



# Fourth Expert Forum on Criminal Justice for Central Asia

Final Report

29-31 October 2012  
Almaty, Kazakhstan

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

In co-operation with:  
OSCE Centre in Ashgabat  
OSCE Centre in Astana  
OSCE Centre in Bishkek  
OSCE Office in Tajikistan  
OSCE Project Co-ordinator in Uzbekistan





(L-r) Benjamin Moreau, Chief of ODIHR's Rule of Law unit; Nurlan Abdirov, Member of the Kazakhstan Parliament; Eva Katinka Schmidt, Deputy Chief of ODIHR's Rule of Law unit; Michael Grau of the Consulate-General of Germany in Almaty, and Stefan Buchmayer of the OSCE Centre in Astana, open the Fourth Expert Forum on Criminal Justice for Central Asia. (OSCE/Shiv Sharma)

## INTRODUCTION AND BACKGROUND

As a continuation of an established tradition, the Office for Democratic Institutions and Human Rights (ODIHR), in co-operation with the OSCE Field Operations present in Central Asia, organized the Fourth Expert Forum on Criminal Justice for Central Asia from 29 to 31 October 2012. ODIHR launched the First Expert Forum on Criminal Justice for Central Asia in 2008 in Zerenda, Kazakhstan. It was then organized in 2009 in Issyk-Kul, Kyrgyzstan and in 2010 in Dushanbe, Tajikistan.

The Fourth Expert Forum brought together around 100 experts from Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan active in the field of criminal justice, including Supreme Court justices and prosecutors, policy makers from the Ministries of Justice and Interior, Members of Parliament, lawyers, academics, and representatives of civil society.

Over the years, the Forum has emerged as a leading regional platform for professional discussion on criminal justice and judicial reform, human rights in criminal procedure, and harmonization of national legislation with international criminal justice standards. Professional practitioners and policy makers exchanged experience and knowledge about current reform processes on a peer-to-peer basis with a view toward applying lessons learnt and good practices to the design of future reform initiatives.

Various topics of relevance to the region were discussed at the 2012 Forum: the role of the investigator in criminal procedure reform, control of pre-trial proceedings and the respective roles of the judge and the prosecutor, the reform of pre-trial proceedings, the status of the defendant in pre-trial proceedings,

rules of evidence, plea and confession bargaining and abbreviated procedures, torture allegations in criminal proceedings, evidentiary defence rights, and criminal law reform. Seven plenary sessions and four working group sessions took place. All sessions gave rise to intense discussions among participants, which were facilitated by prominent international and regional experts in the area of criminal law and procedure. The four official delegations present at the Forum presented the latest reforms envisioned in their respective countries.

The present report does not intend to be comprehensive with regard to the substance of the discussions and interventions which took place during the Forum. Instead, the following is a summary of the main observations, concerns raised, and conclusions made during the sessions. On the basis of these discussions, ODIHR will further consult its Central Asian counterparts and offer its support in their reform endeavours in the criminal justice area. ODIHR takes due note of the suggestion by several participants to organize a Fifth Expert Forum on Criminal Justice for Central Asia in the near future.

Finally, ODIHR would like to express its gratitude to the Kazakh authorities who hosted the Forum and to all ODIHR's counterparts in the region, in particular OSCE Field Operations, the UN Office of the High Commissioner for Human Rights, and the European Union, whose support was crucial to the success of this event.

The Fourth Expert Forum on Criminal Justice for Central Asia was organized by the Rule of Law Unit, Democratization Department of ODIHR, in the framework of ODIHR's assistance program on criminal justice reform in Central Asia.



(Akhmadhon Yusupkhanov)



## KEY MESSAGES AND CONCLUSIONS

In the post-Soviet countries, the investigator carries out the difficult mission of performing investigative acts in order to bring charges against the defendant and gathering evidence on his behalf. This dual role risks going against the right to fair trial in a criminal procedure.

- Granting judicial functions to the investigator contravenes the principle of separation of powers.
- Judicial control in pre-trial stages should be strengthened by establishing effective remedies against acts infringing upon the rights and liberties of the defendant.
- The investigative phase should be governed by the adversarial principle notwithstanding the procedure through which this may be effectuated.
- Reforms of the current status and role of the police or investigator should ensue in order to guarantee separation of powers and equality of arms.

The application of the principle of the presumption of innocence, a fundamental tenet of criminal procedure, should result in a strict distribution of roles between the pre-trial judge and the prosecutor.

- The lawfulness of investigation must be subject to review by an authority that is independent of the investigative authority itself.
- In particular, coercive measures must be reviewed by the pre-trial judge as they interfere with the defendant's constitutional rights.
- The best way to guarantee that the rights of the defence are respected is for the prosecutor to act fairly and disclose evidence to the defence from the very moment the defendant is brought before the judge.

In post-Soviet countries, current efforts to reform the pre-trial stage of legal proceedings usually aim at striking a better balance between the confidential character of the investigation and the adversarial principle.

- In particular, the adversarial principle dictates the possibility for the defence to participate in pre-trial proceedings, notably in the collection of evidence and in challenging or requesting certain investigative measures.
- The pre-trial judge should be responsible for performing judicial review of the pre-trial proceedings.
- The pre-trial judge must not be the judge trying the case on its merits.

It is accepted now that the defendant possesses certain fundamental rights during the pre-trial stage.

- These include:
  - the right to unhindered access to a lawyer,
  - the right for the defence to have access to the case file,
  - the right to have his legal counsel to actively participate in his/her examination, and
  - the right to challenge the lawfulness of one's arrest or detention.
- Proper legal aid mechanisms should be introduced to ensure that indigent defendants can exercise their right to legal counsel and benefit from an effective defence.

## Collection and examination of evidence should be carried out in full respect of human rights.

- Gathering of evidence should become a participatory process where the defense is provided with the right and the opportunity to take part in evidence collection, such as in witness examinations or crime scene re-enactments.
- Evidence obtained through illegal means or in violation of defence rights ought to be excluded.
- The right to be tried by an impartial judge demands that no person having acted as investigator or pre-trial judge in a case sits later on as a trial judge.
- The exclusion of hearsay evidence has led to the curbing of witness fabrication by the police.



(L-r) Jumakhon Davlatov, State Adviser to the President of Tajikistan on Legal Policy, Abubakr Inomov, Ministry of Justice, Abdulahad Qurboniyon, State Agency for State Financial Control and Combatting Corruption and Anna Crowley, Human Rights officer at OSCE Office In Tajikistan lead a presentation on the latest criminal justice reform efforts in Tajikistan which have promoted human rights, rule of law, and fair trial rights to the rank of guiding principles. (OSCE/Shiv Sharma)

## The use of plea agreements and abbreviated procedures raises some of the most critical issues in modern criminal procedure.

- Plea agreements and abbreviated procedures present obvious advantages in terms of time, financial and human resources.
- Yet, such procedures need to be carefully set up as these solutions constitute a form of waiver of justice.
- More specifically, fundamental safeguards to ensure that the defendant gives his/her voluntary and informed consent to the prosecutor's proposal must be put in place, along with a judicial authorization of such processes.

- Further debates among practitioners, law and policy makers, and scholars are required to better assess the advantages and risks of each model before the legislature decides to introduce such procedures.

**The aim of eradicating the practice of torture in the course of criminal proceedings is acknowledged by all countries of Central Asia.**

- The adoption of national preventive mechanisms in the region highlights this commitment.
- Yet, there is a discrepancy between what is foreseen in law and what takes place in practice. All torture allegations must be effectively and thoroughly investigated.
- Evidence obtained under torture is inadmissible and should be excluded from the case file.
- Confessions shall not be admissible in court when there are credible allegations or indications that they were obtained through coercion or deception.

**In order to fulfil equality of arms requirements, defendants should enjoy a number of general evidentiary rights during pre-trial proceedings.**

- These defence evidentiary rights include the right to initiate the taking of exculpatory evidence, to participate in the collection of evidence, and to have access to expert evidence.
- Procedures and laws need to be introduced that assist defence lawyers in gaining equal standing with the police and the prosecution when evidence is being gathered and recorded.
- Investigative acts by the defence should be allowed so long as no other rights are violated.

**The questions of whether and in what manner to criminalize or decriminalize minor offences and administrative offences are particularly relevant in criminal law reform efforts in post-Soviet countries.**

- In particular, the procedure governing the application of administrative sanctions often falls short of those due process standards guaranteed in criminal procedure.
- Although there is no unique solution as to whether a particular offence should pertain to the category of criminal, misdemeanour, or administrative offences, due process safeguards must be observed regardless of the categorization of offence.
- Decriminalization or criminalization should both be subject to indispensable structural and procedural changes.
- Rules should be put in place to minimize or prevent arbitrary decisions or abuse of power by the prosecutor or the police during the process of categorization of criminal actions.



