



Fifth Expert Forum on Criminal Justice for Central Asia

Final Report

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Bishkek, Kyrgyzstan

Organization for Security and Co-operation in Europe
Office for Democratic Institutions and Human Rights



In co-operation with:
OSCE Field Operations in Central Asia
and the United Nations Office on Drugs and Crime





(OSCE/Andrei Borisovich Novoselov)

INTRODUCTION AND OUTLOOK

Criminal justice reform remains on the top of political agendas in Central Asia. In 2014, Kazakhstan completed a comprehensive reform of its criminal procedure code (CPC) and criminal code (CC) which entered into force on 1 January 2015. Kyrgyzstan is well into drafting its new CPC and CC; Tajikistan is drafting a new CC, while Uzbekistan is introducing major amendments in its criminal justice legislation. It was thus amid a series of completed and ongoing reforms that the OSCE Office for Democratic Institutions and Human Rights (ODIHR), in close co-operation with OSCE field operations in Central Asia and the United Nations Office on Drugs and Crime (UNODC) organized the Fifth Expert Forum on Criminal Justice for Central Asia on 24-25 November 2014 in Bishkek, Kyrgyzstan.

Since 2008, the Expert Forum has emerged as a leading regional platform for professional discussion among prominent experts and policy-makers in the countries of Central Asia and other parts of the OSCE region on criminal justice and judicial reform, human rights and fair trial rights as well as the harmonization of national legislation with relevant international standards and OSCE commitments. The Expert Forum was successively organized in Zerenda, Kazakhstan, in 2008, Issyk-Kul, Kyrgyzstan, in 2009, Dushanbe, Tajikistan, in 2010 and Almaty, Kazakhstan, in 2012.

During the two days of the Expert Forum, 72 representatives (26 women and 46 men) of the judiciary, prosecution, police, attorneys, academics and civil society actors from Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan discussed recent reforms, trends and challenges in the criminal justice sector in Central Asia and other parts of the OSCE region. International and regional experts on criminal

justice reform from Canada, Georgia, Kazakhstan, Kyrgyzstan, the Russian Federation, Spain, Ukraine and the United States of America provided examples of practices and experiences from beyond the Central Asian region. To further explore avenues for co-operation and for ODIHR assistance in this area, representatives of Mongolia also attended the event.

The Expert Forum aimed to offer participants the opportunity to discuss and to exchange experiences and good practices related to the current criminal justice and judicial reforms in the region. During the six plenary sessions and four working groups, participants discussed the following issues: investigative measures at the pre-trial stage, the use of preventive measures including alternatives to detention, rules of evidence, the status and role of defence lawyers, jury trials, the division of offences in the criminal sphere, plea bargaining and abbreviated procedures, and the impact of justice actors' gender on justice delivery.

Although it strives to be as comprehensive as possible, the present report does not provide an exhaustive account of all discussions and interventions. Instead, it aims to provide an overview of the discussions and to extract from the constructive and detailed exchanges held, the key messages and conclusions reached by participants.

The Expert Forum also represented an opportunity for participants to voice particular requests for support, including for legislative assistance focused on existing legislation or draft legislation. ODIHR will be following up with Central Asian counterparts to offer targeted assistance to ongoing criminal justice reform efforts in the region.

Finally, ODIHR would like to express its gratitude to the Kyrgyz authorities who hosted the Expert Forum and to ODIHR's counterparts in the region, in particular OSCE Field Operations and the United Nations Office for Drugs and Crime.

The Fifth Expert Forum on Criminal Justice for Central Asia was organized by ODIHR, in the framework of its rule of law program.



(L-r) Ashita Mittal, UNODC Regional Representative for Central Asia, Nataliya Nikitenko, Head of the Parliamentary Committee on Human Rights, Constitutional Legislation and State Structure of the Kyrgyz Jogorku Kenesh, John MacGregor, Deputy Head of the OSCE Center in Bishkek, and Tina Gewis, Chief of ODIHR Rule of Law Unit open the Fifth Expert Forum on Criminal Justice for Central Asia. (OSCE/Andrei Borisovich Novoselov)

COUNTRY PRESENTATIONS

In order to ensure that discussions at the Forum were informed by the reform agenda of each country, the Expert Forum provided representatives of Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan with the opportunity to present the latest developments on criminal justice reforms in their countries.

In his presentation on criminal justice reforms in Kazakhstan, Mr. Berik Baimaganbetov, Senior Prosecutor of the Department of Pre-trial Oversight, described the novelties introduced in the new CC, CPC, Code on administrative offences (CAO) and the criminal execution code adopted in 2014. These novelties include the modification of the start of the detention procedures to begin at the moment of arrest, amending provisions on alternatives to detention to facilitate their implementation, asserting the right to a lawyer for “individuals linked to the crime,” the creation of a pre-trial judge, the introduction of a deposition procedure for unavailable witnesses, and a mechanism for the expedited compensation of victims of serious crimes.

Mr. Arabaev Manas, Expert of the Department on Judicial Reform and Legality from the Administration of the President of the Kyrgyz Republic, held a country presentation on Kyrgyzstan’s criminal justice reform. He emphasized the importance of the work of the various working groups on the draft codes, including the draft CPC, CC, Code on misdemeanours, CAO, and Code of criminal execution. The

current reform primarily focuses on the decriminalization of criminal offences and amending the scope of the CAO, strengthening judicial oversight with the creation of a pre-trial judge, implementing the adversarial principle even at the pre-trial stage and promoting the rehabilitation of prisoners.

As explained by Mr. Mahmudov Nasrullo, Deputy Head of the Committee on Human Rights and Legislation of the Tajik Parliament, Tajikistan has set up a working group to develop a new CC. The current priorities on the criminal justice reform agenda are the streamlining of the CC through the removal of repetitive offences, the re-assessment and reduction of some sentences especially for crimes committed by women with children, promoting the use of conditional release, extending the use of fines instead of detention, introducing the confiscation of proceeds of crime, the decriminalization of 12 offences being moved from the CC to the CAO, strengthening the criminal responsibility for organized crime, corruption and torture, the reduction of the number of crimes subject to capital punishment (from 5 to 3 offences), and the removal of criminal responsibility for legal persons. Until the code is finalized, amendments will be made to the 1998 CC. There are also plans to amend the CPC and CAO.

Mr. Aziz Mirzaev, Head of the International Department of the Supreme Court of Uzbekistan stressed that Uzbekistan continues its reform process by adopting new amendments to its criminal legislation. The latest amendments have introduced alternatives to prison sentences through the payment of fines, house arrest as an alternative to pre-trial detention, a reduction of the number of grave crimes, provisions supporting the improvement of detention conditions, the possibility to commit an offender to a medical institution, and reduced sentences for certain crimes such as economic activity without a license.



Experts Stephen Thaman (l) and Nikolai Kovalev (r) listen to Dmitry Nurumov, Senior Adviser to the OSCE High Commissioner on National Minorities (c), present a compilation of criminal procedure codes from Central Asia. (OSCE/Andrei Borisovich Novoselov)

KEY MESSAGES AND CONCLUSIONS

During the Fifth Central Asia Forum participants discussed various aspects of ongoing criminal justice reforms in the countries of the region. The following is a summary of key messages and conclusions from the discussions.

Plenary Session I – Approval, control and review of investigative actions performed during the pre-trial phase

- The roles of the judge, prosecutor and investigator in the pre-trial phase should be clearly delineated in the law, particularly when it comes to authorizing coercive investigative measures and overseeing the admission of evidence.
- The most intrusive investigative measures (IM) including searches, seizures and special investigative measures (SIMs) should be approved by a judge. Additionally, requests for investigative measures should be reasoned and detailed; short of that a request for an IM should be rejected.
- It is essential that the law clearly defines the scope of application of special investigative measures.
- Under international standards, all persons arrested should be brought before a judge within 48 hours of the arrest for a review of the legality of the arrest.

- The rights of the defendant should be ensured from the onset of the investigation through the participation of defence counsel in the interrogation of the suspect immediately after the arrest and during the examination of witnesses.

Plenary Session II – Use of preventive measures: pre-trial detention and alternative measures

- While selecting a preventive measure, the rule is to first and foremost consider non-custodial measures. Only when non-custodial measures are found unsuitable to the situation should the judge consider pre-trial detention.
- Non-custodial measures allow individuals to try to maintain their regular lives and are less costly than pre-trial detention, even though proper budgeting for their application should be ensured by the state. In addition, they contribute to solving the issue of prison overcrowding.
- The conditions of application of non-custodial measures should be clearly defined in the law and should not lead to treatment as coercive as custodial measures.
- Preventive measures should be authorized by a judge by a reasoned decision following a public hearing in the presence of the defendant assisted by a lawyer and should be subject to regular judicial reviews.
- The severity of the crime cannot be the sole ground for imposing a preventive measure, especially pre-trial detention. Substantive and procedural grounds must be satisfied by the prosecutor/investigator's request.
- Access to a lawyer and the right to effective defence should be guaranteed during the procedure of imposing a preventive measure. Defence lawyers should receive targeted training to better defend the interests of their clients subject to preventive measures.

Working Group 1 – Jury trials

- Given that jury trials contributed to increased transparency, quality of evidence and the adversarial nature of the criminal process in Kazakhstan, they should be guaranteed in practice in all applicable cases, not only in the most serious ones. Also, more types of cases should be adjudicated through jury trials in Central Asia, particularly political crimes and cases dealing with the restriction of freedom of expression.
- Participation in a jury must be considered a civic duty. Clear rules and procedures on jury selection must be adopted to ensure random selection and the impartiality of the jury.
- While the jury should reach a verdict on guilt based on as much information and facts as possible, with the exception of evidence creating prejudice or bias against the defendant, the judge should only provide the jury with procedural and legal explanations.
- Although the jurors cannot be expected to legally motivate their verdict, fair trial principles dictate that a judgment should have a reasoning based on the questions which the jury tried to answer throughout their assignment.

Working Group 2- Division of offences within the criminal sphere (including criminal offences, misdemeanours and administrative offences)

- Central Asian and other post-Soviet countries have embarked on a series of reforms of their criminal legislation, following different approaches. Although there is no one-size-fits-all reform model, any chosen model must uphold fair trial guarantees. Also, such a model should not lead to the criminalization of acts in contradiction with human rights standards.

- Clear legal criteria distinguishing all categories of criminal acts must be established with the understanding that a specific act can fall only into one category.
- Despite the fact that different procedures could be applicable for crimes, misdemeanours and administrative offences, fair trial rights should be guaranteed to all three categories of acts since they all belong to the criminal sphere, particularly when they entail police custody or a prison sentence.
- Administrative offences (AOs) should not foresee police detention nor should they result in a prison sentence since by definition they constitute minor criminal acts. As this objective is yet to be achieved in most Central Asian countries, it is important that meanwhile persons convicted for an AO are detained in separate detention facilities from individuals convicted of crimes.

Plenary Session IV- Rules of evidence

- The defence should have access to the case file at the earliest moment possible during the investigation to be able to mount an effective defence.
- The adversarial principle dictates that the court should base its verdict on legally obtained evidence presented in court and/or on evidence which was subject to examination by both parties. Depositions could help preserve testimonies of witnesses who might be unavailable at the trial. As a general principle, anonymous statements and hearsay evidence should not be admissible.
- Evidence obtained as a result of torture or ill-treatment is not admissible. Allegations of torture should be investigated immediately by an independent body. Central Asian states should adopt stronger exclusionary rules which go beyond the right to remain silent to help eradicate the practice of forced confessions.

Plenary Session V – Status and role of defence lawyers

- The legal profession in Central Asia should be self-organized and self-regulated to ensure it can function independently and provide qualitative services. This requirement for independence means that bar associations should be established and should function independently and disciplinary procedures should be handled within the legal profession.
- Lawyers should have the right to perform their functions freely and independently.
- The right to effective legal assistance must be enforced and means, inter alia, that an individual should have early access to legal assistance, should freely choose his/her legal counsel, and should benefit from effective defence.
- The right to effective legal aid for vulnerable defendants depends to a large extent on an adequate level of public funding.

Working Group 3- Plea bargaining and abbreviated procedures

- Abbreviated procedures constitute a simpler, faster and more cost-efficient alternative to the full-fledged criminal trial as they aim to dispose of criminal cases more expeditiously.
- Being widely considered a panacea to current problems of criminal procedures in Central Asia, plea bargaining has become more and more popular in the region. Yet, plea agreements carry risks and deficiencies including lower fair trial rights guarantees and the risk of coerced agreements.

