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URGENT COMPARATIVE NOTE ON SOME OF SUPREME COURT'S PROPOSED PRIORITIES FOR JUDICIAL REFORM IN KAZAKHSTAN

KAZAKHSTAN

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Based on an unofficial English translation of the document "Proposals for Reforming the Judicial System" provided by the Supreme Court of Kazakhstan on 3 August 2022.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

ODIHR welcomes the request of the Supreme Court of Kazakhstan for international expertise on the applicable international standards and recommendations relating to some of the priority areas for judicial reform as identified in the document "Proposals for Reforming the Judicial System". At the outset, ODIHR notes positively that overall, most of the identified priorities, if addressed adequately, should contribute to enhancing judicial independence and fair trial guarantees in Kazakhstan and should therefore be encouraged in principle.

The purpose of this Urgent Comparative Note is primarily to provide an overview of relevant international and regional standards, recommendations and OSCE commitments with respect to the contemplated priorities for judicial reforms, in particular, in relation to the role and status of judges and protection of their independence, in respect of some aspects of the reform of criminal and civil proceedings and compliance with the right to a fair trial. The Urgent Comparative Note also seeks to offer useful guidance on the proposed priorities for judicial reform with the aim to inform the work of policy- and law-makers in the coming months, in particular when developing and discussing relevant legislation.

Taken in isolation, most of the individual Judicial Reform Priorities appear to pursue legitimate objectives, which are overall compliant with international rule of law and human rights standards and OSCE human dimension commitments. At the same time, the contemplated priorities for reforms may be more effective if they are guided by an overall strategic vision linking all these priorities with the procedural and structural changes beyond the judiciary. Moreover, while the intended objectives of the judicial reform are welcome in principle, reaching the intended results will also call for a fundamental change of the judiciary's (and prosecution service's) institutional culture, the allocation of adequate human and financial resources, including for training and capacity development, public awareness-raising and other broader-scale programmes supporting the judicial reform process, which should accompany any change of legislation. This will also be contingent on an increase in separation of the branches of state power in the country.

Finally, it is essential that, while developing new legislation or amending existing laws, the policy- and law-making process betransparent and involve inclusive and effective consultations, including with representatives of the judiciary. The policy- and law-making process should ensure that adequate time is provided for all stages of the preparation of the amendments and ensuing law-making process. ODIHR remains at the disposal of the Supreme Court of Kazakhstan and other public authorities to further elaborate, upon request, any of the legal issues addressed in this Urgent Comparative Note or review future draft legislation pertaining to judicial reform in Kazakhstan.

Relying on the below overview of international and regional standards and recommendations, and some examples of good states practices, the following principles and recommendations should be considered when pursuing reforms in the identified fields:

A. Step 1 on remuneration and other benefits of judges: the remuneration of judges should ensure an appropriate standard of living and adequately reflect the responsibility of their profession, compared to the level of remuneration of higher civil servants [para. 43]. It should be based on clear, objective and transparent criteria. It is generally recommended to include in legislation a provision ensuring that judges' remuneration is not altered to their disadvantage after their appointment and provide for a mechanism to ensure salary increases at least in line with the costs of living [para. 46]. Other benefits attached to the functions should be enhanced, including social security, encompassing health protection, parental leaves for both parents, invalidity coverage, retirement and other non-financial incentives, including annual, extraordinary, leave for professional training and other paid leaves, while considering extending social security protection to judges' family members [para. 49] and considering measures to promote better work-family balance for justice sector professionals to retain talented professionals [para. 50].

B. Step 3 on balance of powers and judicial immunity: in Kazakhstan, oversight over the use of special investigative powers should not be carried out by the Prosecutor General but rather by an independent external body. More generally, decisions on initiating criminal prosecution (and potentially initiating special investigative operation) against a judge, particularly when it may be connected with their work (functional immunity), should be taken by a body outside the Prosecution office (e.g. Judicial self-governing body, independent from the political branch of power) [paras. 63 and 70]. It is also essential to clearly set out the criteria and circumstances when judicial immunities may be lifted, while specifying the procedural steps and the standard of proof that will be required to limit any possible discretionary decision in this respect and ensure that only duly substantiated claims or complaints may proceed further [para. 64]

C. Step 5 on adversariality of proceeding and equality of arms during the trial phase: any suppression of the transfer of the criminal case file should be assessed within the overall context and criminal procedure. A number of other measures and principles could also be considered to ensure that there is no privilege or advantage to prosecution during the proceedings [see para. 81]. The legislation/procedural rules could clearly state that the prosecutor (and investigators) have the active duty to ascertain both incriminating and exculpatory evidence during the pre-trial procedure, while determining the consequences, should a prosecutor fail or refuse to disclose such evidence [paras. 83-84]. Overall, in order to strengthen the fairness of the proceedings, it is recommended to pursue a reform process aimed at increasing the autonomy and independence of prosecutors [see para. 19].

D. Step 6 on the role of the investigating judge and Step 7 on the reduced use of pre-trial detention: the underlying legislation should clearly provide the (very) limitative circumstances/purposes that may require resorting to pre-trial detention, while specifying that detention should only be ordered if the purposes of investigation cannot be achieved by less restrictive means and also requiring reasonable suspicion/probable cause with regard to the commission of a crime [paras. 92-93]. As long as the investigating judge is involved in deciding on the pre-trial detention, s/he should necessarily review available evidence and information to determine whether there is such reasonable suspicion or probable cause [para. 106]. As to non-custodial measures, they should be provided by law and applied only with the

consent of the offender [para. 97]. The introduction of new technologies as alternative measures to imprisonment, such as the electronic monitoring bracelet, requires close monitoring and systematic evaluation of whether they are adequate and human rights-compliant [para. 98].

E. Step 8 on Institutional Mechanisms to Decide on Alternatives to Imprisonment when Executing Prison Sentences: the underlying legislation should ensure that the special commissions are independent and impartial, and are not under the influence of the local executive authorities under which they sit. This means that the appointing modalities of their members shall ensure independence from the executive authorities as well as from the prosecution service. Moreover, the members of these special commissions should be professionals who are appropriately qualified and trained, including on gender- and diversity-sensitive measures alternative to imprisonment. [para. 117]

F. Step 11 on judicial decisions and the role of the judge when adjudicating: nothing should prevent judges from relying on the principle of fairness and reasonableness when adjudicating, providing that the decision is duly reasoned and while taking into account that legal certainty and consistency are crucial to any judicial system based on the rule of law [para. 75].

G. Step 12 on improving civil procedural rules to trigger more active courts/judges: while the objective is overall positive, merely amending the law may not necessarily lead to the anticipated results if not accompanied by greater structural reform and in-depth change of the institutional culture of the judiciary, which may be supported by a range of policy and programmes offering adequate professional development/training for judges throughout their careers. [para. 120]

H. Step 14 on improved legal representation in civil proceedings: it is essential to fully respect the principles of independence and self-governance of the advokatura while decreasing the level of state involvement in setting professional standards, performance indicators for legal service provision or determination of the fees [paras. 123-124]. In case of professional misconduct, this should be addressed through disciplinary proceedings that should comply with the right to a fair hearing before an independent body, while ensuring that all grounds for suspending and terminating/revoking an advocate's license are defined in a clear, precise and exhaustive manner. [para. 125]

I. Steps 16 and 18 on alternative dispute mechanisms: the so-called objective of "conflict-free society" should not prevent participants to alternative dispute processes to step out of the process at any time before a settlement is reached in order to initiate judicial proceedings, while ensuring that alternative means to litigation should respect the principles of equality, impartiality, and the rights of the parties. [paras. 135-136]

J. Step 21 on the establishment of a government-led arbitration mechanism for administrative disputes: it is for the executive to decide the modalities for resolution of internal disputes between public or semi-public bodies, which could potentially choose some forms of arbitration mechanisms under the auspices of the government, to be regulated outside of the Code of Administrative Procedure and

Process by a separate law, administrative instruction or by-laws issued by the executive. [para. 150]

These and additional Recommendations, are included throughout the text of this Note, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 24 June 2022, the Chairperson of the Supreme Court of Kazakhstan sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request for legislative assistance relating to various aspects of the judicial reform undertaken in the country, including on the selection of judges and the Supreme Court's proposals concerning the reform of the judiciary.

2. On 7 July 2022, ODIHR responded to this request, confirming the Office's readiness to provide expert advice, among other, by outlining applicable international and regional standards and recommendations, and if relevant, providing a comparative overview of good legislative practices in other countries in relation to certain specific aspects of the judicial reform.

3. On 28 June 2022, the Supreme Court of Kazakhstan sent to ODIHR an initial draft concept on some of the Supreme Court's proposed priorities for judicial reform in Kazakhstan, consisting of eight "steps". On 3 August 2022, the Supreme Court sent to ODIHR an updated draft "Proposals for Reforming the Judicial System" (hereinafter "Judicial Reform Proposals"), listing 24 priority actions or "steps" for judicial reform recommended by the Supreme Court, with a request to focus on certain specific issues, including:

   - the independence of the judiciary, especially vis-a-vis the executive and the prosecution service, including the use of special investigative measures during the pre-criminal investigation stage (Step 3), as well as aspects relating to remuneration and other benefits for judges (Step 1), and judgments in accordance with legal principles (Step 11);
   - the right to a fair trial in the context of criminal proceedings, focusing in particular on the adversariality of proceedings (Step 5), the issue of pre-trial detention (Step 7) and the role of the investigating judge (Step 6), and institutional mechanisms to decide on alternatives to imprisonment when executing sentences (Step 8);
   - the right to a fair trial in the context of civil proceedings, including the improvement of civil procedural rules (Step 12), the issue of legal representation (Step 14), alternative dispute resolution through mediation (Step 16) and compulsory pre-trial settlements for tax and customs disputes (Step 18); and
   - other issues including the reform of administrative proceedings, particularly the proposal to establish a government-led arbitration mechanism for administrative disputes (Step 21).

4. Given the short timeline to prepare this legal review due to the expected start of parliamentary work on the judicial reform in September 2022, ODIHR decided to prepare an Urgent Comparative Note on some of the topics of the Judicial Reform Proposals. The Urgent Comparative Note aims at providing an overview of relevant standards and recommendations made at the regional and international levels and some selected examples from certain OSCE participating States, which have been acknowledged as constituting good practices by relevant international or regional bodies, to serve as useful guidance for legislators to pursue the judicial reform in Kazakhstan. Given the urgency, the present document does not provide an extensive and comprehensive overview of good national practices for all of the priority areas.

5. As agreed with representatives of the Supreme Court, ODIHR stands ready to review existing legislation and draft laws that will be developed on the basis of the Judicial Reform Proposals. Such legal reviews will provide more detailed analysis of compliance with international human rights standards and OSCE commitments and will provide relevant examples of good practices from OSCE participating States in relation to specific legislative choices and legal provisions.

6. This Urgent Note was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.[1]

II. SCOPE OF THE NOTE

7. The scope of this Urgent Note focuses only on certain listed steps of the Judicial Reform Proposals submitted to ODIHR by the Supreme Court of Kazakhstan. It primarily aims at providing an overview of relevant international human rights standards and recommendations, OSCE commitments and good legal practices in the OSCE Region (hereinafter "the Region") pertaining to the judiciary. Thus limited, it does not constitute a review of the legal and institutional framework regulating the judiciary in Kazakhstan.

8. The Urgent Note raises key issues and seeks to provide some general guiding principles to further pursue the contemplated reforms through the adoption of legislation if deemed necessary. It is structured in accordance with the above-mentioned main themes, namely the independence of the judiciary, the right to a fair trial in criminal and civil proceedings and other issues as specifically identified by the Supreme Court of Kazakhstan.

9. Given the nature of the document submitted for review, the main purpose of which is to identify some of the priority areas for reform, the Judicial Reform Proposals are drafted in a general and broad manner, and cover a variety of subjects not necessarily conceptually inter-linked with one another. It is understood that such priorities were identified on the basis of broad consultations with representatives of the judicial and legal profession, but that the proposed reforms are yet to be developed into a final policy document and legislation. Pending the development of such legislation, which should include more detailed and precise language, the Urgent Note will provide general principles pertaining to the identified areas of reform to serve as potential guidance for the policy- and law-makers. ODIHR stands ready to review the underlying legislation, if and when these are drafted, to assess their compliance with applicable international rule of law and human rights standards and OSCE commitments and, where relevant, with a view to provide concrete recommendations for improvement. In any case, ODIHR thereby reiterates that it is essential for the reform proposals to be drafted in a manner that their meaning can be discerned clearly, in order to uphold rule of law standards.

10. The Urgent Note also highlights, when appropriate and relevant, good practices from other OSCE participating States. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in

1 ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments. See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council "[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]".

practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country. Country examples should always be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

11. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[2] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[3] and commitments to mainstream gender into OSCE activities, programmes and projects, the Note integrates, as appropriate, a gender and diversity perspective.

12. The Urgent Note is translated into Russian, but in case of discrepancies, the English version shall prevail.

13. In view of the above, ODIHR would like to make mention that this Urgent Note does not prevent ODIHR from formulating additional written or oral recommendations or comments on relevant legal acts or related legislation pertaining to the legal and institutional framework regulating the judiciary and judicial bodies in Kazakhstan in the future.

III. PRELIMINARY REMARKS

14. While the Urgent Comparative Note focuses on the issues identified in the request made by the Supreme Court, it is also important to consider some of the other Steps of the Judicial Reform Proposals to get a full understanding of the range of priority issues that the reform will seek to address. Some of these other Steps are actually also relevant to achieving some of the objectives addressed in this Note.

15. For instance, amending the legislation to strengthen the status, independence and functions of the Judicial Body of Self-Regulation as envisioned under Step 4 is essential given the fundamental role that judicial councils or other judicial self-governing bodies play to guarantee judicial independence in a country. In that respect, ODIHR refers to its recent *Comparative Note on Models of Judicial Councils as Independent and Self-Governing Bodies* (2021), which may provide useful guidance to policy- and law-makers when developing the said legislation. ODIHR also stands ready to review the Draft Law, upon request.

16. The election of district court presidents by judicial self-governing bodies envisioned in Step 2 with mere (formal) appointment by the President also goes in the right direction to strengthen judicial independence and reduce possible influence of the executive over the administration of the judiciary.[4] Similarly, the willingness to further expand the use of jury trials in criminal cases and introduce automatic randomized selection of jurors may be positive. At the same time, **the participation of jurors in court proceedings will only be effective if they have the possibility to actually impact deliberations and decision-making processes of the court; this means that their opinions and conclusions should be something that panels are obliged to take into account, and**

2 UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Kazakhstan acceded to this Convention on 26 August 1998.

3 See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

4 See e.g., ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (3 March 2020), para. 162. See also Venice Commission and DGI, *Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia*, CDL-AD(2014)031, 14 October 2014, para. 84.

not mere recommendations.[5] It is also important that there are **additional safeguards ensuring a maximum level of plurality in terms of backgrounds, ethnicities, gender, ages, professions and overall gender balanced gender representation within jurors' list**.[6] Generally, to enhance transparency of the selection process, it is important that the **underlying legislation clearly outlines the key objective and non-discriminatory criteria, (unbiased and inclusive) procedures and standards serving as the basis for the automatic randomized compilation of the list of potential jurors**.[7]

17. Generally, promoting the use of alternative dispute resolution mechanisms is not problematic *per se* though there are a few guiding principles to respect as further detailed below in Section VI, Sub-sections 2.3 and 2.4 *infra*. Under Step 15, there is mention of using more extensively the Council of Biys as an alternative dispute resolution mechanism. In this respect, while acknowledging the notable reconciliation feature of the Council of Biys and their traditional value and importance in the cultural heritage, their parallel functioning with common courts may be problematic on several fronts. As ODIHR noted in the past regarding similar mechanisms in other Central Asian countries, decisions of such councils, especially in family matters, may adversely affect women.[8] Second, such mechanisms promote reconciliation, which may at times be at the expense of victims' protection, particularly given the inability of such bodies to issue protection orders, provide support and assistance to victims or order the detention of an abuser.[9] ODIHR tends to generally recommend that the **reconciliation procedure before such bodies should only apply in cases which do not fall under the scope of criminal legislation[10] or risk discrimination, by adjudicating on issues such as domestic violence**. Moreover, ODIHR also underlines **the importance of promoting women participation in these bodies[11] and of ensuring that access to common courts is guaranteed in all cases**.[12] These caveats should be kept in mind when working further on the use of alternative dispute resolution mechanisms.

