

## Lawyers for Lawyers (L4L) Submission to the UN Universal Periodic Review (UPR) - UKRAINE

1. Lawyers for Lawyers (L4L) is submitting this report on the state of human rights in Ukraine with recommendations to the OHCHR for the 14th session of the UPR Working Group in the UN Human Rights Council in October/November 2012.
2. Ukraine was a state under review in the second session of the first cycle of the UPR in 2008, being a member of the Human Rights Council in 2008.
3. L4L is an independent and non-political Dutch foundation with the status of '*institution for the promotion of the public interest*' which seeks to promote the proper functioning of the rule of law by pursuing freedom and independence of the legal profession. We do this by supporting lawyers worldwide who are threatened or suppressed in the execution of their legal profession.

### LEGAL AND INSTITUTIONAL MECHANISMS FOR PROTECTING AND PROMOTING HUMAN RIGHTS AND HUMAN RIGHTS INITIATIVES

4. The adequate protection of human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services. These legal services can only be provided effectively by an independent legal profession. This follows from the Charter of the United Nations, the Universal Declaration of Human Rights and from, among several such instruments, the International Covenant on Civil and Political Rights that has been signed and ratified by the Ukrainian government on 12 November 1973.
5. The Ukrainian government, in its National Report (UNR) for the UPR of 9 April 2008, stated that: '*Ukrainian national legislation as a whole is based upon the main international legal documents. Significant progress has been achieved in harmonizing Ukrainian legislation with international norms and standards, in strengthening the methods of legal protection at the national level, in reforming the justice system, and in increasing the level of legal culture*'.<sup>i</sup> It also stated that '*[H]uman rights and freedoms are guaranteed by more than forty articles of Ukraine's Constitution, each of which sets out fundamental rights*'.<sup>ii</sup>
6. When explaining its human rights initiatives with respect to advocacy and judicial reforms the Ukrainian government pointed out that '*[A] draft of the Law "On Advocacy" for bringing Ukrainian legislation into compliance with European standards is now before the Verkhovna Rada of Ukraine for consideration*'<sup>iii</sup> and '*[R]eform of the judicial system in compliance with European standards for ensuring an equitable, independent, effective, and accessible judiciary*' is '*one of the priorities of Ministry of Justice in 2008*'.<sup>iv</sup>
7. In its task of promoting and ensuring the proper role of lawyers, the Ukrainian government should respect and take into account the UN Basic Principles on the Role of Lawyers ('Basic

Principles')<sup>v</sup> that provide a concise description of international norms relating to the key aspects of the right to independent counsel. The Basic Principles are considered a fundamental pre-condition to fulfilling the requirement that all persons have effective access to legal services.

8. However, reports gathered by L4L demonstrates that the Ukrainian government does not uphold the necessary guarantees for the proper functioning of lawyers as set out in the Basic Principles. As a consequence, lawyers encounter difficulties in carrying out their legal profession and also their personal life are heavily impacted. This will be explained in more detail below.

### **Professional associations of lawyers**

9. Currently there is no legal framework for a proper independent and self-regulated Bar Association representing all lawyers in the Ukraine. A self-regulated and properly independent Bar with mandatory membership is regarded as essential to guarantee the independence of the bar, the independence of lawyers and the rule of law; it ensures the protection from state interference. It is also necessary to preserve the quality of legal services.
10. According to Article 24 of the Basic Principles lawyers shall be entitled '*to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity*'. These 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*'.
11. According to the Venice Commission '*[A]dvocates are best placed to assess their peers. Self-regulation is both the most efficient and rigorous means of regulating the profession. For a long time, self-regulation has been part of legal traditions (since at least the 15<sup>th</sup> century) that it has become part of the profession's unwritten constitution.*<sup>vi</sup>
12. L4L welcomes the efforts of the Ukrainian government to establish a national, mandatory bar association, and the fact that the government sought the Venice Commission's opinion on a draft law on the Bar of Ukraine and Practice of Law. As of today, however, the competent Ukrainian authorities still have not adopted a new law on the Bar and the practice of law.
13. In this regard it is noteworthy to keep in mind that the Ukrainian government already committed itself to protect the status of the legal profession and to establish a professional bar association in 1995, nearly 17 years ago, when it acceded to the Council of Europe in 1995. Since then, various draft laws were submitted to the Ukrainian Parliament where they met with serious resistance. The very idea of creating an independent and self-governing Bar Association provoked objections.
14. L4L notes with concern that there were also numerous attempts by the authorities to create a mandatory national bar association for lawyers to control the access to the profession and to control its members. For this reason it is important to guarantee a proper

representativeness of such a body, which can be safeguarded by regular elections, regional representation, etc.

15. L4L also notes with concern that, according to the Parliamentary Assembly of the Council of Europe, on several occasions, the draft laws on which opinions of the Venice Commission have been asked by the Ukrainian authorities, were subsequently withdrawn and that the recommendations of the Venice Commission were not taken into account in the laws ultimately adopted by the Verkhovna Rada.<sup>vii</sup>
16. L4L therefore urges the Ukrainian authorities to adopt a new law on the Bar and the practice of law that 1) recognises the right of the bar to self-government; 2) the right to self-regulate and 3) guarantees a proper representativeness of the bar, for instance by means of regular elections, regional representation, etc. and implement promptly the necessary advocacy reforms. It also urges the authorities to take into account all recommendations given in the Venice Commission's opinions on this matter.

