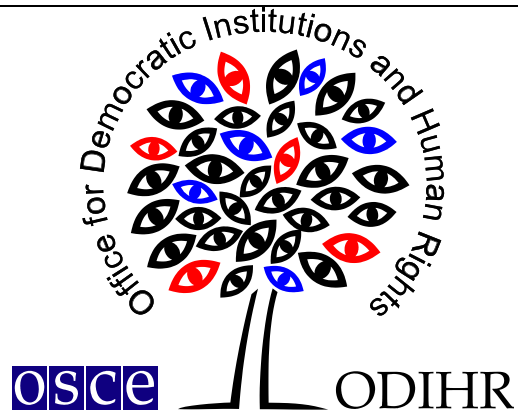


Warsaw, 19 June 2015

Opinion-Nr.: CRIM-KYRG/270/2015 [AIC]

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OPINION

ON THE DRAFT CRIMINAL PROCEDURE CODE OF THE KYRGYZ REPUBLIC

**based on an unofficial English translation of the draft legislation provided by
the OSCE Centre in Bishkek**

*This Opinion has benefited from contributions made by Professor Karoly Bard,
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I. INTRODUCTION

1. *On 25 March 2015, the Head of the OSCE Centre in Bishkek forwarded to the Director of the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a letter from the Head of the Parliamentary Committee on Human Rights, Constitutional Legislation and State Structure of the Kyrgyz Republic. In this letter, the Head of the Parliamentary Committee requested the OSCE to review a number of draft and existing legislative acts of the Kyrgyz Republic, including the draft Code of Criminal Procedure (hereinafter “the Draft Code”) introduced by a number of parliamentarians as part of ongoing discussions on the reform of the judicial and criminal law sector.*
2. *By letter of 2 April 2015, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Code with international human rights and rule of law standards and OSCE commitments.*
3. *This Opinion was prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only the Draft Code, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the criminal justice system in the Kyrgyz Republic.
5. Given the length of the Draft Code, the Opinion only focuses on key issues and main areas of concern, and does not provide a detailed analysis of each provision. In the interest of conciseness, the Opinion also focuses more on areas that require amendments or improvements rather than on the positive aspects of the Draft Code. The ensuing recommendations are based on international and regional standards relating to human rights and fundamental freedoms and the rule of law, as well as relevant OSCE commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. This Opinion is based on an unofficial English translation of the Draft Code provided by the OSCE Centre in Bishkek, which is attached to this document as an Annex. Errors from translation may result. It is also noted that the numbering of the General Part and of the Special Part of the Criminal Code is not consistent; hence the Opinion refers to the numbers of the articles as they appear in the Annex.
7. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments regarding the reform of the criminal justice system in the Kyrgyz Republic that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

8. At the outset, it is noted that this Draft Code contains many positive aspects which correspond to international human rights standards and relevant good practices. Particularly, the role of the examining judge as envisioned by the Draft Code is key in approving, controlling and reviewing investigative actions performed during the pre-trial phase to ensure that they are in compliance with the Draft Code and with

fundamental rights and freedoms. The Draft Code also reflects a number of recommendations made at the 2014 OSCE/ODIHR Fifth Expert Forum on Criminal Justice for Central Asia (2014).¹ As such, it represents a genuine attempt to separate more clearly the role of the prosecutor, who supervises the criminal investigation, from that of the investigator, who conducts the actual investigations. Additionally, the Draft Code contains a number of provisions that aim to ensure that the rights of the defence are protected at all stages of the criminal procedure. It also foresees a number of progressive gender-sensitive procedural measures, as well as a welcome mechanism to ensure access to effective remedies in case of violations of fair trial guarantees and the right to liberty and security.

9. At the same time, a number of provisions of the Draft Code should be drafted in a clearer manner, to ensure its effective implementation and further improve its compliance with international standards. Particularly, more detailed measures should be introduced to prevent and combat torture and other forms of ill-treatment during the criminal justice process and to ensure that evidence obtained through torture or ill-treatment is inadmissible before courts. Moreover, certain provisions should be revised or supplemented to ensure a more effective protection of the rights of the suspect or accused at each stage of the criminal proceedings. The provisions pertaining to juvenile justice, while generally welcome, should be further enhanced in order to be fully compliant with international standards; in particular, a juvenile should, once arrested, have access to a judge to have the lawfulness of his/her detention examined within up to 24 hours (as opposed to the 48 hours required for an adult), have the legality of any pre-trial detention reviewed regularly (preferably every two weeks) and the maximum length of proceedings against an accused juvenile should not go beyond six months.
10. In order to further improve compliance of the Draft Code with international standards, the OSCE/ODIHR has the following key recommendations:
 - A. to ensure adequate protection from acts of torture and other forms of ill-treatment as follows:
 - expressly state under Article 12 and Article 87 par 4 that any documentary or other evidence obtained or that became known as a result of acts of torture or other ill-treatment, including statements made by tortured or ill-treated third persons, shall not be admissible before court; [pars 25 and 112-113]
 - expressly provide under Article 306 clearer rules relating the reversal of the burden of proof on the prosecutor in cases of allegations of acts of torture or ill-treatment and plea agreements should be excluded (Chapters 41 and 42); [pars 117 and 157]
 - require under Article 101 a mandatory medical examination by a doctor from the moment of arrest/detention or within a strict timeline, or at a minimum provide the detainee with the right to ask for such an examination, and introducing a duty for the medial personnel to report suspected cases of torture or ill-treatment; [pars 79 and 95]
 - expressly state that the prosecutor (in Article 85), the examining judge, the judges during pre-trial proceedings as well as during trial proceedings should promptly initiate or order independent investigation *ex officio*, including a forensic medical examination, once they have reasonable reasons to believe that

¹ The Report of the 2014 OSCE/ODIHR Fifth Expert Forum on Criminal Justice for Central Asia (2014) is available at <http://www.osce.org/odihr/147611?download=true>.

- torture or other ill-treatment was committed or upon allegations of torture or ill-treatment made by the suspect/accused or defendant; [pars 79; 120 and 124];
- provide under Article 255 that the decision to dismiss a case involving allegations of torture or ill-treatment shall be communicated to the Ombuds Office and/or the National Centre for the Prevention of Torture, as appropriate, as well as under Article 256 that such entities would have the right to appeal against the decision to dismiss the case; [par 46]
- B. to provide additional safeguards regarding the use of special investigative measures, as follows:
- specify that the procedure and conditions for requesting extension of the special investigative measures under Article 223 par 2 shall fulfil the same requirements as for the initial request; [par 141]
 - provide that the use of evidence of offences other than those for which the order authorizing the special investigative measures was issued, can only be authorized by the examining judge (Article 226); [par 142]
 - ensure that communications involving a suspect/accused and a protected person (such as a lawyer, doctor or psychiatrist) are adequately protected under Chapter 32; [par 145]
- C. supplement Article 87 par 4 to explicitly provide for the inadmissibility of evidence obtained irregularly, e.g. during interrogation of a suspect/accused in the absence of his/her defence attorney [pars 93 and 111]; information relating to the sexual history of the victim in cases of sexual and domestic violence (if not fully necessary to resolve a case) [par 114]; or from privileged communications [par 115];
- D. to enhance the rules relating to juvenile justice in particular as regards the necessity, legality, modality and length of detention and of criminal proceedings in general, as well as the juvenile's right to be heard directly; [pars 62-65; 68; 98]
- E. to ensure that the fair trial rights of the suspect/accused are respected, especially those that could affect the equality of arms in the process of collecting evidence, at the time of arrest and during interrogation (particularly the duty to inform the suspect or accused about his/her rights and the implementation of such rights), and those guaranteeing prompt and, as needed, free access to an attorney with the possibility to communicate privately; [pars 54 and 90-93] and
- F. delete paragraph 3 of Article 47 regarding the power to request fingerprinting, and other extraction of body samples, in cases of misdemeanors and specify under Article 91 of the Draft Code the modalities of retention and destruction of fingerprints and body samples, and at least that they should be removed or destroyed either immediately or within a certain limited time after dismissal of the case or acquittal. [par 51]

Additional Recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards

11. Key international standards applicable in the Kyrgyz Republic in the area of criminal procedure are to be found in the International Covenant on Civil and Political Rights.² In addition, the Kyrgyz Republic has also ratified, among others, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³ (hereinafter “UNCAT”), the Convention on the Elimination of All Forms of Discrimination against Women⁴ (hereinafter “CEDAW”), and the UN Convention on the Elimination of All Forms of Racial Discrimination⁵ (hereinafter “CERD”).
12. At the OSCE level, participating States have generally committed to upholding human rights and the rule of law in criminal justice systems.⁶ Specific OSCE commitments pertaining to criminal procedure emphasize the importance of the independence of the judiciary and of legal practitioners,⁷ as well as guarantees related to the right to liberty (Moscow 1991, par 23).⁸ Moreover, OSCE commitments also contain principles concerning the prosecution service in particular, such as the 1990 OSCE Copenhagen Document, which provides that “the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution”.
13. While the Kyrgyz Republic is not a Member State of the Council of Europe (hereinafter “the CoE”), the Opinion will also refer, as appropriate, to the European Convention on Human Rights and Fundamental Freedoms (hereinafter “the ECHR”) and the case law of the European Court of Human Rights (hereinafter “the ECtHR”), since they serve as useful and persuasive reference documents on the issue of fair trial standards and the right to liberty and security. The Opinion will likewise mention, as relevant, the opinions and publications of the European Commission for Democracy through Law of the CoE (hereinafter “Venice Commission”), given that the Kyrgyz Republic has been a member of the Venice Commission since 1 January 2004.
14. The ensuing recommendations will also make reference, as appropriate, to other specialized documents of a non-binding nature, which have been elaborated in various international/regional fora and may prove useful as they contain a higher level of detail. These documents include, among others:

² UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Kyrgyz Republic acceded to the ICCPR on 7 October 1994.

³ UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “UNCAT”), adopted by General Assembly resolution A/RES/39/46 on 10 December 1984. The Kyrgyz Republic acceded to this Convention on 5 September 1997.

⁴ UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. The Kyrgyz Republic acceded to this Convention on 10 February 1997.

⁵ UN International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly by resolution 2106 (XX) of 21 December 1965. The Kyrgyz Republic acceded to this Convention on 5 September 1997.

⁶ See Ministerial Council Decisions No. 12/05 on upholding human rights and the rule of law in criminal justice systems (Ljubljana, 2005).

⁷ See par 5 of the OSCE Copenhagen Document (1990); and pars 19-20 of the OSCE Moscow Document (1991);

⁸ See par 23 of the OSCE Moscow Document (1991). See also the OSCE Brussels Declaration on Criminal Justice Systems, MC.DOC/4/06 of 5 December 2006, available at <http://www.osce.org/mc/25065?download=true>.

- General Comment 32 of the UN Human Rights Committee (UN HRC) on the right to equality before courts and tribunals and to a fair trial;⁹
 - UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;¹⁰
 - the OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012);¹¹
 - the Model Law on Justice in Matters involving Child Victims and Witnesses of Crime;¹² and
 - the Model Code of Criminal Procedure by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UN OHCHR), and the UN Office on Drugs and Crime (UNODC).¹³
15. Additionally, the OSCE/ODIHR would like to reiterate the recommendations made in its recent Opinion on the Draft Law of the Kyrgyz Republic on Safeguarding and Protection from Domestic Violence (2014),¹⁴ insofar as they relate to criminal proceedings, and remain applicable.

2. Preliminary Remarks

2.1. General Comments

16. Overall, the Draft Code contains a number of positive aspects which reflect international standards. At the same time, provisions in the General Part and in the Special Part of the Draft Code are not always consistent. Indeed, **repetition and inconsistencies could be avoided, for instance by using umbrella clauses (where appropriate), which could then be referred to in later provisions.** This would be preferable to the current structure, which involves numerous, but often inconsistent repetitions of certain provisions in other provisions of the Draft Code. Moreover, while the OSCE/ODIHR is aware of the fact that the current Draft Code sent for review is still a working document, many sections or provisions duplicate one another, or contain very similar wording.¹⁵ It is, however, assumed that such defects will be resolved during ongoing and future revisions of the text.

⁹ UN Human Rights Committee (“UN HRC”) General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, 23 August 2007, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

¹⁰ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter “1985 UN Declaration of Basic Principles of Justice for Victims of Crime”), UN General Assembly Resolution of 29 November 1985, A/RES/40/34, available at <http://www.un.org/documents/ga/res/40/a40r034.htm>.

¹¹ OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012), available at <http://www.osce.org/odihr/94214> (English and Russian versions).

¹² See the Model Law on Justice in Matters involving Child Victims and Witnesses of Crime (2009), available at http://www.unicef.org/ceecis/UNDOC-UNICEF_Model_Law_on_Children.pdf.

¹³ Model Code of Criminal Procedure (2008) developed by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UNOHCHR), and the UN Office on Drugs and Crime (UNODC) (hereinafter “Model Code of Criminal Procedure (2008)”), available at <http://www.usip.org/model-codes-post-conflict-justice-publication-the-model-codes/english-version-volume-2>.

¹⁴ OSCE/ODIHR Opinions on the Draft Law of the Kyrgyz Republic on Safeguarding and Protection from Domestic Violence (2014), available at <http://www.legislationline.org/documents/id/19372> (English version) and at <http://www.legislationline.org/ru/documents/id/19373> (Russian version).

¹⁵ For instance: Article 141 of the Draft Code is similar to Article 104 of the Draft Code on the verification of the legality of detention; Article 142 partially overlaps with Article 117 of the Draft Code; Chapter 19 of the Draft Code on judicial procedure for appeals overlaps with Chapter 16; Section VIII of the Special Part on Pre-trial Judicial Review seems to be a repetition of Articles 138 to 148 of Section VI of the General Part. Similarly, Article 491 duplicates Article 383 and hence should be deleted as it does not relate to juvenile justice.

17. At the same time, it is questionable whether the long lists of rights and obligations of individual participants to criminal proceedings contained in Chapters 5 to 7 are necessary, or useful, since these lists are not exhaustive and are at times inconsistent with subsequent provisions of the Draft Code. Also, it is not clear how the rights mentioned therein shall be applied, and at which stages of the criminal justice process. Moreover, the specific rights listed therein are not precisely defined, particularly in terms of their prompt or timely applicability, whereas, for most fair trial guarantees, time is of the essence. It is recommended to ensure consistency and, in any case, explicitly state the relevant rights that are applicable in provisions concerning specific stages of the criminal procedure.
18. Many provisions of the Draft Code make general references to “cases stipulated by this code” or “in the manner established by law”, but do not include specific cross-references to the relevant provisions of the Draft Code or to specific Kyrgyz legislation. To avoid legal uncertainty and discretionary interpretation of such provisions, **it is recommended to explicitly refer to the exact provision or legislation in such cases.**
19. Finally, it is worth noting that the terminology used in the General Part and in the Special Part is not always consistent (though this may have only been perceived as a problem due to inconsistent translation). For instance, it is understood that the word “misdemeanor” used in the General Part (which is then called “misconduct” in the Special Part) refers to less serious criminal offenses. The judge in charge of overseeing compliance with rules of criminal procedure and with human rights and fundamental freedoms during criminal proceedings, is qualified as an “investigation judge” in the General Part and as an “examining judge” in the Special Part. For the purposes of this Opinion, OSCE/ODIHR will use the term “examining judge”, to avoid any confusion with the role of the French *juge d’instruction*; indeed, the role of the Kyrgyz examining judge appears to be more focused on oversight, rather than on investigation (as opposed to the French *juge d’instruction*). It must also be noted that certain provisions of the Draft Code (for instance Article 26 par 2) **use the term “person guilty of committing a crime” when referring to a “suspect”, which, from a terminological point of view, would already jeopardize the presumption of innocence with regard to criminal suspects. Unless this is an error of translation, it is recommended to replace this term, where appropriate, with references to persons suspected of having committed a crime.**

2.2. General Principles

20. Chapters 1 and 2 of the Draft Code provide a list of principles governing the criminal procedure, which include a welcome protection of key human rights and fundamental freedoms. It is positive that Article 1 par 3 of the Draft Code expressly refers to international human rights standards (both treaties and generally recognized principles and norms) as constituting an “integral part” of the procedural criminal laws of the Kyrgyz Republic. Chapter 2 of the Draft Code also contains a number of references to key fair trial guarantees provided by international human rights standards, such as the independence of judges (Article 9), the protection against self-incrimination (Article 14 par 2), the right to liberty and security (Article 13), the principle of equality before the law and in court (Article 15), the protection of the right to private and family life (Article 18), the presumption of innocence (Article 19), the principle of equality of arms (Article 20), the right to legal assistance (Article 21) and the right to appeal (Article 24). Article 14 par 4 of the Draft Code on the protection of participants to criminal

proceedings is also in line with the State's duty to protect witnesses and victims as required by international instruments.¹⁶ It is welcome that no one may be convicted solely on the basis of her/his confession, which needs to be corroborated by other evidence (Article 14 par 5).¹⁷

21. However, certain key international fair trial rights are either not clearly stated or not mentioned at all. First, Articles 20 and 21 of the Draft Code do not expressly require **that defence counsel shall be provided with adequate time and facilities for the preparation of the defence, which is an important aspect of fair trial, and contributes to the equality of arms of the parties in criminal procedure. This provision should be supplemented accordingly.**
22. Also, **Article 21 on defence rights is not clearly worded (though this may also be a translation issue), and should specifically set out that the accused shall have the right to defend him or herself in person, or through a lawyer of his/her own choosing** (see Article 14 par 3 (d) of the ICCPR).
23. Regarding the right to language interpretation (Article 23 par 3 of the Draft Code), it is unclear whether this would be provided free of charge (although Article 161 par 3 of the Draft Code (General Part) seems to infer that the state budget will cover all costs related to translation). This should be clarified in line with Article 14 par 3 (f) of the ICCPR, which expressly provides for the free assistance of an interpreter if person charged with an offence cannot understand or speak the language used in court. The same applies to Articles 47 and 49 regarding the rights of wrongdoers and suspects, which also refer to **the use of a translator (interpreter) without specifying that this should be free of charge.**
24. Furthermore, **in order for these rights to be applied effectively in practice, the wrongdoer, suspect or accused should be informed about them in a timely and comprehensive manner; this should be added under Chapter 2** (and in other specific provisions relating to rights of participants in criminal proceedings).
25. **Article 12 par 2 of the Draft Code** expressly prohibits the use of threats, violence and other unlawful measures during interrogation and at any stage of the investigatory and judicial actions, which is in line with international human rights standards.¹⁸ At the same time, it would be helpful if this article would state more specifically that **any documentary or other evidence obtained as a result of acts of torture or other ill-treatment¹⁹ shall not be admissible before court, except against a person accused of such acts of torture**, in accordance with Article 15 of the UNCAT. Including such wording would be important, in light of the latest concluding observations by UN

¹⁶ See e.g., Article 22 of the Statute of the International Criminal Tribunal for the former Yugoslavia; see also Article 68(1) of the Rome Statute of the International Criminal Court which provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

¹⁷ This is in line with international standards; see par 65 of the 2014 Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/25/60, 10 April 2014, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-60_en.doc.