18. In addition, bringing about some of the outcomes envisaged in the Judicial Reform Proposals may require some broader scale measures, which are not mentioned in the document communicated by the Supreme Court but are addressed elsewhere.

19. For instance, in order to achieve the objectives envisaged under Steps 3 and 5, i.e. to eliminate the leverage of law enforcement agencies on judges and ensure truly adversarial proceedings, it is also important **to pursue the reform of the prosecution service to ensure autonomy from the political branches and functional independence of**

5 See e.g., ODIHR, *Opinion on the Law of Mongolia on the Legal Status of Citizen Representatives of Court Trials*, 27 December 2019, para. 63.

6 *Ibid.* para. 47 (2019 ODIHR Opinion on Citizen Representatives of Court Trials). See also, though regarding lay judges, German Courts Constitution Act of 1975, last amended in 2019, Section 36, stating that the list of nominees for prospective lay judges should adequately reflect all groups within the population in terms of sex, age, occupation and social status. See also Norwegian Act Relating to the Courts of Justice of 1915, last amended in 2016, regarding the selection procedure in Norway (Sections 64-65 , where lay judges are selected from two pools, one for women and one for men).

7 *Ibid.* para. 45 (2019 ODIHR Opinion on Citizen Representatives of Court Trials).

8 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic*, 19 March 2021, para. 99. See also e.g., regarding the courts of elders in the Kyrgyz Republic, CCPR, Concluding observations on the second periodic report of Kyrgyzstan (2014), CCPR/C/KGZ/CO/2, para. 19.

9 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic*, 19 March 2021, para. 99. See UN Special Rapporteur on Violence Against Women, its Causes and Consequences, 2010 Report, A/HRC/14/22/Add.2, 28 May 2010, para. 83.

10 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic*, 19 March 2021, para. 99. See also ODIHR, Opinion on the Draft Law of the Kyrgyz Republic on Safeguarding and Protection from Domestic Violence (28 October 2014), para. 44.

11 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic*, 19 March 2021, para. 99. See also OSCE, *Compilation of Good Practices "Bringing Security Home: Combating Violence against Women in the OSCE Region"*, page 85.

12 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic*, 19 March 2021, para. 99.

prosecutors.[13] This is essential to contribute to the overall fairness of trials and guarantee access to justice. In this respect, it is worth referring to some of the OSCE human dimension commitments related to the role of prosecutors, in particular that they "*should at all times maintain the honour and dignity of their profession and respect the rule of law*" and that prosecutors "*should respect the independence and the impartiality of judges*", while ensuring that the "*office of prosecutor […] be strictly separated from judicial functions*".[14] In addition, ODIHR would like to refer to the upcoming *Urgent Opinion on the Constitutional Law on the Prosecution Service of Kazakhstan* to be published in September 2022[15] and to other findings and recommendations relating to the functional independence of prosecutors.[16]

20. Overall and as further emphasized below, **taken in isolation, most of the individual Judicial Reform Priorities appear to pursue legitimate objectives, which are overall compliant with international rule of law and human rights standards and OSCE human dimension commitments**. At the same time, **the contemplated priorities for reform may be more effective if they are guided by an overall strategic vision linking all these priorities with the procedural and structural changes to the judiciary and beyond the judiciary**. Moreover, while the intended objectives of the judicial reform are welcome in principle, **reaching the intended results will also call for a fundamental change of the judiciary's (and prosecution service's) institutional culture, the allocation of adequate human and financial resources, including for training and capacity development, public awareness-raising and other broader-scale programmes supporting the judicial reform process, which should accompany any change of legislation**. This will also be contingent on an increase in separation of the branches of state power in the country.

IV. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

1. INDEPENDENCE OF THE JUDICIARY

21. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law as well as an integral part of the fundamental democratic principle of the separation of powers.[3] This independence entails that both the judiciary as an institution, but also individual judges, must be able to exercise their professional responsibilities without being influenced by or fearful of arbitrary disciplinary investigations and/or sanctions by the executive or legislative branches or other external actors. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is treated equally before the law and that no one is above the law. Public confidence in the courts and their perception as independent from political influence is vital in a democratic society that respects the rule of law. In short, a state is governed by the rule of law if, *inter alia*, an independent, impartial and accountable judiciary prevents the exercise

13 See e.g., ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, page 52.
14 OSCE, *Brussels Declaration on Criminal Justice Systems* (2006).
15 The Urgent Opinion will be published on ODIHR legislative database, <www.legislationline.org>.
16 See e.g., ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, paras. 125-148.

of arbitrary power by the authorities and protects the rights of the individuals, so that public decision-making is predictable.

22. The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.[17] More specifically, judicial independence is a prerequisite to the broader guarantee of every person's right to a fair trial i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary.

23. At the international level, it has long been recognized that litigants in both criminal and civil matters have the right to a fair hearing before an "independent and impartial tribunal", articulated in Article 10 of the Universal Declaration of Human Rights, which reflects customary international law, and subsequently incorporated into Article 14[18] of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR").

24. The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the UN Basic Principles on the Independence of the Judiciary (1985),[19] and have been further elaborated in the Bangalore Principles of Judicial Conduct (2002).[20] In particular, these principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.[21]

25. In its General Comment No. 32 on Article 14 of the ICCPR, the UN Human Rights Committee (hereinafter "UN HRCttee") specifically provided that States should ensure "*the actual independence of the judiciary from political interference by the executive branch and legislature*" and "*take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of primary and secondary legislation, and establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them*".[22]

26. While the Republic of Kazakhstan is not a Member State of the Council of Europe (hereinafter "the CoE"), the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the ECHR"), the developed case law of the European Court of Human Rights (hereinafter "the ECtHR") in the field of independence of judiciary, and other CoE instruments may serve as useful reference documents from a comparative perspective. Article 6 of the ECHR provides that everyone is entitled to a fair and public hearing "by an independent and impartial tribunal established by law". To determine whether a body can be considered "independent" according to Article 6 par 1 of the ECHR, the ECtHR considers various elements, *inter alia*, the manner of appointment of

17 See e.g., OSCE, *Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005 .

18 UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Kazakhstan ratified the ICCPR in 2006,<http://indicators.ohchr.org/>.

19 *UN Basic Principles on the Independence of the Judiciary*, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

20 *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006. See also *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity.

21 Bangalore Principles of Judicial Conduct, 2002, Preamble.

22 UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, para. 19. .

its members and their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.[23]

27. OSCE participating States have also committed to ensure "*the independence of judges and the impartial operation of the public judicial service*" as one of the elements of justice "*which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*" (1990 Copenhagen Document).[24] In the 1991 Moscow Document,[25] participating States further committed to "*respect the international standards that relate to the independence of judges […] and the impartial operation of the public judicial service*" (para. 19.1) and to "*ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice*" (para. 19.2).

28. Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the Ministerial Council also called upon OSCE participating States "*to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary*", as a key element of strengthening the rule of law in the OSCE area.[26] Further and more detailed guidance is also provided by the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) (hereinafter the "Kyiv Recommendations").[27]

29. The Urgent Note will also make reference to the opinions of the Consultative Council of European Judges (CCJE),[28] an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, and to the opinions and reports of the Council of Europe's European Commission for Democracy through Law (hereinafter "Venice Commission"), of which Kazakhstan is a member.[29]

30. Other useful reference documents elaborated in various international and regional fora contain more practical guidance to help ensure the independence of the judiciary, including, among others:

- Reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;[30]
- Reports and other documents of the European Network of Councils for the Judiciary (ENCJ);[31]

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23 See e.g., European Court of Human Rights (ECtHR), *Campbell and Fell v. the United Kingdom* (Application no. 7819/77, 7878/77, judgment of 28 June 1984), para. 78. See also *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), para. 38; and *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), para. 103.

24 OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, paras. 5 and 5.12.

25 OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 10 September-4 October 1991).

26 OSCE, *Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area*, Helsinki, 4-5 December 2008.

27 The ODIHR *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence.

28 Available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>, particularly CCJE, *Opinion No. 3 (2002) on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, 19 November 2002. See also CCJE, *Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, 23 November 2001; ; *Magna Carta of Judges*, 17 November 2010, par 13; and *Opinion No. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, 16 October 2015.

29 In particular European Commission for Democracy through Law (Venice Commission), *Report on Judicial Appointments* (2007), CDL-AD(2007)028-e, 22 June 2007; *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004, 16 March 2010 ; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

30 Annual reports available in six languages (including English and Russian) available at: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>.

31 Available at <https://www.encj.eu/>.

- The European Charter on the Statute for Judges (1998);[32]
- Report of the Venice Commission on the Independence of the Judicial System, in particular Part I on the independence of judges; and [33]
- ODIHR Opinions dealing with issues pertaining to judicial councils and the independence of the judiciary.[34]

2. THE RIGHT TO A FAIR TRIAL IN CRIMINAL AND CIVIL PROCEEDINGS

31. The right to fair trial is guaranteed by international and regional agreements on the protection of human rights and fundamental freedoms including the Universal Declaration of Human Rights, the ICCPR, the ECHR and the European Charter on Fundamental Rights and in the same way represents one of the fundamental principles in the vast majority of constitutions from the OSCE region.

32. Key international standards applicable in Kazakhstan in the area of criminal and civil procedure are primarily found in Article 14 of the ICCPR. The right to a fair trial encompasses a number of institutional and procedural guarantees, certain applicable to both civil and criminal proceedings while others apply exclusively in the context of criminal proceedings.[35] Litigants who are parties to certain types of "administrative proceedings" i.e., judicial proceedings which may be carried out according to the code of administrative procedure rather than the code of civil procedure, though not being necessarily qualified as "civil proceedings" within the domestic system, would still fall under the civil limb of the right to a fair trial and should also enjoy guarantees of the right to a fair trial.

33. The right to fair trial encompasses the right to access to justice and equality before the court, the right to independent and impartial court established by law, the right to a public hearing, the right to be presumed innocent, the right to equality of arms and right to fair hearing, the right to a public, timely and reasoned judgment and the right to appeal. The standards emanating from the texts of principal international instruments related to the right to a fair trial, namely Article 14 of the ICCPR (and Article 6 of the ECHR), are largely formed through the rich jurisprudence of, respectively, the UN HRCttee and the ECtHR.[36] General Comment 32 of the UN HRCttee on the right to equality before courts and tribunals and to a fair trial[37] also provides additional guidance on fair trial guarantees provided by Article 14 of the ICCPR.

34. The Judicial Reform Proposals also deal with issues relating to pre-trial detention (Step 7) and the role of the investigating judge in this respect (Step 6), as well as the setting up of institutional mechanisms for deciding on early release (parole) of inmates serving prison sentences (Step 8). Article 9 of the ICCPR on the right to liberty and security of persons and freedom from arbitrary deprivation of liberty is relevant in this respect. Other

32 European Charter on the Statute for Judges (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23].

33 Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004, 16 March 2010.

34 See for instance: ODIHR, *Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017); *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (As of 26 September 2017); *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017); *Opinion on the Law of Ukraine on the Judiciary and the Status of Judges* (30 June 2017); *Opinion on the law 29/1967 Concerning the Judicial System, The Supreme Judicial Council of the Judiciary, and the Status of Judges in Tunisia* (as amended up to12 August 2005 (21 December 2012); and several other opinions available at <<http://www.legislationline.org>.

35 See ODIHR, *Legal Digest of International Fair Trial Rights (2012)*.

36 See e.g. Guide on Article 6 of the ECHR, criminal limb and Guide on Article 6 of the ECHR, civil limb.

37 UN Human Rights Committee ("UN HRCttee"), *General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial*, 23 August 2007.

documents adopted at the UN level serve as useful reference documents to interpret Article 9 of the ICCPR, including the UN HRCttee's General Comment 35 on Article 9 of the ICCPR,[38] UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[39] and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[40]

35. In addition, the Republic of Kazakhstan has also ratified, among others, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[41] (hereinafter "UNCAT"), the CEDAW, the UN Convention on the Elimination of All Forms of Racial Discrimination[42] (hereinafter "CERD") and the UN Convention on the Rights of Persons with Disabilities (hereinafter "CRPD"),[43] which are also relevant to the issue of fair trial guarantees and freedom from arbitrary detention.

36. At the OSCE level, participating States have committed to upholding human rights and the rule of law in criminal justice systems.[44] Specific OSCE commitments pertaining to criminal procedure emphasize the importance of the independence of the judiciary and of legal practitioners,[45] as well as guarantees related to the right to liberty (Moscow 1991, para. 23).[46] The right to a fair trial is also an integral component of OSCE commitments, such as Copenhagen 1990 and Vienna 1989 (Questions relating to Security),[47] in which OSCE participating States committed to organize their legal systems in order to protect the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice; the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. Moreover, OSCE commitments also contain principles concerning the prosecution service in particular, such as the 1990 Copenhagen Document, which provides that "*the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution*".

37. Other specialized documents of a non-binding nature, which have been elaborated in various international/regional fora contain a higher level of detail regarding the rights to a fair trial and to liberty and security of persons and related issues. These documents include, among others:

- the OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012);[48]
- the UN Office on Drugs and Crime (UNODC) Toolkit on Gender in the Criminal Justice System;[49]

38 UN HRC, *General Comment No. 35 on Article 9 of the ICCPR, Liberty and Security of Persons*, 16 December 2014.
39 *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (hereinafter "1985 UN Declaration of Basic Principles of Justice for Victims of Crime"), UN General Assembly Resolution of 29 November 1985, A/RES/40/34.
40 *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly resolution 43/173 of 9 December 1988.
41 UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "UNCAT"), adopted by General Assembly resolution A/RES/39/46 on 10 December 1984. The Republic of Kazakhstan acceded to this Convention on 26 August 1998.
42 UN International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly by resolution 2106 (XX) of 21 December 1965. The Republic of Kazakhstan acceded to this Convention on 26 August 1998.
43 UN Convention on the Rights of Persons with Disabilities (A/RES/61/106), adopted on 13 December 2006, opened for signature on 30 March 2007. The Republic of Kazakhstan ratified this Convention on 21 April 2015.
44 See Ministerial Council Decisions No. 12/05 on upholding human rights and the rule of law in criminal justice systems (Ljubljana, 2005).
45 See par 5 of the OSCE Copenhagen Document (1990); and pars 19-20 of the OSCE Moscow Document (1991);
46 See par 23 of the OSCE Moscow Document (1991). See also the *OSCE Brussels Declaration on Criminal Justice Systems*, MC.DOC/4/06 of 5 December 2006.
47 OSCE/ODIHR Commitment relating to the Right to a fair Trial, available at <https://www.osce.org/files/f/documents/b/0/40046.pdf>.
48 OSCE/ODIHR, *Legal Digest of International Fair Trial Rights* (2012), available in English and Russian.
49 Available at < https://www.unodc.org/unodc/en/justice-and-prison-reform/cpcj-gender.html>.

- the Model Law on Justice in Matters involving Child Victims and Witnesses of Crime;[50] and
- the Model Code of Criminal Procedure by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UN OHCHR), and the UNODC.[51]

V. JUDICIAL INDEPENDENCE AND STATUS AND ROLE OF JUDGES

38. The ensuing sub-sections primarily focus on remuneration and other benefits (including retirement, social security and other non-financial incentives, Step 1) of judges, on judicial immunities and safeguards from executive and prosecutorial powers (including to prevent "prosecutorial bias" of courts, and from the use of special investigative measures – outside of judicial review Step 3).