### **Guarantees for the functioning of lawyers**

17. The fact that there is no national bar association forms a serious threat for the guarantees for lawyers in the Ukraine to function properly.
18. According to Article 16 of the Basic Principles the Ukrainian government must 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*'. Article 17 stipulates that '*[W]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.*' However, the Ukrainian government fails to do so.
19. As a result of discharging their functions, Ukrainian lawyers are subjected to (death) threats, intimidation, and other acts of harassment by the government and other Ukrainian authorities, including representatives of the prosecution, the police and the security service. L4L also learned that lawyers are often subjected to violence or fiscal pressure by the government, especially when they are involved in sensitive cases.
20. Lawyers are, for instance, prevented from visiting clients who are taken into custody by members of the police or representatives of the prosecution. Such preventions may be accompanied by threats and/or the use of violence. Some lawyers were brutally scolded by members of the police, threatened, beaten up and/or detained in police stations without due cause.
21. The impact for lawyers subjected to acts of harassment can be huge. Last year two lawyers who were involved in sensitive cases even left Ukraine after they were released from jail. Before their detention, their law firm was closed down by the security service and the general office of the prosecutor and their bank accounts were closed.

22. In December 2009 and in January 2011 the Council of Bars and Law Societies (CCBE) expressed its concern on the reported human rights violations of three advocates, two in Khmeinitzsk region and one in Donetsk region. One lawyer could not continue his work after all his files and his computer were illegally seized by armed police officers and one of the other lawyers suffered a substantial physical trauma after she was forcefully prevented from being present during the first interrogation of her client who was taken into custody.
23. Reports gathered by L4L demonstrates that lawyers also face problems with the prosecution where the prosecution fails to comply with its duty to provide lawyers access to information as set forth in the Basic Principles. Article 21 of the Basic Principles reads as follows: *'It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time'*.
24. Some of the problems in relation to access of information are - according to the Monitoring Committee of the Council of Europe - engrained in the justice system itself: *'[T]he defence is not given a copy of the case file and can only access it at the Prosecutor's office on days and hours prescribed the Prosecutor. The Prosecutor is free to set the days and times as he sees fit and at short notice. Defendants and their lawyers are obliged to come on the days and at the times set by the Prosecutor, which means that the latter can de facto summon the defendants and their lawyers without restriction. It is not allowed to make copies in the case file. This procedure also allows the Prosecutor to interfere directly in the quality of the defence by ordering an unrealistically short time for the defence to familiarize themselves with the case file. (...).<sup>viii</sup>*
25. The Monitoring Committee also pointed out that the manner in which the Prosecutor presents a case file to the defence not only undermines the principle of equality of arms and, as a result, of a fair trial, but *'the fact that the Prosecutor can summon the defendants and their lawyers at will, often at a short notice and without any recourse for the defendants, [also] opens up the possibility of abuse and harassment by the prosecution. In our meetings with defense lawyers, we received several reports that indicate that such harassment was indeed taking place.'<sup>ix</sup>*

## Judicial reforms

26. To ensure that the rule of law prevails and individual rights are protected effectively, independent lawyers – lawyers who can act freely and without fear of reprisal - play a key role, however, together with the role played by independent judges and independent prosecutors. The findings of national and international observers of the trials against former government members clearly showed that serious shortcomings in the Ukrainian criminal justice system still exists. The new law on judiciary even seems to have worsened the situation. Judicial reforms are therefore still needed. It should, for instance, not be possible anymore that judges are appointed by political bodies. The five year probation term is problematic as well since this may lead to undue influence on the decision-making of judges in their probation period.

## Lawyers for Lawyers' recommendation's to the government, also for the consideration of this Council

1. consistently condemn all forms of harassment against lawyers publicly, at all levels and in strong terms;
2. fully comply with the Basic Principles on the Role of Lawyers, in particular articles 16, 17,18, 19, 20, 21 and 22 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;
3. adopt a new law on the Bar and the practice of law that recognises<sup>1)</sup> the right of the bar to self-government; 2) the right of the bar to self-regulate and 3) the proper representativeness of the bar, for instance by means of regular elections, regional representation, etc. and implement promptly the necessary advocacy reforms, taking into account all recommendations given in the Venice Commission's opinions on this matter and in relation to the necessary changes in the Constitution.
4. Take all other measures needed to guarantee the proper functioning of the rule of law.

### END NOTES

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<sup>i</sup> Paragraph 4 of the National Report submitted in accordance with paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1 – Ukraine A/HRC/WG.6/2/UKR/1.

<sup>ii</sup> Idem, paragraph 6.

<sup>iii</sup> Idem, paragraph 133.

<sup>iv</sup> Idem, paragraph 131.

<sup>v</sup> Basis 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.

<sup>vi</sup> Joint Opinion on the draft law on the bar and practice of law of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe of 18 October 2011, Opinion No. 632 / 2011, paragraph 11.

<sup>vii</sup> Draft Resolution titled 'The functioning of democratic institutions in Ukraine.' Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Parliamentary Assembly, Doc. 12814, 9 January 2012, paragraph 11. The Draft Resolution was unanimously approved by the PACE Monitoring Committee on 15 December 2011.

<sup>viii</sup> Idem, Explanatory Memorandum attached to the Draft Resolution, paragraph 39.

<sup>ix</sup> Idem, paragraphs 39 and 40.