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**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE  
UN HUMAN RIGHTS COMMITTEE IN VIEW OF THE COMMITTEE'S  
EXAMINATION OF UKRAINE'S EIGHT PERIODIC REPORT  
UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS**

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**The International Commission of Jurists**

*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

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## **I. Introduction**

1. During its 130th session from 12 October to 6 November 2020, the Human Rights Committee (the Committee) will examine Ukraine's implementation of, and compliance with, the provisions of the International Covenant on Civil and Political Rights (ICCPR or Covenant), including in light of the State Party's eighth periodic report under article 40 of the Covenant.
2. In the context of this review, the International Commission of Jurists (ICJ) wishes to bring to the Committee's attention some issues of concern pertaining to Ukraine's compliance with and implementation of the ICCPR. This submission highlights a number of concerns relating to the security and independence of lawyers in Ukraine, and their consequences for the protection of certain Covenant rights. In particular, this submission addresses:
  - (a) the institutional independence of the legal profession;
  - (b) security of lawyers and their right to life;
  - (c) restrictions on access to clients and the rights of the defence; and
  - (d) security of lawyers and access to justice in uncontrolled territories in Ukraine.
3. These concerns highlight Ukraine's lack of compliance with its obligations under the Covenant, including in respect of the right to life under article 6 and the right to a fair trial under article 14, in particular, as well as under other Covenant rights, such as Ukraine's obligations under articles 2, 7, 9, 10, and 17 of the ICCPR.

## **II. Security of lawyers and right to life (articles 2, 6, 7, 9, 10, 14)**

4. The Constitution of Ukraine guarantees the independence of legal practice in Ukraine.<sup>1</sup> Article 23 of the Law "On the Bar and Legal Practice" provides certain guarantees against interference with or impediment of lawyers' work, in particular "[. . .] life, health, honour and dignity of an attorney and of his/her family members and their property are under protection of the state, and any encroachments thereupon shall entail liability established by law [. . .]".<sup>2</sup> With respect to this, for example, lawyers are entitled to have measures taken to ensure their safety and protection, if need be, while they are participating in criminal proceedings.<sup>3</sup> Moreover, where investigative actions against lawyers are undertaken, where lawyers are detained pending trial or other measures of restraint are applied, additional safeguards apply, such the need for a judicial decision in this regard adopted upon the motion of the Prosecutor General, Deputy Prosecutor General or the prosecutors of the regional level,<sup>4</sup> or the notification to the Bar Association of the detention of a lawyer.<sup>5</sup>

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<sup>1</sup> The Constitution of Ukraine, article 131-2, in accordance with the amendments dated 2 June 2016. Text of the Constitution of Ukraine on the Constitutional Court's official website: <http://www.ccu.gov.ua/en/kategoriya/legal-documents>.

<sup>2</sup> Law "On Bar and Legal Practice", No. 5076-VI from 5 July 2012, article 23-1-6.

<sup>3</sup> *Ibid.*, article 23-1-3.

<sup>4</sup> *Ibid.*, article 23-1-12.

<sup>5</sup> In accordance with article 481-1-1) of the Criminal Procedure Code of Ukraine and article 23-1-13) of the Law "On Bar and Legal Practice", the note of suspicion might only be issued to a lawyer by the Prosecutor General, his or her deputy, or the Prosecutor of the Autonomous Republic of Crimea, oblasts, Cities of Kyiv and Sevastopol.

5. Yet, in practice, lawyers constitute a frequent target of attacks,<sup>6</sup> endangering their security (article 9 ICCPR ), including through attempts on their life (article 6 ICCPR). Violent attacks on lawyers have led in many instances to their being killed, even through premeditated murder. Between 2013–2019, 12 cases involving killings or attempts to kill lawyers in Ukraine were reported.<sup>7</sup> In eight cases lawyers died as a result of such attacks.<sup>8</sup> At the end of 2019, the Ukrainian National Bar Association (UNBA) reported that over 2,500 infringements of the rights of lawyers had been committed in Ukraine over the previous five years.<sup>9</sup>
6. Physical violence against lawyers has been committed, among others, by law enforcement officers: lawyers may be physically assaulted in local police departments,<sup>10</sup> their own offices, or even before witnesses and clients in order to intimidate them, for example, to force them to “quit” the case; to prevent the lawyer concerned from seeing a client, in violation of the right to a defence; or to unlawfully obtain documents that are covered by legal professional privilege.<sup>11</sup>
7. Violence against lawyers is sometimes perpetrated by organized, nationalist, political groups. Such groups may be involved in attacks, including on judges, lawyers, activists or on others.<sup>12</sup> The UN Office of the High Commission for Human Rights (OHCHR) in its quarterly reports<sup>13</sup> has documented “cases of interference<sup>13</sup> by members of extreme right-wing groups in criminal proceedings of conflict-related and high profile criminal cases through the intimidation of judges, defendants and their lawyers.”<sup>14</sup>

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<sup>6</sup> E.g. International Society for Human Rights Report, Right to a Fair Trial in Ukraine, January 2019, p. 10, available at: [https://humanrights-online.org/wp-content/uploads/2019/03/report\\_english\\_version.pdf](https://humanrights-online.org/wp-content/uploads/2019/03/report_english_version.pdf) (Accessed 07 May 2020).

<sup>7</sup> UNBA Report, Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013–2018), op. cit., p. 5.