- For these reasons, the introduction of plea bargaining in any legal system requires accompanying strong safeguards, including that the defendant agrees to the procedure in an informed and voluntary manner through the assistance of a lawyer and that the content of the plea agreement and the procedure leading to its conclusion are reviewed by a judge.
- Although practice differs on this point, it is advisable that plea bargaining is applied only to criminal offences of lower gravity, especially when first introduced in a legal system.

Working Group 4- Gender composition of legal professions and impact on justice delivery

- Despite the absence of relevant data in some countries of the region, it is safe to say that a gender balance within the legal and law-enforcement professions (judiciary, prosecution, lawyers, police) in Central Asia is yet to be achieved. Although some countries show promising numbers, equal representation of men and women for positions with managerial functions is particularly low.
- Existing inequalities and discrimination regarding the representation of women and their access to managerial positions are explained by various factors, including gender stereotypes, cultural obstacles and inexistent or inefficient public policies to promote the employment of women.
- Solutions exist to thwart such discrimination and inequalities and often start with establishing the proper legal framework to promote gender equality at the state level, including mechanisms to ban discrimination and measures to ensure equal access to employment.
- Other solutions should focus on the regulations adopted at the workplace, such as establishing and implementing a strict policy against harassment and providing training on gender and discrimination issues.



Kench Abdiev, Head of the Investigation Department of the Kyrgyz Ministry of Interior (c), listens to discussions on the scope of application of special investigative measures. (OSCE/Andrei Borisovich Novoselov)

PLENARY SESSION I - APPROVAL, CONTROL AND REVIEW OF INVESTIGATIVE ACTIONS PERFORMED DURING THE PRE-TRIAL PHASE

Main conclusions of the session:

- *The roles of the judge, prosecutor and investigator in the pre-trial phase should be clearly delineated in the law, particularly when it comes to authorizing coercive investigative measures and overseeing the admission of evidence.*
- *The most intrusive investigative measures (IM) including searches, seizures and special investigative measures (SIMs) should be approved by a judge. Additionally, requests for investigative measures should be reasoned and detailed; short of that a request for an IM should be rejected.*
- *It is essential that the law clearly defines the scope of application of special investigative measures.*
- *Under international standards, all persons arrested should be brought before a judge within 48 hours of the arrest for a review of the legality of the arrest.*
- *The rights of the defendant should be ensured from the onset of the investigation through the participation of defence counsel in the interrogation of the suspect immediately after the arrest and during the examination of witnesses.*

Summary of discussions:

- 1. It is fundamental that the roles of the judge, prosecutor and investigator in the pre-trial phase are defined in the law.** The current trend in Central Asia (CA), as observed in Kazakhstan and Kyrgyzstan, is to ensure that the pre-trial judge (PTJ)¹ supervises the pre-trial phase by approving and controlling interferences with protected liberties (such as searches and wiretapping) and recording admissible evidence (overseeing depositions), while the investigator investigates under the supervision of the prosecutor who will then argue the case in court. This positive trend could be reinforced through three additional changes: a. in Kazakhstan, the role of the PTJ should be clarified as it is not entirely clear if this judge would be dealing with approving coercive investigative measures; b. both Kyrgyzstan and Kazakhstan call their pre-trial judge the “investigative judge”. This title could be misleading as one may think that this judge performs investigative functions, like the investigative judge in France; c. in both Kyrgyzstan and Kazakhstan, but also in other CA countries, the respective roles of the prosecutor and the investigator should be clearly separated, as currently both the prosecutor and the investigator can investigate a case. One solution could be to strip the prosecutor of its ability to investigate directly and to entrust the investigator with conducting the investigation under the supervision of the prosecutor who will then argue the case in court.²
- 2. Intrusive investigative measures such as searches, seizures and special investigative measures (SIMs) should be subject to judicial approval on the basis of a reasoned and detailed request.** Currently, judicial authorization for intrusive IMs is established for Kyrgyzstan under the draft CPC³ and partly for Tajikistan,⁴ while in Kazakhstan, Uzbekistan and Turkmenistan such power rests with the prosecutor and/or with the investigator in urgent situations under the supervision of the prosecutor. Regarding the grounds and objective of investigative measures, experts highlighted that these should be outlined in the law in precise terms. References to searches for “objects associated with the case” are too vague. A more precise wording can be found in the Uzbek legislation which mentions “sufficient evidence to believe that the searched object or document is in the person’s dwelling.” Consequently, insufficiently reasoned and detailed requests for investigative measures should be rejected.
- 3. The scope of application of special investigative measures should be clearly defined in legislation.** It was highlighted that Central Asian legislation should be changed to define in detail the type of cases where SIMs can be applied, as well as their objective, grounds and conditions of application. Thus, the law must precisely enunciate the cases where SIMs are available, the persons against which SIMs can be applied,⁵ the maximum duration of the SIM,⁶ the threshold of evidence required for a court to authorize a SIM, the requirement that the SIM request provides a precise description of the information or object sought, etc.

1 This judge is also called the judge of the preliminary phase.

2 In that regard, some participants recommended that the same prosecutor should supervise the investigation and argue the case in court, as is foreseen in the 2014 Kazakh CPC.

3 In the 1997 Kyrgyz CPC, the prosecutor approves all IMs with the exception of interceptions of communications which have to be approved by the judge.

4 In Tajikistan, search and seizure are authorized by the judge, but in exceptional cases, the prosecutor and even the investigator can authorize such measures.

5 Wordings like “suspects who have some relation to the crime” are too vague.

6 In that regard, participants concluded that a term of 6 months for SIMs, as is the case for several CA countries, is excessive. Professor Kovalev suggested that SIMs be applied for 1 month and renewed if the investigator demonstrates the relevance of prolonging the SIM.

4. **A person should be brought before a judge within 48 hours of his/her arrest for a review of the legality of the arrest.**⁷ Kazakhstan and Kyrgyzstan have formalised this requirement in their legislation and draft legislation.⁸ Other Central Asian countries were encouraged to amend their legislation to comply with this requirement.
5. **The rights of a defendant are applicable from the moment of the arrest.** It was recognized that guaranteeing the presence of a defence counsel immediately after the defendant's arrest, as is foreseen in Kazakhstan, is a good practice that should be replicated.⁹ Regarding investigative measures not involving the accused such as the examination of a witness, in all Central Asian countries a defence counsel's participation is subject to the investigator's approval. One expert argued that such a requirement limits the right of the defence to confront witnesses and that witness testimony obtained without a face-to-face discussion with the defence should not be admissible in court. Participants also warned that intrusive investigative measures, such as SIMs, should generally not be applied against lawyers.¹⁰

7 See Concluding Observations of the Human Rights Committee on Gabon's second periodic review, CCPR/CO/70/GAB, 10 November 2000, par. 13; and Human Rights Committee, Views under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), *Borisenko v. Hungary*, Communication 852/99, par. 7.4. where the HRC found a violation of article 9(3) with the detention of a person for 3 days (72h) before being brought to a judge. Also see generally Article 9(3) of the ICCPR which reads: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power..."

8 See Kazakh 2014 CPC article 13(1) and Kyrgyz Draft CPC article 101(6).

9 Most Central Asian countries guarantee the presence of a lawyer upon arrest if requested by the suspect.

10 For more information about the application of SIMs on lawyers, see Plenary Session 5 - Status and role of defence lawyers.



Muhammadvali Shaidullozoda from the Office of the Prosecutor General of Tajikistan (c) highlights the importance of clear national legislation on preventive measures. (OSCE/Andrei Borisovich Novoselov)

PLENARY SESSION II - USE OF PREVENTIVE MEASURES: PRE-TRIAL DETENTION AND ALTERNATIVE MEASURES

Main conclusions of the session:

- *While selecting a preventive measure, the rule is to first and foremost consider non-custodial measures. Only when non-custodial measures are found unsuitable to the situation should the judge consider pre-trial detention.*
- *Non-custodial measures allow individuals to try to maintain their regular lives and are less costly than pre-trial detention, even though proper budgeting for their application should be ensured by the state. In addition, they contribute to solving the issue of prison overcrowding.*
- *The conditions of application of non-custodial measures should be clearly defined in the law and should not lead to treatment as coercive as custodial measures.*
- *Preventive measures should be authorized by a judge by a reasoned decision following a public hearing in the presence of the defendant assisted by a lawyer and should be subject to regular judicial reviews.*
- *The severity of the crime cannot be the sole ground for imposing a preventive measure, especially pre-trial detention. Substantive and procedural grounds must be satisfied by the prosecutor/ investigator's request.*

- *Access to a lawyer and the right to effective defence should be guaranteed during the procedure of imposing a preventive measure. Defence lawyers should receive targeted training to better defend the interests of their clients subject to preventive measures.*

Summary of discussions:

1. **As a principle, the judge should first consider applying alternative, non-custodial measures before considering pre-trial detention. Only if no alternative measure was found suitable can the judge order pre-trial detention.** In Central Asian countries pre-trial detention continues to make up the vast majority of preventive measures ordered, although alternative and non-custodial measures, such as bail, house arrest, electronic monitoring, or personal recognizance, exist. An interesting example from the post-Soviet area is Ukraine where, with the entry into force of the new 2012 CPC, the number of pre-trial detentions ordered decreased dramatically (by 50 percent) as judges resorted more systematically to non-custodial alternative measures. Moreover, non-custodial measures should systematically be imposed instead of custodial measure on vulnerable groups such as women and minors.
2. **If proper budgeting is secured for their implementation, non-custodial measures benefit individuals who remain free from detention, as well as the state which saves on preventive measure costs and the justice system in general as fewer detainees means less crowded prisons.** Non-custodial measures could allow suspects to continue working or studying and would constitute less of an interruption in the life of individuals whose guilt was not proven. Moreover, they are less costly for the state than detention in a prison facility although the use of alternative measures also carries a certain cost for the state budget. In other parts of the post-Soviet sphere such as in Ukraine, the introduction of electronic bracelets as a new preventive measure in the new CPC required an additional budget of 4 million Euros. It is the responsibility of the state to ensure that necessary resources are allocated for the application of such alternative measures. In addition, a Tajik participant noted that non-custodial measures would help solve Tajikistan's problem of prison overcrowding.
3. **The law should clearly define the conditions of application of non-custodial measures.** Since non-custodial measures are rarely requested and imposed in Central Asia and in the post-Soviet space in general, legislators should ensure that all aspects related to their conditions of application are sufficiently determined, including practical aspects regarding how often the authorities should visit a person under house arrest or whether he/she should go to court on his/her own and at his/her own costs or be escorted there by the authorities. One expert explained that in the Russian Federation judges lack guidance and practice on the application of house arrest measures.¹¹ They often refuse to grant house arrestees one hour of outdoor walk daily although this is granted to pre-trial detainees. Moreover, individuals under house arrest cannot receive calls from their lawyers who can only visit them. These restrictive practices make non-custodial measures quite coercive and could defeat the purpose of using alternatives to pre-trial detention.
4. **The judge should be the only one to authorize preventive measures by a reasoned decision following a public hearing in the presence of the defendant assisted by a lawyer.** Currently in Central Asia, preventive measures or measures of restraint can be applied by the judge, the

¹¹ In the Russian Federation, alternative non-custodial measures make up for only 2.2% of all preventive measures ordered.

prosecutor or the investigator, while international standards dictate that they are solely decided by a judge. The decision to impose a preventive measure should be reasoned to explain the grounds and circumstances which justify the imposition of this specific measure and examine the arguments set forth by both parties. The decision should also contain information on the conditions of application of the measure, including the term of the measure and the place of application. In addition, judicial review of the measure's relevance should take place regularly upon the request of the defence lawyer or ex-officio by the judge. The extension of the preventive measure cannot be automatic as the prosecutor must submit new evidence justifying why the measure is still necessary, particularly when the defendant is detained due to the risk of hindering the course of the investigation and the case is sent to trial following the completion of the investigation. Short of that, the defendant should be released.

