of the reform. After all, the reform of the profession of 2002 had similar intentions to the current reform, but did not ultimately result in a unified profession.

## VIII. Conclusions and Recommendations

The legal profession in Russia presents a complex picture. It includes obvious achievements and strengths, but remains severely constrained and flawed in its ability to uphold the rule of law and human rights within the justice system. The history of atomization of the profession, and the regional differences within the vast and diverse Russian Federation, add to the complexity of the picture and the difficulty in upholding standards and securing reforms. The wider problems in the justice system, and its routine failure to protect human rights and in particular the right to a fair trial, including the principle of equality of arms, pose grave challenges to lawyers in fulfilling their professional duties.

Lawyers that belong to *advokatura*, and are therefore members of chambers of lawyers, are well organized, and chambers of lawyers have managed to establish themselves as independent institutions with appropriate powers. This represents a significant safeguard for the independent operation of the profession. The Russian code of professional ethics for lawyers is impressive: it is comprehensive in nature and enshrines high standards and principles, and has potential to become an effective tool in reform of the profession. It is also significant that there is a deep understanding among many lawyers of the ethical principles that govern the legal profession. The importance of the principle of independence of lawyers was widely understood and acknowledged by lawyers and by officials with whom the ICJ held discussions in Moscow. This principle will need to inform measures taken to reform the profession, to ensure that the independence of lawyers remains a central principle of any new unified profession.

In spite of these strengths, there are long-standing problems within the legal profession, connected with the weaknesses of the justice system as a whole, which require urgent attention. The lack of democratic participation by members in the governance of some of the chambers of lawyers is a matter of concern, in particular where chambers of lawyers are run through schemes contrary to the intentions of lawmakers and the spirit of the law. Such practices are detrimental to the quality of the profession, undermine the understanding of fellow-lawyers that they operate in a fair professional environment, and foster tolerance towards corrupt practices.

There is much room for improvement of the qualification criteria for new members of the profession. The great number of lawyers who are annually dismissed and the complaints about unethical conduct of other lawyers point to a need to reconsider the procedure for qualification, which needs to ensure a very high quality of new professionals. The entry point to the profession is where, through elaborating and enforcing high standards across the country, the profession can be rapidly strengthened in a relatively short period of time. Reliance solely on the disciplinary system, to later remedy the flaws of qualification, may be detrimental for the human rights of those whose interests lawyers represent, and will damage the image of the profession.

The disciplinary system, which is well prescribed by law and is generally functional, often fails to address the problem of unethical behaviour of “pocket lawyers”. The widely acknowledged existence of this large group of lawyers who regularly fail to act in accordance with the principles of the profession cannot be considered as to any degree acceptable or tolerable. Given their role in

governance of the profession in accordance with ethical standards, Chambers of Lawyers have a crucial role and responsibility to take measures to eradicate the phenomenon of “pocket lawyers”. Equally, the Federal Chamber of Lawyers has a role in developing and coordinating targeted measures to effectively address the problem of “pocket lawyers” as a most serious problem undermining the independence of the profession.

In criminal procedure, despite a declared and commonly referred to principle of equality of arms, defence lawyers’ functions under law remain limited in both the investigatory and trial phases, while in practice their powers under law are too often obstructed. Despite attempts to improve certain aspects of equality of arms by the Constitutional Court, problems regularly occur: for example, lawyers are prevented from seeing clients without authorisation of the investigation or the court, in violation of national law and of international law and standards on the right to liberty. Other basic guarantees, which are established under international and national law, such as confidentiality of lawyer-client communication and access of defence lawyers to files often do not exist in practice. Significant changes to law and practice are needed in this regard, together with a shift in understanding of the role of the defence.

In court, these flaws of the pre-trial stage not only are perpetuated but form the basis for judicial decisions. On several occasions during its previous reports the ICJ has referred to the extremely high rate of conviction and lack of tolerance of acquittals in Russian legal culture. In a system which perceives acquittals as an abnormality or a failure of the system, the essence of the work of defence lawyers diminishes, with serious consequences for the right to an effective defence, and for the presumption of innocence. The need for a shift in understanding of acquittals as an integral part of the court proceedings should be addressed in the justice system reform. This will automatically lead to a different understanding of the role of defence lawyers in the criminal justice process.

International standards requiring that lawyers must be able to carry out their functions without fear of reprisals, harassment or any other intimidation are not adequately complied with in all parts of the Russian Federation. Like judges and prosecutors, lawyers should be seen as a pillar of the justice system. For the justice system to be capable of protecting human rights, including the right to a fair trial, the authorities, as well as the governing bodies of the profession, must do all within their power to ensure lawyers’ security.

