



## UPR SUBMISSION LAWYERS FOR LAWYERS – KAZAKHSTAN – MARCH 2019

### A. Introduction

1. Lawyers for Lawyers (hereinafter 'L4L') submits this report on the state of human rights, especially those regarding the legal profession, in Kazakhstan, with recommendations to the OHCHR for the 34th session of the UPR Working Group in the UN Human Rights Council in October/November 2019.
2. L4L is an independent and non-political Netherlands foundation, which was established in 1986 and is funded merely by lawyers' donations. L4L promotes the proper functioning of the rule of law through a free and independent exercise of the legal profession around the world and has special consultative status with ECOSOC since 2013.

### B. Executive Summary

3. This submission highlights L4L's key concerns regarding Kazakhstan's compliance with its international and national human rights commitments to guarantee effective access to legal services provided by an independent legal profession as set out in the UN Basic Principles on the Role of Lawyers<sup>i</sup> ('Basic Principles'), focusing on two main themes: (i) no effective guarantees for the functioning of lawyers and (ii) concerns over the independence of the professional association of lawyers. Non-compliance with the Basic Principles undermines the proper functioning of the judicial system and the right to fair trial in particular.
4. Recommendations to the government of Kazakhstan

#### **Regarding (i) no effective guarantees for the functioning of lawyers:**

- (a) **Take immediate measures to ensure that sufficient safeguards are in place, both in law and in practice, to guarantee the full independence and safety of lawyers and their effective protection against any form of retaliation in connection with their professional activity.**
- (b) **Immediately take effective measures to ensure that all communications and consultations between lawyers and their clients within their professional relationship are confidential, including eliminating the practice of calling lawyers as a witness in cases in which they represent their clients, in accordance with art. 16(b) and 22 of the Basic Principles.**
- (c) **Refrain from any actions that may constitute harassment, persecution or undue interference in the work of lawyers, including their suspension, disbarment or other disciplinary actions or criminal prosecution on improper grounds such as the expression of critical views or the nature of cases they are involved in.**

#### **Regarding (ii) concerns about the independence of the professional association of lawyers:**

- (d) **Amend the law 'On the Professional Activities of Advocates and Legal Assistance' as follows:**

- (1) Ensure that the legal profession becomes responsible both for the administration of examinations and other requirements and for the granting of professional licenses**
- (2) ensure that disciplinary proceedings against lawyers are handled by an impartial disciplinary committee established by the legal profession, in accordance with art. 27, 28, 29 of the Basic Principles.**

### **C. Normative and institutional framework of the State**

5. The adequate protection of human rights and fundamental freedoms requires that every citizen has effective access to justice and legal assistance. Legal assistance can only be provided effectively in a judicial system where lawyers, along with judges and prosecutors, are free to carry out their professional duties independently. This follows from the Charter of the United Nations, the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights to which Kazakhstan is a party.
6. On 22 June 2017, the Human Rights Council (HRC) passed a resolution condemning in general “the increasingly frequent attacks on the independence of [lawyers], in particular threats, intimidation and interference in the discharge of their professional functions”. The HRC expressed its deep concern “about the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession” and called upon States “to ensure that any attacks or interference of any sort against lawyers are promptly, thoroughly and impartially investigated and that perpetrators are held accountable”.<sup>ii</sup>
7. Furthermore, the HRC expressed concerns about “situations where the entry into or continued practice within the legal profession is controlled or arbitrarily interfered with by the executive branch, with particular regard to abuse of systems for the licensing of lawyers”<sup>iii</sup>
8. In its task of promoting and ensuring the proper role of lawyers, the government of Kazakhstan should respect and take into account the Basic Principles within the framework of its national legislation and practice. The Basic Principles provide a concise description of international standards relating to key aspects of the right to independent counsel. Adherence to the Basic Principles is considered a fundamental pre-condition to fulfilling the requirement that all persons have effective access to independent legal assistance.<sup>iv</sup>
9. During the interactive dialogue in the UPR cycle of 2014 several recommendations with respect to the proper functioning of the judicial system and a fair trial were accepted by Kazakhstan<sup>v</sup>, including recommendations, 124.13<sup>vi</sup>, 125.53<sup>vii</sup>, 125.68<sup>viii</sup>, 125.69<sup>ix</sup>. Furthermore, Kazakhstan supported recommendation 124.27<sup>x</sup> on the protection of human rights defenders against intimidation and assaults, stating that Kazakhstan considers that this recommendation has already been implemented.
10. However, reports gathered by L4L and information that we received from lawyers in Kazakhstan, demonstrate that Kazakhstan does not always uphold the necessary guarantees for the proper functioning of the legal profession as set out in the Basic Principles. As a consequence, lawyers encounter difficulties in carrying out their profession independently. This also undermines the proper functioning of the judicial system, including the right to fair trial.