<sup>8</sup> Ibid.

<sup>9</sup> UNBA, Over 2,500 crimes against lawyers committed in Ukraine over the past 5 years, 20 December 2019, available at: <https://unba.org.ua/news/5032-za-5-rokiv-v-ukraini-stalosya-bil-she-2500-zlochiviv-proti-advokativ.html> (Accessed 07 May 2020).

<sup>10</sup> UNBA Report, Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013-2018), approved by Decision of the Bar Council of Ukraine No. 2 of 26 February 2016, p. 21, available at: [https://en.unba.org.ua/assets/uploads/news/zvity/UNBA\\_Zahyst\\_Adv\\_2018\\_ENG\\_WEB\(1\).pdf](https://en.unba.org.ua/assets/uploads/news/zvity/UNBA_Zahyst_Adv_2018_ENG_WEB(1).pdf).

<sup>11</sup> Ibid.

<sup>12</sup> See OHCHR, Report on the human rights situation in Ukraine, 16 May 2018 to 15 August 2018, para. 9: “OHCHR is further concerned by attacks on, and intimidation of, defence lawyers by members of extreme right-wing groups, and continuing interference with the independence of judges”; OHCHR, Report on the human rights situation in Ukraine, 16 August 2018 to 15 November 2018, para. 11: “OHCHR also continued documenting cases of increasingly violent attacks against journalists and media professionals, civil society activists, affiliates of political parties and defence lawyers in conflict-related cases perpetrated by members of extreme right-wing groups, narrowing democratic and civic space in Ukraine.”

<sup>13</sup> OHCHR, Report on the human rights situation in Ukraine, 16 November 2018 to 15 February 2019, para. 68, available at: <https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf> (Accessed 07 May 2020).

<sup>14</sup> OHCHR, Report on the human rights situation in Ukraine, 16 November 2018 to 15 February 2019, para. 68, available at: <https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf> (Accessed 21 February 2020).

8. The most common problem for lawyers who have been subjected to an attack (or for their relatives) is the immediate reluctance of law enforcement officials to commence an investigation by recording the attack as a case in the Unified Register of Pre-trial Investigations of Ukraine, which indicates the initiation of criminal proceedings.<sup>15</sup> Even when criminal proceedings are initiated, often no investigation is carried out, and no attempt is made to search for and apprehend the suspected perpetrators, even in instances where video recordings confirming their identities are available to the investigative authorities.
9. During its mission to Ukraine in 2019, the ICJ heard multiple sources express concern about impunity for the suspected perpetrators of attacks against lawyers,<sup>16</sup> as well as allegations of involvement of members of extreme right-wing groups accused of attacking lawyers with certain law enforcement authorities, leading to even flagrant crimes not being investigated.<sup>17</sup>
10. Therefore, a general perception within the legal profession exists that attacks against lawyers enjoy a climate of impunity in Ukraine.<sup>18</sup> This contributes to an overall chilling effect on the legal profession, and inhibits criminal defence lawyers' ability to work independently without fear of reprisals for exercising their profession in line with national legislation and international law.<sup>19</sup>
11. The killings of and other violent attacks on lawyers, and the impunity such attacks enjoy, give rise to concern in regard to Ukraine's compliance with its obligations to respect and protect the right to life under article 6 ICCPR and the right to security of person under article 9 ICCPR, including Ukraine's obligation to take measures to protect individuals within its jurisdiction against acts committed by private persons or entities that impair the enjoyment of their rights under the ICCPR.<sup>20</sup> Furthermore, attacks against lawyers give rise to concern about Ukraine's compliance with its obligations under article 2.1 ICCPR to ensure access to justice and an effective remedy. In particular, they raise concern about the State's compliance with its obligation under article 6 and article 2 ICCPR to ensure that a prompt and thorough investigation into attacks against lawyers be undertaken by an independent and impartial authority. Violence, harassment and

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<sup>15</sup> The Unified Register of Pre-trial Investigations (ERDR) is an electronic database created by an automated system, according to which the collection, storage, protection, search, summary of data on criminal offenses and the course of pre-trial investigation in criminal proceedings is carried out. The entry of a case into ERDR signifies the initiation of criminal proceedings.

<sup>16</sup> Between the Rock and the Anvil: Lawyers under Attack in Ukraine, ICJ Mission Report April 2020, <https://www.icj.org/wp-content/uploads/2020/05/Ukraine-Between-the-rock-and-the-anvil-Publications-Reports-Mission-report-2020-ENG.pdf>, page 27: "Extreme right-wing political parties, organizations and groupings have increased their presence in the Ukrainian social and political landscape often in the name of "patriotism". [...] These groups often carry out violent attacks while enjoying a high level of impunity, which, as the mission heard, could be the result of the alleged endorsement or direct guidance of such groups by high level politicians. [...] While there are several widely known violent groups, the mission most frequently heard references to the group S14".

<sup>17</sup> Ibid., p 32.

<sup>18</sup> Ibid., p 31.

<sup>19</sup> Ibid.