(L-r) Daniyar Kanafin, Defence Attorney at the Almaty City Bar, speaks as Dmitry Nurumov, Legal Adviser at the OSCE High Commissioner on National Minorities, and Richard Soyer, Professor of Criminal Law at the Johannes Kepler University in Linz, listen at a discussion on the role of the investigator in criminal proceedings, and the impact that reform of this role would have on the limits of police investigation. (OSCE/Shiv Sharma)

## SUMMARY OF DISCUSSIONS

### *The role of the investigator in the context of criminal procedure reform*

The investigator holds an essential function in the criminal justice system of post-Soviet countries. The procedural independence the investigator enjoys and the nature of his/her relation with the judge and the prosecutor are key questions related to his/her functions.

Kazakh attorney Daniyar Kanafin explained that, traditionally, the criminal procedure in Central Asia follows the inquisitorial model in the pre-trial proceedings and makes room for a more adversarial component only during the trial phase. More weight is given to the position and powers of the prosecution whereas the defence is traditionally considered as having only limited powers. The investigator, an independent institution in charge of investigative acts, wears two hats while performing his functions: on the one hand, he applies investigative measures decided by the prosecution and brings charges against the defendant, but on the other hand, he is in charge of collecting evidence in favour of the defendant. This dual function is considered a complex objective and risks going against equality of arms and the right to a fair trial.

Attempts to amend the attributes of the investigator took place in Kazakhstan but the latter retained most of his functions. Indeed, the investigator should not be granted judicial powers as the option of “judicializing” his/her function contravenes the principle of separation of powers. This position was also upheld by several participants who provided the example of Kyrgyzstan where judicial safeguards,



enforced by the pre-trial judge, are increasingly adopted for the protection of the rights of the parties. In the same vein, reforms of the Kazakh criminal procedure aim at strengthening judicial control in pre-trial stages by establishing remedies against acts infringing upon the rights and liberties of the defendant. Furthermore, the introduction of jury trials in the Kazakh legal framework reinforced the adversarial principle and, as a matter of fact, coincided with an increase in the number of acquittals (10% of trials completed, compared to 2% in trials without jury).

In this regard, the American model provides an insightful example on how the adversarial principle has influenced the distribution of roles between the judge, the prosecutor, and the defence. For instance, evidence collected by the investigator during the investigation must be presented by the relevant police officer at the trial subject to its exclusion from the procedure. This rule ensures that all parties are given the chance to discuss the admissibility and probative value of each piece of evidence.



Andreas Kangur (l), Lecturer in law from the University of Tartu and Svetlana Bychkova (r), Secretary of the Committee on Legislation and Judicial Reform, Mazhilis of the Parliament of the Republic of Kazakhstan, participate in a discussion on the role of the investigator in Central Asian countries. (OSCE/Shiv Sharma)

The reform of the Austrian criminal procedure law provides an example of current change in dynamics between the police and the prosecutor. Richard Soyer, Austrian academic and defence attorney, explained that the 2004 reform of the criminal procedure, which entered into force on 1 January 2008, sought to eliminate the function of the investigative judge through the creation of a new co-operation model between the prosecution and the police whereby the former controls the investigation and the latter conducts the investigation with a fair amount of autonomy. A 2009 university study<sup>1</sup> found that the new prosecutor/police model did not operate effectively in practice. The examination of a

<sup>1</sup> See Luef-Kölbl / Hammerschick / Soyer / Stangl, "Zum Strafprozessreformgesetz: Die Sicht von Justizakteuren am Vorabend des strafprozessualen Vorverfahrens" JST 2009, 9. The study is a result of a project led by the Universities of Linz and Graz and the Institute for the Sociology of Law in Vienna.



defendant is still conducted by the police in the vast majority of cases even though this task also lies with the prosecutor under the new law. The main conclusions of the study show that the police still dominate pre-trial proceedings and that the prosecutor maintains only loose control over it. Soyer explained that pre-reform concerns were confirmed, as the most arduous part of the reform exercise was to initiate changes in mentality.



Zhemis Turmangambetova, a participant from Kazakhstan speaks at a session on the respective roles of the judge and the prosecutor during pre-trial proceedings as Vera Tkachenko of the UN Office on Drugs and Crime in Kyrgyzstan looks on. The discussion focused on the regulation of measures involving severe interference with the individual rights of a person as well as the regulation of intelligence-gathering operations and how the information obtained is used. (OSCE/ Shiv Sharma)

## *Control of pre-trial proceedings: respective roles of the judge and the prosecutor*

The pre-trial phase is in several aspects a major phase in criminal procedure. Pre-trial proceedings mark the moment when the suspect is identified and when investigation formally starts. It is during the pre-trial phase that facts are established, evidence pointing at the guilt or innocence of the suspect is collected, charges are decided upon and formulated, and the indictment is drafted.

Although these more “active” functions essentially constitute the tasks of the prosecutor, many countries have established the office of the investigative judge. Stefan Trechsel, former President of the European Commission of Human Rights and ICTY *ad litem* judge warned that the same person could not act as a judge adjudicating a case in an impartial way, and at the same time assume the role of a prosecutor who is responsible for leading investigations against a suspect. The principle of the presumption of innocence, which represents the cornerstone of the criminal process, is a legal concept which does not easily resonate on a psychological level. Similarly, the European Court of Human Rights, in *De Cubber v. Belgium* (1987)<sup>2</sup>, ruled that an investigative judge examining a *habeas corpus* request could not later sit in the trial chamber deciding on the defendant’s guilt, since there was a risk of him being partial during the trial due to his familiarity with the case.

The judge of the pre-trial phase is mostly responsible for deciding upon the lawfulness of coercive measures enforced against a suspect. They constitute an interference with individual rights usually guaranteed by the Constitution.

2 See *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86.

The best way to guarantee that the rights of the defence are respected is for the prosecutor to act fairly and disclose evidence to the defence from the very moment the defendant is brought before the judge. Yet, as some participants observed, disclosure of evidence to the defence constitutes a challenge for the principle of secrecy of the investigation, all the more so in cases of organized and transnational crime.

The Ukrainian example is of particular relevance to Central Asia due to their similar Soviet heritage: the 2012 Ukrainian Criminal Procedure Code has been the object of intense discussions since 2006. From the outset, civil society participated in the working group responsible for the reform, whereas the state only joined the working group in 2010. Under the new code, the office of the *investigating judge*, which in the Ukrainian context is a misleading term referring to the pre-trial judge, has changed to acquire a more judicial mandate as opposed to the traditional role of prosecutor and investigator. The new *investigating judge* oversees the investigation and performs certain key functions in the pre-trial phase, such as authorizing so-called measures ensuring criminal process, applying and prolonging restraining measures, authorizing investigative acts, authorizing special investigative measures, and ruling on pre-trial motions.



Dmitry Nurumov (l), Legal Adviser at the OSCE High Commissioner on National Minorities, and Oleksandr Banchuk (r) listen to Saint Louis University Professor of Law Stephen Thaman (c) present the existing models of pre-trial proceedings. Thaman stressed the need for the legislator to carefully consider various models in their reform endeavours. (OSCE/Shiv Sharma)

## *Reform of the pre-trial proceedings*

Current reforms of the pre-trial stage in Central Asia are bound to entail changes in the roles and responsibilities of the investigator, the prosecutor, and the judge. The lawmaker needs to strike a balance between the confidential character of the investigation, and the adversarial principle which dictates the possibility for the defence to participate in pre-trial proceedings in an informed manner.

From a comparative perspective, there are several models governing pre-trial proceedings. As described by U.S. law professor Stephen Thaman, under the U.S., British, and Scandinavian adversarial model, the investigation is carried out by the police with limited control by the prosecutor who can reject a poorly investigated case. Collection of evidence, arrest of suspects, and examination of the crime scene are performed by the police. Another model is to be found in continental Europe as in France, Spain, and Serbia, where the investigative judge is in charge of the investigation and gives orders to the police. A slightly altered model can be found in Austria, Germany, and Italy, where the prosecutor takes up all the functions assigned to the investigative judge under the inquisitorial model. On the other end of the spectrum stands the Soviet model under which the investigation is led by the police but under the tight supervision and approval of the prosecutor. Until recently, the pre-trial judge had nearly no power in that stage and his traditional tasks were taken up by the prosecutor.

The current trend observed in reform endeavours around the world is to shift from the inquisitorial model to a more adversarial one. This is where the reformed European model stands whereby police hold quasi-judicial functions in opening investigations and collecting evidence and where evidence is considered admissible only if the defence has the opportunity to discuss its admissibility.



In this regard, the role of the judge in the pre-trial phase is widely understood as being in charge of judicial review, although international standards do not in all cases clearly define the scope of this review. For instance, the ECtHR does not specify what type of investigative measures can be taken without a judge's authorization. Participants and experts recommended that the pre-trial judge be prohibited from sitting as a trial judge in the same case. This principle is difficult to enforce since there are often not enough judges in lower courts to draw a strict separation line between pre-trial and trial judicial functions.