It is a matter of concern that the majority of those providing legal advice and representation in the Russian Federation operate outside any form of regulation, are not bound by professional ethical standards and do not enjoy the rights and privileges normally accorded to lawyers, and which are stipulated in international standards on the role of lawyers. Many lawyers working outside of *advokatura* do very valuable work, but the lack of regulation of a large part of the profession also carries serious risks for violations of human rights of their clients and for their own professional integrity.

These and other issues should be addressed by the current legislative reform which aims to unite the profession. Steps towards unification of the profession are welcome in principle; however the reform will only be of value if it strengthens rather than weakens the profession and its institutional indepen-

dence; upholds the ideals and ethical principles that have informed the tradition of *advokatura*; and improves the quality of services that lawyers provide and their compliance with ethical standards. Unification would bring together several groups of lawyers with their own strengths and skills, a process that could enrich the profession. However, it will also unify groups of lawyers each with its own problems of corruption and poor quality services. It must be recalled that highly corrupt “pocket lawyers” already operate within the profession that is governed by the Code of Ethics, with a qualification process and disciplinary system. Bringing a larger group of lawyers within this system will therefore not in itself solve problems of corruption or lack of qualification—further practical action will also be necessary. It is therefore important to distinguish which issues may be addressed through unification and which require separate attention. The ICJ in this regard welcomes the recommendations<sup>422</sup> developed following the Special Session of the Council of the President of the Russian Federation on Human Rights and Civil Society as well as broad discussions and participation of various stakeholders that these recommendations invoked<sup>423</sup>.

The main victims of the deficiencies in the justice system and weaknesses in the legal profession are individuals who rely on legal representation for access to justice, or for a fair trial. The purpose of reforms to the organisation of the legal profession must therefore be to ensure that lawyers, and the system in which they operate, are effective in protecting human rights.

Bearing in mind these observations, the ICJ makes the following recommendations.

### **Role of the Chamber of Lawyers**

- The regional chambers of lawyers should strictly follow the prescribed procedure in order to ensure rotation of members of governing bodies.
- Chambers of lawyers and other governing institutions of the profession should take measures to ensure the meaningful participation of a wider group of lawyers in self-governance of the profession.
- Chambers of lawyers should be more proactive in discharging their duty to protect lawyers from harassment of any kind; they should encourage lawyers to raise concerns with them, should carry out their own inquiries into the problem and should ensure that wherever lawyers raise concerns, they are followed through and necessary action is taken to protect the lawyer concerned.
- Rules should be developed to ensure that membership fees of chambers of lawyers, including entrance fees, are reasonable and are based on a formula which reflects the economic reality of each of the regions. In any event, fees should not unduly impede equal access to the profession and should not be abusive.
- Chambers of lawyers should ensure transparency regarding handling of finances, which requires that auditing bodies are strong and genuinely independent and thus are able to serve as an effective check against any abusive or corrupt practices.

<sup>422</sup> The recommendations following the special session “On the role of lawyers in human rights activities”, <http://president-sovet.ru/presscenter/news/read/2643/>.

<sup>423</sup> Comments to the Recommendations following the Special Session “On the Role of Advokatura in Human Rights Activity”, <http://president-sovet.ru/documents/read/386/#doc-1>.

- The chambers of lawyers including the Federal Chamber should use all the powers afforded to them by law for regulation of the profession and enforcing ethical standards set out in the Code of Ethics.
- Rules and regulations should be standardized to provide guidance to ensure that the procedures of chambers of lawyers and their constituent bodies operate in a transparent way, including as regards examinations and disciplinary proceedings.

### **Entry to the profession**

- Qualification requirements which are sufficiently comprehensive and complex should be developed to guarantee a high quality of legal competence of new lawyers, which should include a recognized university law degree.
- A uniform and sufficiently detailed system of evaluation of candidates should be developed to counter bias or arbitrary decisions when assessing candidates for entry to the legal profession.
- A more a comprehensive system for preparation and testing of candidates should be developed in order to ensure consistent and high standards and their enforcement throughout the country. Preparatory materials should provide clear guidance on the necessary aspects of the law which must be mastered to succeed in the exams.
- It must be ensured in practice that the high standard of evaluation of legal knowledge is not bypassed through any dubious practices or corrupt decisions. Such practices must not be tolerated but must be addressed on a systematic level by the Federal Chamber and regional chambers.
- A well-developed system of managing and updating examination data should be developed to ensure that no information is shared or made known in an undue manner or for corrupt purposes.
- Standards, rules and procedures should be developed which prescribe in sufficient detail the conduct of examination bodies' members and procedure for conduct of the examination.