## D. Promotion and protection of human rights

### (i) No effective guarantees for the functioning of lawyers<sup>xi</sup>

11. According to Article 16 of the Basic Principles, Kazakhstan must ensure that lawyers (a) “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference” 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”. L4L has been informed that lawyers in Kazakhstan have been subjected to improper interference and harassment by members of the law enforcement agencies, investigative bodies and the judiciary.<sup>xii</sup> Lawyers working on sensitive cases are frequently denied the right to privately consult with their clients in penitentiary institutions or access to their clients in these institutions. Furthermore, it was reported that some lawyers have been subjected, or threatened with prosecution or disciplinary sanctions on improper grounds, such as the expression of critical views.
12. In certain cases, lawyers may be arbitrarily removed from cases in which they represent clients in accordance with the law. One means of doing this is to name the lawyers as witnesses in cases in which they represent clients.<sup>xiii</sup> Testifying as a witness creates a conflict of interest and the lawyer is prevented from representing a party in the case. This practice whereby lawyers are intentionally made witnesses to be removed from representing clients runs contrary to international standards on the role of lawyers and in particular violates the principle of confidential communication between lawyers and their clients.

### Recommendations to the government of Kazakhstan:

- **Take immediate measures to ensure that sufficient safeguards are in place, both in law and in practice, to guarantee the full independence and safety of lawyers and their effective protection against any form of retaliation in connection with their professional activity.**
- **Immediately take effective measures to ensure that all communications and consultations between lawyers and their clients within their professional relationship are confidential, including eliminating the practice of calling lawyers as a witness in cases in which they represent their clients, in accordance with art. 16(b) and 22 of the Basic Principles.**
- **Refrain from any actions that may constitute harassment, persecution or undue interference in the work of lawyers, including their suspension, disbarment or other disciplinary actions or criminal prosecution on improper grounds such as the expression of critical views or the nature of cases they are involved in.**

### (ii) Concerns over the independence of the professional association of lawyers

13. 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’.

14. In July 2018, the Kazakhstan government adopted the new law ‘On the Professional Activities of Advocates and Legal Assistance’. Certain parts of this law are of concern for they could undermine the independence of the legal profession.<sup>xiv</sup>

15. 1) Under this law the control of the Ministry of Justice over the admission to the practice of law and the issuing of licenses is continued. It stipulates that prospective lawyers who have completed their professional training are to be assessed by the Commission for admission to practice established by the orders of the Ministry of Justice<sup>xv</sup>. The commissions consist of seven members, of which three are members of the Bar Association. The composition of the commissions and the principles of their work are to be approved by the orders of the Minister of Justice of the Republic of Kazakhstan. This raises concerns about their independence. The OSCE Brussels Declaration on Criminal Justice Systems states that “[d]ecisions concerning the authorisation to practice as a lawyer or to join the profession should be taken by an independent body.”<sup>xvi</sup> Similarly, at the regional level, CoE Recommendation R(2000)21 provides that decisions “concerning the authorisation to practice as a lawyer or to accede to this profession should be taken by an independent body.”<sup>xvii</sup> According to the Special Rapporteur on the independence of judges and lawyers, “[t]he legal profession is best placed to determine admission requirements and procedures, and it should be responsible both for the administration of examinations and other requirements.”<sup>xviii</sup>

16. 2) Furthermore, the law stipulates that the Disciplinary Commissions will now besides lawyers include retired judges and ‘representatives of the public’, appointed by the Ministry of Justice<sup>xix</sup>. The Basic Principles state that “disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court” (principle 28). This new composition of the disciplinary commissions – and in particular the presence of three representatives appointed by the executive power – can no longer guarantee that this body “be free from any influence or pressure from the legislative or the executive branches of power or any other party”<sup>xx</sup> and could therefore

### **Recommendations to the government of Kazakhstan:**

- **Amend the law ‘On the Professional Activities of Advocates and Legal Assistance’ as follows:**
  - (1) Ensure that the legal profession becomes responsible both for the administration of examinations and other requirements and for the granting of professional licenses**
  - (2) Ensure that disciplinary proceedings against lawyers are handled by an impartial disciplinary committee established by the legal profession, in accordance with art. 27, 28, 29 of the Basic Principles.**

<sup>i</sup> The Basic Principles were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on 7 September 1990. Subsequently, the UN General Assembly “welcomed” the Basic Principles in their ‘Human rights in the administration of justice’ resolution, which was adopted without a vote on 18 December 1990 in both the session of the Third Committee and the plenary session of the General Assembly.