Svetlana Artikova (l), Chairperson of the Committee on Legislation and Judicial-Legal Issues, Senate of the Oliy Majlis of the Republic of Uzbekistan, highlights the importance of ensuring that justice actors change their mind sets as reforms are being adopted. (OSCE/Shiv Sharma)

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Ukraine's adoption of its new criminal procedure code provides an illustration of current pre-trial reform in post-Soviet countries. Ukrainian lawyer Oleksander Banchuk explained that the initiation of investigation is now to be relieved from burdensome paperwork, constituting the de-bureaucratization of the pre-trial procedure. Also, a stricter separation of functions between the three main actors of the pre-trial phase is now enforced: if the police gather evidence, the prosecutor sanctions police actions and therefore directs the investigation. The investigating judge, as seen above, authorizes investigative acts which could be detrimental to the rights of the suspect. Measures to secure the presence of the defendant include shortened provisional detention measures, bail, and house arrest. Searches and seizures have to be authorized by the court and the procedure of private prosecution whereby the victim can initiate proceedings was simplified. Additionally, the new Ukrainian code allows for heightened defence access to and involvement in evidence collection through requests for additional investigative acts to the prosecutor. The new legislation goes so far as to link the admissibility of a witness testimony with it being provided in court, therefore with the participation of the defence who now has access to the case file during that stage.

Despite the undeniable positive changes in the new Code, Banchuk raised concerns regarding the lingering proximity between the courts and the executive power or the prosecution (or the so-called practice of “rubber stamp judges” who grant all prosecution motions), or the possible misuse of plea bargaining to the detriment of the defence. Some participants concurred with these doubts, especially when discussing special investigative measures contravening the privilege of communication between a defence counsel and his client. Other members of the audience were, on the other hand, sceptical of the excessive rights given to the defence in accessing evidence gathered during criminal investigations which are, in principle, confidential by nature. Several experts, highlighting the ECtHR’s position, explained that the adversarial principle dictates that the defence should be informed of the grounds on which he is being investigated.



Stefan Trechsel, Ad litem Judge at the International Criminal Tribunal for the former Yugoslavia, highlighted the need to uphold the principle of equality of arms whereby procedural measures effectively balance the powers of the police and the prosecution on the one hand, and the legitimate interests and human rights of the defendant on the other. (OSCE/ Shiv Sharma)

### *The defendant in pre-trial proceedings*

The status of the suspect during the pre-trial phase was the focus of much debate in particular with regard to the procedural rights he/she should be granted. Opponents to the awarding of procedural guarantees to the suspect argued that pre-trial proceedings were not about the determination of the criminal charge, but merely about assessing the existence of sufficient evidence to bring the suspect to trial. Yet, because the bulk of evidence is collected during pre-trial proceedings and as the first suspect interrogation is likely to determine the strategy to be adopted by the prosecution, pre-trial proceedings represent a paramount phase of the criminal process. It is therefore believed that, today, the principle of the rights of the defence in pre-trial phase is well consecrated in law and that, in fact, the debate should concentrate on the scope of applicability of these rights and the manner they should be enforced.

In that regard, the notion of pre-trial defence rights is now generally understood as comprising several fundamental rights. One of the most essential ones is the right to be assisted by legal counsel. The current trend, Trechsel stated, is to enable the suspect to be assisted by counsel from the moment of arrest and such a request from the suspect should be immediately responded to. Although the work of the defence counsel is sometimes considered as interfering with the investigation, the investigating authority has to put up with him/her. As the right to legal assistance is not merely theoretical, it implies that the suspect should receive effective legal assistance by a lawyer of his own choosing. Yet, a suspect is not always free to choose his/her own lawyer, as is the case in Kazakhstan where, for instance, only

authorized lawyers can intervene in cases involving state secrets. In that regard, the Canadian and British model of special advocates - lawyers who possess a certain level of security clearance to represent clients in cases involving state secrets - could be further studied.

Furthermore, obstacles to free access to an assigned lawyer should be removed, all the more so if the suspect is detained on remand. Access to legal assistance should be guaranteed even in cases where the suspect cannot afford the services of a lawyer, if the interest of justice so requires. The establishment of an independent and functioning legal aid system rests on the state's shoulders but the bar association should take the lead in organizing and managing such legal aid mechanisms.

In this regard, different models for the provision of legal aid should be explored such as the possibility, as in the United States, for the state to contract private attorneys to perform this function. In Central Asia, reform of the bar to introduce legal aid is ongoing in Kazakhstan, Tajikistan, and Uzbekistan. Ukrainian expert Elena Volochai highlighted the importance of ensuring that lawyers acting under legal aid mandates are duly compensated to avoid possible cases of connivance with the investigating authority. In this connection, the status of defence lawyers should also be protected to promote their professional and independent intervention. It was suggested that lawyers be immune from intrusive investigative measures such as wire-tapping or searches of their offices and from testifying in court as a witness.

Other fundamental defence rights in the pre-trial proceedings encompass, as is the case in Kazakhstan, the right to have access to the case file, participate in the suspect's interrogation, participate in witness examinations and confront them, examine and call one's own witnesses, and appeal against unlawful judicial decisions, especially in the case of habeas corpus requests. This last question is crucial in Central Asia where often there are no full-fledged judicial proceedings to review the legality of detention orders.

Finally, participants stressed that the judge should take a more pro-active stance during the pre-trial stage. There are still instances where motions by the defence are ignored by the pre-trial judge without proper examination, or when violations of defence rights such as monitoring of confidential consultations between clients and lawyers in detention facilities are purposely brushed off.





Almaz Mukhametzhonov from the Prosecutor General's Office of Kazakhstan noted recent developments related to criminal justice reform in his country such as the introduction of plea bargaining. Government representatives from four Central Asian countries gave presentations on the ongoing reform discussions in their own countries, with a view to sharing good practices and lessons learnt in criminal justice reform. (OSCE/Shiv Sharma)

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## *Rules of evidence*

Rules of evidence are laid down in criminal procedure law for one very clear objective, namely to ensure that the truth is established in the most accurate manner possible. Rules of evidence relate to the procedural rules governing how evidentiary material is gathered and admitted. First and foremost, these norms are connected to the dignity of the person under investigation as evidence should never be gathered in violation of the rights of the defence. Consequently, the guiding axiom in evidence collection should be the principle of the presumption of innocence. This directly implies that the fact finder should not be involved in assessing the defendant's guilt or innocence. As an example, the pre-trial judge should not sit as a trial judge and the trial judge - or jurors for that matter - should not have access to materials contained in the case file (for instance, Estonian law bars the judge or jurors from having access to the case file.)

Several models for evidence collection were described by U.S. Law Professor Stephen Thaman including the inquisitorial model where evidence is gathered by the prosecutor or the investigative judge, the collection of evidence by an independent magistrate in which the defence is allowed to participate, or parallel / competitive investigations by the prosecutor and the defence. The latter stands out as an optimal model for gathering evidence. Often used as a basis in international legal instruments, this more adversarial model acquiesces to defence participation in witness examinations and ensures that evidence collected is admissible in court. However, this model is functional only if both parties have equal means to carry out parallel investigations at their disposal. It is widely considered in the U.S., where this model usually applies, that only wealthy people can afford to pay for defence investigation.

Nevertheless, this model provides certain safeguards for the protection of the rights of the defence through the establishment of strict rules on the inadmissibility of evidence obtained in violation of the right to privacy and the right to remain silent.

In line with the inquisitorial legal tradition, the Soviet model of evidence gathering is based on written evidence, where a confession by the defendant is the “queen of evidence.” The primacy conferred to a confession negatively affects the rights of the defence and contributes to the denial of constitutional rights. For instance, although a suspect is entitled to be assisted by a defence counsel during his examination, as foreseen in Russian legislation and underpinned in ECtHR *Salduz v. Turkey* (1999)<sup>3</sup>, this right is difficult to enforce given the existence of so-called “pocket lawyers” who are assigned to assist a suspect “*pro forma*” only, without conducting an effective defence. Participants also expressed concerns about the overriding force given to confessions, even in the face of a contradictory testimony in court. They agreed that the latter should prevail in order to avoid recognizing confessions given under coercion.

In that regard, the experience of Estonian law in terms of modernization of its evidence procedure is quite instructive. Estonian expert Andreas Kangur explained that the reform in Estonian law brought several positive changes. For instance, the use of pre-trial depositions, as a secure way to record testimony while allowing the opponent party to confront the witness, is recommended. This procedure is now available to both parties under Estonian law. Similarly both parties are able to commission experts in contrast to the earlier regulation. Yet, the reform neglected certain elements which require improvement. Indeed, the trial judge is in charge of both establishing the facts and deciding on the admissibility of the evidence despite research, that has shown it is difficult for the human mind to disregard inadmissible evidence once it has been exposed to it. Kangur therefore advises to solve all admissibility questions prior to the trial, preferably by a separate judge. Similarly, he believes that elements related to the defendant’s character, notably prior criminal records, should only be raised before the court at the sentencing stage.