<sup>20</sup> Article 2 para. 1 ICCPR; UN Human Rights Committee, General Comment n° 31, UN Doc CCPR/C/21/Rev. 1/Add. 13, 26 May 2004, para. 8.

threats experienced by lawyers in Ukraine are also contrary to the UN Basic Principles on the Role of Lawyers, which provide that States must ensure that they are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference.<sup>21</sup> As the UN Basic Principles on the Role of Lawyers stipulate “[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.”<sup>22</sup>

12. In addition, attacks on criminal defence lawyers undermine the rights of their clients -- particularly those in detention -- including their rights to a fair trial (article 14); to liberty and security of person (article 9); to freedom from torture or other ill-treatment (articles 7); to humane treatment (article 10); and to an effective remedy (article 2.3) as attacks on their lawyers may, in turn, hinder the provision of effective legal advice and representation, and ultimately, their clients’ access to justice and effective remedies against human rights violations.

**The Human Rights Committee should recommend that the Government of Ukraine, in consultation with the Bar Association and with individual lawyers:**

- **Urgently address the problem of security of lawyers in and outside of courts, of threats, harassment and attacks against lawyers as a matter of priority at policy and, where necessary, legislative level. Urgent security measures should be taken by law enforcement agencies to ensure that lawyers work in an atmosphere free from intimidation, harassment and improper interference.**
- **Investigate promptly and effectively all killings of and attacks on lawyers with the aim of identifying those responsible and bringing them to justice in proceedings that fully respect international fair trial standards.**
- **Involve the UNBA in elaboration and introduction of measures to protect the lives and physical integrity of lawyers, including steps to prevent killings or threats to kill lawyers in relation to the exercise of their professional duties, and implement a system of protection for lawyers who are at risk of violent attacks.**

**III. Restrictions on criminal defence lawyers’ access to clients and the rights of the defence (articles 2, 7, 9, 10, 14 and 17)**

*Access to clients in detention*

13. The Constitution of Ukraine limits representation in criminal proceedings exclusively to lawyers who are members of the Bar Association.<sup>23</sup> The Criminal Procedure Code<sup>24</sup> and the Law of Ukraine “On Pre-Trial Detention”<sup>25</sup> provide for a right to a criminal defence lawyer for a suspected or accused person. At the same time, under the Law of Ukraine “On Pre-Trial Detention”, in the context of criminal proceedings, detention centres’

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<sup>21</sup> Article 16, UN Basic Principles.

<sup>22</sup> Article 17 UN Basic Principles.

<sup>23</sup> Constitution of Ukraine, Article 131.2.

<sup>24</sup> Criminal Procedure Code, Article 42-3.

<sup>25</sup> Law of Ukraine On Pre-Trial Detention, Article 9.

administrations must ensure the conditions necessary for prosecutors, investigating judges and the courts to discharge their functions, but not for criminal defence lawyers.<sup>26</sup>

14. Defence lawyers' access to pre-trial detention facilities can be impeded, as is their access to courts' premises (including courtrooms), to the public prosecutor's office, to police stations and to the sites of other law enforcement agencies, or to government buildings when their clients are held.<sup>27</sup> Defence lawyers who attempt to see their clients in detention may be subjected to overt physical and verbal abuse by law enforcement personnel; such abuse may take different forms, from verbal insults or threats of violence, to physically blocking access to the facility where their clients are held, to hitting or beating lawyers.<sup>28</sup> Reports describe instances where lawyers have had documents -- such as their practising certificates or their clients' instructions or their clients' authorization to represent them -- destroyed.<sup>29</sup>
15. In addition, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has reported numerous cases of police officers questioning suspects without the presence of their lawyer, instances of serious delays in access to a lawyer, as well as examples of suspects having only been given access to their State appointed lawyer for the first time in court, at the temporary detention facilities.<sup>30</sup>
16. As the Human Rights Committee has recognized, the right to communicate with a lawyer of one's own choosing is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.<sup>31</sup> Accordingly, lawyers should be able to advise and to represent persons charged with a criminal offence without restrictions, influence, pressure or undue interference from any quarter.<sup>32</sup> The right of prompt and confidential access to an independent lawyer of one's own choosing is also essential for the protection of the right to liberty and security of person (article 9), including the right to challenge the lawfulness of detention (article 9(4)), the right to be protected against torture or other cruel, inhuman or degrading treatment or punishment (article 7 ICCPR), and the right to an effective remedy for violations of human rights (article 2.3).
17. In light of the above, the ICJ is concerned that the restrictions imposed on criminal defence lawyers' access to their clients undermine their ability to represent their clients' interests. In turn, the rights of criminal suspects and persons charged with a criminal offence to the assistance of a lawyer to protect their rights and to help in their defence are seriously compromised, giving rise to concern about Ukraine's lack of compliance with its obligations under articles 2, 7, 9, 10 and 14 ICCPR.

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<sup>26</sup> Law of Ukraine "On Pre-Trial Detention" No. 3352-XII, 30 June 1993, article 21 "Staff of Pre-trial detention facilities", available at: <https://zakon.rada.gov.ua/laws/show/3352-12> (Accessed 14 May 2020).

<sup>27</sup> ICJ Mission Report, *Between the Rock and the Anvil : Lawyers under Attack in Ukraine*, April 2020, p 39.

<sup>28</sup> Ibid.

<sup>29</sup> UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine (2013–2018)*, op. cit., p. 25.

<sup>30</sup> CPT Report on the visit to Ukraine (8–21 December 2017), CPT/Inf (2018) 41, September 2018, available at: <https://rm.coe.int/16808d2c2b> (Accessed 07 May 2020).

<sup>31</sup> HRC General Comment No. 32, op. cit., para. 37.