¹⁸ Article 7 of the ICCPR, Articles 2 and 16 of the UNCAT and OSCE commitments, including par 23.4 of the OSCE Vienna Document; par 20 of the OSCE Budapest Document; par 21 of the OSCE "Charter for European Security: III. Our Common Response", Istanbul, 19 November 1999, available at <http://www.osce.org/mc/17502>.

¹⁹ The UN Committee against Torture, as the authoritative interpreter of the Convention, has made it clear that statements and confessions obtained under all forms of ill-treatment must be excluded; see *op. cit.* footnote 17, par 26 (2014 Report of the UN Special Rapporteur on torture and other ill-treatment).

human rights bodies on the Kyrgyz Republic²⁰ (see also additional comments on the exclusionary rule in pars 112-113 *infra*).

26. It is further noted that Chapter 2 of the Draft Code does not mention the principle of confidentiality of information. This principle is important, since information gathered during criminal proceedings could, if publicized, potentially compromise investigations, as well as public security, victims' and witnesses' rights to privacy and confidentiality,²¹ or the presumption of innocence of suspects/accused persons.²² Consideration should be given to including this principle under Chapter 2 of the Draft Code.
27. As mentioned above in par 20 *supra*, Article 9 of the Draft Code makes reference to the independence of the judiciary, which is positive; however, nothing is said as to the impartiality of judges,²³ which is also key to ensuring respect for the right to a fair trial.²⁴ **The requirement of impartiality ensures that judges will exercise their function without personal bias, prejudice, or preconceived views on the case or the parties before them, and do not improperly promote the interests of only one side.²⁵ In a similar vein, it is essential that jurors and prosecutors²⁶ are able to carry out their duties independently and impartially, free from any interference.²⁷ It is recommended to supplement Chapter 2 of the Draft Code in that respect.²⁸** Furthermore, the provisions of Chapter 51, which provide detailed rules regarding the jury system, should also include a statement on the overall aim of ensuring the impartiality of the jurors.²⁹ Moreover, this part of the Draft Code should state clearly that where potential jurors have reason to believe that their subjective or objective impartiality may be in doubt, they shall make this known to the judge immediately.³⁰

²⁰ See par 15 of the Concluding Observations of the UN Human Rights Committee (23 April 2014) on the Kyrgyz Republic (hereinafter "2014 Concluding Observations of the Human Rights Committee on the Kyrgyz Republic"), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKGZ%2fCO%2f2&Lang=en. See also "2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic", available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fKGZ%2fCO%2f2&Lang=en.

²¹ Section VII 20(c) of the 2011 UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/RES/65/228, 31 March 2011, available at [https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.pdf](https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model%20Strategies%20and%20Practical%20Measures%20on%20the%20Elimination%20of%20Violence%20against%20Women%20in%20the%20Field%20of%20Crime%20Prevention%20and%20Criminal%20Justice.pdf).

²² See par 97 of the OSCE Guidebook on Democratic Policing, May 2008 (hereinafter "2008 OSCE Guidebook on Democratic Policing"), available at <http://www.osce.org/spmu/23804?download=true>.

²³ It is noted that impartiality is also not specifically mentioned in Article 94 of the Constitution of the Kyrgyz Republic; however, its paragraph 3 states that "Any interference in the administration of justice shall be prohibited. Persons found guilty of influencing upon a judge shall be liable in accordance with the law only prohibits the interference with administration of justice, and influencing judges."

²⁴ *Op. cit.* footnote 11, pages 61-66 (OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012)).

²⁵ *Op. cit.* footnote 9, par 21 (UN HRC General Comment No. 32). See also pars 2.1 and 2.5 of the UN Bangalore Principles of Judicial Conduct (2002), available at http://www.unrol.org/files/Bangalore_principles.pdf; and *op. cit.* footnote 11, page 58 (OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012)).

²⁶ See Guideline 4 of the UN Guidelines on the Role of Prosecutors (1990), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>. See also the Venice Commission Report on the Independence of the Judicial System – Part II: The Prosecution Service (2010), available at http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf.

²⁷ See par 8.4 of UN HRC Communication *Willard Collins v. Jamaica*, No. 240/1987 of 1 November 1991, <http://www.un.org/Docs/journal/asp/ws.asp?m=CCPR/C/43/D/240/1987>; see par 48 of the 2003 Report of the UN Special Rapporteur on the independence of judges and lawyers, E/CN.4/2004/60, 31 December 2003, available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=9140; see also pars 24-26, 55 and 98 of the 2012 Report of the UN Special Rapporteur on the independence of judges and lawyers to the Human Rights Council, A/HRC/20/19, 7 June 2012, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session20/Pages/ListReports.aspx>.

²⁸ See e.g., *op. cit.* footnote 13, Article 17 (Model Code of Criminal Procedure (2008)).

²⁹ *Op. cit.* footnote 11, pages 66-67 (OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012)).

³⁰ See e.g., *Holm v Sweden*, ECtHR judgment of 25 November 1993 (Application no. 14191/88).

28. Article 31 of the Draft Code refers to the random (automatic) assignment of cases to judges, which is an important guarantee of the independence of the judiciary.³¹ However, this provision also mentions the “specialization of judges”; it is unclear what kind of specialization is meant here since the Draft Code does not refer to the existence of any specialized criminal chambers or courts. **In order to guarantee that the allocation of cases is done in a transparent manner, the stakeholders should consider and discuss the establishment of special panels (chambers) that would be specialized in certain categories of crimes, such as economic crimes, juvenile justice, crimes against life or physical integrity, or domestic violence.**
29. Chapter 8 addresses the circumstances and procedures for a judge’s recusal, which is a means to ensure the impartiality of the court. The procedure is well detailed and it is positive that the removal of a judge shall in principle be announced before the trial begins. It is also possible to have the removal pronounced in the course of a court session (Article 72 par 2); however, the consequences of removing a judge after the examination of a criminal case has begun are unclear. In particular, **Article 73 specifies that upon removal, the case should be examined by another judge of the same court or by another court of first instance; however, this provision does not specify whether the case should be retried from the start.** Also, **Article 74, which outlines the procedure for allowing a judge to be removed, does not expressly require that the respective decision of the court be motivated, whereas this is a key precondition for appealing such decisions under Article 74 par 7.**³² It is recommended to supplement and clarify Chapter 8 of the Draft Code accordingly.
30. On a related issue, it is generally acknowledged that the presumption of innocence may be violated if relevant public officials, including judges, police officers and prosecutors, pronounce themselves on the guilt or innocence of individuals before the matter has been dealt with by a competent court.³³ **It is recommended to prohibit this explicitly under Article 19.**
31. Finally, it is welcome that Chapter 2 makes reference on several occasions to victims’ access to justice and to victims’ rights (Articles 10 pars 2 and 22). This is in line with international recommendations which highlight the importance of adopting a victim-centered approach³⁴ to strengthen crime prevention and criminal justice responses. At the same time, it may be advisable to also **include in Article 6 of the Draft Code the assistance to victims and a victim-centered approach as a key principle guiding the criminal procedure** (see also additional comments on victim’s rights under pars 70-72 *infra*).

³¹ See par 74 of the Venice Commission Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010), CDL-AD(2010)004 available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx).

³² See e.g., pars 172-185 in the case *Moiseyev v. Russia*, ECtHR judgment of 9 October 2008 (Application no. 6936/00).

³³ See par 61 of the OSCE/ODIHR and Council of Europe Joint Opinion on the Criminal Procedure Code of Georgia (2014), available at http://www.legislationline.org/download/action/download/id/5608/file/257_CRIM_GEO_22%20Aug%202014_geo.pdf. See also e.g., pars 125-128 in the case of *Ilgar Mammadov v. Azerbaijan*, ECtHR judgment of 22 May 2014 (Application no. 15172/13), par 125-128; pars 32-37 in the case of *Allenet de Ribemont v. France*, ECtHR judgment of 10 February 1995 (Application no. 15175/89).

³⁴ Such an approach focuses on assisting victims in their engagement with the criminal justice process, rather than holding them responsible for any “reluctance” to co-operate with the criminal justice system (see page 34 of 2014 UNODC Blueprint for Action: an Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women (hereinafter “2014 UNODC Blueprint for Action on VAW”), available at http://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf).

2.3. Main Definitions

32. Article 5 provides an extensive list of definitions of the terms used in the Draft Code. While such provision is welcome in principle to ensure legal certainty, it is not certain whether all definitions contained therein are necessary, or always consistent with subsequent provisions of the Draft Code. First, some definitions contained in this article are defined later in provisions dealing with the precise institution, person or proceedings.³⁵ Other definitions would appear to be redundant, as they are not used throughout the Draft Code or are common terms that may not require express definitions (for example, “court”, “judge” or “telephone and other conversation forms monitoring”).
33. Under Article 5 par 8, a “pre-trial procedure” begins with the moment when a court receives a notification of a crime from a prosecutor, whereas Article 153 of the Special Part of the Draft Code considers a pre-trial procedure to commence when the evidence is entered into the Uniform Register of Crimes and Misdemeanors. **The drafters should review the definitions contained under Article 5 and ensure that only those are included which are necessary; repetition of definitions contained in other provisions of the Draft Code should be avoided, and consistency of definitions ensured.**
34. At the same time, certain definitions which are key in criminal proceedings seem to be missing under Article 5. For instance, the terms “minor”, “juvenile”, “children” or “underage children”, which appear frequently in the text, are either not defined or do not always refer to minors of the same age.³⁶ The **definition of a “juvenile”** may be inferred from Article 487 which states that a “juvenile” is a person who has not reached the age of 18. However, **the drafters may still wish to define these terms in Article 5 in the interests of legal certainty because the terms appear (undefined) in a number of provisions.**³⁷ This is important since qualification of an accused/suspect as a “juvenile” should trigger the application of special rules derogatory to those applicable to adults.³⁸ Special criminal procedural rules may still apply depending on the age of an accused/suspect, witness or victim, particularly in terms of age of criminal responsibility as defined by the Criminal Code.
35. **Article 5 also does not include a definition of the standard of proof, i.e., the degree or level of proof of a criminal offence required at each stage of the criminal process (e.g., “reasonable suspicion”, “probable cause”, “balance of probabilities” and “beyond reasonable doubt”).**³⁹ These would be useful additions, as provisions outlining the standards of proof of different stages of criminal proceedings would

³⁵ This is the case with regard to the question of what an appeal is or which court is the court of cassation. There is also a risk of contradiction with definitions that are then provided later (for instance for “suspect”, “accused”, “juror”, etc.).