In the U.S., the exclusion of hearsay is a fundamental principle in evidence law and suffers only rare limitations. The hearsay rule which excludes accounts given by a person outside of court but quoted by a witness testifying in court is now applied in Estonia and fabrication of witness statements by the police is discouraged. Yet, under Estonian law, police reports, albeit being a form of hearsay and being similar to police interview transcripts, which are inadmissible, can still be produced in court.

As debated with several participants, the strict prohibition of hearsay can lead to certain complicated situations, for instance when a witness refuses to testify. There is no possibility to force a person to provide a testimony although the judge has the possibility to subpoena him. The hearsay rule further complicates witness examination, especially in cases involving child victims, victims of sexual crimes, or protected witnesses. Alternative solutions exist whereby the witness could testify behind tinted glass as in Spain, or provide testimony by video link.

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3 See *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008.



Mikola Khavroniuk, Director for Scientific Development, Kyiv-based Centre for Political and Legal Reforms, raises his concerns regarding the use of plea bargaining procedures in light of the rights of the defence. (Akhmadhon Yusupkhanov)

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### *Plea and confession bargaining and abbreviated procedures*

Plea bargaining mechanisms and simplified procedures have been at the centre of criminal procedure reform discussions in Central Asia due to rising crime. This surge of criminal acts has an impact on the number of law enforcement activities, the volume of investigations and judicial proceedings, and ultimately on the caseload of the courts.

The general concept of the so-called plea bargaining agreement consists in the defendant agreeing to the charges raised against him or confessing guilt to the criminal offence at stake, and, in the presence of a lawyer, agreeing to a prosecution's proposal which will form the basis of a ruling delivered by the judge without a fully-fledged trial. The judge delivers a ruling where the sentence is pre-determined and which is lower than the maximum provided by law. Such an alternative to prosecution is cost effective in terms of financial and human resources, and saves time. It theoretically also benefits the defendant who is sentenced to a lesser punishment.

Professor Stephen Thaman distinguished between several plea bargaining models with different scopes and modalities. The most widely known model is the American plea procedure which evolved into a coercive instrument to guarantee the punishment of the defendant. Stephen Thaman illustrated this observation with a U.S. Supreme Court case in which the Court found that plea bargaining did not violate due process rights as guaranteed under the U.S. Constitution. In that particular case, a re-offending thief agreed to a five-year prison sentence as offered by the prosecutor in order to avoid the risk of a full-blown trial which could have resulted in a life imprisonment sentence. The psychological pressure on the defendant is extremely high and raises doubts about the fairness of the process. Other

models of plea bargaining, principally stemming from civil law systems, provide for a more moderate framework. As an example, the German penal order, the Spanish “conformidad” and the Italian “patteggiamento” procedures allow for discounted sentence proposals only for lesser crimes.

Plea bargaining and abbreviated procedures, although widely used in many countries such as Germany, where half of criminal cases are solved with a penal order, carry certain risks and therefore have fuelled a number of criticisms. Participants questioned the fairness and legitimacy of such procedures which, in sum, result in the determination of guilt or innocence at the pre-trial stage.

Experts and participants unanimously agreed that these procedures must be bolstered by a number of safeguards to guarantee a fair trial. These safeguards comprise judicial review of agreements between the defendant and the prosecutor whereby a judge needs to sanction the agreement before it acquires legal force. Usually the judge would review the appropriateness of the agreement by looking into the evidence on the basis of which the prosecutor made the proposal and ascertaining that the defendant gave his consent voluntarily and in an informed manner. Yet, judicial review is at times superficial as the judge may adopt an expeditious attitude in the examination of a case whose outcome has already been agreed to by the parties. A voluntary and informed consent from the defendant is better guaranteed by the assistance of a lawyer who will be in a position to clearly explain to the defendant the consequences of the plea agreement or shortened procedure for his situation. Although the assistance of a legal counsel is often mandatory prior to the defendant’s acceptance of one of these procedures, such a legal requirement could be disregarded in practice.

The lack of consent from the victim constitutes another criticism aimed at these procedures. In this regard, the example of Ukraine is informative as plea bargaining cannot be concluded without the consent of the victim if the latter suffered damages from the offence. Lack of publicity of such processes was criticized by some participants as these procedures create justice done “behind closed doors.” Stefan Trechsel compared such processes to a waiver and even an abdication of justice whereby these solutions resemble social engineering rather than justice *per se*. Stephen Thaman advised legislators in Central Asia to carefully study all models of plea and abbreviated procedures before deciding to adopt them into their legislation. Finally, due to the complex nature of such procedures, participants agreed that they should be the object of a separate conference exclusively dedicated to the question.





Nigina Bakhrieva (c), Director at the Dushanbe-based Nota Bene Public Foundation; Stefan Trechsel (l), Ad litem Judge at the International Criminal Tribunal for the former Yugoslavia, and Ulugbek Azimov (r), Legal expert from Kyrgyzstan, led a working group session on effective responses to torture allegations in criminal proceedings. Among the topics covered, participants examined what can be done to guarantee the proper registration and effective investigation of torture allegations in criminal proceedings. (OSCE/Shiv Sharma)

## *Torture allegations in criminal proceedings*

Torture, as the most serious violation of human rights, has been outlawed at the international level but also at the domestic level in Central Asia. Although states have adopted measures to eradicate torture in the context of criminal proceedings, their partial implementation explains why instances of torture still take place.

Torture is prohibited on different levels. First, it is proscribed as such in several international conventions, notably the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) – hereinafter the UN Torture Convention - which also bans other cruel, inhuman or degrading treatment or punishment. The prohibition is absolute and suffers no derogation. Secondly, torture is further forbidden through the interdiction to use evidence or statements obtained as a result of torture. Yet, there are exceptions to this interdiction in the rare cases where the evidence obtained under torture could be used by the victim to prove he/she had been tortured or to prove his/her innocence. Common law systems usually apply the doctrine of the “fruit of the poisonous tree” whereby evidence discovered subsequently to a statement obtained under torture will be contaminated by the original statement and would consequently be excluded from the procedure. As illustrated by *Gafgen v. Germany* (2010)<sup>4</sup>, the ECtHR does not have a clear-cut stand on the question of contamination of evidence by torture practice. Yet, Trechsel believed that this doctrine should generally be applied with the preventive intent of precluding any advantage for the prosecution

4 See *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010.

as a result of torture. Finally, the prohibition of torture is underpinned by the recognition of the right to remain silent which could be the strongest protection for a suspect.

On a policy level, OSCE states, including in Central Asia, have adapted their legislation to thwart the practice of torture. The primary tool to fight the use of torture usually consists in establishing a national prevention mechanism (NPM), which is what most Central Asian states have done. Participants agreed that civil society should be associated with the establishment and operation of such nationwide mechanisms, as was the case in Kyrgyzstan. Former Kyrgyz judge Ulugbek Azimov depicted the efforts made by Kyrgyzstan in recent years whereby monitoring and visits of detention facilities by the state General Prosecutor's Office, the Ombudsman, and civil society organizations have been put in place. Other organizations such as the UN Special Rapporteur on torture or the ICRC enjoy a mandate to visit detention facilities and converse with detainees. Most Central Asian countries have co-operated with such institutions.

As raised by the participants, other actions which could support the fight against torture include involving sociologists and psychologists in the recruitment of detention facilities personnel and police members, training lawyers to recognize clients who have been tortured and to prepare complaints in that regard to international bodies, and installing video surveillance devices in detention facilities. Finally, it was suggested to amend the legislation to give primacy to live testimony in court as this would eventually deter abusers from resorting to torture since a confession or witness testimony would not have any evidentiary value if not confirmed by a testimony in court.

Yet, in spite of the legislative ban on torture and reform endeavours of Central Asian states, many efforts are still required to ensure that torture allegations are systematically investigated. Trechsel believed that ex-officio investigations should be set up for torture allegations. Finally, proper information of the victim about the investigation on his/her torture allegations and the appropriate compensation of victims remain to be further addressed in the region.



Elena Volochai, Director of the Human Rights Programme at the Kyiv-based NGO Professional Assistance, gives a presentation during the Fourth Expert Forum on Criminal Justice for Central Asia, Almaty, 30 October 2012. (OSCE/Shiv Sharma)

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### *Evidentiary defence rights*

Amid the elements forming the basis of defence rights and equality of arms in criminal proceedings stand evidentiary rights which relate to the possibility for the defence to initiate the taking of exculpatory evidence, to investigate, and take part in the collection of evidence by the police or prosecution. Evidentiary rules diverge depending on the criminal law model in question: inquisitorial systems place the burden of proof on the judge, prosecutor, or police, whereas in the adversarial system that responsibility is carried out by the prosecutor and the defence.