<sup>32</sup> Ibid., para. 34.

- **The Human Rights Committee should recommend that Ukraine ensure an effective system capable of guaranteeing in practice that lawyers are able to meet and communicate with their clients in detention expeditiously and in private without any impediments or restrictions. The law should ensure that the meetings between criminal defence lawyers and their clients be of sufficient duration in practice to guarantee to criminal suspects and persons accused of a criminal offence the right to sufficient time and facilities to prepare a defence.**

*Confidentiality of communication between defence lawyers and clients*

18. Confidentiality of meetings and communications between lawyers and their detained clients is guaranteed under Ukrainian law.<sup>33</sup> In particular, the Law “On Pre-Trial Detention” stipulates that a detained person is entitled to a meeting with their defence lawyer alone, without limits on the number of visits and their duration, at any time and without surveillance or the presence of investigators.<sup>34</sup>
19. However, significant impediments to the right to confidential communications between defence lawyers and their clients have been identified in Ukraine.<sup>35</sup> The key factors that may contribute to the widespread failure to secure confidential communications between defence lawyers and their clients include: the fact that in pre-trial detention centres the physical distance from one another that detainees and their lawyers are forced to keep during their meetings requires them to speak loudly; poor sound-proofing of lawyer-client meeting rooms; use of listening devices installed in lawyer-client meeting rooms; guards reading documents when handing them from a lawyer to a client; and use of soundproof glass cells in court rooms making it impossible for lawyers to communicate with their clients.<sup>36</sup>
20. One technique of interference with lawyers’ work is covert investigative procedures against lawyers, especially those who work on high-profile cases. It may involve tapping telephone conversations between lawyers and clients and intercepting and reading lawyers’ correspondence.<sup>37</sup> According to the UNBA, it is a common practice that law enforcement officers, when requesting court permission for covert investigative operations, such as tapping a mobile phone, are not required to specify the exact phone number or the owner of the phone, thus often resulting in them having the authority to tap any phone.<sup>38</sup>

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<sup>33</sup> Criminal Procedure Code, op. cit., article 42-3, The Law of Ukraine “On Pre-Trial Detention” No. 3352-XII, 30 June 1993, op. cit., Part 5, article 12.

<sup>34</sup> The Law of Ukraine “On Pre-Trial Detention”, op. cit., article 4,

<sup>35</sup> OHCHR, Report on the human rights situation in Ukraine, 16 November 2016 to 15 February 2017, para. 129, op. cit.; CPT Report on the visit to Ukraine (8–21 December 2017), CPT/Inf (2018) 41, September 2018, para. 39, available at: <https://rm.coe.int/16808d2c2b> (Accessed 07 May 2020).

<sup>36</sup> UNBA Report, Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013–2018), op. cit., p. 26.

<sup>37</sup> Between the Rock and the Anvil: Lawyers under Attack in Ukraine, ICJ Mission Report April 2020, op. cit., page 41.

<sup>38</sup> UNBA Report, Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013–2018), op. cit., p. 32.

21. These practices are contrary to article 14 of the ICCPR, which requires that lawyers should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications,<sup>39</sup> as well as with the right to respect for private life under article 17 of the ICCPR. In their communications with clients charged with criminal offences, lawyers should be protected against any undue interference from any quarter, including State officials.<sup>40</sup>

**The Human Rights Committee should recommend that Ukraine:**

- **Ensure respect for the right to genuine lawyer-client confidentiality in places of detention, including by providing special rooms that allow for consultation out of the hearing of law enforcement personnel.**
- **Ensure that, in cases where information is suspected of having originated from confidential lawyer-client communications obtained through unlawful means, the courts inquire into the matter and decide on the admissibility of such evidence.**

*Designation of lawyers as witnesses*

22. The legislation in Ukraine specifically provides that it is prohibited to demand from a lawyer disclosure of data in violation of the principle of legal professional privilege protecting the confidentiality of lawyer-client relations.<sup>41</sup> Furthermore, lawyers may face disciplinary action should they provide information covered by legal professional privilege about cases in which they act as counsel.<sup>42</sup>

23. However, questioning of criminal defence lawyers as witnesses continues as a means to obtain information about the very criminal cases in which they are instructed as defence counsel.<sup>43</sup> In addition, it appears that the authorities resort to it in practice aiming to prevent criminal defence lawyers from continuing to act on behalf of their clients. International lawyers' organizations, including the International Bar Association and the Council of Bars and Law Societies of Europe (CCBE),<sup>44</sup> as well as by the UNBA itself,<sup>45</sup> have previously expressed concern about this practice.

24. Where a lawyer is required to testify in their client's case, this creates a conflict of interest and de facto means that the lawyer is prevented from representing a party in the case. In light of this, intentional designation of lawyers as witnesses in order to force their removal as legal counsel from a case is inconsistent with the prohibition of improper

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<sup>39</sup> HRC General Comment No. 32, op. cit., para. 34. Communications No. 1117/2002, *Khomidova v. Tajikistan*, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, para. 8.5.

<sup>40</sup> Ibid.

<sup>41</sup> Law "On Bar and Legal Practice", op. cit., article 23-1-2.

<sup>42</sup> *Between the Rock and the Anvil: Lawyers under Attack in Ukraine*, ICJ Mission Report April 2020, op. cit., p. 43.