³⁶ For instance, there are references to “minors” being younger than 14 years old in Articles 122 par 4 and 199 par 2 of the Draft Code (Special Part), to a “juvenile suspect, defendant or accused” being younger than 16 years old in Article 495 of the Draft Code (Special Part) and to persons who have “not reached the age of eighteen” in Article 487 of the Draft Code.

³⁷ For example in Articles 44, 45, 51, 52, 58, 63, 82, 108, 114, 117, 142, 143, 161, 163 of the General Part and 200, 202, 282 of the Special Part)

³⁸ See Rule 2 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), A/RES/40/33, 29 November 1985, available at <http://www.un.org/documents/ga/res/40/a40r033.htm>.

³⁹ E.g., “reasonable suspicion” (evidence and information of such quality and reliability that they tend to show that a person may have committed a criminal offence), “probable cause” (an objectively justifiable and articulable suspicion that is based on specific facts and circumstances that it tends to show that a specific person may have committed a criminal offence), “balance of probabilities” (evidence and information that prove that on the balance of probabilities a suspect committed the criminal offenses alleged during a confirmation hearing) and “beyond reasonable doubt” (there is no doubt that would prevent one from being firmly convinced of the accused’s criminal responsibility for the offenses charged); see e.g., *op. cit.* footnote 13, pages 43, 321 and 336 (Model Code of Criminal Procedure (2008)).

ensure greater clarity in this regard in the Draft Code which currently appears to be somewhat vague on this matter.

36. Article 5 par 4 mentions the “spouse” amongst the “close relatives”. It is unclear whether this would also cover partners living together without being married. To avoid a possible discriminatory interpretation of relevant provisions mentioning “close relatives”, it is recommended **to clarify that “close relatives” also encompasses partners living together without being married;**⁴⁰ this is particularly important given that “close relatives” benefit from protective measures and exercise certain rights under the Draft Code,⁴¹
37. Article 5 par 11 of the Draft Code provides the definition of a “dwelling” which is “independent of the form of ownership” and also includes buildings or units used for temporary residence. Such a wide definition is positive as this would encompass various forms of property (not only building), serving as a residence irrespective of ownership and occupation status. Hence this would ensure that also persons without a valid title of property or occupation or living in premises that would not qualify as a building, are also protected against arbitrary searches and seizures.
38. However, certain premises, for instance those owned or occupied by legal entities for business, commercial or other purposes – thus not serving residential purposes – are not mentioned in this provision. Consequently, it is not clear whether they would benefit from the same protective safeguards, particularly those mentioned in Article 16 of the Draft Code (inviolability of a dwelling) or in Article 213 on search and seizures which generally refers to “dwellings” (although its paragraph 13 mentions the “premises of organizations”). The drafters should thus **consider replacing the definition of “dwelling” with a somewhat broader definition of “premises” that would include “dwellings” (as already defined), but also business, commercial or non-commercial premises.** Other relevant articles of the Draft Code should be adapted accordingly.

2.4. Scope and Applicability

39. It is generally positive that Article 6 of the Draft Code, setting out the main purpose of criminal procedure, focuses on the protection of the individual. Article 4 further mentions that the Draft Code applies also to foreign citizens and stateless persons. At the same time, individual provisions of the Draft Code refer to “citizens”, “persons” and sometimes “individuals”.⁴² To ensure that all individuals, regardless of their nationality

⁴⁰ Procedural laws that make distinctions based on any of the grounds listed in Article 26 of the ICCPR which includes “other status” may amount to discrimination (see *op. cit.* footnote 9, par 65 (UN HRC General Comment No. 32)); see also *op. cit.* footnote 10, par 3 (1985 UN Declaration of Basic Principles of Justice for Victims of Crime) which specifically provides that its provisions shall be applicable to all, without distinction of any kind, such as “family status”. See also as a comparison, par 31 of General Comment No. 20 of the Committee on Economic, Social and Cultural Rights on Non-Discrimination regarding discrimination on the basis of “marital or family status”.

⁴¹ E.g., the right for a witness not to testify against one’s close relative (Article 5 par 50), the transfer of the rights of the victim to close relatives in case he/she dies (Article 14) or in case of inability due to age or health issues (Article 27), the possibility for close relatives to represent a civil defendant (Article 60), the right of close relatives not to be interrogated as witnesses (Article 61), the right to benefit from safety measures in cases involving threats of violence against them (Article 84), the right to be notified about a suspect’s detention (Article 106, although it applies also to family members in general).

⁴² See e.g. Article 6 on the purpose of criminal procedure referring to the protection of “individuals”; Articles 11 to 13 mentioning the rights of an “individual” to legal defense, dignity and inviolability while also referring to “persons”; Article 14 on the protection of the rights and freedoms of “citizens” during court proceedings for criminal cases; Article 15 on the equality of “citizens” before the law and in court; Article 18 on the protection of a “person’s” own life and secrecy of a transcript, telephone, and other conversational, postal, or telegraph and other types of communication (although the content of the article refers to “citizen”); Article 27 on the right of a “citizen” to implementation or inclusion in a criminal prosecution and prosecution; Article 136 on court procedure for examining appeals (referring to

or citizenship, have equal access to courts and tribunals and enjoy equal rights, **it would be preferable to systematically use the terms “individual” or “person” throughout, and to amend relevant provisions of the Draft Code accordingly.**

40. Moreover, while Chapter 64 (Special Part) seems to imply that the Draft Code is applicable to legal entities, it is not clearly stated whether it would apply to a “legal entity” in the same manner as to individuals. Furthermore, it is important to highlight that the right to privacy and fair trial guarantees should also apply to associations or non-governmental organization and their members.⁴³ This matter should be discussed, and clarified in the Draft Code, also to ensure adequate protection of the rights of employees and clients of such entities. It may be advisable to expressly state that **the provisions of the Draft Code are applicable to legal entities, subject to special provisions under Chapter 64 (Special Part).** Generally, in most countries, criminal procedure rules apply equally to individuals and to legal entities such as companies; however, holding a corporate body criminally liable may raise certain procedural questions.⁴⁴

2.5. The Principle of Legality

41. Articles 10 par 1 and 26 par 2 of the Draft Code seem to suggest that prosecutors, investigators and functionaries of preliminary investigation agencies shall initiate pre-trial procedures whenever there is an indication that a crime or misdemeanour may have been committed. Article 157 of the Special Part further states that “pre-trial procedure shall be mandatory for all criminal cases and cases of misdemeanours, with the exception of cases of private prosecution”. Hence, these provisions lay down the principle of legality (i.e., that initiating criminal procedures is mandatory and that an investigator or prosecutor has no discretion in this matter).
42. The provisions under Chapter 61 dealing with proceedings against juvenile offenders do not foresee any exceptions to such mandatory prosecution. Most criminal justice systems, however, consider that in juvenile justice, it would be advisable for the **prosecution service to have some sort of discretion in this matter, so as to promote the re-education and rehabilitation of juveniles.**⁴⁵ **The drafters should consider whether to introduce such an exception under Chapter 61 of the Special Part (or under Article 10).**

“citizens”); Articles 151 to 154 on civil lawsuits (referring alternatively to “citizens” or to “individuals”); Article 117 on detention under custody referring to “individuals”, among others.

⁴³ See par 228 of the Joint OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association (2014), available at <http://www.osce.org/odihr/132371>, referring to inspections of a general nature; the same principles should *a fortiori* be applicable *mutatis mutandis* in cases of criminal investigation.

⁴⁴ For instance, as regards the identification of the person to be summoned, the question of who shall act on behalf of the legal entity during trial, whether the legal representatives or governing body or employees have the right to remain silent or to refuse testimony or to submit documents that would incriminate the company or themselves, who may deny access to company’s premises without a search warrant, which forms of punishment may be imposed, who may enter into a plea-bargaining agreement on behalf of the company, etc.; moreover, certain interim measures specifically applicable to legal entities could be adopted by judges such as, as is the case in Romania: a) the suspension of the legal person’s winding-up or liquidation procedure; b) the suspension of the legal person’s merger, division or reduction of the share capital; c) the prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person’s insolvency; d) the prohibition to execute certain legal instruments, established by the legal body; e) the prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated. See the Business Crimes and Compliance Criminal Liability of Companies Survey (2008) prepared by the Lex Mundi Business Crimes and Compliance Practice Group, available at https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf.

⁴⁵ See par 11.2 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), A/RES/40/33, 29 November 1985, available at <http://www.un.org/documents/ga/res/40/a40r033.htm>.