Expert Richard Soyer explained that generally speaking defence rights in terms of evidence collection could be assessed through three different standards. First, a decisive issue is how to ensure that the defence stands on an equal footing with the investigation. Soyer suggested a number of actions which should also be available to the defence, such as the right for the defendant and/or his/her legal counsel to participate in interrogations, crime scene re-enactments, identity parades, inspections, or the preparation of expert testimony. Secondly, the defence should be entitled to initiate the collection of evidence by the police or prosecutor through a motivated request. Certain limitations apply in the case of inadmissible or unusable evidence, or obvious or irrelevant facts. Finally, the defence should have the right to investigate with the objective to uncover exculpatory evidence and to gather information to prepare the motions for collection of evidence. This right is often difficult to exercise as there can be legal and financial obstacles to such a possibility as discussed during the session on rules of evidence. It is generally agreed upon that any investigative act by the defence should be allowed so long as no other rights are violated.

Access to expertise represents another essential feature of evidentiary defence rights. This issue is another area where equality of arms can be appraised. According to Ukrainian expert Elena Volochai, it is essential that experts summoned by the defence have a status similar to that of state appointed experts. The ECtHR, in *Nechiporuk and Yonkalo v. Ukraine* (2011)<sup>5</sup>, criticized a ruling of the Ukrainian Supreme Court which completely ignored the findings of the private expert hired by the defendant alleging ill-treatment by the authorities. The defence should also have the possibility to challenge the appointment of non-independent or unqualified prosecution experts. Ultimately, it falls within the ambit of the court to rule out poor expert opinions. Volochai noted that in Ukraine the maintenance of a list of state experts is kept by the Ministry of Justice which could cast doubt on the experts' independence. This is all the more the case as courts are overly uncritical of prosecution experts' findings. The state-run expertise institution is also crippled with experts deficient in training, education, or experience and a lack of up-to-date technology for accurate forensic expertise. These two features negatively affect the quality of the expert opinions provided and consequently the quality of justice. Thaman and Soyer reckoned that expert opinions should be challenged before the court by the opposite party due to limited qualifications or experience, or lack of integrity.



(L-r) Natalya Seitmuratova from the UN OHCHR Regional Office for Central Asia, Vera Tkatchenko from UNODC in Kyrgyzstan and Nikolai Belorukov, Member of the Constitutional Council of the Republic of Kazakhstan present the main conclusions from the working group on evidentiary defence rights. (OSCE/Shiv Sharma)

Finally, the rules governing the exclusion of inadmissible evidence need to be addressed. In Richard Soyer's opinion, explicit rules on inadmissibility of evidence are rare, especially in Europe, although some commonly accepted principles can be highlighted such as the exclusion of evidence obtained through torture or ill-treatment or in violation of professional secrets for lawyers or of religious confessions. The status of the defence attorney as a witness appeared unclear for some participants who

5 See *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011.



expressed concerns about lawyers not reporting crimes committed by their clients and who, instead, helped them cover up the facts by providing legal advice. Richard Soyer asserted that the privileged counsel-client relationship should not be exploited against the defence. If there is strong suspicion that an attorney committed a criminal offence, there are mechanisms to request his dismissal from the defence team. That being so, a counsel can be called to the bar to testify as a witness on relevant issues regarding private investigations he has conducted. Participants agreed that the exclusion of a piece of evidence should in any case be decided by the court and not by the supervisor of the person who collected it. However, they deplored that in Central Asia evidence which has been found inadmissible nevertheless remains in the case file.



(OSCE/Shiv Sharma)

## Criminal law reform

Today, efforts to undertake structural reform of criminal law revolve around the question of criminalization or de-criminalization of misdemeanour and administrative offences. The creation of distinct categories for reprehensible behaviour needs to be justified: it is pointless to support the proliferation of legal categories if the targeted behaviour is in fact similar to an offence covered under an existing category.

In post-Soviet countries, there is often a category of administrative offences which could include public drunkenness, vandalism, hooliganism, or domestic violence. Ukrainian criminal procedure expert Mykola Khavroniuk questioned the appropriateness of such a separate category of offences, some of which can lead to serious consequences for the offender and can be considered criminal in substance. Indeed, he explained that these offences are not counted in official criminal statistics and therefore make it impossible to prepare an accurate comparative analysis. Some countries, Ukraine included, could appear crime-free. But most importantly, these administrative offences under Ukrainian legislation do not offer the same procedural guarantees for alleged administrative offenders as those in place for criminal offences.

Both experts, Kangur and Khavroniuk, reminded the audience that the ECtHR in *Öztürk v. Germany* (1984)<sup>6</sup> considered that the notion of a criminal offence is an autonomous concept which cannot be limited by rigid labelling. This means that even though an offence is categorized as administrative, it can still be criminal in nature and require the respect of procedural due process rights usually associated with criminal offences. Certain factors should be taken into consideration when determining what a

6 See *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73.

criminal offence is, such as the nature of the offence, the sentencing frame, the harmful character of the offence, and the possibility to register the sentencing in public records.

Consequently, there is no absolute solution to the question of decriminalization of criminal offences or the criminalization of administrative offences. Decriminalization could be beneficial as illustrated by Kangur with the example of Estonia where over half of the population has been found guilty of a misdemeanour or a felony. He argued that widespread criminalization tends to dilute the deterrent effect of punishment and fuels existing temptations to get rid of some of the trial safeguards. On the other hand, the example of Ukraine is telling and stresses the need for criminalization of certain administrative offences. Under this particular body of law, authorities are allowed to take measures restraining the freedoms and liberties of individuals without any judicial guarantees for the administrative offender. For instance, administrative detention ordered as part of a broader criminal investigation must afford judicial guarantees similar to those benefiting a suspect in a criminal case including the right to consult a lawyer (see ECtHR *Doronin v. Ukraine* (2009))<sup>7</sup>. In conclusion, legal classification of punishable offences is left to the discretion of each legal system, subject to the respect of international standards on the rights of the defence which apply in criminal matters and so long as the applicable procedure allows for accurate fact-finding.

In case the legislator decides to effect changes towards decriminalization or criminalization, he will have to bear in mind the indispensable jurisdictional and procedural changes. For instance, there are about five million administrative offences registered in Ukraine per year as opposed to only 300,000 criminal offences. Criminalization of administrative offences will require jurisdictional changes as well as training of court professionals so that the additional caseload could be absorbed. Decriminalization would give rise to similar concerns as employees of administrative agencies will have to build their litigation competencies.

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<sup>7</sup> See *Doronin v. Ukraine*, no. 16505/02, 19 February 2009.



Tamila Rakhmatullaeva (r), Chairperson of the Tashkent-based Felix TK Advocatory Bureau, noted that more attention should be paid to the specific needs of women pursuing legal careers such as provisions for maternity leave. (OSCE/Shiv Sharma)

## ANNEXES

### *Summary of the Gender Session*

A session on gender mainstreaming in criminal justice systems was organized on the margins of the Forum with the purpose of generating discussion on gender issues in the context of criminal justice, whether from the perspective of justice professionals, victims of crimes, or criminal offenders. The session gathered 34 participants, 17 men and 17 women representing all participating delegations, and demonstrated the general interest in this topic, well beyond gender groups. The UN Special Rapporteur on independence of judges and lawyers' Interim Report on gender in the criminal justice systems (August 2011) served as a basis for discussion.

When addressing the question of gender and criminal justice, the consensus is that the ultimate objective of integrating a gender approach is to promote equal access to justice for both men and women. In that regard, most agreed that women are more likely to succumb to discriminatory practices or to be improperly treated in the context of criminal justice systems. There are several key issues in that debate, including the problem of gender representation among justice actors. A parallel can be drawn with equal representation in the political arena where some success has been achieved. Participants from Tajikistan and Kazakhstan explained that around 30% of members of Parliament in their respective countries are women. In Uzbekistan, the Ombudsman in office is a woman. Similar efforts to improve equal representation need to take place in the context of judicial and legal professions. Interim special

measures accelerating substantive equal representation such as establishing quotas could help deliver change. Participants also identified equal representation in law enforcement professions as a priority area for gender integration.

Women also fall victim to crimes. This situation brings about several challenges in terms of promoting a gender sensitive approach to criminal justice. First, criminal acts affecting women must be properly criminalized and appropriate punishments need to be foreseen. Several participants mentioned the practice of brides' kidnappings in Central Asia. Whereas kidnapping is a criminal offence in itself, when applied to the case of women victims, the associated sentence was until recently still lower than that for the theft of cattle. Cultural tradition is not to be neglected when studying these questions as women usually feel ashamed to report some crimes, which in turn results in the absence of investigation and prosecution. Participants agree that more should be done to protect female victims, particularly in the case of gender-based crimes, by opening more state-run shelters or promoting the use of protective measures such as restraint orders. In courtrooms, further victimization should be avoided by, for instance, banning the practice of questioning victims of sex crimes on their past sexual history. Reform efforts should strive to ensure that relevant justice and law-enforcement personnel are adequately trained to assist female victims and that the latter have unhindered access to legal assistance.

At the other end of the spectrum stand women offenders. Their situation should not be overlooked even though estimates usually indicate that women commit only a small fraction of all offences. Longstanding discriminatory beliefs often lead to women's testimonies being undermined or disregarded. There is an acute need to recruit and train detention facilities personnel and place female inmates in suitable detention facilities.