5. **Preventive measures, especially pre-trial detention, cannot be imposed solely on the basis of the severity of the crime.¹² The prosecutor/investigator must prove other substantive and procedural grounds.** First, the prosecution must show probable cause that the accused committed the crime in question and second, the prosecution must prove that there is a serious risk for the accused to abscond, hinder the course of justice or commit a new crime if no preventive measure was applied. Short of demonstrating these elements, the requested preventive measure should not be ordered.
6. **Since they are in charge of providing an effective defence, defence lawyers need targeted training on preventive measures.** Access to a lawyer should be guaranteed in the context of preventive measures proceedings. As such, several participants highlighted the need to conduct additional training for defence counsel on the scope of application of preventive measures and on advocacy skills to better challenge requests and orders for preventive measures. Several lawyers in the audience also denounced the lack of sufficient time to prepare before a hearing on preventive measures.

12 See Art 9 of ICCPR.



Expert Nikolai Kovalev reviews his notes ahead of the discussion on jury trials. (OSCE/Andrei Borisovich Novoselov)

WORKING GROUP 1 - JURY TRIALS

Main conclusions of the session:

- *Given that jury trials contributed to increased transparency, quality of evidence and the adversarial nature of the criminal process in Kazakhstan, they should be guaranteed in practice in all applicable cases, not only in the most serious ones. Also, more types of cases should be adjudicated through jury trials in Central Asia, particularly political crimes and cases dealing with the restriction of freedom of expression.*
- *Participation in a jury must be considered a civic duty. Clear rules and procedures on jury selection must be adopted to ensure random selection and the impartiality of the jury.*
- *While the jury should reach a verdict on guilt based on as much information and facts as possible, with the exception of evidence creating prejudice or bias against the defendant, the judge should only provide the jury with procedural and legal explanations.*
- *Although the jurors cannot be expected to legally motivate their verdict, fair trial principles dictate that a judgment should have a reasoning based on the questions which the jury tried to answer throughout their assignment.*

Summary of discussions:

- 1. Jury trials should be guaranteed in practice in all applicable cases and be made available to additional types of cases including political crimes and cases dealing with the restriction of freedom of expression.** One expert observed that jury trials were introduced in Kazakhstan in 2007 with the aim to “democratize” criminal proceedings through the involvement of lay judges chosen among the population. This move led to a more transparent justice system, and thus a higher degree of public trust in justice, and an increase in the quality of evidence presented by the parties who better prepared their cases. The procedure also became more adversarial as the jury’s scrutiny allowed for more equal opportunities for the parties to present their arguments. Nevertheless, the use of jury trials is quite low in Kazakhstan,¹³ as only the most serious cases within the applicable categories are adjudicated this way.¹⁴ In Kazakhstan, jury trials are available for crimes entailing death penalty or life imprisonment except for crimes committed by a criminal group, drug-related crimes, mercenary or terrorist activities, treason, espionage, threat to the President’s life, and the like.¹⁵ Professor Kovalev argued that these exceptional cases are precisely those which would need jury trials the most. It is recommended that Kazakhstan expands the possibility of jury trials to these cases but also for exceptionally grave crimes, political crimes, and crimes related to the freedom of speech. A similar recommendation was shared with Kyrgyzstan who will soon start conducting jury trials. Experts also observed that the percentage of acquittals under jury trial in Kazakhstan is higher than in bench trials although still lower than the acquittal rate in the Russian Federation which reaches 47% in all jury trial cases.
- 2. Participation in a jury should be considered a civic duty whereby jurors are selected randomly to ensure the jury’s impartiality.** Currently, the Kazakh and Kyrgyz legislation do not explicitly establish participation in a jury as a civic obligation. In addition, rules on juror self-recusal are lacking in Kyrgyzstan and possible abuses can arise from existing rules in Kazakhstan which allow a juror candidate to recuse him/herself without providing a strong justification. Rules on jury selection are in place in both countries, yet, experts suggested that the ineligibility period for jury duty is increased to five years after sitting in a jury trial, from the current period of one year.¹⁶
- 3. The jury should have access to all relevant and non-prejudicial facts and information while the judge should limit its interactions with the jury to providing necessary legal and procedural explanations.** Factual information should be raised before the jury with the exception of information on the defendant’s criminal record and personality that might cause prejudice or bias (e.g. chronic alcoholism or drug addiction) as provided in the laws of Kazakhstan¹⁷ and Kyrgyzstan.¹⁸ Regarding witness statements, one expert explained that elements relevant to the credibility of witnesses should be discussed in the jury’s presence as

13 Since it was introduced in Kazakhstan in 2007, the number of jury trial cases slowly decreased to reach 198 cases in 2013 (0.4% of the total number of cases tried in 2013), compared to 354 cases in 2011 (0.7 % of trials in 2011). Only 1300 cases were adjudicated by jury trial from 2007 to 2013.

14 Some participants stressed that jury trials should be genuinely guaranteed in all applicable cases as in reality they are available only in the most serious cases in Kazakhstan and the Russian Federation, such as death penalty cases.

15 Art. 52 of the 2014 CPC of Kazakhstan.

16 Some participants were concerned that populations in Central Asia are small and might not allow for such a long period of exclusion of previous jurors. Yet, this change would truly guarantee randomness and minimize the possibility of tampering with jurors who are regularly called for jury duty.

17 Art. 650(6) of the 2014 CPC of Kazakhstan.

18 Art. 331-16 (6) of the 1998 CPC of Kyrgyzstan.

they have a direct impact on the jury's perception of the testimony.¹⁹ However, questions of law should be discussed in the jury's absence. Particularly, the judge should neutralize questions related to evidence admissibility in order not to confuse the jury. For instance, when a defendant claims at trial that he/she was forced to confess at the pre-trial stage, the judge should stop the proceedings and order a full investigation into the allegations.²⁰ Under the Central Asian and Russian models, the judge provides guidance to the jurors by clarifying legal and procedural questions, without influencing their decision-making, particularly in the deliberation room. Still, Kazakh participants shared examples of situations where the judge went beyond his/her assigned role and influenced the jury on their verdict.

4. **Fair trial principles require that jury trial judgments be reasoned.** It is important that the judgment is motivated on the basis of the jurors' answers to the questions provided by the judge for guidance. In addition, experts have argued that non-guilty verdicts should not be appealable, contrary to the present situation in Kazakhstan.

¹⁹ See also European Court of Human Rights (ECtHR) judgment, Pichugin v. Russia, 38623/03, 23 October 2012, par. 210.

²⁰ However, the judge should not allow insinuations such as "you know how it works; you know how they interrogate" but should clarify whether the defendant is claiming he/she was forced to testify in a certain way. If so, the judge should request an investigation into the allegations.



Kyrgyz expert, Leyla Sydykova, presents future changes in the reform of the Kyrgyz criminal legislation affecting the division of offences in the criminal sphere. (OSCE/Andrei Borisovich Novoselov)

WORKING GROUP 2 - DIVISION OF OFFENCES WITHIN THE CRIMINAL SPHERE (INCLUDING CRIMINAL OFFENCES, MISDEMEANOURS AND ADMINISTRATIVE OFFENCES)

Main conclusions of the session:

- *Central Asian and other post-Soviet countries have embarked on a series of reforms of their criminal legislation, following different approaches. Although there is no one-size-fits-all reform model, any chosen model must uphold fair trial guarantees. Also, such a model should not lead to the criminalization of acts in contradiction with human rights standards.*
- *Clear legal criteria distinguishing all categories of criminal acts must be established with the understanding that a specific act can fall only into one category.*
- *Despite the fact that different procedures could be applicable for crimes, misdemeanours and administrative offences, fair trial rights should be guaranteed to all three categories of acts since they all belong to the criminal sphere, particularly when they entail police custody or a prison sentence.*
- *Administrative offences (AOs) should not foresee police detention nor should they result in a prison sentence since by definition they constitute minor criminal acts. As this objective is yet to be achieved in most Central Asian countries, it is important that meanwhile persons convicted for an AO are detained in separate detention facilities from individuals convicted of crimes.*

Summary of discussions:

- 1. Although there is no one-size-fits-all reform model for the criminal sphere legislation, any chosen model must uphold fair trial guarantees and human rights standards.** The existing divisions of offences within the criminal sphere in Central Asia and generally in the post-Soviet space are a legacy from the Soviet legal system. Reforms have taken place through the establishment of separate codes for crimes, misdemeanours and administrative offences (AO)²¹ – as in Kyrgyzstan²² – while other reforms prioritized the transfer of the most serious AOs from the CAO to the criminal code’s special section on misdemeanours such as in Kazakhstan.²³ The latter solution was also chosen in other parts of the post-Soviet area as in Georgia.²⁴ Regardless of the model chosen, it is essential that legislators in Central Asia ensure that applicable fair trial rights are guaranteed in relevant legal proceedings and that human rights standards are respected when deciding to transfer a specific act to another category of offences. In particular, legislators should refrain from transferring AOs which are not criminal in nature (such as offences related to freedom of expression, of assembly or of religion) to the criminal code as such a transfer would violate international standards on human rights.
- 2. Each category of offences must be distinguished through clear legal criteria as one particular conduct can only be classified as one specific offence.**²⁵ There are still numerous debates about the rules and criteria that should govern the classification of a certain act. For Kyrgyzstan, crimes²⁶ are distinct from misdemeanours²⁷ due to their criminal nature, their scope and the severity of the harm they cause. Misdemeanours are different from AOs due to their criminal nature which indicates a violation of rules and relations in society while AOs indicate a violation of established administrative rules. Other post-Soviet countries rely on more general criteria such as Georgia which distinguishes crimes from AO based on the gravity and nature of the act.
- 3. Fair trial rights should be guaranteed in all three categories of offences as they belong to the criminal sphere.** Experts highlighted existing differences in fair trial rights guarantees in the processing of crimes, misdemeanours, and AOs. It can be argued that since AOs are minor offences the applicable procedure can be less formalistic than that for crimes or misdemeanours. Nevertheless, core fair trial guarantees such as the right to legal assistance and the right to sufficient time for preparing one’s case²⁸ must still be ensured since AOs remain

21 In this section, the term “misdemeanours” refers to “criminal infractions” or “délits” under the French legal system; while “administrative offences” refers to “minor offences” or “contraventions” under the French legal system. For additional information on terminology and equivalents in Russian language, see Annex 3- Glossary.

22 Kyrgyzstan is currently reforming its Criminal Code, developing a new Misdemeanor Code and revising its Administrative Offences Code.

23 Kazakhstan adopted in July 2014 a new CC and CAO. In the course of this reform, Kazakhstan moved 25 administrative offences to the criminal code as misdemeanours or as crimes.

24 Georgia is reforming its code of AO and developing a new section on misdemeanors to be included in its Criminal Code.

25 The principle of *non bis in idem* prohibits that the same act be tried or punished twice, including in cases where the same act is outlawed under different categories of offences. See ECtHR judgment *Sergey Zolotukhin v. Russia*, 14939/03, 10 February 2009, Par. 70-97; 120-122.

26 See art. 18 of the draft CC of Kyrgyzstan.

27 See art. 15 of the draft Code on Misdemeanours of Kyrgyzstan.

28 Concerns were raised that lawyers in Central Asia usually do not have sufficient time to prepare their case in AO procedures which often are summary proceedings. An example from another part of the post-Soviet space, namely Georgia, was discussed where certain AOs should be adjudicated within 24 hours after the case is being sent to the court. Also, there are instances when appeal hearings are scheduled 24 hours after the defendant receives the first-instance judgment which renders an effective defence very difficult.

criminal offences. In addition, since in most countries of Central Asia and of the post-Soviet space AOs can still give rise to police detention²⁹ and prison sentence, reinforced procedural and substantive guarantees must be in place in such cases, including the requirement of reasonable suspicion for arrests,³⁰ the strict respect for the principle of presumption of innocence and the requirement of reasoned decisions.

4. **Police detention or prison sentences should not be applied for administrative offences since they are minor criminal acts.** Kyrgyzstan in its draft codes on misdemeanours and on AOs envisages eliminating the possibility of detention. The same solution might be chosen in other parts of the post-Soviet area such as in Georgia. It was suggested that other Central Asian countries also envision this solution. While such reforms are yet to be initiated, detention terms for AOs should be further reduced and the management of the prison population and facilities should be improved. As an example of good practice, Georgia recently reduced the maximum term of imprisonment sentence for AOs from 90 days to 15 days.³¹ Recent reforms in Kazakhstan saw an important number of AO moved to the Criminal Code's misdemeanours part, thus triggering the possibility of detention for these acts.³² A Kazakh participant noted with concern that with the Criminal Code entering into force in January 2015, Kazakhstan is likely to face a rise in the number of imprisonments which the country's penitentiary infrastructure will not be able to absorb as additional penitentiary facilities will only be ready by 2017. The participant thus suggested for this part of the reform to be postponed until then.