43. Article 25 par 2 lists a number of criminal offences which constitute cases of “private prosecution” exclusively⁴⁶; these require the victim to submit a complaint, and may be resolved based on a plea bargaining agreement. For cases of semi-private prosecution (for crimes of medium gravity), a victim’s complaint is also required, but a plea-bargaining agreement does not appear to be possible. In any case, for both private and semi-private prosecutions, even in the absence of a victim’s complaint, the prosecutor or investigator may still initiate pre-trial procedures in cases of dependence, helplessness or other situations where a victim cannot defend him/herself; in cases of semi-private prosecution, this obligation extends to cases that would affect the essential interests of other persons, a community or government (Article 25 par 4). This means that, in these limited situations, criminal offences of minor and medium gravity can in principle be prosecuted *ex officio*, even if a victim withdraws his/her complaint.
44. In this context, it should be noted that international good practices regarding the fight against violence against women and domestic violence require that investigations into or prosecution of certain criminal offences (such as physical violence of a certain gravity; sexual violence, including rape; forced marriage; female genital mutilation; forced abortion and forced sterilization) shall not depend only on a victim’s complaint.⁴⁷ It is not clear whether these kinds of cases fall within the scope of *ex officio* prosecution under Article 25 par 4. To avoid uncertainty in these matters, **it is recommended to specify that these types of criminal offences shall be investigated and prosecuted irrespective of a complaint submitted by the victim.** Furthermore, **it is noted that Article 18 par 1 sub-par 11 on the termination of a criminal procedure if a victim does not support a private or semi-private prosecution does not make reference to the exception provided under Article 25 par 4; it is recommended to amend this provision accordingly.**
45. Article 27 par 2 of the Draft Code provides that in case a prosecutor refuses to prosecute, “a victim shall nevertheless be entitled to support the prosecution”. Presumably, this shall provide victims with the opportunity to take over the prosecution themselves as “private prosecutors”. The wording of the provision should, however, be clarified. In addition, under Article 256, victims may appeal the rulings of an investigator or prosecutor dismissing a criminal case – which is positive – to the “supervising prosecutor or to the court”. **It would be helpful if this provision would clarify which is the first-instance appeals body; ideally, appeals shall first go to the supervising prosecutor, whose decisions could then be appealed before court.** Moreover, while Article 257 mentions the effects of a reversal of the investigator’s ruling dismissing the criminal case (i.e., re-opening by the prosecutor), **the appeal would be more effective if the criminal case is re-opened by a different, and thus more impartial prosecutor.**⁴⁸ **Article 257 should be amended accordingly.**

⁴⁶ i.e., Article 180 (Bigamy or Polygamy), Article 189 (Violation of Inviolability of the Home), Article 190 (Obstruction of the Exercise of Electoral Rights), the first part of Article 192 (Violation of the Procedure for Financing Election Campaign), the first part of Article 193 (Misappropriation of Resources during Elections or Referenda), the first and second parts of Article 194 (Falsification of Election Documents), the first part of Article 195 (Organization of an Illegal Religious Group), Article 199 (Robbery), article 203 (Misappropriation or Embezzlement of Entrusted Property), and Article 223 (Counterfeiting of Payment Documents) of the new *Draft Criminal Code*.

⁴⁷ See e.g., par 129 of the OSCE/ODIHR Opinion on the Impact of the Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence on Legislation in Montenegro, 10 September 2014, available at http://www.legislationline.org/download/action/download/id/5613/file/FINAL%20ODIHR%20Opinion%20on%20the%20Impact%20of%20the%20Ratification%20of%20the%20CoE%20Istanbul%20Convention_Montenegro_10Sept2014_ENGLISH.pdf.

⁴⁸ See e.g., par 44 in the case of *Ipati v. Republic of Moldova*, ECtHR judgment of 5 February 2013 (Application no. 55408/07).

Moreover, **the modalities of an appeal against the prosecutor’s decision to dismiss a case are unclear and should be clarified in Chapters 36 or 37.**

46. In particular in cases concerning torture or ill-treatment, some additional safeguards to ensure effective official investigations, prosecutions and conviction may be considered. For instance, Article 255 which deals with the content of the ruling and procedure dismissing a criminal case could state that **the decision to dismiss a case involving allegations of torture or ill-treatment shall be communicated to the Ombuds Office (which may in principle participate in proceedings)⁴⁹ and/or the National Centre for the Prevention of Torture (which may intervene in criminal procedures in cases involving torture or other ill-treatment).⁵⁰ Article 256 could further provide that in these types of cases, such entities would have the right to appeal against the decision to dismiss the case.** Moreover, the investigation of such acts should be separated from the main criminal proceedings and carried out by an independent and impartial body, and not by the investigator and prosecutor in charge of the criminal investigations against the complainant.⁵¹ Although the rules on recusal and removal under Chapter 8 should in principle allow for the removal of a prosecutor in such cases, it is advisable to clarify this point.
47. As to the grounds for terminating criminal prosecution listed under Article 28 of the Draft Code, **they do not include cases where the defendant’s guilt is not proven – whereas the “absence of sufficient evidence” is stated in Article 254 of the Special Part as a ground for terminating pre-trial procedure. To ensure consistency, this ground should thus also be added to Article 28.** Additionally, Article 28 par 5, stating that a case shall be terminated if the criminal offence was committed in a state of incapacity, should include a reference to Article 177 of the Draft Code, which specifies how such state of incapacity shall be determined.
48. Under Article 28 par 3, the termination of criminal prosecution based on the lapse of the statute of limitations “shall not be allowed if the accused objects”. In such cases, criminal proceedings will then continue under the regular procedure. Article 28 par 3 further clarifies that if an accused is found guilty, the court shall render a verdict of guilt, but not impose punishment. Such a provision is rather unusual (though not entirely exceptional, as similar rules may be found in other countries),⁵² but would nonetheless be in line with general rules on the presumption of innocence.⁵³ **It is however not clear whether the guilty verdict would then appear in the defendant’s criminal record and whether he/she would be considered a recidivist should he/she commit a criminal offence in future. Article 28 should be clarified in that respect.**

⁴⁹ See Article 8 par 12 of the Law of the Kyrgyz Republic on the Ombuds Institution, available at <http://www.legislationline.org/topics/country/20/topic/82>.

⁵⁰ See Article 4 par 2 of the Law of the Kyrgyz Republic “On the National Center of the Kyrgyz Republic on prevention of torture and other cruel, inhuman or degrading treatment or punishment” (2012), available at http://www.ap.tch/content/files/npm/eca/Kyrgyzstan_NPM%20law_ENG.pdf.

⁵¹ See e.g., par 45 in the case of *Ipati v. Republic of Moldova*, ECtHR judgment of 5 February 2013 (Application no. 55408/07).

⁵² See e.g., par 13 of the OSCE/ODIHR Opinion on the Draft Criminal Procedure Code of the Republic of Armenia, 23 April 2013, available at http://www.legislationline.org/download/action/download/id/4407/file/228_CRIM_ARM_23%20April%202013_en.pdf.

⁵³ *ibid.* par 13 (2013 ODIHR Opinion on the Draft Criminal Procedure Code of Armenia). See also pars 35-41 of the case *Adolf v. Austria*, ECtHR judgment of 26 March 1982 (Application no. 8269/78).

3. The Rights of the Suspect and of the Accused

3.1. Fair Trial Guarantees

49. Chapter 6 of the Draft Code sets out the rights and obligations of “wrongdoers” (persons who allegedly committed a misdemeanour), of “suspects” (persons suspected of a crime, but not yet indicted) and of “accused” (persons suspected of a crime, who have been indicted). While it is undoubtedly important for these persons to know their rights, it is questionable whether such lengthy and non-exhaustive lists of rights are useful (see par 17 *supra*).
50. Moreover, certain rights which are essential to ensure the effective exercise of other rights are not listed under Chapter 6, or not precisely formulated. For instance, Article 47 par 4 and Article 49 par 4 refer to the right to receive a written explanation about one’s rights – which is particularly welcome and in line with good practices.⁵⁴ However, this provision should also take into account cases **where persons are not able to read or understand what is written (e.g. because they are blind or do not understand the state language)**. These provisions should be revised to take into account these situations as well (in a manner similar to Article 27, which states that an individual arrested shall be informed, in a language that he/she understands, of the reasons for his/her arrest). It is positive that Article 197 par 3 regarding interrogation refers to specific modalities that shall be applied to deaf or mute persons, but this provision should **also refer to the modalities of interrogating persons who do not speak the state language, and their right to be provided with free interpretation/translation** (as mentioned earlier).
51. As regards specifically the obligations of a “wrongdoer”, Article 47 par 3 refers to the obligation to undergo fingerprinting, imprinting and the extraction of biological samples (blood). It is questionable whether such an obligation is proportionate to the gravity of the offense, given that misdemeanours are by definition criminal offenses of minor gravity. **Requiring individuals to undergo fingerprinting, and other extractions of body samples, without distinguishing between grave and less serious offences, would appear to be disproportionate, given that it fails to adequately balance the public interest of conducting an investigation and preventing crimes against the protection of the right to respect for private life.**⁵⁵ The drafters should reconsider this provision. Moreover, while Article 91 deals with the destruction of evidence upon termination of a case, it is not clear whether this would also apply to fingerprints and body samples mentioned in Article 47 (and Article 49 on the rights and obligations of a suspect); **Article 91 of the Draft Code should specify the modalities of retention and destruction of fingerprints and body samples, and specify that they should be removed or destroyed either immediately or within a certain limited time after dismissal of the case or acquittal.**⁵⁶
52. Article 51 par 7 of the Draft Code provides that “convicted” and “acquitted” persons have the right to receive a copy of the court decision and to appeal the decision. It would be advisable to supplement this provision by clearly stating that they shall have

⁵⁴ See e.g., in the European Union, the “Letter of Rights” as provided under Article 4 of the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>; see also http://ec.europa.eu/justice/criminal/criminal-rights/right-information/index_en.htm.