Given the importance of gender-based discrimination and stereotyping in the context of criminal justice systems as well as their relationship with other social questions, a larger discussion of these phenomena involving society as a whole would be beneficial. The state holds an important responsibility in improving the situation through the conduct of research and impact studies on the question to identify the areas in need of intervention and legislative changes and to design appropriate responses.





Representatives from Kyrgyzstan at a presentation of the recent developments related to criminal justice reform in their country noted that Kyrgyzstan's new constitution of 2010 prescribes that all domestic legislation should be in line with international human rights standards. (OSCE/Shiv Sharma)

## *Annotated Agenda*

The aim of the Expert Forum is to bring together leading experts and policy makers to discuss recent reforms, trends and initiatives in the criminal justice sector in the countries of Central Asia and other OSCE regions. The event should serve as a platform to exchange experiences and expertise between participating States on matters encompassed by the OSCE commitments related to the rule of law.

### *DAY ONE, 29 OCTOBER*

**08:30 – 09:00**

**Registration**

**09:00 – 09:30**

**Introduction and opening remarks**

**Speakers:**

Official of the Republic of Kazakhstan

*Mr Stefan Buchmayer*, Human Dimension Officer, OSCE Centre in Astana

*Mr Michael Grau*, Generalkonsul, Consulate-General of Germany in Almaty

*Mr Benjamin Moreau*, Chief, Rule of Law Unit, ODIHR

09:30 – 10:45

**Plenary Session I – The role of the investigator in the context of criminal procedure reform**

Moderator:

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

Panellists:

*Mr Daniyar Kanafin*, Defence attorney, Almaty City Bar

*Mr Richard Soyer*, Professor of criminal law, Johannes Kepler University, Linz

While the distribution of roles among actors in criminal justice systems will be a recurrent theme throughout the Forum, this session will concentrate on current reform proposals specific to the figure of the investigator, in particular those aimed at the streamlining of his powers in criminal proceedings. Participants will thus be invited to discuss questions such as what the functions of the investigator should be, the impact reform of his role would have on the limits of the police investigation, and how independent of the direction and supervision by public prosecutors this last should be.

As any conceptual shift in the role of the investigator will likely require systemic institutional reform, particular attention will be paid to how the interaction between the investigator and other actors in the criminal justice process may be affected. The streamlining of the functions of the investigator may, for instance, lead to the revision of the overall role of the police in pre-trial investigation. Discussion will therefore also look at how reform of the investigator's role would affect the separation between police inquiry (doznanie) and preliminary investigation (predvaritel'noe sledstvie).

10.45-11.30

**Country Presentation – Kazakhstan**

Presentations by government representatives of the Republic of Kazakhstan will explore recent developments and ongoing reform discussions related to criminal justice reform, with a view to sharing good practices and lessons learnt in the areas of criminal justice encompassed by the Forum.

Questions and answers.

11.50 -13.00

**Plenary Session II – Control of pre-trial proceedings: respective roles of the judge and the prosecutor**

Moderator:

*Mr Daniyar Kanafin*, Defence attorney, Almaty City Bar

Panellists:

*Mr Stefan Trechsel*, Ad litem Judge, International Criminal Tribunal for the former Yugoslavia

*Mr Oleksandr Banchuk*, Manager of Criminal Justice Projects, Centre for Political and Legal Reforms, Kyiv

Current reform proposals call for the police to carry out investigations under the supervision of the prosecutor. In this context, procedural measures that effectively balance the powers of the police and the prosecution on the one hand, and the legitimate interests of the defendant on the other, become imperative when attempting to uphold the principle of equality of arms. This session is thus principally concerned with the regulation of investigation procedures, and the role the prosecution and the judiciary play in their implementation – especially, the extent to which they may be placed under judicial control. The discussion should specifically focus on the regulation of measures involving severe interference with individual rights of individuals at the pre-trial stage of proceedings. The session will also touch upon the regulation of intelligence gathering operations (operativno-rozysknaja dejatel'nost') and the use of information obtained thereby.

Reform of the functions of a criminal justice actor may necessitate concurrent institutional reform for a number of criminal justice bodies. There may be a need to look at the bodies that are responsible for matters such as selection, appointment, and tenure of the criminal justice actor whose functions are being reformed. Discussion will consequently explore the impact reform of judicial and prosecutorial functions at the pre-trial stage may have on the abovementioned matters.

During the session participants will also be invited to exchange opinions on the preliminary hearing mechanism, in particular on which procedures and structures need to be put in place so that the preliminary hearing does not become a mere formality, and may best fulfil the purpose of ensuring the lawfulness of an indictment.

14.00-15.30

#### Working Groups Session

##### *Working Group 1: Reform of pre-trial proceedings*

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 Oleksandr Banchuk*, Manager of Criminal Justice Projects, Centre for Political and Legal Reforms, Kyiv

Working Group 1 will address technical aspects and issues raised in Plenary Sessions I and II in more depth. The following questions are proposed for the discussion:

- If the functions of the investigator and of the prosecutor are reformed, how could their roles be separated and what should their relationship be at the pre-trial stage? In which cases and in what fashion can the prosecutor take part in the conduct of investigative actions?
- Should the initiation stage of a criminal case be completely abolished? When can pre-trial investigation be considered formerly commenced?
- What is the fate of the police inquiry (doznanie) under the current reform proposals?
- What may be the detrimental effects on the fairness of the trial when there is no judicial authorization/control on investigative measures that limit individual rights?

- What role should courts have in pre-trial proceedings in terms of securing evidence for the main trial? What type of evidence may be deposited with the court and which with the prosecutor? How should the mechanism for deposition of evidence be integrated in criminal procedure law?
- What kind of legal provisions might ensure that the preliminary hearing works as an effective filter between pre-trial investigation and trial? What rules and legal standards should the judge apply in the process of reviewing the indictment at the preliminary hearing? What rights and obligations will parties have in relation to this issue?

The Working Group should appoint a rapporteur to consolidate and present the main observations at the next Plenary Session with a view to highlighting key issues.

### *Working Group 2: The defendant in pre-trial proceedings*

Moderator:

*Mr Laurențiu Hadîrcă*, Legislative Support Officer, ODIHR

Panellists:

*Mr Stefan Trechsel*, Ad litem Judge, International Criminal Tribunal for the former Yugoslavia

*Ms Elena Volochai*, Director of the Human Rights Program, NGO Professional Assistance, Kyiv

*Mr Daniyar Kanafin*, Defence attorney, Almaty City Bar

Working Group 2 will address the rights and procedural guarantees of suspects during the preliminary investigation stage in the context of criminal procedure reform. The following questions are proposed for the discussion:

- In what way can the procedural guarantees that apply upon arrest be strengthened?
- What safeguards need to be introduced to counter arbitrary arrests? Should the procedure for taking first statements of arrested persons be placed under judicial control? In what way can practical impediments to the exercise of the right to access a lawyer of one's choosing be minimized?
- What should the powers of the defence to conduct parallel investigation be? How can the right of the defence to deposit witness testimonies before a judge at the pre-trial stage be secured?
- What are the essential legal standards for bringing charges? How does the initiative of streamlined police investigation address the issue of procedural guarantees of suspects?
- What reforms are necessary to ensure that pre-trial detention alternatives serve the purposes of restraint measures, in particular, that of securing the defendant's presence at trial? What mechanisms and infrastructure are needed to facilitate their usage?
- Which legislative amendments could be discussed to modernize the list of alternatives to pre-trial detention in view of the defendant's right to liberty?

The Working Group should appoint a rapporteur to consolidate and present the main observations at the next Plenary Session with a view to highlighting key issues.

15.50-16.35

### Country Presentation – Kyrgyzstan

Presentations by government representatives of the Kyrgyz Republic will explore recent internal developments and ongoing reform discussions related to criminal justice reform, with a view to sharing good practices and lessons learnt in the areas of criminal justice encompassed by the Forum.

Questions and answers.

16.35 - 18.00

### Plenary Session III – Reports from the Working Groups

Moderators:

*Ms Valerie Marchand*, Team Leader, European Union Project “Support to the Judicial and Legal reform in the Republic of Kazakhstan”

*Ms Eva Katinka Schmidt*, Deputy Chief, Rule of Law Unit, ODIHR

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, 30 OCTOBER

09:45-11:10

### Plenary Session IV – Rules of evidence

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 Andreas Kangur*, Lecturer in law, University of Tartu

The principal implication of the equality of arms notion concerns the opportunity of the prosecution and the defence to present evidence and the rules for its consideration. Discussion in this session will address questions related to the gathering, registration and examination of evidence, and consider possible legislative amendments and structural changes that need to be introduced to guarantee equality of arms in practice.

A first concrete issue for discussion relates to the principle of “immediacy”: in some jurisdictions police documents and the police dossier collated at the pre-trial stage cannot be considered evidence and no recourse to them can be made during trial. This plenary session will examine such practice, and explore the procedural arrangements that can most effectively guarantee the equality of the parties in



presenting and examining evidence. Discussion should seek to identify, for instance, the procedures and rules that should be put in place to ensure the evidence in favour of the defendant is gathered in a timely and objective fashion.