29 Also known as administrative detention. See Annex 3- Glossary.

30 In Georgia, arrest on the basis of suspicion of commission of an administrative offence does not require the authorities to prove reasonable suspicion.

31 This reduction of the term of imprisonment was adopted on the recommendation of the United Nations Human Rights Committee.

32 A new Kazakh CC entered into force on 1 January 2015, simultaneously with the new CAO.



Spanish expert, Lorena Bachmaier Winter (r), discusses international standards on the examination of evidence during a panel discussion with experts Oleksandr Banchuk (l) and Stephen Thaman (c). (OSCE/Andrei Borisovich Novoselov)

PLENARY SESSION 4 - RULES OF EVIDENCE

Main conclusions of the session:

- *The defence should have access to the case file at the earliest moment possible during the investigation to be able to mount an effective defence.*
- *The adversarial principle dictates that the court should base its verdict on legally obtained evidence presented in court and/or on evidence which was subject to examination by both parties. Depositions could help preserve testimonies of witnesses who might be unavailable at the trial. As a general principle, anonymous statements and hearsay evidence should not be admissible.*
- *Evidence obtained as a result of torture or ill-treatment is not admissible. Allegations of torture should be investigated immediately by an independent body. Central Asian states should adopt stronger exclusionary rules which go beyond the right to remain silent to help eradicate the practice of forced confessions.*

Summary of discussions:

1. **The defence should have access to the case file as early as possible during the investigation.** In Central Asia, the defence is allowed to peruse the case file prior to the trial. The conditions and time of this access differ from country to country but can lead to instances where law-

yers do not have sufficient time to prepare their case and to make submissions prior to the beginning of the trial, especially when the case file is voluminous. For instance, participants from Uzbekistan explained that under existing legislation defence lawyers have access to the case file at the end of the investigation, which at times means only three days prior to the beginning of the trial.³³ They reckon that this seriously limits their ability to make additional submissions regarding the investigation and properly prepare for trial. Experts stressed that the defence should be guaranteed disclosure of any exculpatory evidence in possession of the prosecutor or investigator sufficiently well in advance to be able to prepare a defence.³⁴ In Ukraine, for instance, the case file is accessible to the defence anytime during the investigation as long as such access does not hinder the course of the investigation.³⁵ Although disclosure of the case file can be restricted if the prosecution brings sufficient proof that the disclosure of certain evidence could jeopardize the continuation of the investigation, it is important that the pre-trial judge is involved in allowing such restrictions in order to limit the possibility of abusive restrictions. Finally, experts highlighted that maintaining electronic files would tremendously facilitate access to the case file.

- 2. Evidence has to be legally obtained and subject to examination by both parties.** Despite the existing legal guarantee in all Central Asian states for a direct and oral examination of all evidence at trial,³⁶ it is still common practice for courts to heavily rely on evidence obtained at the pre-trial phase, such as police reports, prior statements of unavailable witnesses³⁷ or of the defendant.³⁸ As highlighted by several experts, prior statements without cross-examination should not, as a general rule, be admissible as such practice infringes upon the adversarial principle.³⁹ Several Central Asian countries have introduced deposition procedures which foresee the examination of a witness who is likely to be unavailable by the parties before the court prior to the beginning of the trial.⁴⁰ Thus, the use of depositions, whenever opportune, can help preserve the testimony of unavailable witnesses and eliminates the need to rely on prior statements which were not subject to cross-examination. Similarly, some countries from the post- Soviet space such as Ukraine greatly restricted the use of hearsay evidence to further respect the adversarial principle. For instance, statements made to the police are not admissible; the witness would have to testify at the trial for his/her testimony to be admissible. Regarding defendant's prior statements, they should in principle have no evidentiary value, particularly when the statement amounts to a confession made in the absence of a lawyer.⁴¹

33 See art 53 (1) of the 1994 Uzbek CPC. The same provision about access at the end of the inquiry or the pre-trial investigation is found under Tajik law under art 53(2)(7) of the Tajik 2010 CPC.

34 ECtHR, Report of the European Commission on Human Rights, Jespers v. Belgium, 8403/78, 14 December 1981, Par. 58.

35 See art 221 of the Ukrainian CPC.

36 See 2014 Kazakh CPC art 331(1-2); 1999 Kyrgyz CPC art 253(1); 2010 Tajik CPC art 272; 2009 Turkmen CPC art 340; and 1994 Uzbek CPC art 26.

37 Witnesses can be unavailable due to illness, death or being abroad. Some experts stressed that the authorities should do everything possible to secure the presence of witnesses who travelled abroad and could resort to letters rogatory allowing for the examination of witnesses by foreign authorities or through videoconference. See ECtHR inadmissibility decision in Haas v. Germany, 73047/01, 17 November 2005. States must demonstrate that they made reasonable efforts to look for a witness.

38 All CA codes provide that prior statements of absent witnesses can be read in court, see 2014 Kazakh CPC Art 372; 1999 Kyrgyz CPC art 294(1)(2); 2010 Tajik CPC art 317(1)(para.2); 2009 Turkmen CPC art 395; 1994 Uzbek CPC art 104.

39 The ECtHR recognized exceptions to this rule and found that prior statements of unavailable witnesses could be read in court but could not constitute the sole and decisive evidence for securing a conviction, see ECtHR judgment Hümmer v. Germany, 19 July 2012, Par. 42.

40 See 2014 Kazakh CPC arts 70(3)(1) and 217(1) and the Kyrgyz draft CPC art 195.

41 See the "Salduz doctrine" adopted by the ECtHR in its judgment Salduz v. Turkey, 36391/02, 27 November 2008, Par

Finally, the use of anonymous witness' statements violates the right to cross-examination and that to an effective defence as the witness' identity is kept secret. Such statements should in principle not be admitted, although strictly limited exceptions may exist.⁴²

3. **Torture allegations should be investigated immediately by an independent body and evidence obtained through torture or ill-treatment should be inadmissible.** Although legislation in Central Asia outlaws torture and the use of evidence obtained under duress, forced confessions still take place. Any torture or ill-treatment allegation made by the defendant should result in the interruption of the trial and the judge should immediately order an effective and independent investigation into the alleged facts. Thus, an investigation led by the prosecution's office would not qualify as independent and would be in contravention with international standards. Participants from Tajikistan mentioned the 2012 amendments to the criminal code to further criminalize torture and inhumane acts but also remarked that since then no perpetrator was convicted despite a few investigations opened against police officers. Finally, one expert stressed that it is insufficient to introduce, as was done in most Central Asian countries, the requirement for the police to inform the defendant of his/her right to remain silent since this right can be waived. A stronger exclusionary rule, similar to that in the Russian CPC,⁴³ would require that any statement made by the defendant in the absence of his/her legal counsel and which he/she subsequently retracts should be considered inadmissible.

50-62. The doctrine states that individuals detained at police stations should have access to a lawyer and that the interrogation of an individual by the police without the assistance of a lawyer could amount to a violation of his/her right to a fair trial. On a related note, the ECtHR has ruled that a confession made in the presence of a lawyer can be used but not as sole and decisive evidence to secure conviction.

⁴² According to the ECtHR, the statement of an anonymous witness can be used in a procedure if it does not constitute the sole and decisive evidence to secure a conviction and if such statement was treated with extreme care by the judiciary, see ECtHR judgments *Kostovski v. Netherlands*, 11454/85, 20 November 1989, Par. 44-45, and *Doorson v. Netherlands*, 20524/92, 26 March 1996, Par. 46 and 76.

⁴³ See art. 75 (2) of the CPC of the Russian Federation.



Mavliuda Kulikova, Lawyer from the Uzbek NGO Legal Problems Research Center (r), stresses the importance of the right to adequate time and facilities to prepare one's defence, while Gulnora Ishankhanova, Legal Officer at the NGO Legal Initiatives Support Centre in Tashkent (l) listens. (OSCE/Andrei Borisovich Novoselov)

PLENARY SESSION 5 - STATUS AND ROLE OF DEFENCE LAWYERS

Main conclusions of the session:

- *The legal profession in Central Asia should be self-organized and self-regulated to ensure it can function independently and provide qualitative services. This requirement for independence means that bar associations should be established and should function independently and disciplinary procedures should be handled within the legal profession.*
- *Lawyers should have the right to perform their functions freely and independently.*
- *The right to effective legal assistance must be enforced and means, inter alia, that an individual should have early access to legal assistance, should freely choose his/her legal counsel, and should benefit from effective defence.*
- *The right to effective legal aid for vulnerable defendants depends to a large extent on an adequate level of public funding.*

Summary of discussions:

- 1. The legal profession and bar associations in Central Asia should be independent and self-regulated.** Experts encouraged lawyers to actively strive for the self-governance and self-regulation of the profession and to push for independent bar associations to be established. Many Central Asian countries have established bar associations to defend lawyers' interests and status. Yet, many participants voiced their belief that bars fail to independently represent lawyers due to the involvement and influence of the authorities, usually the Ministry of Justice (MoJ), in the bars' management and in procedures related to access to the profession. In certain countries, board members of the bar are appointed by the MoJ or other executive bodies. Tajik participants explained that discussions on the country's first draft law for a unified bar association were interrupted due to a disagreement between lawyers and the MoJ on the latter's participation in the bar's qualification commission. It was suggested that ODIHR assists Tajikistan in this process through a legal review of the draft law. Additionally, experts argued that even though international norms and legislation in some European countries authorize commissions composed by the state authority or a court to conduct disciplinary procedures against lawyers,⁴⁴ in the context of Central Asia, such solutions should be avoided as they might lead to additional influence of the executive over the legal profession and risk further undermining the status of lawyers. Participants concluded that it is best that disciplinary matters are handled by the bar association.
- 2. The work of lawyers should not be hindered.** Experts and participants agreed that respect for the legal profession required that lawyers are independent from the executive, especially so because, in the context of criminal defence, they are the state's opponent in the courtroom.⁴⁵ Participants also shared an example of how lawyers' work can further be hindered by unclear legislation, as is the case with secret procedures in Kazakhstan. An expert explained that the current regime of secret procedures subjects lawyers who would like to access so-called "state secret information" to an arbitrary and unclear verification process which can include, for instance, a prohibition for the lawyer to travel. In practice, lawyers are prevented from performing their regular work under the pretext that he/she might touch upon state secret information or might be discouraged from doing so because of the unclear verification process.
- 3. Defendants have a right to effective legal assistance.** In most Central Asian states, the right to legal counsel is applied from the moment of arrest, either automatically or upon the suspect's demand. Individuals should also be informed of the right to be assisted by a lawyer, and of the right to communicate with a third person in case of detention. It is essential that the state ensures that lawyers are available to assist newly arrested suspects regardless of the time of the day. In cases where the defendant does not know of a lawyer to assist him/her, investigative organs should refrain from suggesting a particular lawyer as is currently the practice in Tajikistan and Uzbekistan.⁴⁶ Instead, the bar association should assist the defendant in

44 See the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, Par. 28.

45 Some participants argued that Central Asian lawyers should be granted immunity from criminal prosecution as allegations that lawyers committed a crime in the performance of their functions are often used as excuses to hamper the work of lawyers in Central Asia.

46 Tajik and Uzbek authorities are allowed to choose a legal counsel on behalf of the defendant should the latter ask them to do so or if the defendant was not able to appoint a lawyer within five days.

choosing a lawyer, as is foreseen in the Kazakh legislation.⁴⁷ Such a reform would contribute to curb the phenomenon of “pocket lawyers” who are known to carry out their function in a perfunctory way.⁴⁸ Finally, experts highlighted that the right to an effective defence requires that a defence counsel diligently investigate any excuse or fact which could help exculpate the defendant but also pursue other defence strategies as relevant.

4. **The right to legal aid can be realised only with the adequate level of public funding.** One expert explained that public defender offices, one form of legal aid provider in the USA, are composed of lawyers but also of investigators and social workers. Yet, without adequate funding, public defender offices could not dispense quality legal assistance. Similarly, Central Asian states were encouraged to commit adequate funding to their legal aid systems.