⁵⁵ See e.g., pars 41-46 of the case *M.K. v. France*, ECtHR judgment of 18 April 2013 (Application no. 19522/09).

⁵⁶ Regarding the indefinite retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, see e.g., pars 105-126 in the case of *S. and Marper v. the United Kingdom*, ECtHR judgment of 4 December 2008 (Application nos. 30562/04 and 30566/04).

the right to a reasoned judgment, which allows parties to judicial proceedings to determine whether or not there are grounds to appeal a court's decision, and to prepare the appeal itself.⁵⁷

53. **Article 82 par 2 of the Draft Code (referring back to Article 79 par 5) states that the decision on removal of a defence attorney is taken by the investigator during investigation proceedings. Given that the investigator is by definition not a neutral instance, and could, in a sense, even be called the opponent of the defence attorney, it is recommended to amend this provision so that such a decision is rendered by a judge.**
54. From the provisions of the Draft Code, it is not apparent whether a prosecutor has the duty to ascertain both incriminating and exculpatory evidence during the pre-trial procedure.⁵⁸ **It is also not clear whether investigators have the active duty to investigate exculpatory as well as incriminating evidence. This should be clarified under Chapter 5.** This is of particular relevance given that the prosecution is generally in a better position to gather evidence; to repair this imbalance, the prosecution is normally obliged to provide the defence with access to the evidence gathered, particularly exculpatory evidence.⁵⁹ This is all the more important in the context of plea-bargaining (see Article 26 par 5 of the Draft Code). In the absence of any duty to disclose exculpatory evidence, the prosecutor could easily impose a plea-bargaining agreement on the accused and jeopardize the principle of equality of arms mentioned under Article 20 of the Draft Code. **The prosecutor's obligation to disclose evidence to the defence should be clarified in the Draft Code; in particular, this obligation should relate to evidence that would show or indicate the innocence of the accused, mitigate his/her guilt or that would have bearing on the credibility of other evidence presented by the prosecution.**⁶⁰ The Draft Code should then also determine the consequences, should a prosecutor fail or refuse to disclose such evidence. Under international criminal law, the remedies for such violations range from additional time for review for the defence, to staying the proceedings and ordering the release of the accused; the court can also choose to reprimand and sanction the prosecutor.⁶¹

⁵⁷ *Op. cit.* footnote 11, pages 209-2011 (OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012)).

⁵⁸ See e.g., Article 6 par 2 of the Swiss Criminal Procedure Code which states that “[The criminal justice authorities] shall investigate the incriminating and exculpating circumstances with equal care”; see also Article 54(1) of the Rome Statute of the International Criminal Court which states that “[t]he Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally”.

⁵⁹ See par 8.3 of UN HRC case *Van Marcke v Belgium*, Communication no. 904/2000 (2004), where the UN HRC observed that the right to a fair hearing does not, in itself, require that the prosecution bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence.

⁶⁰ See e.g., Article 67 (2) of the Rome Statute of the International Criminal Court which states that “In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide”. See also the US case law e.g., *Brady v. Maryland* 373 US 83 (1963) addressing the violation of the constitutional duty resting on the Prosecutor in the US to disclose exculpatory evidence, more specifically disclose a witness statement containing exculpatory material; see also *R v. Ward* Cr App R 1(1992): “It is now settled law that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed is ‘an irregularity in the course of the trial’ [...] ‘Non disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed piece of evidence might have shifted the balance or opened up a new line of defence’”.

⁶¹ See the Paper by Ligeia Quackelbeen “The Prosecutorial Duty to Disclose Exculpatory Material - Appropriate remedies and sanctions: The necessity of implementing a code of conduct”, available at http://www.academia.edu/5169072/The_Prosecutorial_Duty_to_Disclose_Exculpatory_Material_Appropriate_Remedies_and_Sanctions.

55. According to Article 260 par 2, extracts and copies of files that contain information classified as a state secret, commercial secret or other protected secret should be made available to the defendant and counsel during the trial. The Article further provides for one exception pertaining to information about persons whose safety must be assured. While this is somewhat positive as this implies full disclosure of information, in practice, it is unlikely, or perhaps even not desirable that certain state secrets or other classified documents will be fully disclosed during trial. **The drafters and stakeholders should further discuss the modalities and procedures for handling protected information; safeguards adopted in other countries could be considered in this context.**⁶²
56. Article 503 regulates the procedure to be followed where offenders may not be held criminally liable, in cases of mental disorder. This procedure appears to involve an investigation of the case; upon the completion of pre-trial proceedings, the competent investigator will then commit the case to court. Chapter 62 does not, however, mention any security measures that could be taken prior to the completion of the pre-trial procedure and the court ruling, where the mentally ill person represents a danger to him/herself or to others. In any case, **any deprivation of liberty of the individual in question shall be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law; in particular, any deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continued necessity.**⁶³ Moreover, the procedures should ensure respect for the views of the individual and that any representative genuinely represents and defends the wishes and interests of the individual; for instance, the legal framework should allow the individual to challenge his/her legal representation and prosecutors, investigators and judges should be obliged to seek his/her views at all stages of the procedure.⁶⁴ Where, after significant efforts have been made, the will and preferences of an individual cannot be determined, the “best interpretation of will and preferences” must be taken into account.⁶⁵ Article 503 should include such safeguards as well.
57. Finally, Article 177 par 2 sub-par 3 provides that forensic inquiries shall be conducted where necessary to establish the mental or physical state of the suspect or accused, in case of doubts as to his/her mental capacity, in order to safeguard his/her rights and legitimate interest during the criminal process. Article 177 par 2 sub-par 6 further provides that such forensic inquiry shall only be obligatory for the most serious criminal cases. The first provision addresses the issue of incompetency to stand trial, while the second seems to deal with the issue of a plea of mental illness as a defence. However, **forensic inquiry to determine the mental state of a suspect or accused at the time of the commission of the offence is crucial irrespective of the gravity of the alleged criminal offense. The limitation mentioned under Article 177 par 2 sub-par 6 should thus be reconsidered, and ideally removed, or expanded to also cover less grave cases.**

⁶² See e.g., *op. cit.* footnote 11, pages 124-125 (OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012)).

⁶³ See par 19 of the UN HRC General Comment No. 35 on Article 9 of the ICCPR (28 October 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en.

⁶⁴ See e.g., par 38 of the CRPD Committee General Comment No. 1 (2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en.

⁶⁵ *Ibid.* par 21 (CRPD General Comment No. 1 (2014)).

3.2. Trials in Absentia

58. Article 317 of the Draft Code pertains to trials *in absentia*. International standards do not exclude trials in absentia *per se*. However, given the right to every accused to a public, and oral hearing⁶⁶, a person convicted *in absentia* should be able to subsequently obtain from a court a fresh determination of the merits of the charge, in respect of both law and fact, unless he/she has waived his/her right to appear and to defend him- or herself or intended to escape trial.⁶⁷ **The potential right to re-trial mentioned in Article 317 par 5 should be expanded, to include not only defendants who were outside of the Kyrgyz Republic when the trial took place, but also to other defendants convicted *in absentia*.**⁶⁸
59. Article 317 also does not require the court to establish that a summons was effectively served on the defendant in cases of his/her absence.⁶⁹ **Without an effective summons, the defendant may not even be aware of the proceedings, and proceedings *in absentia* would then violate his or her right to a public hearing. Article 317 should be supplemented accordingly.**
60. Finally, Article 317 par 7 refers to the cassation procedure although the second part of this article states that in such cases, trials shall be held following the general procedure; unless an error of translation, it is thus unclear whether a person convicted *in absentia* may merely bring a cassation claim, as opposed to benefiting from an actual re-trial. This should be clarified and, if necessary, amended, **to ensure that he/she has a right to a re-hearing of the case**, while bearing in mind the exceptions already set out in par 58 *supra*.

3.3. Juvenile Justice

61. The section on proceedings in juvenile cases (Chapter 61) is overall in line with international standards. It provides, among others, that during the pre-trial and trial procedures, the intellectual, cognitive and mental development of the juvenile has to be considered (Article 488 par 1 sub-par 3). According to Article 497, a psychological and psychiatric examination is mandatory to establish if the juvenile has the capacity to be aware of his/her actions. A psychological forensic examination may be conducted to establish the level of intellectual, cognitive and mental development of the juvenile. **Chapter 61 does not, however, specify the consequences should it be determined that a juvenile has no capacity to be aware of his/her actions; in particular, it is not clear whether this will relieve him/her from criminal liability or whether this will only be relevant for sentencing. This should be clarified.**
62. Chapter 61 on juvenile justice contains numerous other safeguards that are in line with international standards. Particularly, Article 500 on court sentencing of a juvenile defendant requires the court to consider placing the juvenile under probation instead of punishment, the imposition of non-custodial sanctions, and the possibility to abstain from imposing punishment, discharge the juvenile and impose educational measures (Articles 500 and 501).⁷⁰ However, **the principle that detention of a juvenile should be a measure of last resort should be more clearly stated under Articles 490 and**

⁶⁶ *Op. cit.* footnote 33, par 46 (2014 ODIHR and CoE Joint Opinion on the Criminal Procedure Code of Georgia).

⁶⁷ See par 82 in the case of *Sejdovic v. Italy*, ECtHR judgment of 1 March 2006 (Application no. 56581/00).

⁶⁸ See par 27 in the case of *Colozza v. Italy*, ECtHR judgment of 12 February 1985 (Application no. 9024/80); and pars 81 and 84 in the case of *Sejdovic v. Italy*, ECtHR judgment of 1 March 2006 (Application no. 56581/00).

⁶⁹ See e.g., the Council of Europe in Resolution (75)11 on the *Criteria Governing Proceedings Held in the Absence of the Accused*.