<sup>43</sup> *Between the Rock and the Anvil: Lawyers under Attack in Ukraine*, ICJ Mission Report April 2020, op. cit., p. 42.

<sup>44</sup> See CCBE letters to the President of Ukraine regarding violations of rights of lawyers in Ukraine, including interrogation of lawyers as witnesses: 2016 — <https://unba.org.ua/assets/uploads/site/12/Letter%20to%20President%20of%20Ukraine%2023.12.pdf> ; 2017 — [https://unba.org.ua/assets/uploads/1ce75aee67ad49f6464c\\_file.pdf](https://unba.org.ua/assets/uploads/1ce75aee67ad49f6464c_file.pdf).

<sup>45</sup> UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine (2013–2018)*, op. cit., pp. 32–33

interference with the lawyer's work, and frequently, with the right of confidential communication between lawyers and their clients protected under articles 14 and 17 of the ICCPR.<sup>46</sup>

25. It also runs contrary to international standards on the role of lawyers and, in particular, the principle of confidential communication between lawyers and their clients.<sup>47</sup> The practice also appears to be contrary to article 17 of the Covenant and undermines the right to a fair trial because of its chilling effect on the ability of criminal defendants to give instructions to their lawyers.

- **The Human Rights Committee should recommend that the Government of Ukraine take measures to ensure that by law and in practice lawyers are protected against being called as witnesses without justification or for improper purposes in cases where they represent clients, with the aim of preventing them from continuing to act on behalf of their client.**

#### *Equality of arms and the right to a defence*

26. Despite recent justice system reforms, including the reform of the Supreme Court, the national police and the prosecution,<sup>48</sup> in Ukrainian criminal proceedings, in practice, there persists a lack of equality of arms between prosecution and defence:<sup>49</sup> judges often accept all the materials submitted in evidence by the prosecutor and accept all the witnesses required by the prosecution, while at the same time raising questions about the submission of evidence and witnesses on behalf of the defence.<sup>50</sup> Besides, defence lawyers may not be informed or not informed in due time about the court hearings, which may in practice lead to adoption of decisions without the participation of a lawyer for the defence, even where this is mandatory under national law.<sup>51</sup> This leads to violations of article 14 ICCPR, which requires that all parties be guaranteed the same procedural rights, unless distinctions are justified by law on objective and reasonable grounds.<sup>52</sup> Ukraine's criminal proceedings, in practice, are often marred by violations of the principle of equality of arms.<sup>53</sup>

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<sup>46</sup> HRC, General Comment No. 32, op. cit., para. 34; Basic Principles on the Role of Lawyers, op. cit., Principles 8, 16 and 22.

<sup>47</sup> See: HRC, General Comment No. 32, op. cit., para. 34; Basic Principles on the Role of Lawyers, op. cit., Principles 8 and 22.

<sup>48</sup> *Between the Rock and the Anvil: Lawyers under Attack in Ukraine*, ICJ Mission Report April 2020, op. cit., pp. 9 and 10.

<sup>49</sup> The United Nations Monitoring mission in Ukraine engages, inter alia, in monitoring of court trials and its observations support findings by the ICJ—lack of equality of arms in a number of cases, with courts disregarding arguments of the defence lawyer, OHCHR, Report on the human rights situation in Ukraine, 16 November 2017 to 15 February 2018, [https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf), para. 44.

<sup>50</sup> *Between the Rock and the Anvil: Lawyers under Attack in Ukraine*, ICJ Mission Report April 2020, op. cit., p. 44.

<sup>51</sup> UNBA Report, *Violation of Attorneys' Professional Rights and Guarantees in Ukraine (2013–2018)*, op. cit., p. 36.

<sup>52</sup> HRC, General Comment No. 32, op. cit., para. 13. Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4.

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

27. According to the Law of Ukraine “On Pre-Trial Detention”, the administration of the detention centres is obliged to create appropriate working conditions only for the prosecutor, the investigating judge and the court, omitting defence lawyers.<sup>54</sup> In practice, as a result, criminal defence lawyers often work in conditions that are described as poor, and that can have a negative impact on their ability to prepare and present their client’s case.<sup>55</sup> The circumstances in which criminal defence lawyers are forced to operate include long waiting times when visiting clients (including waiting outside in bad weather conditions), and working in cold and unheated rooms.<sup>56</sup>
28. Finally, at the pre-trial stage defence lawyers often do not have access to the case files, often because they are unable to locate them and the procedure for criminal defence lawyers’ access is not prescribed in law.<sup>57</sup> Thus, defence lawyers continue to be dependent on procedural decisions taken by investigators or prosecutors who often may refuse to accept lawyers’ requests for access to the case files, instead referring the lawyers concerned to the registry office, resulting in delays of several days in the consideration of their request.<sup>58</sup> These practices are contrary to Ukraine’s obligations under Article 14 ICCPR, under which ensuring adequate time and facilities for the preparation of the defence is an important element of the right to a fair trial.<sup>59</sup>
- **The Human Rights Committee should recommend that the Government of Ukraine take prompt measures to guarantee equality of arms at all stages of criminal proceedings, and that lawyers be given a genuine opportunity at all stages of the proceedings to operate on an equal basis with the investigation and the prosecution.**

*Search of lawyers’ offices*

29. In Ukraine, the right to a fair trial under article 14 ICCPR, and the right to respect for private life and the home under article 17 ICCPR, may be violated when State agents resort, without justification or in excess of authority, to searching and seizing documents from lawyers by force, including through searches of lawyers’ offices involving the use of violence by armed officers to obtain evidence in cases.<sup>60</sup> There have been reports that searches of a lawyer’s premises have led to unwarranted seizures of documents

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<sup>54</sup> Law “On Pre-Trial Detention”, op. cit., article 21 “Staff of Pre-trial detention facilities”: “administration of pre-trial detention facilities has an obligation [ . . . ] to create necessary conditions for the work of an investigator, prosecutor, an investigative judge, and a court, which is connected to a criminal proceeding; [ . . . ].”