1. REMUNERATION AND OTHER BENEFITS OF JUDGES (STEP 1)

39. Step 1 of the Judicial Reform Proposals addresses the need to make the profession of a judge appealing, including through remuneration and other benefits.

40. The administration of justice by a judge in an impartial, fair, professional and independent manner is of vital interest for the whole society and the integrity of judiciary creates public trust. In recognition of this and as a safeguard of judicial independence, the remuneration of judges should correspond to the importance, value and responsibility of a judge in a democratic society. In that context, the Magna Carta on Judges states that: "*Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of...remuneration and financing of the judiciary*". In this respect, **Step 1 of the Judicial Reform Proposals pursues a legitimate objective and should be encouraged.**

41. A vast majority of the international documents deem that the system of remuneration and retirement of judges should be established by law.[52] In the Commentary of the Bangalore Principles on Judicial Conducts, this requirement is supplemented by the opinion that the legal establishment of the remuneration and retirement scheme for judges is "*not subject to arbitrary interference by the executive in a manner that could affect judicial*

50 See the *Model Law on Justice in Matters involving Child Victims and Witnesses of Crime* (2009).

51 *Model Code of Criminal Procedure* (2008) developed by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UN OHCHR), and the UN Office on Drugs and Crime (UNODC) (hereinafter "Model Code of Criminal Procedure (2008)").

52 - UN Basic Principles on Independence of Judiciary, point 11: The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.;
- Council of Europe Recommendation (2010)12, point 53, first sentence: The principal rules of the system of remuneration for professional judges should be laid down by law.
- CCJE Opinion no 1,point 11: While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living.
- Magna Carta of Judges point 11: Following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law.
- ODIHR opinions, see e.g., *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (3 March 2020), para. 36, which emphasizes that "*the remuneration of judges should be guaranteed by law in conformity with the dignity of their office and the scope of their duties, given the importance of adequate remuneration to protect judges from undue outside interference*".

independence.[53] *Within the limits of this requirement, however, Governments may retain the authority to design specific plans of remuneration that are appropriate to different types of courts. Consequently, a variety of schemes may equally satisfy the requirement of financial security, provided the essence of the condition is protected*".[54]

42. The purpose of the appropriate remuneration of judges coupled with an adequate pension scheme is "*to avoid undue influence*"[55], "*shield them from inducements aimed at influencing their decisions*[56] and "*more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality"*[57].

43. The Kyiv Recommendations provide that salaries of judges should be "*raised to an adequate level which satisfy the needs of judges* ***for an appropriate standard of living and adequately reflect the responsibility of their profession***."[58] The Venice Commission's Report on the Independence of Judges states though that "*the level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria*"[59] and "*may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions".*[60] In some of its Opinions, ODIHR also underlined that the level of remuneration should be determined in the light of the social conditions in the country and **compared to the level of remuneration of higher civil servants** and **should always be based on clear, objective and transparent criteria**.[61]

44. Accordingly, the application of vague criteria resulting in different remuneration of judges[62] or "*systems making judges' core remuneration dependent on performance"*[63] should be avoided as they could create difficulties for the independence of judges because they may produce differences in treatment or burdensome approach to work.

45. In relation to the reduction of judicial salaries, the ENCJ Report recommends that the "*…remuneration of judges and magistrates must remain commensurate with their professional responsibility and high public duty…*" and that remuneration "*…of judges and prosecutors should be constitutionally guaranteed in law, so as to preserve judicial*

53 See Venice Commission, Opinion on the Law on Administrative courts and the Law on the Entry into Force of the law on Administrative Courts and Certain Transitional Rules of Hungary CDL-AD(2019)004: "Allowing the President of the SAC [Supreme Administrative Court] and the Minister, a member of the executive, to choose which judges should receive a distinction associated with higher remuneration raises concerns regarding judicial independence." See <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)004-e>.

54 *Commentary on Bangalore Principles on Judicial Conduct*, Part on Conditions for Independence, p. 29.

55 *Magna Carta of Judges* (Fundamental Principles), para. 7

56 Council of Europe, *Recommendation (2010)12*, para. 53.

57 European Charter of Judges, para. 6.1, <https://rm.coe.int/16807473ef>.

58 2010 ODIHR Kyiv Recommendations on Judicial Independence, para. 13.

59 2010 Venice Commission's *Report on the Independence of the Judicial System – Part I: The Independence of Judges*.

60 European Charter for Statute of Judges, point 6.2. <https://rm.coe.int/16807473ef>. For instance, in **Serbia**, the remuneration of judges is regulated by the Law on Judges and is determined on the basis of the basic salary that in turn is determined by the Law on Budget, and provides for six salary categories in accordance with the existing court jurisdiction while also regulating potential increase of a basic salary of judges who have to work overtime due to understaffing as well as of judges who work on the cases related to organised crime and war crimes, see Legal Information System of Serbia: The Law on Judges <https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2008/116/2/reg>, Section Material Status of a Judge: Articles 37-42.

61 *Ibid.* para. 36 (2020 ODIHR Opinion on Mongolia). See also e.g., 2010 Venice Commission's *Report on the Independence of the Judicial System – Part I: The Independence of Judges*, para. 46. See also e.g., the Organic Law on the Judiciary of Spain, which provides that the remunerations of the magistrates of the Supreme Court are similar to those of the holders of other high Constitutional Bodies, according to the nature of their functions.

62 See paragraph 34 of the Venice Commission *Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro*, CDL-AD(2011)010-e.

63 Council of Europe, *Recommendation (2010)12*, para. 55.

independence and impartiality."[64] It adds that **discussions on remuneration of judges should involve the judiciary**.[65]

46. The important aspect of the legal remuneration system relates to "*safeguards against a reduction in remuneration, aimed specifically at judges which should be also established by law*[66] *as "a common and desirable guarantee of judicial independence*."[67] In that respect, ODIHR specifically recommended, as done in certain countries,[68] **that the legislation regulating the judiciary include a provision ensuring that judges' remuneration is not altered to their disadvantage after their appointment.**[69] **Moreover, a mechanism to ensure salary increases at least in line with the costs of living should be considered, to avoid *de facto* reduction of judges' salaries**.[70]

47. Being aware though, of the social conditions, Venice Commission has observed that "*in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary*" if dictated, for example, by an economic crisis. The Court of Justice of the European Union also held that the reduction in judicial salaries could be permissible in the context of broader austerity measures linked to an EU financial assistance programme.[71] ODIHR also acknowledged that in times of economic emergency, a reduction of the salaries of judges may be considered providing that there is a general reduction in comparable public service salaries and judges are treated no less favourably than others paid from the public budget.[72] In any case, the Venice Commission emphasizes that "*proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge's profession and his or her burden of responsibility*".[73]

48. The Kyiv Recommendations note that individual (ad hoc) -monetary bonuses or privileges assigned to judges should be abolished but, when retained, they should be awarded on the basis of predetermined criteria and a transparent procedure with the court chairs having no say in the granting of such bonuses or privileges.[74] In this regard, the Venice Commission, in the Report on the Independence of Judges noted that "*bonuses which include an element of discretion should be excluded*"[75] as such allocation of benefits could, because of the element of discretion, easily permit arbitrariness in the assessment of needs by individual judges and the application of criteria. For this reason, it was recommended to abolish in time such benefits and replace them by an adequate

64 European Network of Councils for the Judiciary (ENCJ), *Report on Judicial Reform in Europe (2011-2012)*, recommendations 9-10, page 18.
65 *Ibid.*
66 Recommendation (2010) 12 point 53, last sentence
67 The Venice Commission Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania) p.3
68 See e.g., in Slovenia (Article 44 of the Law on Judicial Service of Slovenia, which provides that a judge's salary may not be reduced during the period of judicial service, except in the cases stipulated by law); and Romania, where the Law on Status of Judges and Prosecutors of Romania (republished), Law no. 303/2004 <https://legislatie.just.ro/Public/DetaliiDocument/64928>, bars the reduction of salaries except in the cases provided by the law.
69 See ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (3 March 2020), para. 36. See also European Network of Councils for the Judiciary (ENCJ), *2015-2016 Report on Funding of the Judiciary*, page 5.
70 *Ibid.* para. 36 (2020 ODIHR Opinion on Mongolia). See e.g., CCJE *Opinion no. 1 (2001)*, para. 62.
71 See e.g., Court of Justice of the European Union (CJEU), Grand Chamber, 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*.
72 *Ibid.* para. 36 (2020 ODIHR Opinion on Mongolia). See e.g., CCJE *Opinion no. 1 (2001)*, para. 62; and ibid. ENCJ *2015-2016 Report on Funding of the Judiciary*, page 5.
73 Venice Commission, *Amicus Curiae Brief for the Constitutional Court of 'The former Yugoslav Republic of Macedonia' on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials*, para. 11.
74 ODIHR Kyiv Recommendations on Judicial Independence.
75 Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, 2010, paras. 46-47. The report observed the practice in post-socialist countries by which judges enjoy different non-financial benefits including apartments, cars etc.

level of financial remuneration.[76] This should not prevent the provision of relocation grant or housing subsidy, providing that they are granted on the basis of clear, objective and transparent criteria and rules and do not put a judge into a position of dependence.

49. **The attractiveness of the profession is not only determined by the remuneration *stricto sensu*, but also by other benefits attached to the functions, including social security, encompassing health protection, parental leaves for both parents, invalidity coverage, retirement and other non-financial incentives, including annual, extraordinary, leave for professional training and other paid leaves**.[77] The European Charter on Status of Judges provides that judges should be accorded "***protection against the usual social risks, namely illness, maternity, invalidity, old age and death***".[78] Some countries **extends social security protection to judges' family members**[79] during active service and after retirement, which should contribute to maintaining an appropriate standard of living for judges. As to pensions, **the retirement scheme should be established by law and should be set up in a reasonable relationship to the level of remuneration when working, [80] i.e., in a level which must be as close as possible to the level of the final salary as a judge before retirement**.[81] Further, judges should benefit from other aspects of social security.

50. The issue at stake is also closely related to the retention of justice sector personnel, especially when better salaries may be offered in the private sector. In this respect, in its publication on *Gender, Diversity and Justice* (2019), ODIHR noted that "*the reduction and elimination of the gender gap in parental leave policies has been observed to have a positive impact"* regarding the retention of justice sector personnel.[82] Hence, it is generally recommended to **review access to social benefits in light of gender and diversity considerations and promote better work-family balance for justice sector professionals**, in particular, by bridging the gender gap in access to parental leave to ensure retention[83] and thereby **retain talented professionals in the judiciary**.

2. BALANCE OF POWERS AND JUDICIAL IMMUNITY (STEP 3)

51. Step 3 of the Judicial Reform Proposals seeks to increase guarantees of judicial immunity and to limit or exclude the leverage of law enforcement agencies over judges. The

76 Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, paras. 46-47.

77 For instance in **Slovenia**, the Law on Judicial Service regulates that during annual leave and extraordinary paid leave, a judge has the right to compensation in the amount of 100% of the salary for the previous month. The employer shall pay a judge compensation for absence from work due to illness or injury not related to work in the amount of 80% of the judge's salary in the previous month, namely up to 30 working days for individual absence from work, but for not more than 120 working days in a calendar year. The regulations on pension and disability as well as health and other social insurance, which apply to persons in employment, also apply to judges, unless otherwise provided by law. A judge is entitled to other personal benefits and reimbursements such as severance pay upon retirement, reimbursement of costs for transportation to and from work, allowance for meals during work, allowances to meet the costs for a second home where the judge is required to relocate to take up the post, etc. A judge has the right to an annual leave of up to forty working days, but not less than thirty working days and to extraordinary paid leave of up to seven working days in an individual calendar year for personal reasons (see Legal Information System of Slovenia: The Law on Judicial Service (unofficial consolidated text no. 23) <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO334>, Section Remuneration and Allowances: Articles 44-60). See also in **Romania**, see Regulation regarding vacations of Judges and Prosecutors of Superior Council of Magistres from 2005 in connection to Article 79 of the Law on Status of Judges and Prosecutors.

78 The European Charter, para. 6.3. <https://rm.coe.int/16807473ef>.

79 See e.g., **Spain**, the Organic Law on Judiciary guarantees the economic independence of the judges and magistrates through an adequate remuneration with respect to the dignity of the jurisdictional function as well as a social security system both for judges and their families during active service and retirement. In **Romania**, Article 79 of the Law on the Status of Judges and Prosecutors, which provides that active or retired judges and prosecutors, as well as their dependent spouses and children, benefit from free medical assistance, medicines and prostheses, subject to compliance with the legal provisions regarding the payment of the social insurance contribution

80 Council of Europe, *Recommendation (2010)12*, paras. 53-54.

81 The Explanatory Memorandum to the European Charter, para. 6.4, <https://rm.coe.int/16807473ef>.

82 See ODIHR, *Gender, Diversity and Justice – Overview and Recommendations* (2019), page 15 and recommendation 5.

83 *Ibid.*

justification also refers to the low rate of acquittals by judges as a consequence of courts' "prosecutorial bias" as an issue.

2.1. Balance of powers

52. It is understood that the prosecution still tends to have a predominant role throughout the judicial proceedings, despite recent reform in the area of criminal justice, including the extension of the powers and oversight functions of the investigative judges in a number of areas.[84] It is overall welcome that Step 3 seeks to address this issue.

53. The UN Basic Principles on the Independence of Judiciary state that "*it is* a *duty of all governmental and other institutions to respect and observe the independence of the judiciary*" and that judiciary should be able to decide matters "*on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason"*.[85] This outlines two aspects namely the internal independence and external independence of a judge. The internal independence relates to the internal functioning of judges when taking decisions, which are to be governed by the Constitution and laws and not by the orders or instructions of judges from higher instances or presidents of the courts.[86] The external independence "*is a duty of all government and other institutions to observe and respect the independence of judiciary*", i.e. it concerns the relationship of various institutions, including the prosecution and law enforcement agencies, toward the judiciary.

54. The Bangalore Principles on Judicial Conduct provide that a judge should exercise the judicial functions "*free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason*", and "*a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom*".[87]

55. As to the relationship of prosecutors and judiciary specifically, the Bordeaux Declaration on "Judges and Prosecutors in a Democratic Society" states that "*the role of judges…is to properly adjudicate cases brought regularly before them by the prosecution service, without any undue influence by the prosecution or defence or by any other source*."[88] Namely, while a prosecutor cannot be denied to act in full capacity when the matters of law and facts of the case are at place, "*the prosecutor may not interfere in any way in the judge's decision making process and is bound to abide by the judge's decisions"* and cannot *"oppose the enforcement of such decisions, other than by exercising such right of recourse as may be provided for by law*.[89] This approach has been underlined by Recommendation No. 2000 (19) on the Role of the Public Prosecution in Democratic Society by statement that *"public prosecutors must strictly respect the independence and*

84 See United Nations Country Team (UNCT) submission for the Universal Periodic Review of Kazakhstan in October 2014, the "*inequality of arms remains a key characteristic of the criminal process. The Procuracy (prosecution) performs the predominant role throughout the judicial process…*" Since then, important criminal justice reforms have taken place, with the UNCT reporting in their submission to the 3rd UPR cycle of Kazakhstan on legislative changes in the area of criminal justice. The report noted the "*… adoption on 21 December 2017 of the law on modernization of procedural bases of law-enforcement activity… extended the powers and oversight functions of investigative judges to authorizing surveillance and their duration, bail and forced examination. For fairer balance of and equality of arms in criminal process, defence lawyers can now approach the investigative judge directly with a motion to initiate certain investigative actions, except surveillance measures, instead of the body in charge of the criminal investigation*." See UNCT Kazakhstan, *Submission for the 3rd Universal Periodic Review cycle*, para. 21.