### **Guarantees for lawyers**

- Equality of arms must be guaranteed at all stages of criminal proceedings, which demands at a minimum that the procedures prescribed by law are strictly adhered to by law enforcement bodies and that defence lawyers are given a genuine opportunity at all stages of the proceedings to operate on an equal basis with the investigation and the prosecution.
- A system should be introduced to effectively guarantee in practice that lawyers are able to meet and communicate with their clients without any impediments, restrictions and without authorisation by an investigator or other prosecuting authorities who have an interest in the case. Such meetings should be of sufficient duration to allow the client and the lawyer to discuss all the necessary issues related to the defence.
- A system should be in place that allows lawyers to access their clients expeditiously. Delays and queues for lawyers outside places of detention or any other practical obstacles to access to a lawyer should be protected against. Courts should not tolerate practices where access is obstructed



including on grounds of inaccessibility of the investigator, or other obstacles to the rights of access to a lawyer, guaranteed under the law.

- In all cases, lawyers should be able to consult their clients privately. Facilities in places of detention which ensure genuine confidentiality of such communication must be provided, including special rooms and consultation outside of the presence and hearing of law enforcement personnel. In any event, in cases where information is suspected to have been obtained through unlawful means, the courts should inquire into the matter and decide on the admissibility of such evidence.
- Killings and physical attacks against lawyers in connection with their professional functions constitute attacks on justice and should be considered so by law and in practice; such violence must not be tolerated by the authorities and should be treated as amongst the most serious cases of interference with the justice process, equal to attacks on other actors of the justice system such as judges or prosecutors.
- When such attacks take place, they must be promptly and thoroughly investigated by an independent authority and those responsible should be brought to justice through a fair trial.
- Lawyers must be protected against all forms of threats and harassment; this includes interrogation of lawyers as witnesses. The prohibition on this practice must be strictly followed in practice and breaches of the prohibition should be remedied by the courts which should recognize it as an attempt to exert undue pressure on lawyers.

### **Duties of lawyers and the disciplinary system**

- The disciplinary system for lawyers must be applied rigorously and consistently against lawyers who act in violation of ethical standards of the profession.
- Acts of corruption, including those of so-called “pocket lawyers” should be seen as an egregious form of violation of the Code of Ethics and therefore disciplinary action should be initiated and disciplinary sanctions should be applied consistently and rigorously where lawyers fail to act in the interests of their clients.
- Measures for the impartial allocation of lawyers for state-funded legal defence, such as those which have already been tested in some regions, should be developed and introduced to prevent the problem of “pocket lawyers”. Procedures which are conducive to the existence of “pocket lawyers”, including the appointment of state defence lawyers by investigators, and investigators calculating the honorarium for defence lawyers work, should be reviewed.
- As a supplement to the Code of Ethics, standards for effective provision of legal aid should be developed which should be used as guidance in qualifying acts of lawyers as unethical. Such guidelines should help in addressing the difficulty of proving unethical behaviour of a lawyer in cases where a lawyer is negligent in his or her representation of a client or is present at a court hearing on behalf of a client as a formality only.
- Guarantees against abuse of the disciplinary system against lawyers who act in accordance with professional ethics should be rigorously maintained.

## Reform of the legal profession

- Unification of the legal profession should be seen as an opportunity to strengthen the achievements of the Russian legal profession and address shortcomings in order to build a strong and modern legal profession, which is able to address challenges and act in accordance with international standards.
- This reform should help strengthen the status of lawyers in order to establish an understanding of the profession as an independent pillar of the justice system; it should result in a better enforcement of professional ethics and should lead to better protection for lawyers through measures adopted by the consolidated profession.
- There should be a gradual transition which can allow for a smooth process of unification but that ensures that the new members strengthen rather than weaken the independence of the profession. It should therefore be understood that not everyone may automatically become a member of the new chamber of lawyers but that a qualification process should be put in place.
- Such a qualification should ensure a high level of legal knowledge and professional ethics. To facilitate the process a differential approach to qualification may be adopted. For example it may be appropriate to develop different qualification standards for different categories of professionals that join *advokatura*, taking account of specialisation or the nature or length of professional experience.
- Qualification requirements that aim to create a mere “screen” to disguise low standards should not be applied in transitional arrangements under the reform, as such solutions may be detrimental for the profession.
- The independence of chambers of lawyers must be preserved and lawyers’ confidence in the governing bodies of *advokatura* should not be undermined but should be reinforced as a result of the reform.
- In a unified profession, lawyers who are members of the Chamber of Lawyers should be able to represent in court the entities in which they work as staff members.
- Irrespective of whether the profession is unified under a single Federal Chamber and regional chambers, reforms should ensure that all those providing legal services should be represented by some form of bar association, should be subject to qualification procedures and standards, to the Code of Ethics and to a disciplinary system, and should enjoy the rights and privileges of lawyers.
- It should be a guiding principle of any reform of the profession that it should strengthen access to justice. Measures should be taken to guard against the monopoly on legal representation of *advokatura* diminishing access to court due to a reduction in the numbers of persons providing legal assistance.

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