<sup>55</sup> Between the Rock and the Anvil: Lawyers under Attack in Ukraine, ICJ Mission Report April 2020, op. cit., p. 44.

<sup>56</sup> UNBA Report, Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013–2018), op. cit., p. 36.

<sup>57</sup> Between the Rock and the Anvil: Lawyers under Attack in Ukraine, ICJ Mission Report April 2020, op. cit., p. 45.

<sup>58</sup> The Agency for Legislative Initiatives Report, The Bar of Ukraine: the Lessons Learned from the Early Years of Self-Governance, 2018, p. 45, available at: [https://parlament.org.ua/wp-content/uploads/2018/09/bar\\_of\\_ukraine\\_shadow\\_report.pdf](https://parlament.org.ua/wp-content/uploads/2018/09/bar_of_ukraine_shadow_report.pdf) (Accessed 07 May 2020).

<sup>59</sup> Ibid., para. 32. Communications No. 282/1988, Smith v. Jamaica, para. 10.4; Nos. 226/1987 and 256/1987, Sawyers, Mclean and Mclean v. Jamaica, para. 13.6

<sup>60</sup> UBA Report, Defenseless Defenders: Report on the Infringement of Rights and Guarantees of Attorneys in Ukraine, op. cit., p. 30.; see also UNBA Report, Violation of Attorneys’ Professional Rights and Guarantees in Ukraine (2013–2018), op. cit., p. 16 available at: [https://en.unba.org.ua/assets/uploads/news/zvity/UNBA\\_Zahyst\\_Adv\\_2018\\_ENG\\_WEB\(1\).pdf](https://en.unba.org.ua/assets/uploads/news/zvity/UNBA_Zahyst_Adv_2018_ENG_WEB(1).pdf).

concerning clients, laptops, phones and even money. Some lawyers have had their offices vandalized, hindering their ability to work for considerable periods of time.<sup>61</sup>

30. Instances of abusive searches of lawyers' premises and infringement of professional secrecy are increasing and have gradually spread across all regions of Ukraine.<sup>62</sup> Mostly carried out by police investigators, but often also by personnel of the Ministry of Interior, Security Service of Ukraine, newly created anti-corruption bodies, tax and financial inspectors, these searches go far beyond what is envisaged by a search warrant issued by a judge, and often take on a violent character — and almost always result in violations of attorney-client privilege.<sup>63</sup> Such searches lead to violations of the right to a fair trial under article 14 of the ICCPR, in accordance with which lawyers' communications with clients charged with criminal offences should be protected against any undue interference from any quarter, including State officials.<sup>64</sup>

- **The Human Rights Committee should recommend that the Government of Ukraine take measures to guarantee that law enforcement authorities refrain from unjustified and/or abusive searches of lawyers' offices and homes, particularly those that fail to respect lawyer-client privilege.**

#### **IV. Institutional independence of the legal profession in Ukraine (articles 2, 14)**

31. According to the law of Ukraine “on the Bar and Legal Practice”, the legal profession of Ukraine (“advokatura”) is independent of governmental bodies, including local government, their officials and officers.<sup>65</sup> The Ukrainian National Bar Association (UNBA) Statute defines the UNBA as an apolitical, autonomous and independent organization<sup>66</sup> that has financial and organizational independence.<sup>67</sup>

32. Up until 2019, when its independence was threatened as a result of the introduction of draft legislation (No. 9055) on the Bar Association to replace the law of 2012 “On the Bar and Legal Practice” (Law No. 5076-VI),<sup>68</sup> the UNBA appeared to be independent in law and in practice, in accordance with the UN Basic Principles on the Role of Lawyers.<sup>69</sup> The draft law was submitted by the then President Petro Poroshenko, as an “urgent” and

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<sup>61</sup> UNBA Report, Violation of Attorneys' Professional Rights and Guarantees in Ukraine (2013–2018), op. cit., p. 16.

<sup>62</sup> Ibid., p 28.

<sup>63</sup> Ibid., p 31.

<sup>64</sup> HRC General Comment No. 32, op. cit., para. 34.

<sup>65</sup> The official translation from the parliament website available at: <https://zakon.rada.gov.ua/laws/show/5076-17?lang=en> (Accessed 07 May 2020); The law No. 5076-VI from 5 July 2012, hereinafter referred to as ‘Law “On Bar and Legal Practice”’. Article 5

<sup>66</sup> Statute of the UNBA, 17 November 2012, article 1.6.

<sup>67</sup> Ibid., article 3. For the source of income see the Law “On Bar and Legal Practice”, op. cit., article 58.

<sup>68</sup> Ukraine: ICJ stresses the need for security of lawyers and an independent legal profession, <https://www.icj.org/ukraine-icj-stresses-the-need-for-security-of-lawyers-and-an-independent-legal-profession/>.