47 See 2014 Kazakh CPC, art. 68(3).

48 An expert recalled a case where the Moscow Bar disciplined a “pocket lawyer” and excluded him from the profession for standing by while the police coerced his client to make a confession by breaking his jaw.



Munkhtsetseg Lodoi from the Mongolian Ministry of Justice (l) and Badamkhand Yundendorj from the Law Enforcement University of Mongolia (r) listen to presentations on plea bargaining. (OSCE/Andrei Borisovich Novoselov)

WORKING GROUP 3 - PLEA BARGAINING AND ABBREVIATED PROCEDURES

Main conclusions of the session:

- *Abbreviated procedures constitute a simpler, faster and more cost-efficient alternative to the full-fledged criminal trial as they aim to dispose of criminal cases more expeditiously.*
- *Being widely considered a panacea to current problems of criminal procedures in Central Asia, plea bargaining has become more and more popular in the region. Yet, plea agreements carry risks and deficiencies including lower fair trial rights guarantees and the risk of coerced agreements.*
- *For these reasons, the introduction of plea bargaining in any legal system requires accompanying strong safeguards, including that the defendant agrees to the procedure in an informed and voluntary manner through the assistance of a lawyer and that the content of the plea agreement and the procedure leading to its conclusion are reviewed by a judge.*
- *Although practice differs on this point, it is advisable that plea bargaining is applied only to criminal offences of lower gravity, especially when first introduced in a legal system.*

Summary of discussions:

- 1. Abbreviated procedures allow for a more expeditious disposal of criminal cases because they are simpler, faster and more cost-efficient than fully fledged criminal trials.** Abbreviated procedures include plea bargaining or agreements and summary trials. Most countries in Central Asia have adopted some form of abbreviated procedures.
- 2. Despite its popularity, plea bargaining risks undermining fair trial rights guarantees.** Criminal justice systems in Central Asia, much like the rest of the world, face problems of lengthy trials, heavy caseloads and prison overcrowding. Plea bargaining appears like an obvious solution as it results in lower and shorter penalties and less publicity for the defendant, an expeditious and more cost-efficient procedure, reduced prison population, etc. It is also seen as an efficient tool in organized crime cases where one defendant can agree to a plea agreement to receive a lesser sentence in exchange of admission of guilt and information on the case. Plea bargaining was introduced in Kazakhstan's new CPC and is foreseen in the Kyrgyz draft CPC. Similarly, it was introduced in other parts of the post-Soviet area such as Ukraine.⁴⁹ Despite these advantages, plea bargaining suffers from certain flaws. First, it can be perceived as a way to "buy justice" since the prosecution agrees to lower the sentence in exchange for the defendant's guilty plea - justice is not seen to be done. Second, the fully fledged criminal procedure, with a trial stage, provides fair trial rights guarantees such as publicity and transparency of the trial, legal certainty and application of a standard of proof for conviction. These guarantees are waived by the defendant when there is a plea bargain. Also, it is a particular challenge to introduce plea bargaining in transitioning democracies where the judiciary risks being weaker and less independent in reviewing the validity of the plea bargain. Finally, the very nature of the plea procedure is coercive on the defendant who is pressed to accept a lower sentence in order to avoid trial where the potential sentence can be much higher or more serious. In countries where a fully fledged trial is unlikely to lead to an acquittal, plea bargaining is not a choice but the only viable recourse. In this context, the prosecution can also more easily abuse its position to coerce the defendant into agreeing to the plea bargain.
- 3. Thus, strong safeguards must accompany the introduction of plea bargaining in any legal system.** Experts explained that to ensure a minimum level of fairness in plea bargaining, the procedure must be carefully framed by safeguards. The most important one is for the defendant to make an informed and voluntary decision to enter into a plea agreement, free from coercion or duress on the part of the prosecution. What constitutes voluntariness, duress and coercion was thoroughly discussed.⁵⁰ Secondly, the plea agreement and the process which led to its conclusion must be subject to judicial review.⁵¹ The judge should reject any plea agreement reached through coercion and order a trial. Other safeguards usually include the mandatory assistance and presence of a lawyer and the possible retraction by the defendant

49 See 2012 Ukrainian CPC, arts. 468- 476.

50 One expert discussed the ECtHR judgment *Natsvlishvili and Togonidze v. Georgia*, 9043/05, 29 April 2014. In this case, the ECtHR ruled that no coercion or duress was found in the plea agreement procedure between the prosecution and the defendant - the managing director and shareholder of a public company charged with embezzlement - who, prior to the conclusion of the agreement, had spent four months in the same prison cell as his alleged kidnapper and returned all his shares in the company to the State. In the Court's opinion, the fact that the defendant was assisted by two lawyers and had initiated the plea agreement demonstrated that he was not coerced into entering the plea. See also the partly dissenting opinion of Judge Gyulumyan.

51 See ECtHR judgment *Natsvlishvili and Togonidze v. Georgia*, 29 April 2014, par. 92-95.

at any stage of the procedure before the agreement is signed. Additionally, some legal systems require that the judge is satisfied that the plea bargain is based on evidence showing probable cause that the defendant committed the offence, that the prosecutor consults with the victim prior to reaching a plea deal and that an appeal is available in plea agreement procedures. In cases with multiple defendants, some countries such as Spain require as a good practice example that all defendants agree with the plea agreement, short of that the case will proceed to trial.⁵²

4. **Plea bargaining should be applicable only to criminal offences of lower gravity.** In many countries which have introduced it, plea bargaining is only available for lesser or medium gravity criminal offences.⁵³ In Kyrgyzstan, after much debate, the current version of the draft CPC foresees that plea agreements are made available for crimes entailing up to ten years of prison, while the new Kazakh CPC envisages plea bargaining for crimes entailing up to 12 years of prison. One expert, referring to the inherent coercive nature of the plea bargain and the low acquittal rates in Central Asia, vigorously recommended that plea agreements be used only in cases of minor crimes, particularly when first introduced in a legal system. One interesting example from the post-Soviet region comes from Georgia which introduced plea bargaining in its CPC in 2004. However, plea bargaining was made available for all crimes.⁵⁴ The procedure was amended ten times and is now widely used as 80-90% of all criminal cases are disposed through plea bargaining. Yet, many weaknesses in the procedure were identified, including the limited role played by the judge, the extremely broad discretion awarded to the prosecution in proposing the terms of the agreement and the excessive use of fines in plea agreements. These deficiencies are all the more concerning in instances where a plea bargain is reached in a serious crimes case.

52 For an example of a case where witnesses who concluded plea agreements with the prosecution testify against the defendant, see ECtHR admissibility decision *Verhoek v. the Netherlands*, 54445/00, 27 January 2004.

53 This is the case for Ukraine, France, and Spain, along with other countries.

54 The Georgian CPC does not limit the applicability of plea bargaining to specific crimes, by deduction, it is applicable to all crimes. One limitation is that for crimes of torture, threat of torture, degrading or inhumane treatment, a plea agreement cannot result in a full release from sentence; see art. 144^{1, 2, 3} of the Georgian CPC.



Experts Oleksandr Banchuk (r) and Sergej Nasonov (l) discuss on the margins of the Fifth Expert Forum. (OSCE/Andrei Borisovich Novoselov)

WORKING GROUP 4 - GENDER COMPOSITION OF LEGAL PROFESSIONS AND IMPACT ON JUSTICE DELIVERY

Main conclusions of the session:

- *Despite the absence of relevant data in some countries of the region, it is safe to say that a gender balance within the legal and law-enforcement professions (judiciary, prosecution, lawyers, police) in Central Asia is yet to be achieved. Although some countries show promising numbers, equal representation of men and women for positions with managerial functions is particularly low.*
- *Existing inequalities and discrimination regarding the representation of women and their access to managerial positions are explained by various factors, including gender stereotypes, cultural obstacles and inexistent or inefficient public policies to promote the employment of women.*
- *Solutions exist to thwart such discrimination and inequalities and often start with establishing the proper legal framework to promote gender equality at the state level, including mechanisms to ban discrimination and measures to ensure equal access to employment.*
- *Other solutions should focus on the regulations adopted at the workplace, such as establishing and implementing a strict policy against harassment and providing training on gender and discrimination issues.*

Summary of discussions:

1. Gender balance among justice actors and the police is yet to be achieved in Central Asia.

Worldwide, the current status of gender balance among legal and law-enforcement professionals (judiciary, prosecution, lawyers, police) varies greatly from country to country, with some examples where women are predominant in the judiciary.⁵⁵ However, when it comes to the highest courts, gender balance is extremely rare - most supreme courts around the world are primarily composed of male judges.⁵⁶ Although numbers for Central Asia need to be further researched, participants discussed the example of Kyrgyzstan where in 2013, women constituted 20% of the staff in the General Prosecutor's Office and 47.7% in the Supreme Court.⁵⁷ However, when it comes to women's representation within managerial positions, the results were mixed as women held some high positions within the prosecution and the judiciary, but were mostly relegated to human resources or juvenile justice affairs in the police.⁵⁸ Participants further explained that in other Central Asia states women are relatively well represented in these professions but only a handful of them hold managerial positions. Additional research is needed to understand the current gender balance in these professions and the relationship between gender and justice delivery.

2. The under-representation of women in these professions, especially in managerial positions, can be explained by various factors.

In many cultures, stereotypes about female legal professionals include that they are more sensitive and lenient than men. This is presumably reflected in the way they hand down verdicts and the specialities they choose, such as family law, juvenile justice and violence against women. Studies found that women do act as a representative of their gender in court and that gender has an impact on decisions where women's interests are affected broadly.⁵⁹ Yet, a study analysing over 30,000 judgments in bench trials in the USA shows that men and women hand down similar verdicts and sentences in similar cases.⁶⁰ Another study of U.S. Supreme Court decisions showed that women are more inclined to liberal decisions than men and influence men in that sense when sitting together in a panel.⁶¹ Given the complex relationship between gender and delivery of justice, it would be too simplistic to limit the role of women to the areas of law which allegedly fit their nature (family law, juvenile justice, etc.) - a phenomenon called "ghettoization." Additionally, women can be restricted by traditional gender roles enforced in society which see their primary role as dealing with household and family matters. The lack of public policies promoting women's employment and flexibility in working hours or a patriarchal mentality seeing women as too vulnerable to be managers and be promoted constitute examples of obstacles to women's employment and career development. Finally, imbalance in the representation

55 See for example Slovenia and France where the proportion of women judges is respectively 78% and 64%.

56 Among the selected examples, the country where gender balance is respected the most is Australia (out of seven judges of the highest court, three are women).

57 See National Committee on Statistics of Kyrgyzstan. In addition, women represent 66.7% of staff in the Military Court and 43.7% in the Ministry of Justice.

58 There are no female officers in the investigative organs of the police. This creates obstacles when there is a need to interrogate female victims of violent crimes.

59 See Boyd, C. L., Epstein, L. and Martin, A. D. (2010), *Untangling the Causal Effects of Sex on Judging*. American Journal of Political Science, 54: pp 389-411.

60 See John Gruhl, Cassia Spohn and Susan Welch (1981), *Women as Policymakers: The Case of Trial Judges*, American Journal of Political Science, Vol. 25, No. 2, pp. 308-322.

61 See Donald R. Songer and Kelley A. Crews-Meyer (2000), *Does Judge Gender Matter? Decision Making in State Supreme Courts*, Social Science Quarterly, Vol. 81, No. 3, pp. 750-762.

of men and women professionals is at times explained by the values of the nominating body which can be a political institution.⁶²

3. **A comprehensive legal framework to promote gender equality at the state level is the first step to curb such discrimination and inequalities.** International standards promote gender equality and require that States take measures to end discrimination by ensuring effective legal protection, abolishing discriminatory laws and establishing the appropriate national legal framework.⁶³ Even though all Central Asian states acceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), efforts still need to be made to ensure that all relevant laws are adopted. For instance, several countries in Central Asia still need to outlaw domestic violence or establish proper measures to combat discrimination against women.⁶⁴ In addition, participants debated over state-sponsored child care which would allow female professionals to be able to continue their career after child birth or the adoption of temporary positive action measures (such as quotas) to ensure gender balance in managerial posts in legal professions. However, many felt that these measures would require additional resources which states in Central Asia are lacking.
4. **Other solutions include adopting workplace regulations which counter gender discrimination and inequalities.** Participants also identified proper regulations at the level of the workplace to be essential, such as a regulatory framework against discrimination and harassment (for example, sexual or racial harassment) to ensure such behaviour is outlawed⁶⁵ and that complaints in that regard can be heard effectively.⁶⁶ The workplace can also hire an expert to assist with handling discrimination and harassment complaints and provide advice to staff. In addition, it was suggested that the workplace introduces flexible working hours to accommodate parents and organizes training seminars on harassment, discrimination and gender equality issues.