85 *Ibid*, UN Basic Principles.and Bangalore Principle 1.1.

86 See CCJE Opinion no. 19, point 13. See also judgment *Parlov-Tkalčić v. Croatia*, Application no. 24810/06, 22 December 2009, para. 86.

87 *Commentary on Bangalore Principles of Judicial Conduct*, points 1.1. and 1.3.

88 CCJE Opinion no. 12 (2009) and CCJE Opinion no. 4 (2009), Bordeaux Declaration, para. 5, <https://rm.coe.int/1680747391>.

89 Bordeaux Declaration, Explanatory Note, para. 35, <https://rm.coe.int/1680747391>.

the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure".[90] OSCE human dimension commitments specifically provide that prosecutors "*should respect the independence and the impartiality of judges*", while ensuring that the "*office of prosecutor […] be strictly separated from judicial functions*".[91]

56. It is noted that the recent constitutional amendments adopted by referendum on 5 June 2022 have not amended Article 83 on the Prosecutor's Office, which envisions the prosecution service as an organ of general "supervision". As previously stated by ODIHR, *"[s]uch a 'supervisory' prosecution model is in fact reminiscent of the old Soviet prokuratura model. At the same time, over the last decades, many postcommunist democracies have sought to deprive their prosecution services of extensive powers in the area of general supervision, by transferring such prerogatives to other bodies, including national human rights institutions (such as an Ombudsperson). The rationale for such reforms was to abolish what was considered to be an over-powerful and largely unaccountable prosecution service. […] [R]etaining a system where vast powers are vested in only one institution, […] may pose a serious threat to the separation of powers and to the rights and freedoms of individuals*",[92] and *a fortiori*, to judicial independence.

57. To limit such imbalance and strengthen judicial independence, the Venice Commission and ODIHR generally find it advisable to remove the general supervisory powers from the prosecution service to confine its powers to the field of criminal prosecution.[93] It is also important to introduce effective safeguards to supervise investigation by the prosecutors, and ensuring that any measures taken by the prosecution that affects human rights falls within judicial review and control.[94] At the same time, **eliminating "prosecutorial bias" will require more than a change of legislation and more fundamental change of the judiciary's (and prosecution service's) institutional culture.** Judges and public prosecutors should be independent from each other and also enjoy effective independence in the exercise of their respective functions. In this respect, it must be emphasized that public prosecutors should enjoy complete functional independence, ensure accountability and prevent proceedings from being initiated in an arbitrary manner.[95] At the same time, prosecutors are accountable to courts as their decisions and actions are scrutinized by courts and in some cases can be reviewed by the courts.[96] ODIHR thereby refers to its upcoming *Urgent Opinion on the Constitutional Law on the Prosecution Service of Kazakhstan* to be published in September 2022.[97]

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90 CoE *Recommendation No. 2000 (19) on the Role of the Public Prosecution in Democratic Society*. See also the Report on the Independence of Judges where the Venice Commission observed that "*the supervisory powers of the Prokuratura in post-Soviet states often extend to being able to protest judicial decisions no longer subject to an appeal*." and that "*…judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal*"; Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, paras. 66-67.

91 OSCE, *Brussels Declaration on Criminal Justice Systems* (2006).

92 ODIHR-Venice Commission, *Joint Opinion on the draft law "on Introduction of amendments and changes to the Constitution" in the Kyrgyz Republic*, 19 October 2016, para. 98; ODIHR, *Opinion on the Key Legal Acts Regulating the Prosecution Service in the Kyrgyz Republic*, 18 October 2013, para. 13. See also *ODIHR Preliminary Opinion on the Draft Amendments to the Legal Framework "On Countering Extremism and Terrorism" in the Republic of Kazakhstan* (2016), para. 52.

93 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic*, 19 March 2021, para. 105. See also Venice Commission, *Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 26 April 2022, para. 73.

94 *Ibid.* Venice Commission, *Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 26 April 2022, para. 73.

95 CCJE Opinion nos. 4 and 12, On The Relations Between Judges And Prosecutors In A Democratic Society, Bordeaux Declaration, 8 December 2009, paras. 3 and 9.

96 UNODC and International Association of Prosecutors, *The Status and Role of Prosecutors*, p. 19. See also ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, paras. 125-148.

97 The Urgent Opinion will be published on ODIHR legislative database, <www.legislationline.org>.

2.2. Judicial Immunity

58. In principle, the legislation should protect functional immunity for judges' (lawful) acts performed in the exercise of their judicial functions, which is essential to ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of the initiation of prosecution or civil action by an aggrieved party, including state authorities.[98] Its purpose is to shield judges from non-meritorious claims brought by aggrieved parties in connection with the lawful exercise of judicial functions. In any case, if a judge commits a criminal offense in the exercise of his or her office, he or she should not benefit from functional immunity.[99]

59. As regards the immunity of judges, it is necessary to separate the substantive issue relating to the material scope of the functional immunity, which should provide the legal grounds to pronounce the inadmissibility of a complaint against a judge, from the procedural safeguards which exist to protect such functional immunity. The rationale for such procedural safeguards is to avoid false accusations or vexatious claims against judges, and accordingly provide a mechanism for preventing or stopping investigation/proceeding when there is no proper case for suggesting that any criminal liability exists on the part of a judge.[100] In principle, when not exercising judicial functions, judges should in principle be liable under civil, criminal and administrative law in the same way as any other citizen,[101] though certain procedural safeguards may be provided to protect judges from unfounded or false, and vexatious accusations or complaints that are levelled against a judge in order to exert pressure on him or her.[102]

60. Step 3 refers to some procedural safeguards before initiating special operational-search activities against judges in the form of an authorization of the Prosecutor General or of the Chairperson of the Judicial Jury of the High Judicial Council.

61. At the outset, it is important to emphasize that there exists a great diversity of approach regarding the potential liability of judges, judicial immunities and the modalities for lifting such immunities across the OSCE region. Any country example in this respect should always be approached with caution since it cannot necessarily be replicated in

98 ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (3 March 2020), para. 107. See also *UN Basic Principles on the Independence of the Judiciary*, which explicitly refer to judicial immunity stating that "*Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions*"; UN Special Rapporteur on the independence of judges and lawyers, *Report on the notion of judicial accountability*, A/HRC/26/32, 28 April 2014, para. 52. See also 2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, paras. 37 and 41; Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Moldova on the Immunity if Judges*, CDL-AD(2013)008, para. 19; CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, para. 52; and ECtHR, *Ernst v. Belgium* (Application no. 33400/96, judgment of 15 October 2003), para. 85, holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued.

99 See *op. cit.* footnote 26, par 61 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges), which states: *"[judges] should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes*". See also CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, paras. 52 and 75: "*i) judges should be criminally liable in ordinary law for offences committed outside their judicial office; ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions*".

100 Ibid. para. 110. See also para. 55 of 2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*.

101 2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, para. 50. See also e.g., *op. cit.* footnote **Error! Bookmark not defined.**, par 71 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that *"[w]hen not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen"*. See also CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, para. 75: "*i) judges should be criminally liable in ordinary law for offences committed outside their judicial office; ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions*". See also Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Moldova on the Immunity if Judges*, CDL-AD(2013)008, para 53.

102 See ODIHR, *Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia* (3 March 2020), para. 109.

another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

62. When it comes to the "procedural immunity" (procedural safeguards for lifting judicial immunity) and the institution of criminal proceedings or decision on detention (deprivation of liberty) for judges, the OSCE participating States approach it rather differently. For instance, the Croatian and Serbian Constitutions bar the institution of criminal proceedings against or deprivation of liberty of judges for criminal offences committed during the performance of duties without the prior consent of the Judicial Council.[103] Similarly the consent or authorization of the Judicial General Council is required in Mongolia.[104] In Slovenia or Latvia, the consent should be obtained by the parliament, while in Poland, according to the Law on Common Courts,[105] a judge may not be detained or held criminally liable without consent of *the competent disciplinary court*. There exists various other mechanisms, ranging from an authorization granted by the Plenary Court of the Federal Tribunal in Switzerland, from a decision of a political body (consent of the President of the Republic upon the proposal of the Supreme Court in Estonia). In some countries, the initiation of criminal proceedings against judges falls within the exclusive competence of a specific body, for instance the Prosecutor General in Latvia or in Sweden. In other countries, different procedural rules would apply compared to ordinary cases, for instance to determine the competent courts (Italy, Luxembourg, Greece).. Whatever the modalities for lifting the judicial immunity, they should be analysed within their broader context, institutional framework and political and legal culture.

63. As recommended in an earlier ODIHR Opinion on the use of special investigative powers in Kazakhstan, **oversight over the use of such powers should not be carried out by the Prosecutor General but rather by an independent external body**.[106] **More generally, decisions on initiating criminal prosecution (and potentially initiating special investigative operation) against a judge, particularly when it may be connected with their work (functional immunity), should be taken by a body outside the Prosecution office (e.g. Judicial self-governing body, independent from the political branch of power). This could also fall within the competence of an investigating judge or other body presenting guarantees of independence from the executive and legislative branches.**

64. Moreover, vague, imprecise and broadly-worded provisions regarding liability of judges and judicial immunities may have a chilling effect on judges' independent and impartial interpretation of the law, assessment of facts and weighing of evidence, and may also be abused to exert undue pressure on judges when deciding cases and thus undermine their independence and impartiality.[107] It is therefore important **to clearly set out the criteria and circumstances when judicial immunities may be lifted, while specifying the procedural steps and the standard of proof that will be required to limit any possible**

103 According to the *Report of the Croatian State Judicial Council*, for 2021, 74 requests for the initiation of the criminal proceedings were received, out of which 55 were rejected , 7 requests were answered to the claimer, 4 requests were granted and 8 requests were pending.

104 See Article 39 of the Law on Judiciary of Mongolia (15 January 2021).

105 Article 80 of the Polish Law on Common Courts: A judge may not be detained or held criminally responsible without the permission of the competent disciplinary court. This does not apply to detention when a judge is caught in the act of committing a crime, if the detention is necessary to ensure the proper course of the proceedings. Until a resolution is issued, allowing a judge to be held criminally responsible, only urgent actions may be taken. https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/prawo-o-ustroju-sadow-powszechnych-16909701.

106 See ODIHR, *Preliminary Opinion on the Draft Amendments to the Legal Framework "On Countering Extremism and Terrorism" in the Republic of Kazakhstan* (2016), para. 52.

107 See Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Moldova on the Criminal Liability of Judges* (13 March 2017), CDL-AD(2017)002, para. 48.

discretionary decision in this respect and ensure that only duly substantiated claims or complaints may proceed further.[108]

3. USE OF SPECIAL INVESTIGATIVE POWERS

65. Step 3 of the Judicial Reform Proposals has identified that the deployment of special investigative powers by law enforcement against judges may form a factor in the "prosecutorial bias" of courts, i.e. presumably by being used as a tool to pressure judges into siding with the prosecution. Special investigative measures include the use of informants, undercover agents, interception of communications, various forms of surveillance, as well as covert interference such as search of private dwellings and property. The intrusive nature of these measures calls for robust safeguards against their abuse, including with respect to the authorisation and supervision of their deployment. Specifically, the deployment of special investigative measures must be carried out in compliance with the right to respect for private life protected by Article 17 of the ICCPR (and Article 8 of the ECHR).

66. The ECtHR has set "*minimum safeguards against abuse*" when authorities are resorting to such measures. Accordingly, a statutory law should clearly define the conditions and circumstances in which the authorities are empowered to resort to such measures, including:

(i) the nature of the offences in relation to which secret surveillance may be ordered;[109]

(ii) the definition of the categories of people who may be placed under surveillance;

(iii) the limits on the duration of the surveillance;

(iv) the procedure to be followed for examining, protecting, using and storing the data obtained;

(v) the precautions to be taken when communicating the data to other parties; and

(vi) the circumstances in which the intercepted data may or must be erased or destroyed.[110]

67. Furthermore, the legislation should also specify the permissible objectives of intelligence collection; the threshold of suspicion required to initiate (or continue) surveillance measures (there should be concrete facts indicating the criminal offence/security-threatening conduct and a "*probable cause*", "*reasonable suspicion*" or other similar requirement that a person, or persons, have committed, are committing, or are planning the commission of a security offence);[111] clearly define their scope, including the types of personal data that may be collected and/or processed for national security purposes; identify the authorities competent to authorize, review and carry out such measures; and

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108 See e.g., UNODC and Global Judicial Integrity Network, *Expert Group Meeting on the Role of Judicial Immunities in Safeguarding Judicial Integrity – Meeting Report* (2019), page 8; and 2014 ODIHR-Venice Commission *Joint Opinion on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, para. 42.

109 The ECtHR does not necessarily require to exhaustively list, by name, the specific offences, but sufficient details should be provided on the nature of the said offences; see ECtHR, *Roman Zakharov v. Russia* [GC] (Application no. 47143/06, judgment of 5 December 2015), paras. 243-244.

110 See e.g., ECtHR, *Weber and Saravia v. Germany* (Application no. 54934/00, decision of 29 June 2006), para. 95; and *Zakharov v. Russia* [GC] (Application no. 47143/06, judgment of 3 December 2015), para. 231. See also UN Special Rapporteur on the protection and promotion of human rights while countering terrorism (UN SRCT), *Compilation of Good Practices on Legal and Institutional Frameworks and Measures that Ensure Respect for Human Rights by Intelligence Agencies while Countering Terrorism, including on their Oversight (2010)* (hereinafter "UN SRCT Compilation"), Practice 21.

111 See e.g., CoE, European Commission for Democracy through Law (Venice Commission), *Report on the Democratic Oversight of Signals Intelligence Agencies*, CDL-AD(2015)011, para. 38.

determine the rules governing the use of evidence in potential criminal cases.[112] It is also important that such special operational and investigative actions not be used to obtain confidential or privileged communications.[113]

68. One additional safeguard is the requirement that the agencies must be subject to an external oversight ensuring that the legal preconditions for use of its powers, such as interception, bugging and video surveillance, are met.[114] In most European countries, this external person/entity is a judge and the ECtHR has expressed a clear preference for a system of judicial control, stating that it offers "*the best guarantees of independence, impartiality and a proper procedure*"[115]

69. The Bordeaux Declaration underlines, regarding the role of judges and prosecutors in the pre-trial stage, that "*the judge independently or sometimes together with the prosecutor, supervises the legality of the investigative actions, especially when they affect fundamental rights (decisions on arrest, custody, seizure, implementation of special investigative techniques, etc*)" and that "*As a general rule, public prosecutors should scrutinise the lawfulness of investigations and monitor the observance of human rights by the investigators when deciding whether a prosecution should commence or continue*."[116] It further provides that it is essential that any measures taken in this context which involve significant infringements of freedoms, in particular temporary detention, are monitored by a judge or a court.[117]

70. **In light of the foregoing, the Judicial Reform Proposals' idea of placing the authorisation of special investigative measures against judges in the hands of the Prosecutor General of Kazakhstan could be questioned**. While such assessment falls outside the scope of this review, as noted in previous opinions, the guarantees of independence of the Prosecutor General do not appear to offer sufficient safeguards against arbitrary or indiscriminate use of special investigative measures.[118]

4. JUDICIAL DECISIONS (STEP 11)

71. Step 11 of the Judicial Reform Proposals relates to the role of the judge when adjudicating, and more specifically, aims to ensure that civil law judges have discretion to deviate from legal norms if legal principles, especially the principle of fairness and reasonableness, so require.