<sup>69</sup> Article 24, Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (UN Basic Principles). 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.

“priority” measure.<sup>70</sup> This was done despite the fact that the process of development of the draft law lacked the necessary level of consultation and participation of representatives of the legal profession, and in particular, of the UNBA, a main stakeholder that was strongly opposed to it.<sup>71</sup> Proposals in the draft law gave rise to concern for the independence of the Bar Association, and for the capacity of lawyers to act in defence of human rights.<sup>72</sup>

33. Following the 2019 Presidential elections, the draft law was automatically withdrawn. Nevertheless, the ICJ remains concerned that similar proposals may be put forward again, and underlines that, as mentioned by the UN Special Rapporteur on the independence of judges and lawyers in his letter to the Ukrainian authorities, “the legislation concerning the legal profession should be developed by the legal profession itself. When established by law, the legal profession should be duly consulted at all stages of the legislative process (see A/64/181, para. 53).”<sup>73</sup>

- **The Human Rights Committee should recommend that Ukraine ensure the maintenance of the independence of the Bar Association, including against legal or other initiatives that may undermine its independence and the role it plays in the governance of the legal profession. In this regard, any reform that concerns the functioning of the Bar Association should be designed and implemented in meaningful consultation with the Bar Association.**

#### **V. Security of lawyers in uncontrolled territories (articles 2, 6, 7, 9 and 14)**

34. In the Donetsk and Luhansk regions, where the armed conflict and regular attacks continue, lawyers who reside, practise law or represent clients in the zones affected by the armed conflict have found their personal security, liberty and professional practice at increased risk of attacks by the local authorities, or violent, extreme, right-wing groups or the State authorities of Ukraine.<sup>74</sup>

35. While the central Ukrainian Government does not currently exercise effective control over the Donetsk and Luhansk regions, it still has positive obligations under the ICCPR with respect to the risks and actual violations of Covenant rights lawyers face in those

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<sup>70</sup> See the timeline for the Draft law “On Bar and Legal Practice” No. 9055, 7 February 2019, available at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=64557](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64557) (Accessed 07 May 2020).

<sup>71</sup> On 26 February 2019, the UNBA submitted its Resolution against the adoption of the draft law (the Resolution was adopted by the Congress of Lawyers of Ukraine on 15 February 2019) to the Parliament. The UNBA requested to have the draft law returned to the drafters for revision and has been actively campaigning against its adoption.

<sup>72</sup> See ICJ statement: <https://www.icj.org/ukraine-icj-stresses-the-need-for-security-of-lawyers-and-an-independent-legal-profession/>. See further, Communication of the Special Rapporteur on the independence of judges and lawyers to the President of Ukraine, OL UKR 1/2019, 28 January 2019, pp. 6 and 7, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24313> (Accessed 07 May 2020).

<sup>73</sup> Communication of the Special Rapporteur on the independence of judges and lawyers to the President of Ukraine, OL UKR 1/2019, 28 January 2019, pp. 6 and 7, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24313> (Accessed 07 May 2020).

<sup>74</sup> Between the Rock and the Anvil: Lawyers under Attack in Ukraine, ICJ Mission Report April 2020, op. cit., p. 49.

territories. In addition, the Ukrainian authorities have positive obligations under the ICCPR in respect of the risks and actual violations of Covenant rights lawyers endure on the territory of Ukraine where the Ukrainian Government exercises effective control and that arise in relation to their work in the uncontrolled territories.

36. At the very beginning of the conflict, an abduction of two lawyers by armed groups was reported.<sup>75</sup> Since then, there have been reported cases of physical violence against lawyers in the conflict area, but only in one case has an investigation been launched in these cases by the Ukrainian authorities.<sup>76</sup> The incidents reported include threats and harassment relevant to Ukraine's obligations under articles 2, 6, 7 and 9 ICCPR to respect and protect the rights of lawyers, including through prompt and effective investigations.

37. Furthermore, the ICJ has been informed that, while it is a general problem for all individuals, lawyers specifically cannot travel freely to and from the uncontrolled territories.<sup>77</sup> When lawyers practising in Ukraine travel to the uncontrolled territories, upon their return from the armed conflict zone to government-controlled Ukraine, they may face prosecution for collaboration with the *de facto* authorities of "Luhansk People's Republic" and "Donetsk People's Republic".<sup>78</sup> It was also reported that lawyers who applied for licenses in non-government-controlled areas later face problems in Ukraine.<sup>79</sup> These reports give rise to concern about Ukraine's failure to comply with its obligations to respect the independence of lawyers in accordance with the Covenant and the UN Basic Principles on the Role of Lawyers.

**The Human Rights Committee should recommend that the Government of Ukraine take urgent steps**

- **To carry out prompt, thorough and independent investigations into known cases of harassment of lawyers in relation to providing legal assistance in uncontrolled territories, where such harassment takes place in the territory controlled by the Government of Ukraine. In such cases, every effort should be made both by the UNBA and relevant State authorities to regularly monitor violations of lawyers' rights.**

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<sup>75</sup> OHCHR, Report on the human rights situation in Ukraine, 15 June 2014, para.35. available at: <https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf> (Accessed 07 May 2020).

<sup>76</sup> UHHRU Report, Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine, op. cit., p. 34.