62 For instance, after the Canadian conservative party arrived to power, only 1 female judge out of 13 vacant positions was appointed in 2014. Under the liberal party's rule, 40% of the nominations were for female judges.

63 See the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979 by the UN General Assembly.

64 Tajikistan adopted a law to ban domestic violence in 2013. Kyrgyzstan adopted a law on domestic violence in 2003, a law on equal opportunities for men and women in 2008, and the law on normative acts in 2009 which makes gender analysis mandatory for all draft laws.

65 In Ontario, over 75% of discrimination and harassment claims recorded within the legal profession were initiated by women in 2012.

66 The Ontario Bar created special committees to hear discrimination and harassment complaints against members of the legal profession which can also be reviewed by the Human Rights Tribunal of Ontario.



Iskander Alimbayev, a lawyer from the Almaty Bar Association (l) and Gulnar Bajgazina, Director of the Educational Centre of Almaty Bar Association (r) listen to discussions at the Fifth Expert Forum along with Kazakh expert, Daniyar Kanafin (c). (OSCE/Andrei Borisovich Novoselov)

ANNEXES

Annotated Agenda

24-25 November 2014
Park Hotel, Bishkek, Kyrgyzstan

Since 2008, the Expert Forum brings together leading experts and policy makers to discuss the latest reforms, trends and initiatives in the criminal justice sector in the countries of Central Asia and other parts of the OSCE region. With this Fifth Expert Forum, ODIHR continues to engage in promoting exchange of experiences and expertise between participating States on OSCE commitments and international standards related to the rule of law and criminal justice systems.

Format of the sessions:

- In the introductory session, one representative of each country delegation will be invited to deliver a presentation on the latest reform efforts in their country in the area of criminal justice and judicial reform. Each representative will be allocated 15 min for their presentation.
- In plenary sessions, each panellist will make a short presentation (20 min each) on different aspects of the session topic following which country delegations will be invited to make short observations on the specific issues addressed with regard to the current situation in their

respective country (5 min for each delegation). After country observations, all participants will be invited to discuss.

- In working group sessions, participants will be invited to join one of the two working group sessions. Ideally, each session will be attended in equal numbers. For this purpose, all participants will be invited to choose their preferred working group sessions during the registration on 24 November. Due to the limited capacity in each working group, the distribution will take place on a first-come, first-served basis. During the working group sessions, the panellists will each make a short presentation (20 min each) on different aspects of the session following which country delegations will be invited to make short observations on the issues addressed with regard to the current situation in their respective country (5 min for each delegation). After country observations, all participants will be invited to discuss.

DAY ONE, 24 NOVEMBER 2014

08:30 – 09:00

Registration

09:00 – 09:30

Introduction and opening remarks

Speakers:

Ms. Nataliya Nikitenko, Head of the Parliamentary Committee on Human Rights, Constitutional Legislation and State Structure of the Kyrgyz Jogorku Kenesh

Mr. John MacGregor, Deputy Head of OSCE Centre in Bishkek

Ms. Ashita Mittal, UNODC Regional Representative for Central Asia

Ms. Tina Gewis, Chief of Rule of Law Unit, ODIHR

09:30 – 10:45

Plenary Session I – Presentation of the latest criminal justice reforms in Central Asia

Moderator:

Ms. Tina Gewis, Chief of Rule of Law Unit, ODIHR

Panellists:

Mr. Arabaev Manas, Expert of the Department of Judicial Reform and Legality, Administration of the President of the Kyrgyz Republic

Mr. Berik Baimaganbetov, Senior prosecutor of the Department of Pre-trial Oversight, General Prosecutor's Office, Kazakhstan

Mr. Mahmudov Nasrullo, Deputy Head of the Committee on Human Rights and Legislation of the Parliament, Tajikistan

Mr. Aziz Mirzaev, Head of the International Department of the Research Center of the Supreme Court, Uzbekistan

10.30-10.45

Coffee break

10.45-12.20

Plenary Session I – Approval, control and review of investigative measures performed during the pre-trial phase

Moderator:

Mr. Dmitry Nurumov, Legal Adviser, OSCE High Commissioner on National Minorities

Panellists:

Mr. Stephen Thaman, Professor of Law, Saint Louis University, St. Louis

Mr. Nikolai Kovalev, Associate Professor of Law, Wilfrid Laurier University, Ontario

Investigative measures – including search, seizures, interrogations of witnesses and suspects, arrest/police custody – conducted at the pre-trial stage, when the principle of presumption of innocence is to be fully adhered to, can interfere with fundamental human rights, such as the right to liberty and security and the right to privacy. To ensure that these interferences are legally grounded, justified by and strictly limited to the necessities of the criminal investigation, an independent and impartial authority must be responsible for authorising the investigative measure, controlling its proper application and reviewing the legality of its application. Such control and review mechanisms are particularly important when covert measures are applied. Kazakhstan recently reformed its regime for special investigative measures while other Central Asian countries are considering such reforms. Participants will thus be invited to reflect on the following questions:

1. Which investigative acts require judicial authorization?
2. Who is in charge of approving, controlling and reviewing the investigative measure in the course of a criminal investigation? What is the distribution of powers between the pre-trial judge, the prosecutor and the investigator concerning the control of legality of investigative measures?
3. What are the elements which need to be proven prima facie for the approval of the investigative measure? To what extent are decisions for the conduct of investigative measures substantiated?
4. How is evidence preserved for use at trial in case a witness is unable to attend? Are there provisions for depositions?
5. For which investigative measures does defence counsel have a right to be present? For which measures can the investigator/prosecutor allow the defence counsel or defendant to be present?
6. Regarding legal requirements for arrest/police custody, how is reasonable suspicion (or probable cause) usually assessed?
7. Concerning arrests/police custody, is there an obligation for the person to appear before a judicial authority? If yes, how long after the beginning of deprivation of liberty does this appearance have to take place?
8. Generally, does the procedure regulating arrests/police custody comply with requirements deriving from the right to liberty and to security?
9. What are the mechanisms put in place to review the legality of arrests/police custody and who is in charge of the review? Also, who can initiate this review?
10. In case arrests/police custodies are subject to judicial review, what safeguards are in place to ensure that there is, in practice, a thorough and independent review of the legality of the arrests/police custodies?

11. In cases of covert measures, are there special approval, control and review mechanisms in place? Who is in charge of those?
12. For how long can covert measures be applied? What are the procedures applicable to the extension of these measures? What are the maximum terms admitted in this case?
13. Should a person have the right to be informed on the results of the covert measures applied against him/her if eventually he/she is acquitted and if the results were not discussed during the trial? If yes, on whom does the obligation to inform the person rest?

12.20 – 13.30

Lunch

13.30 – 15.10

Plenary Session II – Use of preventive measures: pre-trial detention and alternative measures

Moderator:

Mr. Dmitry Nurumov, Legal Adviser, OSCE High Commissioner on National Minorities

Panellists:

Mr. Oleksandr Banchuk, Manager of criminal justice projects, Centre for Political and Legal Reforms, Kyiv

Mr. Sergej Nasonov, Associate Professor of Criminal Procedure, Criminal Procedure Law Department of Kutafin Moscow State Law University

Most Central Asian countries have recognised judicial authorization of pre-trial detention (postcharge detention) and all have introduced alternative measures to pre-trial detention, such as house arrest. The use of detention pending trial can be necessary to ensure the presence of the defendant during the proceedings, to mitigate the risk of tampering with evidence or generally to guarantee that there will be no interference with the completion of the investigation. Yet, pre-trial detention should be an exception and used only if other preventive measures, such as bail or restraining orders, are deemed insufficient to eliminate the risk of flight or harm to others. Because pre-trial detention highly interferes with the right to liberty and contravenes the principle of presumption of innocence, it should only be ordered as a last resort and should be framed by a number of legal requirements. The use of alternative measures also has policy and financial implications as adequate public resources⁴ must be foreseen to promote the use of such measures. For this session, participants will discuss the following issues:

1. Under the national legal framework, which preventive measures are foreseen to ensure that the defendant is present during trial and who is in charge of approving such measures? Are there alternative measures for particular groups such as female offenders?
2. Although the application of alternative measures carries a lesser cost for the state than pre-trial detention, how does the state ensure that adequate public resources are allocated to promote an increased use of alternative measures?
3. Is the authority required by law to consider all possible options before deciding on one measure? Among all available measures, how does the relevant authority decide which measure is appropriate to the circumstances?
4. What is, on average, the proportion of each preventive measure imposed in the countries of Central Asia? What are the reasons for such allocation and what are the main consequences for the country's justice system?

5. In the case of pre-trial detention, what are the conditions for imposing such measure or, in other words, what must be proved, prima facie, for a decision on pre-trial detention to be made? Is reasonable suspicion (or probable cause) of the defendant having committed the criminal offence a legal condition for detention? Are necessity and proportionality of this measure assessed?
6. How long after the moment the person is deprived of liberty is the detention hearing usually scheduled?
7. What is the most common motivation for pre-trial detention orders? To what extent is the severity of the criminal offence considered in deciding on a pre-trial detention decision?
8. What are the approval and review mechanisms for pre-trial detention measures? Who can initiate them?

15.10 – 15.25

Coffee break

15.25 – 17.00

Working Groups Session

Working Group 1: Jury trials

Moderator:

Mr. Daniyar Kanafin, Lawyer of the Almaty City Bar

Panellists:

Mr. Nikolai Kovalev, Associate Professor of Law, Wilfrid Laurier University, Ontario

Mr. Sergej Nasonov, Associate Professor of Criminal Procedure, Criminal Procedure Law Department of Kutafin Moscow State Law University

Jury trials were introduced in Kazakhstan and Kyrgyzstan with a view to engage citizens in the judicial process, as ultimately, justice is rendered in the name of the people. Other countries in Central Asia are also looking into this possibility. The inclusion of lay persons in the adjudication process raises various questions, including on the selection of an impartial jury, the role of jurors, the influence of the professional judge and how to ensure that the jury can perform its essential functions despite its lack of legal knowledge and training. Participants will be invited to discuss the following issues:

1. What were the stated objectives of introducing jury trial in the national legal framework? Were these objectives achieved?
2. For which type of crimes is jury trial applicable? Is jury trial available in appeals proceedings?
3. Does the mixed model of court with jury, where the judge deliberates with the jurors in the jury room, technically qualify as jury trial?
4. Do the existing rules regarding selection of jurors guarantee random appointment of jurors? Are parties present during the jury selection?
5. Is there a possibility for parties to directly challenge the selection of some jurors?
6. What is the scope of the jury's role and duties?
7. Do jurors have access to all relevant information for their mission?
8. How is information that could create bias against a party and is irrelevant to the procedure treated? For instance, does the presiding judge usually take up his/her role of ensuring that prior criminal record is not discussed during the debates in court?

9. Is the jury present during discussions on admissibility of evidence?
10. What particular rules could be put in place to increase impartial determination of guilt and sentence? What rules are in place to ensure that the judge does not influence the jurors during the deliberations, beyond assisting them on questions of law?
11. What is the procedure and based on what grounds can the verdict of a jury court be reversed? What are the statistics on the reversal of jury court judgment in countries where jury trials are applicable?
12. What rules are in place to ensure that judgments delivered in jury trials are properly reasoned? If juries and the court in general are not required to provide reasons for their verdict, on which grounds can appeals be submitted? If juries and the court in general are not required to provide reasons for their verdict, on which grounds can appeals be submitted?