<sup>ii</sup> UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/35/12, 22 June 2017, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/35/L.20](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/L.20).

<sup>iii</sup> UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/35/12, 22 June 2017, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/35/L.20](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/L.20).

<sup>iv</sup> During its 29th session (from 15 June – 3 July 2015), the Human Rights Council adopted without a vote a resolution on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. While recalling the Basic Principles on the Role of Lawyers and condemning the increasingly frequent attacks on the independence of lawyers, in particular threats, intimidation and interference in the discharge of their professional functions, the Human Rights Council reminded all States of their duty “to uphold the integrity of [lawyers] and to protect them, as well as their families and professional associates, against all forms of violence, threat, retaliation, intimidation and harassment resulting from the discharging of their functions, and to condemn such acts and bring the perpetrators to justice”. See UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers A/HRC/RES/29/6, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/29/L.11](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.11)

<sup>v</sup> Report of the Working Group on the Universal Periodic Review Kazakhstan, 10 December 2014, A/HRC/28/10.

<sup>vi</sup> Recommendation 124.13: Revise the Criminal Procedure Code in order to strengthen the role of defence lawyers and extend the power of investigative judges in criminal proceedings (Czech Republic)

<sup>vii</sup> Recommendation 125.53: Take steps to further strengthen the impartiality and independence of the judiciary by implementing existing judicial procedures, and by promptly and thoroughly investigating any allegations or complaints of corruption in its courts (Canada)

<sup>viii</sup> Recommendation 125.68: Take all necessary measures in order to provide a fair and independent judiciary system, which respect the rights of the defence (France)

<sup>ix</sup> Recommendation 125.69: Intensify efforts to enhance the complete independence and functioning of the judiciary (Kenya)

<sup>x</sup> Recommendation 124.27: Take effective measures to ensure freedom of expression and independence of the media, including the media expressing critical voices, and ensure protection of journalists, bloggers, human rights defenders and independent media and their work against assaults and intimidation (Czech Republic)

<sup>xi</sup> Basic Principles on the Role of Lawyers, principles 16, 17, 18, 19, 20, 21, 22

<sup>xii</sup> Concerns about this have been expressed by the Human Rights Committee in its the concluding observations on the second periodic report of Kazakhstan in 2016, CCPR/C/KAZ/CO/2, 9 August 2016, par. 37 & 38, available on: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KAZ/CO/2&Lang=En](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KAZ/CO/2&Lang=En)

<sup>xiii</sup> Resolution of the Third Republican Conference of the Bar Councils’ Delegates on violations of the guarantees of the attorneys’ rights and restricting independence of the Advokatura, 8 July 2016, available on: <http://advokatura.kz/resolution-of-the-third-republican-conference-of-the-bar-councils-delegates/>

<sup>xiv</sup> Concern about this law has also been expressed by the ICJ <https://www.icj.org/kazakhstan-icj-alarmed-at-government-interference-in-legal-profession/>

and the Special Rapporteur on the Independence of Lawyers and Judges

<https://www.ohchr.org/Documents/Issues/IJudiciary/Communications/OL-KAZ-17-01-18.pdf>

<sup>xv</sup> Article 39 sub 1 of the law ‘On the Professional Activities of Advocates and Legal Assistance’, available on:

<http://adilet.zan.kz/rus/docs/Z1800000176>

<sup>xvi</sup> Document of the Fourteenth Meeting of the Ministerial Council, Brussels, 4-5 December 2006 Brussels 2006, Op. cit. p. 99.

<sup>xvii</sup> Council of Europe Recommendation (2000)21 On the freedom of exercise of the profession of lawyer, available on: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016804d0fc8](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d0fc8)

<sup>xviii</sup> UN Special Rapporteur on the Independence of Judges and Lawyers, 2016 Report, UN Doc A/71/348, 22 August 2016, para. 77, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/264/93/PDF/N1626493.pdf?OpenElement>>.

<sup>xix</sup> Article 72 sub1 and article 73 sub 1 of the law ‘On the Professional Activities of Advocates and Legal Assistance’, available on: <http://adilet.zan.kz/rus/docs/Z1800000176>

<sup>xx</sup> A/64/181, para. 55.