The session will also introduce the question of inadmissibility of evidence obtained through torture and ill-treatment, by briefly touching upon challenges in implementing legislation related to the examination of torture allegations. Working Group 3 will examine this particular issue in more depth.

**11:30-13:00**

### **Plenary Session V – Plea and confession bargaining and abbreviated procedures**

Moderator:

*Mr Daniyar Kanafin*, Defence attorney, Almaty City Bar

Panellists:

*Mr Stephen Thaman*, Professor of law, Saint Louis University, St. Louis

*Mr Ulugbek Azimov*, Legal expert, Kyrgyzstan

A number of simplified procedural mechanisms can be adopted that significantly speed up criminal proceedings, allowing both parties to avoid a lengthy and costly trial and facilitating the clearance of case backlog. Discussion in this session will look at the objectives and the grounds for the use of abbreviated procedures and plea bargaining. The kind of institutional framework needed for the proper functioning of such mechanisms will be an important point to address: specific focus will be put on the importance of having an independent prosecution service, and on the practical risks associated with such simplified procedural mechanisms, especially in relation to the rights of the defendant.

With regard to abbreviated procedures, participants will be invited to discuss the following important points: the powers of the police, the prosecutor, and the judge; how the judicial prerogative to establish guilt and impose a sanction is upheld; the rights and status of the victim, and how they can be harmonized with the procedural rights of defendants and due process standards; how judicial decisions are challenged and appeals processed; and, whether the decision in a case resolved through plea bargaining has pre-judicial force in other criminal prosecutions.

Finally, the experience of a number of OSCE participating States with prosecutors' decisions that terminate criminal proceedings (in place of mounting an indictment) – such as dropping the case for lack of “public interest” in the matter, and the “conditional disposal” of a case – will also be discussed.

**14:00-14:45**

### **Country Presentation – Tajikistan**

Presentations by government representatives of the Republic of Tajikistan will explore recent internal developments and ongoing reform discussions related to criminal justice reform, with a view to sharing good practices and lessons learnt in the areas of criminal justice encompassed by the Forum.

Questions and answers.

14:45-16:15

## Working Groups Session

### *Working Group 3: Torture allegations in criminal proceedings*

Moderator:

*Ms Nigina Bakhrieva*, Director, Public Foundation Nota Bene, Dushanbe

Panellists:

*Mr Stefan Trechsel*, Ad litem Judge, International Criminal Tribunal for the former Yugoslavia

*Mr Ulugbek Azimov*, Legal expert, Kyrgyzstan

Working Group 3 will discuss the issue of an effective response to torture allegations in criminal proceedings, with particular attention to international standards on promptness, thoroughness and impartiality. The following questions are proposed for the discussion:

- What amendments may be considered for criminal codes and criminal procedure codes, and what structures should be put in place, to guarantee the proper registration and examination of torture allegations in criminal proceedings?
- What constitutes sufficient grounds to initiate a formal investigation into allegations of torture?
- What rights do the victims of torture have in terms of examination of evidence (e.g. to examine files, to have witnesses questioned, to challenge the decisions of the examining body)?
- Which safeguards should be put in place during a formal investigation into allegations of torture (e.g. victim protection measures, witness protection measures, suspension of the alleged perpetrator from law enforcement service)?
- Which legal procedures need to be developed to ensure that victims of torture can enjoy the full scope of remedies (e.g. state compensation, rehabilitation, restoration of rights)?
- What are the risks associated with the “self-reporting of crime” procedure? Is it justifiable to maintain its evidentiary relevance in criminal procedure laws given those risks?

The Working Group should appoint a rapporteur to consolidate and present the main observations at the next Plenary Session with a view to highlighting key issues.

### *Working Group 4: Evidentiary Defence Rights*

Moderator:

*Mr Stephen Thaman*, Professor of law, Saint Louis University, St. Louis

Panellists:

*Mr Richard Soyer*, Professor of criminal law, Johannes Kepler University, Linz

*Ms Elena Volochai*, Director of the Human Rights Program, NGO Professional Assistance, Kyiv

Working Group 4 will focus on examining practical and procedural issues relating to the collection, deposition and evaluation of evidence by the defence, in view of equality of arms requirements. The following questions are proposed for the discussion:

- What general evidentiary rights should defendants have during pre-trial proceeding?
- The introduction of which procedure and laws would assist defence lawyers in gaining equal standing with the police and the prosecution when evidence is being gathered, recorded, and evaluated?
- What legal impediments should be removed from the criminal procedure to ensure the equality of parties with regards to evidence (e.g. reliance on the investigator's authorization to gather evidence and conduct forensic examination)?
- What additional services/structures need to be developed in order to facilitate gathering of evidence by the defence (e.g. independent forensic service, independent medical service)?
- What procedures and mechanism would have to be put in place at the preliminary stage of criminal proceedings so that the evidence gathered by the police may be effectively challenged as illegal and inadmissible?
- What are, if any, the ex officio powers of the prosecution and of the judiciary as regards the admissibility of evidence?

The Working Group should appoint a rapporteur to consolidate and present the main observations at the next Plenary Session with a view to highlighting key issues.

**16.35 -18.00**

#### **Plenary Session VI – Reports from the Working Groups**

Moderators:

*Ms Natalya Seitmuratova*, Human Rights Officer, Regional OHCHR Office for Central Asia

*Ms Vera Tkachenko*, International Project Manager, “EU and UNODC Project “Support to the Prison Reform in the Kyrgyz Republic”

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.

## **DAY THREE, 31 OCTOBER**

**09.00-09.45**

#### **Country Presentation – Uzbekistan**

Speakers:

*Ms Svetlana Artikova*, Chairperson of the Committee on Legislation and Judicial-Legal Issues of the Senate of the Oliy Majlis of the Republic of Uzbekistan

*Mr Aziz Mirzaev*, Head of the International Department of the Research Centre on Democratization and Liberalization of Judicial Legislation and Ensuring the Independence of Judicial System under the Supreme Court of the Republic of Uzbekistan.

Presentations by government representatives of the Republic of Uzbekistan will explore recent internal developments and ongoing reform discussions related to criminal justice reform, with a view to sharing good practices and lessons learnt in the areas of criminal justice encompassed by the Forum.

Questions and answers.

**09.45-11.15**

### **Plenary Session VII – Criminal law reform**

Moderator:

*Mr Oleksandr Banchuk*, Manager of Criminal Justice Projects, Centre for Political and Legal Reforms, Kyiv

Panellists:

*Mr Mykola Khavroniuk*, Director for Scientific Development, Centre for Political and Legal Reforms, Kyiv

*Mr Andreas Kangur*, Lecturer in law, University of Tartu

Criminal justice reform proposals in a number of OSCE countries consider transferring some administrative offences into a proposed category of criminal misdemeanours. Related revision of criminal legislation would also divide the existing criminal offences into crimes and misdemeanours. Discussion in this session will firstly aim to provide an overview of the current approaches to differentiating administrative offences, criminal misdemeanours and crimes in OSCE participating States. Account will have to be taken of the fact that whereas the procedure for prosecuting misdemeanours naturally differs from that used for more serious offences, general due process safeguards must be observed regardless of the type of offence.

The session will look into the following specific issues: the criteria to be examined when determining the category of the offence; which offences – of those that fall within the criminal law – are to be retained as crimes, and which are to be classed as misdemeanours; the rules that should be put in place for the categorization of criminal actions to minimize or prevent arbitrary decisions or abuse of power by the prosecutor or the police in this process; the legal consequences of misdemeanour charges on the individual rights of a person; the rules and principles of sentencing that should be applied in the prosecution of misdemeanours; and, whether misdemeanours should be punished only by non-custodial sentences or whether short-term custody sentences may also be employed.

**11.35-13.00**

### **Concluding session - Final remarks**

Moderator:

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



(OSCE/Shiv Sharma)

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## *Experts' Biographies*

### **Ulugbek AZIMOV (Kyrgyzstan)**

Mr. Azimov possesses experience with the prosecution as well as with the bench. He held the position of Deputy Prosecutor and Senior Assistant Attorney in Batken and Osh provinces of Kyrgyzstan respectively (1995-2001). Following this, he was appointed District Court Judge in Bishkek (2002-2005). Currently, Mr. Azimov is a legal expert in various national and international institutions. He has worked with the public foundation Independent Human Rights Group since 2006, and sits in the Public Oversight Board of the Kyrgyz Ministry of Internal Affairs and the Working Group on Strengthening the Criminal Code and the Criminal Procedure Code. He is also an expert with the OHCHR's Regional Office in Central Asia. Mr. Azimov was decorated by the Kyrgyz Ombudsman for his significant contribution to the protection of rights and freedoms in Kyrgyzstan in 2010.