Working Group 2: Division of offences within the criminal sphere (including criminal offences, misdemeanours and administrative offences)

Moderator:

Mr. Oleksandr Banchuk, Manager of criminal justice projects, Centre for Political and Legal Reforms, Kyiv

Panellists:

Mr. George Burjanadze, Program Coordinator of the Human Rights Program, Open Society Georgia Foundation, Tbilisi

Ms. Leila Sydykova, Deputy President of the Kyrgyz-Russian Slavic University for International Affairs, Bishkek

While it is the legislator's role to ensure that all wrongdoings are sanctioned under the law, the legal classification of such wrongdoings into criminal, misdemeanour and administrative offences carries important consequences from a legal point of view. This classification will determine the legal regime to be applied in a given situation and relates to who will be in charge of examining and sanctioning the wrongdoing, what sanctions can be imposed on the alleged offender, what measures can be imposed on him/her pending judicial examination of the case, by whom and how the alleged offender will be judged and sanctioned and what procedural rights the alleged offender will be afforded. All countries in Central Asia have developed specialized laws on administrative offences although there have been discussions in recent years on whether some of these offences should be re-classified as misdemeanours. Yet, recent reform discussions have prompted the legislator to criminalize some offences which could be considered part of the administrative realm and to outlaw certain acts associated with the exercise of fundamental freedoms (for example, freedoms of religion, expression, or association) as administrative or misdemeanour offences. Thus, participants will be invited to discuss the following questions:

1. On which criteria were recent shifts in the qualification of offences within the criminal sphere or from the criminal to the administrative sphere, or vice versa, based? What are the expected results of such shifts?
2. Who decides about the criminal or administrative qualification of the acts in question? What are the legal and practical safeguards put in place to ensure that the qualification of the act is done in an objective manner?
3. When a person is suspected to have committed an administrative offence, is a judge involved in reviewing the case or is the alleged offender subject to an administrative decision?

4. In case a person subject to administrative procedure for the suspicion of having committed an administrative offence is put under administrative arrest, what rights does he/she have?
5. What is the respective range of sentences that can be imposed on criminal and administrative offenders? If administrative imprisonment can be imposed by law, how is it different from criminal imprisonment, taking into consideration the maximum length of the sentence and detention conditions?
6. What are the main differences between the administrative and criminal procedures in terms of suspects' rights?
7. Are there possibilities for the administrative and criminal procedure to be intertwined? Are there situations where a wrongdoing is first assessed as an administrative offence (with the ensuing application of the administrative procedure) and is then re-qualified as a criminal offence? How are the rights of the defendant safeguarded in such a situation? In view of the defendant's right to liberty?

17.00 - 18.00

Plenary Session III – Reports from the Working Groups

Rapporteurs: TBC

The rapporteurs from Working Groups 1 and 2 should consolidate and present the main observations from their respective groups, with a view to highlighting key issues. This should serve as a basis for discussion throughout the session, and allow for all participants to exchange views on the topics of the working groups.

DAY TWO, 18 NOVEMBER 2014

09:20 – 11:00

Plenary Session IV – Rules of evidence

Moderator:

Mr. Oleksandr Banchuk, Manager of criminal justice projects, Centre for Political and Legal Reforms, Kyiv

Panellists:

Ms. Lorena Bachmaier, Professor of Law, Complutense University, Madrid

Mr. Stephen Thaman, Professor of Law, Saint Louis University, St. Louis

Evidence forms the basis of a criminal trial, whether it is in written, oral or material form. Many procedural rules outline the collection, presentation and examination of and access to evidence with a view to guarantee equality of arms in the evidentiary phase. These rules also help ensure that each party has an opportunity to present evidence in support of its arguments and that each side can challenge evidence presented by the opposite side. In recent reform discussions, access to evidence for the defence has been stressed as an important aspect not to be overlooked, particularly the timely access to the case file and the participation of independent expert witnesses. Situations involving absent witnesses and the conduct of special investigative measures undoubtedly complicate the use and admission of evidence.

Finally, it is essential that evidence obtained in violation of fundamental rights of witnesses and the accused are struck out as inadmissible. Participants will be invited to reflect on the following questions:

1. Under the applicable legal framework and in practice, how much time is there between the defence's access to the case file and the beginning of the main trial? Is the time allocated sufficient for a proper preparation?
2. Under the national framework and in practice, how can the prosecution and the defence collect and tender evidence? How successful are parties in initiating the taking of and requesting evidence in support of their case, particularly expert evidence?
3. What are the measures in place to ensure that each party has access to forensic expertise provided by independent laboratories and that it is provided within reasonable time, especially in case pre-trial detention is imposed?
4. If applicable under the national legal framework, on what grounds can a party request the deposition of a witness? Does the opposite party have to be informed of the deposition and does it have to attend the deposition proceeding? If not, what are the consequences on the defence's right to examine or have examined witnesses against him/her?
5. At trial, can both the prosecution and defence summon witnesses to be examined by the court? Does the judge grant the authorization of witness summoning on the basis of similar considerations for both parties?
6. To what extent is hearsay evidence admissible at the trial? When may a prior written statement of a witness be read at trial without the witness testifying? May the reports of investigative measures, such as searches, wiretaps, arrests, confrontation, etc. be read at trial without calling the police who performed the measures to testify?
7. How is evidence collected through covert measures considered at trial? Are both parties offered the same opportunities to examine and question such evidence? Are there safeguards to ensure that only evidence which was examined by both parties can be presented and used to enter into a conviction?
8. As most of the time protected witnesses are prosecution witnesses, what are the ways used to ensure that the defendant can mount an effective defence by responding accurately to the statements made by a protected witness who testifies anonymously? In other words, how is the principle of equality of arms safeguarded?
9. Which are the mechanisms and procedures in place to exclude evidence unlawfully obtained? Who has the responsibility to implement these procedures? Are these bodies most appropriate to endorse such a role?
10. How is evidence - including confessions - allegedly obtained through torture or ill-treatment handled? Is the allegation of torture and ill-treatment being systematically investigated in a thorough, independent and prompt manner?
11. What are the rules to ensure that only relevant evidence is presented at trial? In complex cases, how can the judge limit the presentation of evidence only to relevant evidence and avoid the presentation of numerous similar testimonies?

11.00 – 11.15

Coffee break

11.15 – 12.50

Plenary Session V – Status and Role of defence lawyers

Moderator:

Ms. Vera Tkachenko, International Project Manager, United Nations Office on Drugs and Crime, Programme Office in the Kyrgyz Republic

Panellists:

Mr. Daniyar Kanafin, Lawyer of the Almaty City Bar

Mr. Stephen Thaman, Professor of Law, Saint Louis University, St. Louis

The defence counsel whose role it is to safeguard the rights of the defendant during the criminal process must be allowed to perform his/her function effectively. Access to the case file, confidential and unrestricted communication with the defendant, even one detained, and opportunities to challenge the opposite party's arguments constitute only a sample of the fair trial rights issues dealt with by the defence counsel. Yet, lawyers also have a role beyond the mere criminal process. They should contribute to ensuring that their professional duties are performed independently and that they are treated on an equal footing with other justice actors. Internal mechanisms to organize the profession, to protect its independence from external influence as well as to ensure qualitative performance need to be discussed more broadly within but also outside the profession. This session will focus on the following questions:

1. What system is currently in place to ensure the institutional independence of the profession of the lawyer from external influence?
2. What can the community of lawyers do to ensure that it is further empowered and adequately resourced to conduct its regular activities? What measures are in place to ensure the independence, quality, integrity and accountability of the profession?
3. Are representatives of the profession included in the legislative process of relevant laws, such as working groups drafting criminal justice legislation?
4. Do all cases of mandatory legal defence foreseen under the national legal framework guarantee that defendants are afforded legal advice in all situations where their fair trial rights might be at stake?
5. At what time during the preliminary investigation does the suspect/accused have a right to a lawyer? If they are indigent, do they have a right to an appointed lawyer? Are all persons arrested or detained awarded the right to see a lawyer as soon as they are deprived of their liberty? Do lawyers have prompt, regular, unrestricted and confidential access to their clients in detention?
6. If defence lawyers can be the subject of covert measures, what safeguards are in place to ensure that they can work independently and effectively? Additionally, what safeguards are included in the law and in practice to guarantee that the rights of the defendant (including the right to confidential communication with his/her lawyer) are respected?
7. Are lawyers perceived to be equally treated by other justice actors in court? Do they benefit from the same opportunities to present and submit procedural challenges and present their case as the prosecution does?
8. In practice, do lawyers actually provide legal aid during pre-trial proceedings? Are there any public defender offices which provide legal aid to indigent defendants?
9. What are the quality-control mechanisms in place to ensure that legal aid is delivered on time (including during the early stage of the proceeding), professionally, effectively and by independent lawyers to indigent and vulnerable groups?

12.50 – 14.00

Lunch

14.00 – 15.40

Working Groups Session

Working Group 3: Plea bargaining and abbreviated procedures

Moderator:

Mr. Daniyar Kanafin, Lawyer of the Almaty City Bar

Panellists:

Ms. Lorena Bachmaier, Professor of Law, Complutense University, Madrid

Mr. George Burjanadze, Human Rights Program Coordinator, Open Society Georgia Foundation, Tbilisi

To date several Central Asian countries have introduced abbreviated procedures and procedural agreements in their codes and are looking into expanding the scope of these procedures, with a view to increase the efficiency of their criminal justice systems. Yet, a number of safeguards should be put in place to ensure that such procedures are subject to an informed and voluntary agreement on the part of the defendant to enter into such procedure, particularly when admission of guilt is required. Kazakhstan's and Kyrgyzstan's criminal procedures include a form of plea bargain and other countries might decide to adopt a similar procedure. Questions regarding the mandatory assistance of a legal counsel and the information and agreement of the victim regularly arise. Discussions during the working group should be guided by the following questions:

1. What are the main types of abbreviated forms of procedures and procedural agreements in Central Asian legal systems and how often are they currently used?
2. What are the initial results regarding the use of these procedures? Are there indications that the objective of a more expedient administration of justice was achieved?
3. Is there a particular standard of evidence that needs to be satisfied by the prosecutor before initiating these procedures?
4. Do these procedures include recognition of guilt? If yes, what safeguards are in place to ensure that recognition of guilt by the suspect is made knowingly and deliberately?
5. In the case of plea agreement, on what elements (charges or nature and quantum of sentence) do the prosecution and the defence have to agree?
6. Is a judge required to approve such procedure? If yes, what are the elements he or she needs to examine to make sure the procedure was legally conducted? Does the judge specifically verify whether guilt was admitted knowingly and deliberately?
7. Is the suspect subject to such procedures required to be assisted by a lawyer? If no, who is responsible for assisting the suspect in the exercise of his/her rights?
8. Is the opinion of the victim taken into consideration in determining whether an abbreviated procedure will be used?

Working Group 4: Gender composition of legal professions and impact on justice delivery

Moderator:

Ms. Leila Sydykova, Deputy President of the Kyrgyz-Russian Slavic University for International Affairs, Bishkek

Panellists:

Mr. Nikolai Kovalev, Associate Professor of Law, Wilfrid Laurier University, Ontario

Ms. Gulsara Alieva, Professor of the Kyrgyz-Russian Slavic University, Bishkek

The promotion of more equal societies is certainly advanced by a justice system administered and operated by men and women, in relatively similar numbers, at any given level of an institution. Yet, only little research has been done either on the gender composition in the judiciary, prosecution services, the police and the lawyer profession, or on the impact of the gender of the legal / police professional on the way justice is delivered or seen to be delivered. The existence of biases and stereotypes associated with the gender of a particular justice or law enforcement professional deserves additional research to better understand their causes and eventually deconstruct existing perceptions. This working group will thus help identify the exact areas where additional research is warranted. For that purpose, the following questions will guide the participants' reflection:

1. Is information about gender composition of the judiciary, prosecution services and the lawyer profession available publicly? If not, what is the reason?
2. Is there information on gender composition disaggregated by position/level of functions? Is gender balance close to being achieved among chiefs/heads of courts, prosecution offices, police units?
3. Based on existing public documents and your experience, what is the current status of gender composition of the mentioned professions? Are there developing trends in terms of gender balance within these professions? Are there plans to intensify scientific research in that area?
4. Are there reform initiatives and policies related to increasing gender balance in the mentioned professions?
5. If discriminatory attitudes are observed, how are they recorded, monitored and sanctioned by the management of the institution/profession?
6. Are their pre-conceptions about how justice will be delivered based on the sex of the justice/law enforcement actor? If yes, which are they and what are the underlying reasons for such pre-conceptions?
7. According to you, what is needed to fight such pre-conceptions? If there is an observed imbalance between men and women, what measure could help remedy that?