<sup>77</sup> Between the Rock and the Anvil : Lawyers under Attack in Ukraine, ICJ Mission Report April 2020, op. cit., p. 50.

<sup>78</sup> UHHRU Report, Advocates under occupation: Situation with observing the advocates' rights in the context of the armed conflict in Ukraine, op. cit., p. 37.

<sup>79</sup> OHCHR, Report on the human rights situation in Ukraine, 16 August to 15 November 2017, para. 83, available at: [https://www.ohchr.org/Documents/Countries/UA/UARreport20th\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/UARreport20th_EN.pdf) (Accessed at 07 May 2020): "Persons residing in territory under the control of armed groups, including those in detention, who wished to obtain a lawyer faced new challenges. On 30 June 2017, the 'head' of 'Donetsk People's Republic' issued a 'decree' stating that only lawyers who were 'certified' by the 'Donetsk People's Republic' may represent a 'defendant' in 'criminal cases', which is in conflict with the 'law on bar and practice of law'. Many lawyers fear obtaining such 'certification', as it may put them at risk of arrest and prosecution when they travel to government-controlled territory because the certification procedure requires taking an oath to the 'Donetsk People's Republic'."

- **To conduct full and impartial investigations, where cases of attacks on lawyers due to representing clients in uncontrolled territories become known, and to take effective measures to prevent similar violations in the future whether by de facto authorities or the national authorities of Ukraine.**

#### **VI. Access to Justice in Uncontrolled Territories (articles 2, 7, 9, 10, 14)**

38. Arbitrary deprivations of liberty, including through incommunicado detentions<sup>80</sup> of people residing in the conflict zone and mass preventive arrests<sup>81</sup> were reported as being carried out by the agents controlled by the State, as well as by the “authorities” of the self-proclaimed ‘republics’.<sup>82</sup> In addition, banning or denying access to one’s lawyer<sup>83</sup> is reported to take place for prolonged periods of time,<sup>84</sup> as are mass detentions without access to lawyers,<sup>85</sup> with reported cases of confessions being extracted under duress, following torture and ill-treatment, without the presence of a lawyer.<sup>86</sup>

**The Human Rights Committee should recommend that the Government of Ukraine take all measures within its power to ensure that lawyers’ work in all uncontrolled territories is not impeded by State or non-State actors, and that access to justice in the uncontrolled territories is improved. In particular, they should take measures to ensure that all persons on the territory of Ukraine who are detained are afforded all necessary legal safeguards in accordance with international human rights law, including being provided with competent legal advice and prompt access to a lawyer in case of detention.**

<sup>80</sup> OHCHR, Report on the human rights situation in Ukraine, 16 November 2017 to 15 February 2018, paras 46, 67, available at: [https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf) (Accessed 07 May 2020).

<sup>81</sup> 2 February 2018, the ‘people’s council’ of the ‘Luhansk people’s republic’ amended the ‘martial law’ to introduce the notion of ‘preventive arrest’, which can be applied for up to 30 days and then extended to 60 days. Such ‘arrest’ could be applied on the basis of a decision of the ‘minister of state security’ or the ‘minister of the interior’, in agreement with the ‘prosecutor general’, and may be based on allegations that a person may have been involved in crimes against the security of the ‘republic’. Source: Office of the United Nations High Commissioner for Human Rights Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018, [https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf), para 35.

<sup>82</sup> OHCHR, Report on the human rights situation in Ukraine, 16 February to 15 May 2018, paras 7, 51, 55, available at: [https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/ReportUkraineFev-May2018_EN.pdf) (Accessed 07 May 2020).

<sup>83</sup> OHCHR Reports in Ukraine, available at: <https://www.ohchr.org/en/countries/enacaregion/pages/uareports.aspx>: 9th Report, para. 97; 10th, para. 124-5; 12th, para. 50; 14th, para. 99 (interrogated without a lawyer); 15th, para. 43; 16th, paras 94, 163; 18th, para. 43; 19th, paras 55, 58, 78; 20th, paras 40–41, 50, 56, 75; May–August 2018, para. 47; May–August 2019, para. 47.

<sup>84</sup> OHCHR, Report on the human rights situation in Ukraine, 15 June 2014, op. cit., para. 218; OHCHR, Report on the human rights situation in Ukraine, 16 November 2016 to 15 February 2017, op. cit., para. 75; OHCHR, Report on the human rights situation in Ukraine, 16 May to 15 August 2017, para. 185, available at: [https://ohchr.org/Documents/Countries/UA/UAReport19th\\_EN.pdf](https://ohchr.org/Documents/Countries/UA/UAReport19th_EN.pdf) (Accessed 07 May 2020); OHCHR, Report on the human rights situation in Ukraine, 16 May to 15 August 2018, para. 80, available at: [https://www.ohchr.org/Documents/Countries/UA/ReportUkraineMay-August2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/ReportUkraineMay-August2018_EN.pdf) (Accessed 07 May 2020); OHCHR, 12th Report in Ukraine (see footnote above), para. 50.

<sup>85</sup> OHCHR, Report on the human rights situation in Ukraine, 16 May to 15 August 2016, <https://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport.pdf>, para. 104.

<sup>86</sup> OHCHR, Report on the human rights situation in Ukraine, 16 May to 15 August 2016, para. 77, available at: <https://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport.pdf> (Accessed 07 May 2020).