⁷⁰ See e.g., *op. cit.* footnote 38 (1985 UN Beijing Rules on Juvenile Justice).

- 500, as recommended by international human rights bodies.**⁷¹ Moreover, it is unclear whether Article 118 relating to time periods of detention under custody would be applicable in cases of detention of juveniles; in any case, **derogatory rules should be applicable for these cases and the legality of pre-trial detention should be reviewed regularly, preferably every two weeks.**⁷² It is recommended to supplement Chapter 61 accordingly.
63. Regarding the arrest of a juvenile, the general rules of the Draft Code appear to be applicable (i.e., that the detained person will be brought before a judge within 48 hours); it must be highlighted that international bodies recommend that **in cases of juveniles, access to a judge should be guaranteed within 24 hours maximum.**⁷³ This should be expressly stated under Chapter 61.
64. Article 490 par 3 of the Draft Code stipulates that placing juveniles in care is an option that should be considered when deciding on the imposition of restrictive measures. It is recommended **to consider including further alternatives to detention as recommended by the UN Standard Minimum Rules for the Administration of Juvenile Justice (1990) (hereinafter “the Beijing Rules”),**⁷⁴ such as close supervision, intensive care or placement within a family.⁷⁵
65. Moreover, the UN CRC Committee has indicated that **the maximum length of proceedings against an accused juvenile should be six months, whether he/she is detained or not.** This should also be specified under Chapter 61 (or elsewhere in the Draft Code).⁷⁶ Moreover, Article 480 should expressly provide for the separation of minors from adults in cases of custodial measures.⁷⁷
66. Article 490 par 4 provides that the parents of a juvenile or legal representatives shall be informed of his/her apprehension and detention in custody, but does not specify when such a notification should be made. The Beijing Rules require **such notification to be made immediately upon the apprehension of the juvenile or, where immediate notification is not possible, within the shortest possible time thereafter (Rule 10 of the Beijing Rules).** It is recommended to supplement Article 490 accordingly.
67. Furthermore, the Draft Code does not appear to allow for the diversion of juvenile cases, whereas the Beijing Rules recommend that juvenile justice agencies should have the power to dispose of cases without taking recourse to formal hearings and to, upon consent of the juveniles, refer them to appropriate community or other services (Rule 11

⁷¹ See par 67 (a) of the Concluding Observations of the CRC Committee on the Kyrgyz Republic (7 July 2014), available at .

⁷² See par 83 of the UN CRC Committee General Comment No.10 on “Children’s rights in Juvenile Justice” (2007), CRC/C/GC/10.

⁷³ *ibid.* par 83 (UN CRC Committee General Comment No. (2007)); and *op. cit.* footnote 63, par 33 (UN HRC General Comment No. 35 on Article 9 of the ICCPR).

⁷⁴ *Op. cit.* footnote 38, Rule 13 (1985 UN Beijing Rules on Juvenile Justice).

⁷⁵ See also UNICEF Guidance for Legislative Reform on Juvenile Justice (2011), available at http://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdf.

⁷⁶ See par 83 of the UN CRC Committee General Comment No.10 on “Children’s rights in Juvenile Justice” (2007), CRC/C/GC/10, available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>; and *op. cit.* footnote 63, par 33 (UN HRC General Comment No. 35 on Article 9 of the ICCPR).

⁷⁷ Article 37 (c) of the UN CRC and Article 10 (b) of the ICCPR. See also UN HRC General Comment No. 13 on Article 10 of the ICCPR which states that “Under article 10, paragraph 3, juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned”; Rule 8 of the Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 which states that “Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate” (available at <http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf>).

of the Beijing Rules). While this may be addressed in other legislation, it is recommended to **clearly state under Chapter 61 that diversion measures should be considered as a priority whenever appropriate and desirable; appropriate legal safeguards regarding the imposition of such measures should be provided, particularly the requirement that the juvenile must freely and voluntarily give his/her consent in writing**, in accordance with international standards.⁷⁸ The drafters should consider amending the Draft Code in that respect.

68. Finally, basic procedural rights such as the presumption of innocence, the right to be notified of the charges (directly and in a way that he/she understands them),⁷⁹ the right to remain silent, the right to counsel, the right to the presence of a parent or guardian (and teacher) during interrogation and/or trial, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall also be guaranteed at all stages of proceedings (Beijing Rules No. 7) and should be communicated to the juvenile in a manner appropriate to his/her age. In addition, it is important to note that **the juvenile should always have the right to be heard directly and/or through legal or other appropriate assistance, and be given the opportunity to express his/her views concerning (alternative) measures that may be imposed; specific wishes or preferences that he/she may have in this regard should be given due weight.**⁸⁰ These rights should be stated more clearly in Chapter 61.

3.4. Rights of Persons with Disabilities

69. Article 51 par 5 of the Draft Code states that the rights of a “legally incompetent accused or defendant” (understood as referring to persons deprived of legal capacity and placed under guardianship based on their mental health) “shall be implemented by his or her legal representative”. It is not the purpose of this opinion to conclude whether the Kyrgyz system of ‘legal incapacitation’ is in line with international standards. It is worth noting, however, that although the Kyrgyz Republic is not a signatory of the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”), recommendations at the international level urge States to not deny persons with disabilities their legal capacity and to rather support them in the exercise of their legal capacity in a manner that respects the rights, will and preferences of persons with disabilities. Such support should never amount to substitute decision-making.⁸¹ **Article 51 par 5 (and other provisions of the Draft Code as appropriate) should therefore specify that persons deprived of their legal capacity shall take part in criminal proceedings, with the support of their representatives and/or other trusted persons, and that they should have the opportunity express their views at all stages of the procedure.**

⁷⁸ For a list of conditions and legal safeguards, see par 27 of the CRC Committee General Comment No. 10 on “Children’s rights in Juvenile Justice” (2007), available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

⁷⁹ *ibid.* pars 47-48 (CRC Committee General Comment No. 10 on “Children’s rights in Juvenile Justice” (2007)).

⁸⁰ *ibid.* pars 43-35 (CRC Committee General Comment No. 10 on “Children’s rights in Juvenile Justice” (2007)). See also *op. cit.* footnote 63, par 62 (UN HRC General Comment No. 35 on Article 9 of the ICCPR)

⁸¹ See e.g., pars 16-17 of the UN CRPD Committee General Comment No. 1 (2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en. See also pars 66-76 in the case of *Shtukaturov v. Russia*, ECtHR judgment of 27 March 2008 (Application no. 44009/05).

4. Victims' Rights and Adequate Procedural Measures

4.1. Victims' Rights

70. Article 42 of the Draft Code defines a victim as a person “to whom emotional, physical or property losses have been caused by a crime or misdemeanor”. **This should include, as recommended by international good practices, the immediate family or dependants of the direct victim, and persons who have suffered harm when assisting victims in distress or to prevent victimization.**⁸²
71. Article 42 further provides an extensive list of the rights of victims, which at times fall short of what is understood by “victims’ rights” in criminal proceedings according to international standards.⁸³ These should include the right to compassionate treatment, including respect for victims’ dignity,⁸⁴ to have their views and concerns presented and considered at appropriate stages of the proceedings;⁸⁵ to be informed about the various existing means for protection, such as witness protection programmes and other protective measures (e.g. restraining, removal and protection orders); and to be informed about their roles and the scope, timing and progress of the criminal case.⁸⁶ Specifically, victims should also be informed of the decision to prosecute or not to prosecute,⁸⁷ of the decision to appeal or not to appeal,⁸⁸ as well as about the release (or escape) of the accused.⁸⁹ Additional rights include measures related to access to justice, including medical and psychological assistance,⁹⁰ legal aid (i.e., legal advice, assistance and representation),⁹¹ and the provision of information on how to obtain full and effective reparation (i.e., restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition).⁹² Moreover, the right to be informed about one’s rights is

⁸² *Op. cit.* footnote 10, Principle 2 (1985 UN Declaration of Basic Principles of Justice for Victims of Crime).

⁸³ See the 1985 UN Basic Principles of Justice for Victims of Crime; see also Annex to the UN Economic and Social Council (ECOSOC) Resolution 2005/20, 22 July 2005 (hereinafter “2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime”), available at http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf. As a reference, see also the CoE Recommendation Rec(85)11 on the Position of the Victim within the Framework of Criminal Law and Procedure; CoE Recommendation Rec(87)21 on Assistance to Victims and the Prevention of Victimization; CoE Recommendation Rec(97)13 Concerning Intimidation of Witnesses and the Rights of the Defence; CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice; CoE Recommendation Rec(2006)8 on Assistance to Victims. See also the CoE Convention on the Compensation of Victims of Violent Crimes (CETS No. 116), available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=116&CM=1&CL=ENG>.

⁸⁴ *Op. cit.* footnote 10, Principle 4 (1985 UN Declaration of Basic Principles of Justice for Victims of Crime).

⁸⁵ *ibid.* Article 6(b) (1985 UN Declaration of Basic Principles of Justice for Victims of Crime). See also *op. cit.* footnote 83, Article 21 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

⁸⁶ *Op. cit.* footnote 10, Articles 5 and 6(a) (1985 UN Declaration of Basic Principles of Justice for Victims of Crime). See also *ibid.* Article 19 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

⁸⁷ See pars 118 and 136 of *Kelly and Others v the United Kingdom*, ECtHR judgment of 4 May 2001 (Application No 30054/96).

⁸⁸ See e.g., pars 37-42 of *Gorou v Greece*, ECtHR judgment of 20 March 2009 (Application No 12686/03).

⁸⁹ See e.g., Article 56 par 1 (b) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CoE Istanbul Convention).

⁹⁰ *Op. cit.* footnote 10, Principle 14 (1985 UN Declaration of Basic Principles of Justice for Victims of Crime).