72. Judgments of courts and tribunals should adequately state the reasons on which they are based, especially with regard to essential findings, evidence and legal reasoning.[119] This is key as this requirement contributes to certainty about the interpretation and application of the law, allows parties to judicial proceedings to determine whether or not there are

112 See *Global Principles on National Security and the Right to Information* (2013 Tshwane Principles), developed and adopted on 12 June 2013 by a large assembly of experts from international organizations, civil society, academia and national security practitioners, Principle 10.E. See also e.g., ECtHR, *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (Application no. 62540/00, judgment of 28 June 2007), pars 76-77; ECtHR, *Uzun v. Germany* (Application no. 35623/05, judgment of 2 September 2010), par 63. See also Practice 21 of the 2010 UN SRCT Compilation.

113 See e.g., ECtHR, *Kopp v. Switzerland* (Application no. 23224/94, 25 March 1998), where the Court emphasized that legally privilege communications between a lawyer and his or her client require better protection from interception than delegation of the decision about recording to a junior clerk.

114 The lack of external review was decisive in a judgment of the ECtHR holding that Bulgarian legislation on secret surveillance was incompatible with Article 8: ECtHR, *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* (Application no. 62540/00, judgment 28 June 2007), para. 85.

115 See e.g., ECtHR, *Klass and Others v. Germany* (Application no. 5029/71, judgment of 1978), paras. 55-56.

116 Bordeaux Declaration, Explanatory Note, paras. 48-49, <https://rm.coe.int/1680747391>.

117 Bordeaux Declaration, Explanatory Note, para. 51, <https://rm.coe.int/1680747391>.

118 ODIHR, *Preliminary Opinion on the Draft Amendments to the Legal Framework "On Countering Extremism and Terrorism" in the Republic of Kazakhstan* (2016), para. 52.

119 See e.g., *General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial*, 23 August 2007, para. 29; pages 209-211 of 2012 ODIHR Legal Digest of International Fair Trial Rights. See also, CCJE, *Opinion no. 11 (2008) on the Quality of Judicial Decisions*, paras. 31-50.

grounds to appeal a court's decision, serves the purpose of demonstrating to the parties that they have been heard and allows public scrutiny of the administration of justice, among others.[120]

73. To render justice in a fair and equal manner, judicial decisions must be of high quality. CCJE Opinion no. 11 provides several principles in that regard.[121] It notes that judicial decisions "*to be of high quality… must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable*."[122] Judicial decisions must be clear and intelligible. They also must provide reasoning, that may involve "… *interpreting legal principles, taking care always to ensure legal certainty and consistency. However, when a court decides to depart from previous case law, this should be clearly mentioned in its decision*."[123]

74. As noted by UNODC, when adjudicating disputes, judges are subject to the law**,** meaning that their decisions are based on the application of the law, as issued by Parliament and/or by other legitimate sources provided for by the political system.[124] At the same time, it is further underlined that *"[s]ome degree of creativity and discretion is inherent in any kind of act of interpretation, whether of case law or statute",* though with due consideration of the above-mentioned caveats.

75. In light of the above, nothing should prevent judges from relying on the principle of fairness and reasonableness when adjudicating, providing that the decision is duly reasoned and while taking into account that legal certainty and consistency are crucial to any judicial system based on the rule of law.

VI. RIGHT TO A FAIR TRIAL IN CRIMINAL AND CIVIL PROCEEDINGS

76. In the interests of brevity and relevance, the scope of this Section is limited to selected issues raised in the Judicial Reform Proposals. More specifically, in relation to criminal proceedings, the Section will focus on "Step 5. Ensure a real adversariality between the parties to the proceedings", "Step 7. Limiting the Use of the Measure of Restrain – Detention" and related "Step 6. Expanding the Powers of the Investigating Judge" as well as "Step 8" addressing the Institutional Mechanisms to Decide on Alternatives to Imprisonment when Executing Prison Sentences. In relation to civil proceedings, the issues of improvement of civil procedural rules (Step 12) and of legal representation (Step 14) and of alternative dispute resolution through mediation (Step 16) and compulsory pre-trial settlements in tax and customs matters (Step 18).

1. CRIMINAL PROCEEDINGS

1.1. The "Real" Adversariality of Proceedings and Equality of Arms during the Trial Phase (Step 5)

120 ibid. pages 210-211 (2012 ODIHR Legal Digest of International Fair Trial Rights); and para. 31 (2008 CCJE Opinion no. 11).
121 CCJE Opinion no. 11 (2008) on the quality of judicial decisions, <https://rm.coe.int/16807482bf>.
122 CCJE Opinion no. 11 (2008) on the quality of judicial decisions, pars. 32-33, <https://rm.coe.int/16807482bf>.
123 CCJE Opinion no. 11 (2008) on the quality of judicial decisions, par. M under 'Main conclusions and recommendations' <https://rm.coe.int/16807482bf>.
124 See UNODC, Module 14: Independence of the Judiciary and the Role of Prosecutors.

77. Step 5 envisages to suppress the transfer of the criminal case file to the court, as a way of bolstering adversarial process. In order to properly assess such an option, it would be important for ODIHR to know more about how the proposed change will affect evidence-gathering and examination, also at the pre-trial stages, as well as the trial court's obligations. Indeed, it is not useful to compare only selected aspects of the criminal procedure in isolation but it is essential to look at the overall context and criminal procedure. In this respect, ODIHR stands ready to provide more comprehensive expert advice and recommendations on the basis of the specific legislative proposals that will be developed. Still, the below considerations are relevant to the objective being pursued, i.e., enhancing the adversariality of proceedings and equality of arms during the trial phase.

78. Article 14(1) of the ICCPR and Article 6(1) of the ECHR both refer to a "fair" hearing by an independent and impartial tribunal. As emphasized in the ECtHR caselaw, the essence of a fair trial is "*that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence*."[125] Although different in scope, the principles of equality of arms and of the adversariality of proceedings are closely inter-linked.

79. The principle of equality of arms requires a "fair balance" between the parties, i.e., that each party be given a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis his/her opponent.[126] The adversarial principle requires that all procedural actions within the trial proceedings are performed in the presence of the parties who consequently can express upon them their views and positions. So, any element presented in the proceedings that may have an impact on the final outcome should be discussed in the courtroom.

80. The equality of arms and adversarial principles require *effective* participation in the trial proceedings which implies that the defendant is not only present at the hearing, but can also hear and follow it. Such principles must equally be respected in the proceedings before the appeal court.

81. The equality of arms and adversarial principles have a number of implications in terms of proceedings during the trial phase, including but not limited to the following:

- *No privilege or advantage to prosecution during the proceedings*, for instance by being allowed to participate in certain hearings where the accused person is not allowed to be present or represented or does not have the right to submit submissions in reply;[127]
- *Equal treatment of witnesses for the prosecution and the defence*.[128] Refusal to hear any witnesses or examine evidence for the defence, while examining the witnesses and evidence for the prosecution, may constitute a violation of the equality of arms.[129] Equally, a violation of the principle of equality of arms, according to the ECtHR, is given if the trial court refuses to call defence witnesses to clarify an

125 ECtHR, *Rowe and Davis v. the United Kingdom* [Grand Chamber], Application no. 28901/95, para. 60.

126 See e.g., ECtHR, *Öcalan v. Turkey*, Application no. 46221/99, para. 140; *Foucher v. France*, Application no. 22209/93, para. 34; *Zhuk v. Ukraine*, Application no. 45783/05, para. 25; *Faig Mammadov v. Azerbaijan*, Application no. 60802/09, para. 19.

127 See e.g., ECtHR, *Zhuk v. Ukraine*, Application no. 45783/05, paras. 32-34, where the ECtHR held that the principle of equality of arms was violated because the Supreme Court examined the case in camera in the presence of the prosecutor, but in the absence of the defendant (who had asked to be present), emphasizing that, while the lack of a public hearing before a jurisdiction whose competence was limited to questions of law might not be in breach of Article 6 § 1 *per se* provided that a public hearing was held at first instance, the prosecutor should not be given any advantage during such proceedings for instance by participating during preliminary hearings and procedural fairness required that the applicant should also have been given an opportunity to make oral submissions in reply.

128 However, at the European level, whether the ECtHR finds a violation depends on whether the witness has actually enjoyed a privileged role, see e.g., EctHR, *Bönisch v. Austria*, Application no. 8658/79, para. 32.

129 ECtHR, *Borisova v. Bulgaria*, Application no. 56891/00, paras. 47-48; *Topić v. Croatia*, Application no. 51355/10), para. 48.

uncertain situation, which constituted the basis of charges.[130] In determining whether the fairness of proceedings was compromised by failure to examine witnesses put forward by the defence, the ECtHR examines: (i) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation; (ii) whether the domestic courts considered the relevance of the witness' testimony and provided sufficient reasons for their decision not to examine this witness at trial; and (iii) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings.[131]

- *Guaranteed access to documents from the investigation file* that are essential to effectively prepare one's defence, [132] with any restriction being clearly defined and strictly circumscribed and only justified if it pursues a legitimate aim, is strictly necessary and proportionate and with adequate safeguards accompanying non-disclosure;[133]
- *Unrestricted access by the defence to the case file* and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial.[134] Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence from being made available to the accused before the trial, and the accused should not be prevented from the opportunity to comment on the evidence through his lawyer in oral submissions.[135]
- *Appointment of experts in the proceedings.*[136] In certain circumstances, the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of the principle of equality of arms, as it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field.[137] Moreover, the ECtHR held that a failure of the prosecution to disclose technical details on which an expert report is based may impede the possibility for the defence to challenge the expert report, and thus raise an issue of equality of arms under Article 6(1) of the ECHR.[138]

82. The right to an adversarial hearing means, in principle, the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.[139] As a rule, Article 6(1) of the ECHR requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.[140] In systems where the prosecution is obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the prosecuting authorities themselves decide what may or may not be relevant

130 ECtHR, *Kasparov and Others v. Russia*, Application no. 21613/07, paras. 64-65.
131 ECtHR, *Abdullayev v. Azerbaijan*, Application no. 6005/08, paras. 59-60.
132 ECtHR, Korneykova v. Ukraine, Application no. 39884/05.
133 The entitlement to disclosure of relevant evidence is not an absolute right and the non-disclosure may pursue certain legitimate aims such as protecting national security, the need to protect witnesses who are at risk of reprisals or to keep secret the methods used by the police to investigate crime, which must be weighed against the rights of the accused. In some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. See ODIHR, *Legal Digest of International Fair Trial Rights* (2012), pages 124-125.,
134 ECtHR, *Beraru v. Romania*, Application no. 40107/04, para. 70.
135 ECtHR, *Öcalan v. Turkey*, Application no. 46221/99, para. 140.
136 ECtHR, *Khodorkovskiy and Lebedev v. Russia (no.2)*, Applications nos. 51111/07 and 42757/07, para. 499.
137 See e.g., ECtHR, *Stoimenov v. the former Yugoslav Republic of Macedonia*, Application no. 17995/02, para 38; *Matytsina v. Russia*, Application no. 58428/10, para. 169; *Khodorkovskiy and Lebedev v. Russia*, Applications nos. 11082/06 and 13772/05, para. 187.
138 ECtHR, *Kartoyev and Others v. Russia*, Application no. 9418/13, paras 71-73.
139 ECtHR, *Brandstetter v. Austria*, Applications nos. 11170/84; 12876/87; 13468/87, para 67.
140 ECtHR, *Rowe and Davis v. the United Kingdom*, Application no. 28901/95, para 60.

to the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of the ECHR.[141]

83. From the Judicial Reform Proposals, it is understood that one of the challenges is the 'prosecutorial bias' of courts, which side with the investigators and the prosecution. In some countries, the **legislation clearly states that the prosecutor (and investigators) have the active duty to ascertain both incriminating and exculpatory evidence during the pre-trial procedure**.[142] This is of particular relevance given that the prosecution is generally in a better position to gather evidence; to repair this imbalance, the prosecution is normally obliged to provide the defence with access to the evidence gathered, particularly exculpatory evidence.[143] **The procedural rules may provide the prosecutor's obligation to disclose evidence to the defence, including evidence that would show or indicate the innocence of the accused, mitigate his/her guilt or that would have bearing on the credibility of other evidence presented by the prosecution**.[144]

84. The applicable legislation should also **determine the consequences, should a prosecutor fail or refuse to disclose such evidence**. Under international criminal law, the remedies for such violations range from additional time for review for the defence, to staying the proceedings and ordering the release of the accused; the court can also choose to reprimand and sanction the prosecutor.[145]

1.2. Reduced Use of Pre-trial Detention (Step 7)

85. Step 7 of the Judicial Reform Proposals signals the intention to expand the use of alternatives to pre-trial detention. In particular, it states that "[d]etention should be a measure of last resort" and further refers to alternative measures such as the use of tracking devices, including electronic bracelets, to monitor those subject to other pre-trial restrictions.

86. Pursuant to Article 9 para. 3 of the ICCPR, *"[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".* Similarly, Article 5 para. 3 of the ECHR provides: "*Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of*

141 ECtHR, *Natunen v. Finland*, Application no. 21022/04, paras. 47-49; *Matanović v. Croatia*, Application no. 2742/12, paras. 158 and 181-182.

142 See e.g., Article 6 par 2 of the Swiss Criminal Procedure Code which states that "[The criminal justice authorities] shall investigate the incriminating and exculpating circumstances with equal care"; see also Article 54(1) of the Rome Statute of the International Criminal Court which states that "[t]he Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally".

143 See par 8.3 of UN HRC case *Van Marcke v. Belgium*, Communication no. 904/2000 (2004), where the UN HRC observed that the right to a fair hearing does not, in itself, require that the prosecution bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence.

144 See e.g., OSCE/ODIHR, *Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (2015), para. 54. See also Article 67 (2) of the Rome Statute of the International Criminal Court which states that "In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide". See also the US case law e.g., *Brady v. Maryland* 373 US 83 (1963) addressing the violation of the constitutional duty resting on the Prosecutor in the US to disclose exculpatory evidence, more specifically disclose a witness statement containing exculpatory material; see also R v. Ward Cr App R 1(1992): *"It is now settled law that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed is 'an irregularity in the course of the trial" […] "Non disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed piece of evidence might have shifted the balance or opened up a new line of defence"*.

145 See the Paper by Ligeia Quackelbeen "The Prosecutorial Duty to Disclose Exculpatory Material - Appropriate remedies and sanctions: The necessity of implementing a code of conduct", available at <http://www.academia.edu/5169072/The_Prosecutorial_Duty_to_Disclose_Exculpatory_Material_Appropriate_Remedies_and_Sanctions>.

this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

87. Principle 39 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment clearly states that "*[e]xcept in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law*".

88. In the review of good practices to limit the use of detention as a preventive measure, the following four core documents are of relevance: the *UN Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules),[146] the *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules),[147] the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules)[148] and the *European Rules on community sanctions and measures*.[149]

89. The Tokyo Rules provide a set of principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment. The Rules should be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages (Rule 2.1). The criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions (Rule 2.3) while non-custodial measures should be used in accordance with the principle of minimum intervention (Rule 2.6).

90. With respect to the pre-trial stage, the Tokyo Rule 5.1 specifically provides: "*Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate".* Regarding pre-trial detention, Rule 6.1 states that "*Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim*". Rule 6.2 further specifies: "*Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings*".