15.40 – 16.00

Coffee break

16.00 – 17.00

Plenary Session VI – Reports from the Working Groups

Rapporteurs: TBC

The rapporteurs from Working Groups 3 and 4 should consolidate and present the main observations from their respective groups, with a view to highlighting key issues. This should serve as a basis for discussion throughout the session and allow for all participants to exchange views on the topics of the working groups.

17.00 – 18.00

Concluding session - Final remarks

Moderators:

Mr. Dmitry Nurumov, Legal Adviser, OSCE High Commissioner on National Minorities

Speakers:

Representative of the Kyrgyz Republic delegation

Ms. Vera Tkachenko, International Project Manager, United Nations Office on Drugs and Crime,
Programme Office in the Kyrgyz Republic

Ms. Nathalie Tran, Rule of Law Officer, ODIHR

Experts' Biographies

Gulsara ALIYEVA (Kyrgyzstan)

Gulsara Aliyeva is a graduate from the Philosophy Faculty (1981) as well as from the postgraduate program from the Lomonosov Moscow State University. There, she obtained her PhD in Social Philosophy in 2004, and currently is a Professor of the Philosophy Department at the Kyrgyz-Russian Slavic University. Ms. Aliyeva worked for more than 20 years for the Ministry of Interior of Kyrgyzstan, and has the rank of a Police Colonel, after retiring from a 22-year career in law enforcement. She has been acting as an independent expert on law enforcement and gender issues, participating in various projects related to police reform, promotion of gender equality, and HIV/AIDS prevention.

Lorena BACHMAIER WINTER (Spain)

Lorena Bachmaier Winter holds a PhD in Law from Complutense University (Madrid, Spain) and has been a criminal and civil procedure, and arbitration law Professor at the Faculty of Law at the same university since 1996. In this capacity, she also teaches in the summer law course program of Saint Louis University since 2004. She is the author of five books and more than a hundred scientific articles on justice systems and procedure. She has worked extensively as an international legal expert with various international organizations in Ukraine, Georgia, Bosnia and Herzegovina, Latvia, Russia, Moldova and Central Asia. Ms. Bachmaier is a member of the editorial board of law reviews from Brazil, Romania and Croatia, and is also a visiting scholar at the Max-Planck-Institute for Criminal Law and Procedure (Germany), and at the Universities of Berkeley, Harvard and Stanford (USA).

Oleksandr BANCHUK (Ukraine)

Oleksandr Banchuk holds a PhD degree in Law from Kyiv National Taras Shevchenko University. He is also a Ukrainian lawyer and is on the managing board of the think tank Centre for Political and Legal Reforms since 2003. In that capacity, he coordinates the implementation of various projects in the field of human rights, criminal proceedings, anti-corruption, and administrative offences. Mr. Banchuk was involved in the preparation of several draft laws in Ukraine such as the Law on Normative and Legal Acts, on Free Legal Aid, on Prosecutor's office, on Police and Police Activities, the Criminal Procedure Code, the Code of Administrative Offenses and the Code of Criminal Infractions. He was also a member of the working group on drafting the Criminal Procedure Code and the Code on Criminal Infractions of Kyrgyzstan (2013-2014). Mr. Banchuk authored and co-authored 20 books, approximately 100 articles and researches on public law, legal aid, and legal reforms in Ukraine, Armenia and Kyrgyzstan.

Giorgi BURJANADZE (Georgia)

Mr. Giorgi Burjanadze is a Program Coordinator with the Open Society Georgia Foundation, working on various projects under the Human Rights Program. He has recently been appointed as an expert on various criminal justice projects for UNDP, UN Women, and several Georgian NGOs. Between 2012 and 2014 he worked as a senior legal expert for an EU project to support the Public Defender's Office in Georgia. Mr. Burjanadze taught international criminal law, criminal justice, and human rights law at various universities in Georgia. Mr. Burjanadze is currently working on his PhD in Law at the Tbilisi State University and has authored and co-authored 15 publications on criminal procedure, rule of law and fair trial rights.

Daniyar KANAFIN (Kazakhstan)

Daniyar Kanafin is an attorney of the Almaty City Bar and a board member of the National Bar Association. He was awarded the title of “Attorney of the Year” by the Union of Lawyers of Kazakhstan in 2009. Before and during his activity as an attorney, Mr. Kanafin lectured in various universities throughout Kazakhstan. He was the Dean of a Faculty of the Kazakh State Law University and the Scientific Secretary of the Dissertation Council (2002-2003). In 2013 the Ministry of Justice of Kazakhstan awarded him the “Contribution to the improvement of judicial authorities” medal. Mr. Kanafin holds a PhD in Law. He is an Associate Professor, and the Deputy Head of the Center for Training and Professional Development of Lawyers of the Almaty City Bar. Mr. Kanafin authored over 65 scientific papers.

Nikolai KOVALEV (Canada)

Nikolai Kovalev holds a PhD in Law from Queen’s University in Belfast, Northern Ireland, and currently is an Associate Professor of criminology at the Wilfrid Laurier University (Canada). He completed a postdoctoral fellowship at the University of Toronto in 2009. Mr. Kovalev served as an expert on comparative criminal justice reforms (particularly in post-Communist states), law reform and international human rights for the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), American Bar Association/ Rule of Law Initiative (ABA/ROLI) and U.S. Department of Justice. He prepared legal opinions on draft laws on jury and lay assessors in Kazakhstan and Kyrgyz Republic, and on the draft Criminal Procedure Code of Tajikistan. Mr. Kovalev is the author and co-author of more than 10 publications in English and in Russian on various criminal justice topics.

Sergej NASONOV (Russia)

Sergej Nasonov holds a PhD degree in Law from the Kutafin Moscow State Law University where he works as an Associate Professor of the Department on Criminal Procedure Law since 1999. Mr. Nasonov is also a lawyer of the Moscow Bar since 1996. He is a member of the Independent Council of Legal Expertise – an inter-regional network of practising lawyers and legal academics providing legal support for public interest litigation – and became in 2013 an expert of the Permanent Commission on Precedent Cases of the Russian Presidential Council for Civil Society and Human Rights. He is the author of an important number of publications on criminal procedure law and of four monographs. He is also the author and the administrator of the website on jury trials: <http://jurytrial.ru/>

Dmitry NURUMOV (Kazakhstan)

Dmitry Nurumov served as Legal Adviser and then as Senior Adviser to the OSCE High Commissioner on National Minorities (OSCE HCNM) from 2011 to 2014. Prior to that, for more than seven years he worked in the Rule of Law Unit of the OSCE Office for Democratic Institutions and Human Rights as OSCE ODIHR Rule of Law Coordinator in Central Asia. Before joining the OSCE ODIHR he was a Legal Expert for the OSCE Centre in Almaty from 2001 to 2003. In the past, Mr. Nurumov also worked for a number of other international organizations, including the International Organization for Migration (IOM). He holds a PhD degree in International Public Law from Moscow State Institute (University) of International Relations (MGIMO) and specializes in criminal justice reform. Currently he holds the position of Special Adviser to the OSCE High Commissioner on National Minorities.

Leyla SYDYKOVA (Kyrgyzstan)

Leyla Sydykova holds a PhD in Law from Al-Farabi Kazakh National University. Since 2011 she is the Deputy President of the Kyrgyz-Russian Slavic University. She has been a Professor of criminal law and criminology from 1994 until 2007 and since 2010. Between 2007 and 2010, Ms. Sydykova was a member of the Kyrgyz Parliament. She led the Committee of Defence and Law Enforcement. In 1997 she was the head of the Kyrgyz working groups on the draft laws on the Criminal Code, Criminal Procedure Code, and Criminal Execution Code. Currently, she is heading the working group on drafting the new Criminal Code of the Kyrgyz Republic, the Code on Criminal Infractions, and the Code on Contraventions, as well as the draft laws on the Register of Criminal Convictions and on the Grounds for Amnesty. Ms Sydykova is an expert working with international organizations like the UN and the OSCE. She is a member of the editorial board of several law reviews from Kyrgyzstan, and is the author and coauthor of 103 scientific publications, including a number of articles on human rights, criminal law and women's rights and corruption.

Stephen C. THAMAN (United States)

Stephen C. Thaman holds a PhD in Law from Albert-Ludwig-University (Freiburg, Germany). He is a comparative criminal law and procedure Professor at Saint Louis University Law faculty (St. Louis, USA) since 1995. He advised law- and policy-makers on the reform of the codes of criminal procedure in Russia, Latvia, Georgia, Kyrgyzstan and Indonesia. Mr. Thaman, who is fluent in six languages, has lectured in many countries across the world on issues related to U.S. and comparative criminal law and procedures. After 12 years as an Assistant Public Defender (California, USA), Mr. Thaman accepted a Fulbright Senior Professor Award at the Institute of Criminal Law and Procedure at the Free University of Berlin and was awarded a research fellowship at the Max-Planck Institute for Comparative and International Criminal Law, Germany. Mr. Thaman is currently on the Scientific Advisory Board of the Max-Planck Institute in Freiburg. Mr. Thaman's articles on comparative criminal law and procedure have appeared overseas in several languages and in prominent U.S. journals. In 2008 the second edition of his book "Comparative Criminal Procedure: A Casebook Approach" was published.

Primary terms		Основные термины	
Arrest - the act of apprehending a person for the alleged commission of an offence or by the action of an authority		Задержание - акт задержания лица по подозрению в совершении какого-либо правонарушения или по решению какого-либо органа (в основном по уголовному подозрению, обвинению)	
Detention		Содержание под стражей - любое действие, направленное на лишение свободы человека, в том числе, но не исключительно, до доставления к судье в рамках процедуры <i>habeas corpus</i>	
Detainee - person deprived of liberty except as result of conviction for an offence		Задержанный - любое лицо, лишенное свободы не в результате осуждения за совершение правонарушения	
Preventive/Administrative Detention		Превентивное/административное задержание - может быть и не по уголовному обвинению	
Preventive measures/Measures of restraint		Меры пресечения	
Detention on remand/Pre-trial detention - usually, after court's approval on the preventive measure		Арест - как мера пресечения/предварительное заключение - как правило после судебного решения о выборе меры пресечения	
Alternative preventive measures/alternative measures of restraint		Альтернативные аресту (заключению под стражу) меры пресечения	
Deprivation of liberty as general criminal sanction		Лишение свободы в уголовном порядке (в том числе, из контекста может быть тюремным заключением, отбыванием наказания в колонии, арестом на короткий срок и т.д.)	
Imprisonment (as administrative sanction)		Тюремное заключение	
Imprisonment as specific criminal sanction		Административный арест	
Crimes (roughly correspond to felonies in Common Law)	Minor crimes	Преступления	Преступления небольшой тяжести
	Medium-gravity crimes		Преступления средней тяжести
	Grave crimes		Тяжкие преступления
	Especially grave crimes		Особо тяжкие преступления
Criminal infraction - also referred to as Criminal delict/Délit pénal (FR)/ roughly corresponds to misdemeanours in common law tradition		Уголовный проступок	
Contraventions - also referred to as Administrative		Нарушения/Административные деликты	

Administrative offences in post-soviet tradition -

Административные правонарушения в пост-советской традиции

<p>Administrative sphere - Административная сфера</p> <p>Contraventions also referred to as Administrative offences Minor offences</p> <p>Нарушения (адм. деликты)</p>		<p>Criminal Offences</p> <p>Уголовные Правонарушения</p>	<p>Penal sphere</p> <p>Уголовная сфера</p>	<p>Civil-law sphere, including civil delicts</p> <p>Гражданско-правовая сфера, в том числе гражданско-деликтные отношения</p>
<p>Criminal infraction/Criminal delict</p> <p>Délit pénal (FR)/ roughly corresponds to misdemeanours in common law tradition -</p> <p>Уголовный проступок</p>	<p>Crimes</p> <p>(roughly correspond to felonies in common law tradition) - Преступления</p>			
<p>Minor crimes - Преступления небольшой тяжести</p>	<p>Medium-gravity crimes - Преступления средней тяжести</p>	<p>Grave crimes - Тяжкие преступления</p>	<p>Especially grave crimes - Особо тяжкие преступления</p>	