### **Nigina BAKHRIEVA (Tajikistan)**

Ms. Nigina Bakhrieva is a Tajik lawyer specialized in human rights and more specifically on the right to freedom from torture and to effective investigations of torture cases. She was expert consultant for several international organizations (OSCE/ODIHR, OSCE Center in Bishkek, OHCHR, EU) and NGOs (such as Open Society Justice Initiative) working on this topic in Tajikistan and Kyrgyzstan. As such, she trained on effective investigations in torture cases, developed related training programs and assisted in developing mechanisms to ensure compliance with international instruments outlawing torture. She was also the Program Director of the Bureau on Human Rights and Rule of Law, a Tajik NGO (2003-2009) and is currently the Director of the NGO Tajikistan Civil Society Coalition against Torture and the Tajik NGO Nota Bene.



### **Oleksandr BANCHUK (Ukraine)**

Mr. Oleksandr Banchuk is a Ukrainian lawyer who currently sits as a Board Member of the Centre for Political and Legal Reforms. He also holds the position of Manager of the Centre's criminal justice program since 2003. In this capacity, he is responsible for coordinating 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 Legal Aid (passed in 2004), on Prosecutor's office, the Criminal Procedure Code, the Code of Administrative Offences and the Code of Criminal Misdemeanours. He also authored and co-authored several publications and research on public law, legal aid, and legal reforms in Ukraine. Prior to this, Mr. Banchuk was a business lawyer in Ukprodukt Company (2001-2003). He obtained a Ph.D. in Law in 2008.

### **Leonid GOLOVKO (Russian Federation)**

Mr. Golovko is a Professor of criminal procedure at the Law Faculty of Lomonosov Moscow State University and Chief of the Centre for Criminal Procedure, justice and prosecutorial oversight of this University. He took part in numerous projects on criminal justice reform and judicial reform in Central Asia with the UN and OSCE/ODIHR.

### **Daniyar KANAFIN (Kazakhstan)**

Mr. Daniyar Kanafin has been an attorney of the Almaty City Bar since 2000 and a member of the Union of Lawyers of Kazakhstan and of the National Bar. In addition to being a practitioner, Mr. Kanafin also lectured in various universities throughout Kazakhstan. He was the Dean of the Justice and Judiciary Department of the Kazakh State Law University (2002-2003) and Associate Professor of Criminal Procedure Law at the Kazakh Humanitarian Law University (2002-2006). Additionally, Mr. Kanafin was a member of the Scientific Advisory Board of the Supreme Court of the Republic of Kazakhstan. He received several awards for his work, including from the Ministry of Justice of Kazakhstan for his active participation in the implementation of the state's constitutional obligations. Mr. Kanafin obtained his Ph.D. in criminal procedure and science in 1997.

### **Andreas KANGUR (Estonia)**

Mr. Andreas Kangur is an Estonian university lecturer specialized in evidence and trial advocacy. Since 2002, he has been lecturing at the University of Tartu's Law School on legal writing, evidence and trial advocacy, among other subject matters. In this capacity, he founded the university's Law Clinic and currently acts as its Director. He also served as an expert on criminal and misdemeanor procedures in the Criminal Procedure Reform Committee established by the Estonian Ministry of Justice. Since 2002, Mr. Kangur has worked as a Senior Judicial Training Specialist at the Judicial Training Department of the Supreme Court of the Republic of Estonia. He is responsible for monitoring the implementation of the yearly judicial training curriculum and coordinates joint training projects with judicial training centres in other countries such as Albania and Montenegro. Mr. Kangur authored several articles and books on evidence, misdemeanor proceedings and criminal procedure in general. He is expected to earn a Ph.D. in law from the University of Glasgow in 2014.

### **Mykola KHAVRONIUK (Ukraine)**

Mr. Mykola Khavroniuk possesses dual expertise in law-enforcement and criminal law. He obtained a Ph.D. in 1998. For over ten years, Mr. Khavroniuk worked in the Regional Prosecutor's Office of the Central Region of Ukraine, mainly as Senior Investigator and Military Prosecutor. He was then Chief of the Division of National Safety, Defence, Law-Enforcement Activity and Crime Combating of the Ukrainian Parliament (1999-2006), before lecturing at various institutions such as the National Academy of the Security Service of Ukraine (1993-1999) and the National Academy of Internal Affairs (2002-2004). While directing the Legislative Support Department and the Legal Department of the Supreme Court of Ukraine (2006-2012), Mr. Khavroniuk represented the Supreme Court Chairman before the Constitutional Court and participated in the drafting of various pieces of national legislation. Mr. Khavroniuk also authored and co-authored many books and articles on the theme of criminal justice and law-enforcement. At present, he is the Director for Scientific Development of the Centre for Political and Legal Reforms.

### **Dmitry NURUMOV (OSCE)**

Dmitry Nurumov graduated from the Law Department of the Kazakh State University. In 2001 he obtained a postgraduate degree from Moscow State University of International Relations (MGIMO). In 2000 he worked as consultant for the International Organisation for Migration and in 2003 for the OSCE Centre in Almaty. He joined the ODIHR Rule of Law Unit in 2004 as the OSCE/ODIHR Rule of Law Coordinator in Central Asia and organized the III. Expert Forum on Criminal Justice for Central Asia held in 2010 in Dushanbe. Mr. Nurumov currently works for the OSCE High Commissioner for National Minorities.

### **Richard SOYER (Austria)**

Mr. Richard Soyer is an Austrian academic and attorney with expertise in criminal law and procedure. He has practiced law as an attorney in Vienna for over 20 years and was included in the lists of defence counsel at the ICTY and the ICC. After earning a Ph.D. in law from the University of Vienna, Mr. Soyer developed his academic career as criminal law professor at the Universities of Graz and Linz, where he currently acts as focal point on corporate criminal law and criminal law practice. He holds honorary functions within the Vienna Bar and the Austria Bar and acts now as the Chairman of the Criminal Law Reform Commission of the Austrian Bar and as the Speaker of the Austrian Criminal Bar Association. Finally, Mr. Soyer is the co-editor of two legal reviews, "Journal für Strafrecht" and "Juridikum".

### **Stephen C. THAMAN (United States)**

Mr. Thaman was an Assistant Public Defender in California for 11 years from 1976-1987, having defended in around 60 jury trials, from misdemeanors to death penalty cases. He is Professor of Law at Saint Louis University since 1995 where he teaches criminal law and procedure, comparative law and comparative criminal procedure. He is Director of the Summer Law Program in Madrid, Spain. He is on the Scientific Advisory Board of the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg, Germany. He has written authoritative studies of the new jury systems in Russia and Spain and about lay participation in Venezuela, Japan and Kazakhstan. He has written articles for German, Spanish, Russian and French journals and Festschriften about important issues in U.S. Criminal Law and Procedure and comparative criminal procedure. The second edition of his book "Comparative Criminal Procedure: A Casebook Approach" was published in Jan. 2008. He edited and

contributed the synthetic chapter to the book “World Plea Bargaining” which was published in 2010. A new book, “Exclusionary Rules in Comparative Law” will appear in 2012. Mr. Thaman has been involved as consultant in criminal procedure reform efforts in Russia, Latvia, Georgia, Kazakhstan, Kyrgyzstan, Armenia and Indonesia.

#### **Stefan TRECHSEL (Switzerland)**

Mr. Stefan Trechsel possesses over 40 years of experience both in the practice and teaching of criminal law. Mr. Trechsel obtained a Ph.D. from the University of Bern, Faculty of Law, in 1966. He started his career as a District Attorney in Berne acting as defence lawyer in martial court cases (1971-1975). Mr. Trechsel then took up various distinguished positions within Swiss and international institutions. For instance, he was a member of federal and cantonal working groups in charge of drafting Swiss legislation, in the area of criminal law and procedure, among other things. Mr. Trechsel also advised on criminal justice reform efforts in Tajikistan, Russia, and Bulgaria. While acting as a member of the European Commission of Human Rights (1975 – 1999) then becoming its Vice-President and President, Mr. Trechsel pursued his academic career by lecturing in the universities of Fribourg, Berne, St. Gall, University of California, LA, Saint Louis University, etc. He is currently an ad litem judge of the ICTY, sitting in the case of Prosecutor v. Prlić and others.

#### **Elena VOLOCHAI (Ukraine)**

Ms. Elena Volochai is a Ukrainian expert on psychological forensic expertise and human rights standards. While working as an independent consultant, she advised on the development of national human rights programs in Ukraine (1998) and Tajikistan (2011-2012) and participated in the evaluation of such programs as well. She also developed or evaluated strategic planning documents for numerous NGOs including Amnesty International- Moldova and Ukrainian Helsinki Council of Human Rights Protection. Ms. Volochai also worked as a consultant for international organizations such as OSCE, UNDP, IOM, and EU. Ms. Volochai has been appointed as an expert for national courts and international organizations since 1995, providing psychological expertise for individuals and non-pecuniary damage evaluation including for victims of torture and other human rights violations. Finally, she has been the Director of the Human Rights Program of the Ukrainian NGO Professional Assistance since 2004.