91. Good practices show that underlying legislation, for instance criminal procedure codes, should clearly convey that there should be a presumption in favour of liberty, and that limitations such as detentions should be the exception rather than the rule, as stated in Article 9 par 3 of the ICCPR.[150]

92. As regards pre-trial detention, it is generally recommended **to clearly provide in underlying legislation the (very) limitative circumstances/purposes that may require**

146 See UN General Assembly Resolution 45/110 adopted on 14 December 1990, *UN Standard Minimum Rules for Non-Custodial Measures* (the Tokyo Rules).
147 See UN General Assembly Resolution adopted on 21 December 2010, *UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules).
148 Available at: <https://digitallibrary.un.org/record/120958?ln=en>.
149 See Council of Europe, *Recommendation CM/Rec (2017) 3 on the European Rules on community sanctions and measures*, which replaced the previous Recommendation (2000)22 on improving the implementation of the European rules on community sanctions and measures and the Recommendation R (92)16 on the European Rules on community sanctions and measures.
150 See e.g., OSCE/ODIHR, *Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (2015), paras. 100-102.

resorting to pre-trial detention, while specifying that detention should only be ordered if the purposes cannot be achieved by less restrictive means.[151] Such purposes should in principle be limited to "reasonable suspicion" or "probable cause"[152] that the alleged offender will abscond, alter or destroy evidence or exercise undue influence on or intimidate witnesses, commit a criminal offence or public safety may be endangered if the alleged offender remains free.[153]

93. Moreover, in principle, a person may only be detained in the context of pre-trial criminal proceedings *on reasonable suspicion of having committed an offence*.[154] The applicable legislation should therefore **specify the need for reasonable suspicion/probable cause with regard to the commission of a crime, and not only with regard to possible evasion of justice or commission of additional crimes as stated above**.[155]

94. Further, it is essential that the danger of absconding is not gauged solely on the basis of the severity of the punishment and that, as with less serious offences, other relevant factors would also need to be taken into account.[156] These should include the manner and circumstances of the commission of the crime, the alleged offender's personal characteristics and circumstances, past conduct and/or convictions, the environment and conditions in which s/he lives and other relevant elements.[157] At the pre-trial stage, it should be provided that the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the alleged offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.

95. Finally, it is also recommended that **a specific provision on rulings on measures of restraint requires prosecutors, investigators or judges, as appropriate, to substantiate why possible less restrictive measures would not achieve one of the purposes mentioned.**[158] Also, underlying **legislation should afford pre-trial detainees effective, "prompt and regular access to counsel" to allow them to challenge the lawfulness of their *continued* detention**.[159]

96. It is also worth reiterating that regarding juveniles, persons below 18 years of age, their pre-trial detention shall be a measure of last resort (Beijing Rule 13.1). If at all possible, detention pending trial shall be limited to exceptional circumstances and all efforts shall be made to apply alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.[160] In cases where preventive detention is nevertheless considered necessary, juvenile courts and investigative bodies

151 *Ibid.*, para. 100.
152 "Reasonable suspicion" refers to evidence and information of such quality and reliability that they tend to show that a person may have committed a criminal offence while "probable cause" refers to an objectively justifiable and articulable suspicion that is based on specific facts and circumstances that it tends to show that a specific person may have committed a criminal offense; this is a lower threshold than the "balance of probabilities" (evidence and information that prove that on the balance of probabilities a suspect committed the criminal offenses alleged during a confirmation hearing) and "beyond reasonable doubt" (there is no doubt that would prevent one from being firmly connived of the accused's criminal responsibility for the offenses charged); see e.g., pages 43, 321 and 336 of the Model Code of Criminal Procedure (2008).
153 See e.g., Article 177 of the Model Code of Criminal Procedure (2008).
154 See e.g., OSCE/ODIHR and Council of Europe, *Joint Opinion on the Criminal Procedure Code of Georgia* (2014), para. 13.
155 See e.g., OSCE/ODIHR, *Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (2015), para. 101.
156 See e.g., OSCE/ODIHR, Opinion on the Draft Criminal Procedure Code of Armenia (2013), para. 33. See also e.g., ECtHR, *Tomasi v. France*, Application no. 12850/87, para. 98; and *Piruzyan v. Armenia*, Application no. 33376/07, para. 105.
157 See e.g., Article 177 of the Model Code of Criminal Procedure (2008).
158 See e.g., OSCE/ODIHR, *Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (2015), para. 100.
159 See UN Committee against Torture, *General Comment No. 2 on the implementation of Article 2 of UNCAT* (2008), para. 13.
160 See para. 17 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty*, 14 December 1990; and Rule 13.2 of the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules). See also e.g., OSCE/ODIHR, *Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (2015), para. 106.

should ensure that such cases are processed in an expeditious manner, to ensure that any period of detention remains as short as possible.[161]

97. As to the (preferred**) use of non-custodial measures, the first requirement is that they shall be prescribed by law** (Tokyo Rule 3.1). The selection of measures should be based on an assessment of established criteria in respect of both the nature and gravity of the offence as well as the personality, background of the offender, the purposes of sentencing and the rights of victims (Tokyo Rule 3.2) as well as backgrounds and family ties and potential impact of separation from families/communities, especially for women alleged offenders.[162] Rule 58 of the Bangkok Rules specifically provides that *"[a]lternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible".* Non-custodial measures imply the exercise of discretion of judicial or other competent body, on one side **and their application requires the consent of the offender** on the other (Tokyo Rule 3.4.).

98. The Judicial Reform Proposals specifically refer to the use of electronic bracelets (and other modern means) as an alternative to pre-trial detention. This direction is generally in step with international guidelines. Indeed, Rule 2.4 of the Tokyo Rules specifies that *"[t]he development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated*". This rule allows for **the introduction of new technologies as alternative measures to imprisonment, such as the electronic monitoring bracelet, but highlights the need of close monitoring and systematic evaluation of any new non-custodial measure.**

99. On the specific subject of electronic monitoring as an alternative to pre-trial detention, the Recommendation CM/Rec(2014)4 of the Council of Europe's Committee of Ministers to member States sets detailed standards. It provides, *inter alia*, the following basic principles:

> *"III. Basic principles*
> *1. The use, as well as the types, duration and modalities of execution of electronic monitoring in the framework of the criminal justice shall be regulated by law.*
> *2. Decisions to impose or revoke electronic monitoring shall be taken by the judiciary or allow for a judicial review.*
> *3. Where electronic monitoring is used at the pre-trial phase special care needs to be taken not to net-widen its use.*
> *4. The type and modalities of execution of electronic monitoring shall be proportionate in terms of duration and intrusiveness to the seriousness of the offence alleged or committed, shall take into account the individual circumstances of the suspect or offender and shall be regularly reviewed.*
> *5. Electronic monitoring shall not be executed in a manner restricting the rights and freedoms of a suspect or an offender to a greater extent than provided for by the decision imposing it.*
> *6. When imposing electronic monitoring and fixing its type, duration and modalities of execution account should be taken of its impact on the rights and interests of families and third parties in the place to which the suspect or offender is confined.*
> *7. There shall be no discrimination in the imposition or execution of electronic monitoring on the grounds of gender, race, colour, nationality, language, religion,*

161 *Ibid*. See specifically Beijing Rule 13.1, which states: *"Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time".*
162 See Bangkok Rule 58.

sexual orientation, political or other opinion, national or social origin, property, association with a national minority or physical or mental condition."

100. These standards make it clear that any new non-custodial measure shall be human rights-compliant. In particular, it shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the alleged offender, shall respect his/her dignity and the alleged offender's right to privacy as well as that of their family (Rules 3.8, 3.9 and 3.11 of Tokyo Rules).

101. As a conclusion, and as stated in Rule 21.1 of the Tokyo Rules, new "Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process". In this context, the UN Commentary on the Tokyo Rules[163] emphasizes the importance that States develop: *"[…] additional innovative measures in response to changing conditions in the criminal justice system*" while emphasizing that they cannot be seen as stand-alone solution to criminal justice problems. Rather, they "*should be developed and implemented within the framework of comprehensive national development plans, including the development of employment, education, social welfare and health […] and coordinated with overall development goals*".[164]

102. Regarding specifically women alleged offenders, the Bangkok Rules also advocate for a holistic approach. Indeed, Rule 60 specifies that ***"[a]ppropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system***. *These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services".*

1.3. The Role of the Investigating Judge (Step 6)

103. Step 6 of the Judicial Reform proposals focuses on strengthening the role of the investigating judges by giving them the power to verify the evidence and correctness of the qualification of the act presented by the prosecution.

104. The exact role of an investigating judge, and, in particular, the powers such a judge holds vis-à-vis the prosecution, vary greatly in the legal systems across the OSCE region.[165]

105. In some countries, investigating judges have very broad powers, including reviewing the file of evidence and leading criminal investigations, including by interviewing the accused, victims and witnesses and preparing the case file for the trial judge(s). Such broad powers may also encompass ordering warrants and visiting the crime scene. Some

163 UN Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (1993), page 37, available at <https://digitallibrary.un.org/record/486292?ln=en>.

164 *Ibid.*

165 For example, in **Belgium**, the criminal procedure is characterized by the preliminary enquiry which is in control of the public prosecution and the judicial investigation, which is led by the investigating judge and monitored by the public prosecutor's office; similarly in **France**, the investigating judge (*juge d'instruction*) leads the investigation and has broad investigating powers, such as ordering wiretapping, for example. When strong or corroborated evidence indicates that a person or company may be criminally responsible for the acts being investigated, the target is specifically designated as such (a status known as *mis en examen*), and decides whether a case can go to trial.); in **Luxembourg**, the police and/or an investigating judge are responsible for the preliminary enquiry. Once the investigation has been completed, the case will be brought before the court in chambers, where a decision is made regarding whether the case will be judged by a court or dismissed); in **Spain**, the investigating judge leads the investigation, opens the judicial proceedings and adopts all necessary investigative measures, such as the questioning of the suspect whose rights the judge should take care of; and **Slovenia** (grants similar powers to the investigating judge, as a result of which this judge assumes the role of both judge and investigator in certain (usually more serious) criminal cases).

key principles relating to the investigating judge can be discerned from the case-law of the ECtHR in which it held that although investigating judges do not determine a "criminal charge", the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial and therefore Article 6(1) of the ECHR applies to the investigation procedure conducted by an investigating judge.[166]

106. It is understood that the role and powers of the investigating judge in Kazakhstan are more limited than those stated above. At the same time, it is understood that s/he is competent to authorize pre-trial detention. In light of the above**, a person may only be detained in the context of pre-trial proceedings *on reasonable suspicion of having committed an offence*, which means that an investigating judge should necessarily review available evidence and information to assess whether they are of such quality and reliability to show that a person may have committed the criminal offence**. Then, as a second step, the judge should review whether the (very) limitative circumstances/purposes that may require resorting to pre-trial detention exist (see Sub-Section VI.-1.-1.2 *supra*).

107. In any case, the investigating judge's powers should respect the rights of the person under investigation, including the right to be presumed innocent until proved guilty (Article 14(2) ICCPR) and the rights of the defence and the principle of equality of arms (see Sub-Section VI.-1.-1.1 *supra*).[167]

1.4. Institutional Mechanisms to Decide on Alternatives to Imprisonment when Executing Prison Sentences (Step 8)

108. Step 8 of the Judicial Reform Proposals seeks to create special commissions under the local executive authorities to advise the court on the possibility of parole and conversion of prison sentences.

109. The objective of seeking alternatives to detention is in line with the promotion of the use of non-custodial measures at the international level, for instance in the Tokyo Rules. As mentioned above, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions (Tokyo Rule 2.3).

110. More specifically, in relation to post-sentencing alternatives, in order to avoid institutionalization and to assist offenders in their early reintegration into society, the Tokyo Rule 9.2. provides: (a) Furlough and halfway houses; (b) Work or education release; (c) Various forms of parole; (d) Remission; (e) Pardon. Pursuant to Tokyo Rule 9.3, *"[t]he decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender".*

111. The Council of Europe Recommendation CM/Rec (2017)3 on the European Rules on community sanctions and measures establish a set of rules on the issue of community sanctions and measures as alternative measures to detention, with guiding principles on human rights protection as well as for further implementation. The European Rules establish conditions pertaining to the legal framework related to alternative measures, i.e. community sanctions. Like the Tokyo Rules, they require that "*the use, as well as the types, duration and modalities of implementation of community sanctions and measures shall be regulated by law."* Secondly, both "*the authorities responsible for deciding on the imposition, modification and revocation of community sanctions and measures as well as their powers and responsibilities"* and *"the authorities responsible for the*

166 ECtHR, *Vera Fernández-Huidobro v. Spain*, Application no. 74181/01, 6 January 2010, paras. 108- 114
167 ECtHR, *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 140.

implementation of community sanctions and measures shall be laid down in law". The European Rules also recommend that a sufficient range of suitably varied community sanctions and measures be made available to be used in practice.[168]

112. Recommendation Rec(2003)22 of the Committee of Ministers on conditional release (parole) sets out detailed standards regarding the granting of conditional release and mandatory release system, as well as relevant procedural safeguards, including that the deciding authority should be established by law, the convicted persons' right to be heard in person and to be assisted according to the law as well as to have adequate access to their files and to be notified in writing of the reasoned decisions, which they may appeal to a higher independent and impartial decision-making authority established by law on both substantive and procedural grounds. [169]

113. As another useful resource, the European Prison Observatory issued the "*Alternatives to Imprisonment in Europe: A handbook of good practice*".[170] The Handbook provides an overview on modalities for the provision of alternatives to imprisonment in eight EU countries, as well as policy recommendations towards reducing the use of prison and criminalisation, and improving the use of alternatives to imprisonment.

114. Regarding the institutional mechanisms for deciding on alternatives to imprisonment at the stage of the execution of a sentence, the Tokyo Rule 9.3 specifically states that *"[t]he decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender"*.

115. The European Rules on Community Sanctions and Measures specify that *"[t]he authorities responsible for deciding on the imposition, modification and revocation of community sanctions and measures shall be laid down in law, as will their powers and responsibilities*". The explanatory statement further refers to "*a deciding authority that is a court, judge, prosecutor or administrative authority only as laid down in law*", while ensuring that such an authority "*secures independence having regard to the doctrine of the separation of powers and impartiality*". In addition, Rule 24 provides that *"[a]dvice to the court or the public prosecutor concerning the preparation, imposition or implementation of a community sanction or measure shall only be provided by staff of an organisation provided for by law*." As emphasized in the explanatory statement to Rule 24, the purpose is that the deciding authority relies on full and impartial information about the individual's personal circumstances, which is reliable and of good quality thereby requiring that such information be provided by a professional or legally designated body, with staff who are appropriately trained, qualified and authorized by the competent organizations.

116. Regarding women prisoners specifically, the Bangkok Rule 63 further provides that *"[d]ecisions regarding early conditional release (parole) shall favourably take into account women prisoners' caretaking responsibilities, as well as their specific social reintegration needs*". More generally, it is important to also consider particular support requirements of women during their social reintegration and re-entry to society, following release, which require the full cooperation of outside agencies and services.[171] This may require that adequate gender- and diversity-sensitive training is provided to the members of the deciding authority or of the body/entity providing advice to the deciding authority.

168 See Council of Europe, *Recommendation CM/Rec (2017) 3 on the European Rules on community sanctions and measures*. The European Rules provide a non-exhaustive list including: suspension of the enforcement of a sentence to imprisonment with imposed conditions; community service (i.e. unpaid work on behalf of the community); victim compensation, conditional release from prison followed by post release supervision, etc. (Rule 2).

169 See Council of Europe, Recommendation Rec(2003)22 of the Committee of Ministers on conditional release (parole).

170 European Prison Observatory, Catherine Heard, "*Alternatives to Imprisonment in Europe: A handbook of good practice*" (2016).

171 See the Explanatory Statement to Bangkok Rules 45-47.

117. If the above-mentioned proposal is pursued**, the underlying legislation should ensure that the special commissions are independent and impartial, and are not under the influence of the local executive authorities under which they sit. This means that the appointing modalities of their members shall ensure independence from the executive authorities as well as from the prosecution service. Moreover, the members of these special commissions should be professionals who are appropriately qualified and trained, including on gender- and diversity-sensitive measures alternative to imprisonment.** ODIHR stands ready to review the draft law that will aim at introducing such a mechanism.

2. CIVIL PROCEEDINGS

2.1. Improving Civil Procedural Rules to Trigger More Active Courts/Judges (Step 12)

118. Step 12 of the Judicial Reform Proposals seeks to incorporate key principles guiding administrative procedures into the Civil Procedure Code to ultimately trigger a more active role of the courts/judges in the settlement of civil law disputes and ultimately enhance the public satisfaction in the civil justice system. As indeed noted in the ODIHR Opinion on the Draft Concept on Administrative Procedure, "*in administrative proceedings, courts must play a more active role in guaranteeing the equality of arms*", mainly because of the special nature of administrative proceedings, "*where the state automatically holds an overwhelmingly stronger position than the individual*".[172] In civil law litigations, on the other hand, judges usually adopt a more passive stance and leave the parties to fix the contours of the litigation.

119. Whatever the modalities for ensuring a more active role of the courts/judges in civil law disputes, the caveat should always be to ensure respect for the principle of equality of arms, which means that the procedural conditions at trial must be the same for all parties (see Part VI, Sub-Section 1.1). Given the inherent advantageous position of the administrative authorities in administrative proceedings, certain special rules or modalities, including a more active role of the judge, are justified to correct any imbalance. The legal drafters should therefore carefully review the *rationale* for incorporating new rules into the Civil Procedure Code and potential impact on fair trial guarantees and the principle of equality of arms. ODIHR stands ready to review any proposed amendments to the civil procedural rules from this perspective.

120. Finally, it must be underlined that **merely amending the law is unlikely to lead to the anticipated results if not accompanied by greater structural reform and in-depth change of the institutional culture of the judiciary, which may be supported by a range of policy and programmes offering adequate professional development/training for judges throughout their careers.**

2.2. Improved Legal Representation in Civil Proceedings (Step 14)

121. Step 14 of the Judicial Reform Proposals underlines two essential challenges pertaining to legal representation in judicial/civil proceedings, i.e., the low professionalism of advocates/legal professionals and certain professional misconducts relating to the unnecessary initiation or prolongation of litigation.

172 OSCE/ODIHR, *Opinion on Concept Note on the Implementation of the Code of Administrative Procedure and Process*, 16 March 2021, para. 29. See also Venice Commission, *Draft Opinion on the Administrative Procedure and Justice Code of Kazakhstan* (2018), para. 35.

122. The most comprehensive international (non-binding) instrument on the questions of protecting the right to access to legal services and the independence of the legal profession is the UN Basic Principles on the Role of Lawyers ("Basic Principles").[173] In their preamble, the Basic Principles stress that "*adequate protection of the human rights and fundamental freedoms to which all persons are entitled … requires that all persons have effective access to legal services provided by an independent legal profession*." The Basic Principles provide guidance on essential aspects of the organization of the legal profession, such as access to legal services, lawyers' admission to the profession, lawyers' key duties and responsibilities, guarantees for the proper functioning of lawyers, self-organization of lawyers, and disciplinary liability. Principle 16 requires that states "*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*."

123. ODIHR hereby would like to refer back to the key recommendations made in its *Opinion on the Draft Law of the Republic of Kazakhstan on the Professional Activities of Advocates and Legal Assistance (2018).*[174] In particular, as this is of relevance to the Judicial Reform Proposals, the ODIHR Opinion emphasized the **importance to fully respect the principles of independence and self-governance of the profession while decreasing the level of state involvement in setting professional standards and performance indicators for legal service provision** and ensuring instead that the relevant professional bar/advocate associations have the power to do so.[175]

124. Moreover, ODIHR specifically recommended that **no state body be involved in the determination of the fees between a lawyer/advocate and his/her client, except in the context of state-paid legal aid**.[176] Indeed, determining the size of fees lawyers may receive for client-paid legal services is problematic and not in line with the prevailing practice among OSCE participating States.[177] It is good practice to allow lawyers to negotiate their fees relatively freely, while providing some basic principles of the fee structure and requiring that fees should be generally adequate and proportionate to the value and complexity of the case. Some states have also chosen to establish mandatory minimum fees or/and scales and tariffs that can be referred to in default of an agreement between the lawyer and the client (e.g., Albania, Austria, Croatia).[178]

125. **In case of professional misconduct, this should be addressed through disciplinary proceedings that should comply with the right to a fair hearing before an independent body, while ensuring that all grounds for suspending and terminating/revoking an advocate's license are defined in a clear, precise and exhaustive manner**. ODIHR hereby refers to the key recommendations O to S of its *2018 Opinion*.

173 Basic Principles of the Role of Advocates, adopted by the Eighth UN Congress on the Prevention of Crimes and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

174 OSCE/ODIHR, *Opinion on the Draft Law of the Republic of Kazakhstan on the Professional Activities of Advocates and Legal Assistance (28 February 2018).*

175 *Ibid.*, para. 21. See also Principle 26 the Basic Principles of the Role of Advocates, which states that *"[c]odes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation."*

176 *Ibid.*, para. 23.

177 For an overview of national practices on this issue, see World Bank, *Comparative Analysis of Bar Associations and Law Societies in Select European Jurisdictions*, 2017, pp. 24-26, <https://openknowledge.worldbank.org/bitstream/handle/10986/28959/121502-WP-ComparativeAnalysisofBarAssociationandLawSocietiesinSelectEuropeanJuriscditionsEN-PUBLIC.pdf?sequence=1&isAllowed=y>.

178 *Ibid.*

2.3. Encouraging Reconciliation Procedures and Introducing State-guaranteed Free Mediation (Step 16)

126. Step 16 seeks to encourage recourse to mediation for reconciliation to pursue a so-called "conflict-free society", including by broadening the scope of state-guaranteed legal aid to be available to vulnerable social groups willing to use mediation.

127. Mediation is commonly understood to be a process in which a neutral third person facilitates the resolution of a dispute between two or more parties. There is no common or exact definition of which elements are required in order for mediation to proceed, and what sets mediation apart from other types of alternative dispute resolution. As a relatively new topic on the agendas of domestic and international law-makers, the number of documents setting out a framework of international standards tailored specifically to the processes and conduct of mediation is still relatively limited.

128. However, certain universal conventions and other documents setting standards in the area of international human rights, do have bearing on the conduct and modalities of mediation procedures. In particular, fair trial rights and the right of access to and equality before courts may also be affected by laws regulating mediation. Thus, Article 14 of the ICCPR on the right to a fair trial and equality before courts and tribunals is of particular relevance.

129. In cases of mediation touching upon the rights of women and the rights of children, particularly in criminal and family matters, the UN Convention on the Rights of the Child[179] (CRC) and the UN CEDAW[180] set international standards which must be adhered to in relevant legislation and its implementation. Because of the nature of the mediation process and its aim to conserve amicable relations between the participants, mediation is particularly well-suited for family matters, including questions of custody. Hence, the European Convention on the Exercise of Children's Rights explicitly mentions mediation as a preferred way to resolve disputes affecting children, where appropriate.[181] While Kazakhstan is not bound by this regional instrument, it may serve as useful guidance in this context.

130. At the OSCE level, OSCE commitments have framed access to mediation as one of the modalities of access to effective remedies and therefore access to justice, together with judicial, administrative and conciliation procedures.[182]

131. The Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) has issued four recommendations setting out important minimum standards for mediation in different areas of law, namely in family, civil and penal matters and disputes between administrative authorities and private parties.[183] These standards are accompanied by three sets of guidelines which interpret the issued recommendations.[184] In its Guidelines

179 *UN Convention on the Rights of the Child* (CRC), adopted on 20 November 1989, entered into force on 2 September 1990, 1577 UNTS 3. The Republic of Kazakhstan ratified this Convention on 12 August 1994.

180 *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted on 18 December 1979, entered into force on 3 September 1981, 1249 UNTS 13. The Republic of Kazakhstan acceded to this Convention on 26 August 1998.

181 *CoE European Convention on the Exercise of Children's Rights*, adopted on 25 June 1996, entered into force on 1 July 2000, CETS No. 160.

182 See e.g., Annex to Decision No. 3/03 Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area at III. 9).

183 These are the CoE *Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation*, adopted by the Committee of Ministers at the 616th meeting of the Ministers' Deputies on 21 January 1998; *Recommendation No. R (99) 19 on the Committee of Ministers to Member States concerning mediation in penal matters*, adopted by the Committee of Minsters at the 679th meeting of the Ministers' Deputies on 15 September 1999; *Recommendation Rec(2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties*, adopted by the Committee of Ministers at the 762nd meeting of the Ministers' Deputies on 5 September 2001; and *Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters*, adopted by the Committee of Ministers at the 808th meeting of the Ministers' Deputies on 18 September 2002. The four recommendations are available at <http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pd>f.

184 European Commission for the Efficiency of Justice (hereinafter "CEPEJ"), *Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters*, CEPEJ(2007)14, adopted on 7 December 2007;

for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters (hereinafter "CEPEJ Guidelines on family and civil mediation"), the CEPEJ also recommended the use of the *European Code of Conduct for Mediators* (of the European Union) as a minimum standard for civil and family mediation, while also taking into account the specific nature of family mediation.[185] The CEPEJ also recently developed the *European Code of Conduct for Mediation Providers* (December 2018), which may also serve as a useful reference document.

132. Within the European Union, *Directive 2008/52/EC*[186] (hereinafter "European Directive on Mediation") also sets standards regarding mediation in civil and commercial matters in its Member States. Even though Kazakhstan is not bound by this directive, it sets standards for mediation, particularly in the areas of confidentiality and the use of mediation-related information as evidence, and might hence be a valuable tool for law-makers and other stakeholders.

133. In criminal matters, mediation is also mentioned or recommended as an alternative means of conflict resolution in several other international standard-setting documents addressing the position of victims in the context of criminal procedures.[187]

134. Finally, as regards the peaceful resolution of conflict, at the UN level, mediation is a tool that is often used in connection to peace processes and/or the resolution or prevention of ethnic conflicts. The relevant standard-setting manual is the *UN Guidance for Effective Mediation* (2012),[188] which emphasizes, *inter alia*, the importance of the inclusiveness of mediation processes, in particular in an ethnically diverse environment.[189] At the OSCE level, the peaceful settlement of disputes is also one of the ten guiding principles of the Helsinki Final Act of the Conference on Security and Co-operation in Europe, which explicitly mentions mediation as one means to peacefully resolve conflicts.[190] As such, mediation has a special status within the OSCE area as a commitment which OSCE participating States adhere to in order to prevent or end local, regional or international conflicts. This commitment has been reiterated and further developed by other OSCE documents, particularly the *Guidance Note on Enhancing Gender-Responsive Mediation*[191] and the *OSCE Ministerial Decision No. 3/11 on Elements of the Conflict Cycle Related to Enhancing the OSCE's Capabilities in Early Warning, Early Action, Dialogue Facilitation and Mediation Support, and Post-Conflict Rehabilitation*,[192] among others.[193]

Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, CEPEJ(2007)13; *Guidelines for a better implementation of the existing recommendation on alternatives to litigation between administrative authorities and private parties*, CEPEJ(2007)15.

185 *Op. cit.* footnote 184 at 1.8. (CEPEJ Guidelines on family mediation and mediation in civil matters); see also CoE, *Opinion of the Directorate General of Human Rights and Rule of Law, Justice and Legal Co-operation Department, on the Serbian Draft Law on Mediation*, 23 April 2013, page 14; and the *European Code of Conduct for Mediators* (2004).

186 *Directive 2008/52/EC* of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

187 CoE, *Recommendation Rec(2006)8 on assistance to crime victims*, 14 June 2006; *Recommendation No. (85)11 on the position of the victim in the framework of criminal law and procedure*, 28 June 1985; *Recommendation No. R(87) 21 on assistance to victims and the prevention of victimization*, 17 September 1987; UN General Assembly Resolution 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (29 November 1985), GAOR 40th Session Supp 53, 213; *EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime*, and replacing Council Framework Decision 2001/220/JHA.

188 *UN Guidance for Effective Mediation* (New York, 2012).

189 See also the speech of Ambassador Fred Tanner (Swiss OSCE Chairmanship) on the *"Inclusivity of mediation processes"* at the 3rd meeting of Regional, Subregional and other International Organizations on Preventive Diplomacy and Mediation (5 February 2014).

190 CSCE, *Final Act of the Conference for Security and Cooperation in Europe* **(1 August 1975) 14 ILM 1292.**

191 OSCE Secretariat, OSG/Gender Section, Vienna, October 2013, available at <http://www.osce.org/gender/107533?download=true>.

192 OSCE MC.DEC/3/11 (27 December 2011), available at <http://www.osce.org/mc/86621?download=true>.

193 See also the oSCE-UN, *Report on Perspectives of the UN and Regional Organizations on Preventive and Quiet Diplomacy, Dialogue Facilitation and Mediation: Common Challenges and Good Practices* developed in co-operation with the United Nations (February 2011).

135. It is worth noting that there have been ample debate as to whether mandatory mediation constitutes an unacceptable restraint on the right of access to the court and therefore a violation of Article 14 of the ICCPR (or Article 6 of the ECHR).[194] In that respect, it must be emphasized that compulsion to mediate *is not* a violation of Article 14 of the ICCPR/Article 6 of the ECHR because it is simply a requirement to attempt mediation, and not to achieve an outcome through mediation and if the parties are unable to reach a solution through mediation, the traditional paths of justice are still open to them. In that respect, the European Directive on Mediation, while defining mediation as a voluntary process, acknowledges that Member States may have laws mandating mediation as an initial step. In light of the foregoing, **it is important that the so-called objective of "conflict-free society" mentioned under Step 16 does not prevent participants to mediation processes to step out of the process at any time before a mediation settlement is reached in order to initiate judicial proceedings.**

136. Regarding access to mediation, as a more cost-effective procedure, it is welcome that the Step 16 mentions access to state-guaranteed legal aid for vulnerable social groups since the fees necessary to initiate mediation processes may *de facto* prevent effective access to such alternative modes of dispute resolution by certain persons or groups. More generally, ODIHR would like to refer back to its 2015 recommendations containing general guidance on recourse to mediation in Kyrgyz Republic[195], as well as 2018 recommendations regarding the state legal aid system in Kazakhstan[196] and stands ready to analyse any proposed amendments to the legislation on state legal aid that may be drafted in the near future.

2.4. Compulsory Pre-trial Settlements for Tax and Customs Disputes (Step 18)

137. The Judicial Reform Proposals seek to "introduce a compulsory pre-trial settlement procedure for tax and customs disputes" (Step 18).

138. As mentioned above regarding mediation, legislation regulating alternative dispute resolution institutional mechanisms and modalities should not affect the very essence of fair trial rights and the right of access to and equality before courts. The ECtHR has held that a requirement to attempt a friendly-settlement procedure before bringing a claim for damages against the State may constitute a legitimate restriction on the right of access to a court.[197] According to the ECtHR, the manner in which such restriction operates cannot reduce the access to court in such a way or to such an extent that the very essence of the right is impaired.[198]

194 See, for example, T Naughton, 'Mediation and the land and environment court of New South Wales' (1992) 9 *Environment and Planning Law Journal* 219 at 223. See also *Halsey v. Milton Keynes NHS Trust* and *Steel v. Joy and Halliday* [2004] EWCA Civ 576. See also the comments of Laws J in *Ex parte Witham*, who concluded that it was not lawful to set fees at a non-affordable level in order to encourage mediation, as this would effectively diminish the right to sue in a practical sense: *R v. Lord Chancellor, Ex parte Witham* [1998] QB 575 Div Ct. See, for example, S Fielding, 'Mediation post-Halsey' (2004) 154 *New Law Journal* 1394, T Allen, 'A closer look at Halsey and Steel' (2004) available at www.cedr.com and 'What happens now? The impact of Halsey' (2004) available at www.cedr.com.

195 See OSCE/ODIHR *Opinion on the draft Law on resolution of disputes through mediation and amendments to related legislation*, para 8.

196 See Key Recommendations F, G and H from the OSCE/ODIHR, *Opinion on the Draft Law of the Republic of Kazakhstan on the Professional Activities of Advocates and Legal Assistance (28 February 2018)*, recommending in particular: (F) To increase the overall accessibility and sustainability of the legal aid system by distinguishing between primary and secondary legal aid and widening the range of legal aid of providers to include legal consultants, paralegals, NGOs and legal clinics as primary legal aid providers and to include legal consultants as secondary legal aid providers in civil cases; [paras. 29-31] (G) To set out clear eligibility criteria for all categories of legal aid in a comprehensive manner [paras. 32-33]; and (H) To establish an operationally independent body to manage legal aid services across the country whose functions would include those currently assigned to the designated state body as well as additional functions, such as reviewing requests for legal aid and appointing lawyers/legal aid providers.

197 See e.g., ECtHR, *Momčilović v. Croatia*, Application no. 11239/11, paras 55-57.

198 See e.g., ECtHR, *Jüssi Osawe v. Estonia*, Application no. 63206/10, paras 36 and 43.

139. Several soft law instruments have been developed at the Council of Europe level regarding alternative dispute resolution mechanisms. Recommendation No. R (86) 12 of the Council of Europe's Committee of Ministers to Member States concerning measures to prevent and reduce the excessive workload in the courts encourages member states to consider, where appropriate, "*a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings*."[199]

140. Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties further notes that alternative means of resolving administrative disputes may allow for speedier and less expensive resolution, friendly settlement, expert dispute resolution, resolving of disputes according to equitable principles and not only strict legal rules, and greater discretion (Preamble, para. 8). At the same time, **the Recommendation warns that judicial review should be preserved, "*as this constitutes the ultimate guarantee of protecting both users' rights and the rights of the administration*" (**Preamble, para. 11) **and underscores that alternative means to litigation should respect the principles of equality, impartiality, and the rights of the parties** (Preamble, para. 12).

141. As principles of good practice, the Recommendation Rec(2001)9 advises:

> *"2. Scope of alternative means*
>
> *i. Alternative means to litigation should be either generally permitted or permitted in certain types of cases deemed appropriate, in particular those concerning individual administrative acts, contracts, civil liability, and generally speaking, claims relating to a sum of money.*
>
> *[…]*
>
> *3. Regulating alternative means*
>
> *i. The regulation of alternative means should provide either for their institutionalisation or their use on a case-by-case basis, according to the decision of the parties involved.*
>
> *ii. The regulation of alternative means should:*
>
> *a. ensure that parties receive appropriate information about the possible use of alternative means;*
>
> *b. ensure the independence and impartiality of conciliators, mediators and arbitrators;*
>
> *c. guarantee fair proceedings allowing in particular for the respect of the rights of the parties and the principle of equality;*
>
> *d. guarantee, as far as possible, transparency in the use of alternative means and a certain level of discretion;*
>
> *e. ensure the execution of the solutions reached using alternative means.*
>
> *iii. The regulation should promote the conclusion of alternative procedures within a reasonable time by setting time-limits or otherwise.*
>
> *iv. The regulation may provide that the use of some alternative means to litigation will in certain cases result in the suspension of the execution of an act, either automatically or following a decision by the competent authority.*

199 Council of Europe, *Recommendation No. R (86) 12* of the Council of Europe's Committee of Ministers to Member States concerning measures to prevent and reduce the excessive workload in the courts, paragraph I.

II. Relationship with courts

i. Some alternative means, such as internal reviews, conciliation, mediation and the search for a negotiated settlement, may be used prior to legal proceedings. The use of these means could be made compulsory as a prerequisite to the commencement of legal proceedings.

[...]

iv. In all cases, the use of alternative means should allow for appropriate judicial review which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration.

III. Special features of each alternative means

[...]

3. Negotiated Settlement

i. Unless otherwise provided by law, administrative authorities shall not use a negotiated settlement to disregard their obligations.

ii. In accordance with the law, public officials participating in a procedure aimed at reaching a negotiated settlement shall be provided with sufficient powers to be able to compromise."[200]

142. Following the Recommendation, the European Commission for the Efficiency of Justice (CEPEJ) has issued "Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties", which were issued in order to help member states to implement the Recommendation.[201]

143. In 2021, the United Nations issued a *Handbook on the Avoidance and Resolution of Tax Disputes*,[202] which seeks to provide guidance on various mechanisms that may be used to avoid tax disputes between tax administration and tax payers, and where such disputes arise, to resolve them accordingly. In Chapter 2 of the Handbook, various approaches to avoiding disputes between tax administrations and the taxpayers are explored. Among them, the Handbook describes so-called "advance agreements/prefiling agreements", which allow a taxpayer to obtain certainty on an issue by engaging directly with the tax administration in advance of a dispute on a particular issue.[203] Other forms of settlements also include mediation as a form of process-related assistance that involves the use of a mediator or facilitator to assist two parties with the resolution of their potential dispute.[204]

144. In terms of dispute resolution mechanisms in tax matters, the UN Handbook further elaborates on two types of dispute resolution mechanism: an administrative appeal that

200 Council of Europe, *Recommendation Rec(2001)9* on alternatives to litigation between administrative authorities and private parties.
201 See <https://rm.coe.int/1680747683>.
202 UN *Handbook on the Avoidance and Resolution of Tax Disputes* (2021), <https://www.un.org/development/desa/financing/document/un-handbook-avoidance-and-resolution-tax-disputes>.
203 See e.g., the Pre-Filing Agreement (PFA) under Pre-Filing Agreement Programme of the United States Internal Revenue Service (IRS), according to which the IRS offers its corporate taxpayers the opportunity to enter into the Pre-Filing Agreement Program (Program), which oversees the issuance of a Pre-Filing Agreement (PFA). If accepted into this Program, the taxpayer will undergo an examination of a specific issue in advance of the return being filed, with the end goal of obtaining a PFA, a form of closing agreement which binds both the taxpayer and the tax administration. A critical difference between a PFA and other types of advance rulings is that the PFA will only be provided with respect to a "closed transaction" for which a position has not yet been taken on a return. The agreement is a form of closing document, which legally binds both the taxpayer and the IRS to the terms of the agreement. Once executed, the PFA cannot be re-opened absent a showing of fraud, malfeasance or other bad faith act. The benefit of PFA is that both sides (taxpayer and administration) achieve certainty in advance of a return being filed. Namely, by addressing and agreeing issues in advance of filing, the need for post-filing activity is eliminated. Similar modalities exist in other countries, such as France.
204 There are two types of mediation, depending on who acts as mediator: in-house facilitation involving an impartial official of the tax administration acting as a facilitator, while the mediator in an "independent mediation" is an independent body.

may be requested to review the conclusions of a review or audit that potentially affects the amount of tax owed; and administrative mediation. Through the latter procedure, officials of the tax administration trained in dispute resolution techniques facilitate the dialogue between the relevant officials in the tax administration and the taxpayer with the aim of helping to resolve the dispute. Whereas the officials who deal with administrative appeals provide their own analysis of the action or actions of the tax administration that led to the disputes, the role of the mediator is merely to enhance the communication between the disputing parties and facilitate an agreed resolution of the matter. Through such facilitation, the mediators assist the parties in clarifying and understanding each other's positions or reaching a mutually acceptable compromise.

145. Of note, the Committee of Experts on International Cooperation in Tax Matters have recently elaborated the Preliminary Draft of the Chapter on Domestic Dispute Resolution Mechanisms,[205] which contains a dedicated part related to "negotiated settlements", which often allow taxpayers to settle their disputes with the tax authority through settlement agreements,[206] though in certain countries such modalities are not always permitted.[207]

146. The above-mentioned international and regional standards and country practices confirm that **while a procedure to reach a friendly settlement before proceeding with a court trial may be made compulsory, pending the conclusion of a settlement, recourse to a judicial review should be retained to protect the rights of the private parties and of the administration**. This should be reflected in future legislation regulating such matter.

VII. OTHER ISSUES

1. PROPOSAL TO ESTABLISH A GOVERNMENT-LED ARBITRATION MECHANISM FOR ADMINISTRATIVE DISPUTES (STEP 21)

147. Step 21 proposes to establish a government-led arbitration mechanism to resolve disputes between government agencies, state institutions and subjects of the quasi-public sector without recourse to the courts.

148. ODIHR thereby refers to its recent *Opinion on Concept Note on the Implementation of the Code of Administrative Procedure and Process (CAPP)*.[208] As noted in the Opinion, internal administrative procedures pertaining to the legal relationships and/or disputes of

205 Committee of Experts on International Cooperation in Tax Matters Eighteenth session New York, 23-26 April 2019 Item 3 (g) of the provisional agenda Dispute avoidance and resolution Preliminary Draft of the Chapter on Domestic Dispute Resolution Mechanisms Note by the Subcommittee on Dispute Avoidance and Resolution https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-04/18STM_CRP2-Chapter3-Handbook-dispute-avoidance-and-resolution.pdf

206 See e.g., in France and Croatia. In Croatia, according to the *General Tax Law*, tax authority and taxpayer may for newly established obligations during the tax supervision procedure, until final minutes of the supervision have been delivered, conclude the tax settlement. The subject of the settlement may be: newly established tax obligation in the procedure where the tax basis is determined by evaluation, time limit for payment of such obligation and reduction of the interests. The condition to make a settlement is the acceptance of such newly established obligation in the procedure and waive of the use of legal remedies on it. The settlement made against laws, public interest and rights of third parties is not allowed. The settlement cannot be made if during the supervision there is suspicion that a criminal act may have been committed. The settlement constitutes an enforceable legal act and is executed according the rules on execution of the tax rulings. Another possibility for alternative dispute settlement is to conclude an administrative contract between the tax authority and the taxpayer, which provides for the partial or complete payment of the overdue tax debt.

207 *Ibid.*

208 OSCE/ODIHR, *Opinion on Concept Note on the Implementation of the Code of Administrative Procedure and Process* (2021), especially paras. 35-39.

the "state vs. the state" should be clearly separated from those dealing with the "state vs. the citizen" relationships to be covered by the CAPP. Indeed, the Opinion emphasizes that there are fundamental differences in the balance and standing of the parties in such cases, given the powers and resources of the state *vis-à-vis* those of the individual. The Opinion further notes that adopting internal working procedures to resolve disputes between public bodies should belong to the remit of the executive branch. As noted in the 2021 ODIHR Opinion, the internal rules and procedures of administrative bodies could be the object of an internal administrative instruction, or of a similar by-law issued by the executive.[209]

149. Similarly, the Venice Commission observed that the internal procedure of or dispute settlement modalities between public authorities "*by [their] content, structure and form, should not be part of the [CAPP]*" and that due to its normative particularities, the internal procedure "breaks" the structure of the Administrative Procedure Code, as it "*refers to situations and relations that are not directly connected to the concept of administrative procedure or court proceedings directly concerning individuals and other private parties*."[210]

150. In light of the above, **it is for the executive to decide the modalities for resolution of internal disputes between public or semi-public bodies, which could potentially choose some forms of arbitration mechanisms under the auspices of the government, to be regulated outside of the CAPP by a separate law, administrative instruction or by-laws issued by the executive**.

2. Recommendations Related to the Judicial Reform Process and Amending the Legal Framework relating to the Judiciary in Kazakhstan

151. OSCE participating States have committed to ensure that legislation will be "adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability" (1990 Copenhagen Document, par 5.8).[211] Moreover, key OSCE commitments specify that "[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (1991 Moscow Document, par 18.1).[212] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[213]

152. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.[214] Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation;[215] the State should also provide for an adequate and timely feedback

209 OSCE/ODIHR, *Opinion on Concept Note on the Implementation of the Code of Administrative Procedure and Process* (2021), para. 35. Moreover, at an OECD/SIGMA 2009 Conference on Public Administration Reform and European Integration, the presentation of a paper explicitly emphasized that laws on administrative procedure should not allocate competence between public authorities; see Rusch, Wolfgang, Administrative Procedures in EU Members States, Conference on Public Administration Reform and European Integration Budva, Montenegro 26-27 March 2009, <http://www.sigmaweb.org/publications/42754772.pdf>.

210 See Venice Commission, *Draft Opinion on the Administrative Procedure and Justice Code of Kazakhstan* (2018), para. 24.

211 Available at <http://www.osce.org/fr/odihr/elections/14304http://www.osce.org/fr/odihr/elections/14304>.

212 Available at <http://www.osce.org/fr/odihr/elections/14310http://www.osce.org/fr/odihr/elections/14310>.

213 See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.

214 ibid.

215 According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking

mechanism whereby public authorities should acknowledge and respond to contributions.[216] To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,[217] meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted, and enhance public trust in the institutions in general.

153. With regard to the judiciary's involvement in legal reform affecting its work, international recommendations have stressed "*the importance of judges participating in debates concerning national judicial policy"* and legislative reform concerning their status and the functioning of the judicial system.[218]

154. The preparation of future amendments to the legal framework pertaining to the judiciary should be subjected to legitimate, open and meaningful consultation process, especially with bodies of the judiciary, association of judges or similar bodies, and individual judges, the academia, lawyers' associations as well as with the public or civil society organizations. Moreover, given the potential impact of a future reform of the Laws on the independence of the judiciary and the rule of law, it is essential that such reform be preceded by an in-depth research and impact assessment, completed with a proper problem analysis using evidence-based techniques to identify the best efficient and effective regulatory option.[219]

155. It is also key that proper time be allocated for the preparation and adoption of amendments. In that context, both the government and the Parliament should have sufficient time to review and evaluate the draft amendments, and to take professional account of the opinions of the staff and the relevant committee, and consider the views of judicial stakeholders, civil society organizations and other experts. In principle, adequate time limits should be set prior to the actual drafting exercise, as well as for the proper verification of draft laws and legislative policy for compatibility with international human rights standards, including a gender and diversity impact assessment, at all stages of the law-making process.[220] Furthermore, given the potential substantive changes, sufficient *vacatio legis* should be provided to allow adequate time to implement the proposed reform.

156. In light of the above, the process by which future amendments will be developed and adopted should conform to the aforesaid principles of democratic law-making. Any legitimate reform process relating to the judiciary, especially of this scope, **should be transparent, inclusive, extensive and involve effective consultations, including with representatives of the judiciary, judges' and lawyers' associations, the academia, civil society organizations and a full impact assessment including of compatibility**

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into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), pars 40-41.

216 See e.g., *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

217 See ODIHR, *Assessment of the Legislative Process in Georgia* (30 January 2015), pars 33-34. See also e.g., ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, Section II, Sub-Section G on the Right to Participate in Public Affairs.

218 *Op. cit.* footnote **Error! Bookmark not defined.**, par 31 (CCJE *Opinion no. 18 (2015)*); *op. cit.* footnote **Error! Bookmark not defined.**, par 1.8. (1998 *European Charter*). See also *op. cit.* footnote **Error! Bookmark not defined.**, par 9 (2010 CCJE Magna Carta of Judges), which states that *"[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)*"; and ENCJ, *2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate*, Recommendation 5, which states that *"[j]udiciaries and judges should be involved in the necessary reforms"*.

219 See e.g., ODIHR, *Report on the Assessment of the Legislative Process in the Republic of Moldova* (2010), par 14.5.

220 See e.g., *op. cit.* footnote 217, pages 6 and 7 (2015 ODIHR Report on the Assessment of the Legislative Process in Georgia).

with relevant international human rights standards, according to the principles stated above. Adequate time should also be allowed for all stages of the preparation of the amendments and ensuing law-making process. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary or in other fields.

3. GENDER, DIVERSITY AND JUDICIAL REFORM

157. As it stands, the Judicial Reform Proposals are silent as to the possible gender and diversity considerations that should guide any judicial reform process. In addition to some specific recommendations made above, ODIHR thereby would like to refer to its 2019 Recommendations on Gender, Diversity and Justice[221] as they may serve as useful guidance throughout the judicial reform process in order to ensure the inclusiveness of the justice system in Kazakhstan.

[END OF TEXT]

221 See OSCE/ODIHR, *Gender, Diversity and Justice: Overview and Recommendations* (2019).