⁹¹ As defined in par 8 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted by General Assembly resolution 67/187 of 20 December 2010, available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf, which state that “the term ‘legal aid’ includes legal advice, assistance and representation [...] for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require”.

⁹² See pars 51-54 of the 2014 OSCE/ODIHR Opinion on Compensation of Damages for Victims of Criminal Acts in Montenegro, available at <http://www.legislationline.org/documents/id/19167>. See also Section 3.8.2. of the 2012 UN Women Handbook for Legislation on Violence against Women (hereinafter “the 2012 UN Women Handbook for Legislation on VAW”), available at

key to the effective enjoyment of such rights. **Article 42 of the Draft Code (and other provisions of the Draft Code) should be supplemented accordingly.** Particularly, **Article 155 (Special Part) on the duty to accept and examine applications and reports of crime and/or misconduct should specify the duty to inform the victims about their rights as listed above** (see also comments on the duty to inform the victims and witnesses about their rights at the start of interrogation, in par 133 *infra*). **This should also include the right not to testify against one's relatives which is not expressly listed under Article 42.**

72. Other protective measures to assist certain victims and facilitate their testimony should also be considered, such as confidentiality measures (measures designed to protect the identity of the victim from the press and the public),⁹³ privacy measures (special evidentiary rules designed to limit the questions that may be posed to a victim during the trial);⁹⁴ and victim support measures.⁹⁵ Certain measures which are applicable in the context of witness protection programmes (Chapter 9) could also be available to certain victims, particularly in cases of sexual and domestic violence, as well as for child victims to prevent secondary victimization.

4.2. Protection of Participants to Criminal Proceedings

73. It is commendable that Chapter 9 of the Draft Code (General Part) expressly provides for certain measures to ensure the safety of persons participating in criminal proceedings, including victims and witnesses, which is in line with the overall international trend. One important aspect which is omitted is **the obligation to notify victims when the accused/convicted person is released from custody, or when house arrest is terminated** (see par 71 *supra*).
74. It is welcome that Article 85 provides for the adoption of certain measures of restraint, such as 'proximity restraint orders', and that, according to Article 128, such orders limit the possibility for an accused or defendant to meet with a victim or other participant in the criminal case. However, and particularly in the context of domestic violence, **some additional protective measures could be considered to adequately protect victims and witnesses**, as recommended for instance in the OSCE/ODIHR Opinion pertaining to preventing and combating domestic violence in the Kyrgyz Republic.⁹⁶ It is recommended to enhance the Draft Code accordingly.

http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf.

⁹³ E.g., removing any identifying information such as names and addresses from the court's public records and media; using a pseudonym for the victim; prohibiting disclosure of the identity of the victim or identifying information to a third party; permitting victims to testify behind screens or through electronic or other special methods avoiding direct contact with the perpetrator; allowing in camera proceedings or closed sessions during all or part of the trial (i.e. during victim's testimony), see page 119 of the UNODC Handbook on Effective Prosecution Responses to Violence against Women and Girls.

⁹⁴ Such as prohibiting questions about the victim's prior or subsequent sexual conduct; not requiring corroboration of the victims testimony; etc.

⁹⁵ Such as permitting the victims to testify in a manner that allows him/her to avoid seeing the accused (closed CCTV or screen); limiting the frequency, manner and length of questioning; permitting a support person, such as a family member or friend, to attend the trial with the victim; a video-recorded interview.

⁹⁶ This could include the possibility for investigating bodies to immediately issue certain emergency protection or restraining orders (including the removal of perpetrators from their home irrespective of the ownership title to the property), when the circumstances so require, subject to later confirmation by an examining judge; see *op. cit.* footnote 14, par 58 (2014 ODIHR Opinion on Kyrgyz Anti-Domestic Violence Legislation); see also par 69 of the OSCE/ODIHR Opinion on the Draft Code of Ukraine on Preventing and Combating Domestic Violence, DV-UKR/232/2013, issued on 31 July 2013, available at

http://www.legislationline.org/download/action/download/id/5048/file/232_DV_UKR_31%20July%202013_en.pdf. See also *op. cit.* footnote 21 (2011 UN Model Practical Measures on the Elimination of Violence against Women). Regarding

75. Moreover, the nature and scope of the protective measures listed under Article 85 (and Chapter 14) could be broadened, for instance by including the prohibition to use or possess firearms or other weapons; and/or the confiscation of certain objects.⁹⁷ Chapter 9 of the Draft Code should be supplemented in that respect, while taking into consideration the fair trial rights of the defendant, including the right to be served with such orders and the right to appeal (which includes the right to be informed about possibilities of appeal).⁹⁸
76. Moreover, it is usually acknowledged that criminalizing the violation of restrictive or protective orders is extremely important in ensuring the effectiveness of legislation.⁹⁹ **Consequently, it is recommended, if not already provided, to introduce an offence in the Criminal Code for such violations.¹⁰⁰ The consequences of the violation of the orders, i.e. criminal liability and related penalties, should always be indicated in writing in the orders themselves.**¹⁰¹
77. Article 86 of the Draft Code also provides for certain measures to protect the safety of victims and witnesses during court examination. This includes the possibility for them to testify without being seen by other participants in the trial, for instance via video transmission. This is in accordance with international standards which also strive to reduce the risk of confrontation between victims and perpetrators in certain cases, such as domestic violence.¹⁰² Such protective measures should apply at all stages of the criminal proceedings, including investigations on police premises, unless contacts are necessary or useful for the proper conduct of proceedings.¹⁰³
78. While measures to protect the anonymity of witnesses are justifiable, sufficient procedural safeguards should be put in place to ensure that the rights of the accused are adequately protected. Particularly, it should be **clearly stated that a conviction may not be solely or decisively based on statements of witnesses whose identity was not revealed to the defence, which may prevent the defence from disputing the credibility of the statement.**¹⁰⁴ **It is recommended to supplement Article 86 accordingly.**

specifically the pre-trial measures that may be taken by a prosecutor as conditions for pre-trial release, see page 94 of the UNODC Handbook on Effective Prosecution Responses to Violence against Women and Girls (2014), available at http://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf. See also *op. cit.* footnote 92, Section 3.10.3 (2012 UN Women Handbook for Legislation on VAW).

⁹⁷ *ibid.*, footnote 92, Section 3.8.2 (2012 UN Women Handbook for Legislation on VAW). See also par 29, Part IV, “A Framework for Model Legislation on Domestic Violence”, Report of the Special Rapporteur on violence against women, its causes and consequences (1996) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/104/75/PDF/G9610475.pdf?OpenElement>. See also *op. cit.* footnote 21, par 7 (2011 UN Model Practical Measures on the Elimination of Violence against Women). See also *op. cit.* footnote 34, par 62 (2014 UNODC Blueprint for Action against Violence against Women).

⁹⁸ See e.g., par 272 of the Explanatory Report to the CoE Istanbul Convention, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm>.

⁹⁹ See page 9 of the UN Expert Group Meeting on Good Practices in Legislation on Violence Against Women, Expert Paper by Cheryl A. Thomas on Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union, 17 June 2008, available at [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20\(Cheryl%20Thomas\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Cheryl%20Thomas).pdf). See also *op. cit.* footnote 92, Section 3.10.9 (2012 UN Women Handbook for Legislation on VAW).

¹⁰⁰ For examples of criminal penalty imposed in other countries, see *ibid.*, Section 3.10.9 (2012 UN Women Handbook for Legislation on VAW).

¹⁰¹ See par 29(vi), Part IV, 1996 UN Model Legislation on Domestic Violence.

¹⁰² See e.g., *op. cit.* footnote 89, Article 56 (CoE Istanbul Convention).

¹⁰³ *Op. cit.* footnote 12 (Model Law on Justice in Matters Involving Child Victims and Witnesses of Crime (2009)).

¹⁰⁴ See e.g., pars 44-45 of the case *Kostovski v. Netherlands*, ECtHR judgment of 20 November 1989 (Application no. 11454/85).

79. Article 85 par 6 of the Draft Code seems to imply that in cases where safety measures are requested due to allegations of acts of torture or other cruel, inhuman or degrading treatment, the prosecutor is to perform a pre-trial investigation. This is a positive addition, which should, however, apply not only in the context of safety measures but in any situation where a prosecutor suspects that an accused or defendant has been tortured or ill-treated. In any such cases, **the prosecutor should initiate pre-trial investigations ex officio. Also in the context of court proceedings, judges should be obliged to refer newly revealed facts regarding allegations of torture or ill-treatment, for independent investigation, either by a prosecutor (who is different from the one in charge of the main case) or by another independent body** (see par 46 *supra*). Complaints and reports of torture or ill-treatment should always be promptly and effectively investigated, even in the absence of an express complaint, if there are other indications pointing to the commission of such acts.¹⁰⁵ Moreover, unless already provided by other legislation, **relevant medical personnel should also have the duty to report suspected cases of torture.**

4.3. Gender and Child-Sensitive Procedural Measures

80. It is welcome that the Draft Code includes certain measures to avoid the “secondary victimization”¹⁰⁶ of victims. These include certain child-sensitive measures such as the presence of a teacher or psychologist and a representative during examination, interrogation or confrontation of a minor/juvenile (Articles 63, 113, 202, 203, 350, 493 and 495), the interrogation of certain witnesses or victims using video communication (Articles 199 and 200 of the Special Part) and the possibility for the court to exclude the public to protect the interests of a minor (Article 314). It must be noted though that the presence of a teacher or psychologist should not prevent the additional participation of parents or guardians, for instance during the interrogation (Article 202 par 1).¹⁰⁷ The Draft Code also provides for a number of gender sensitive measures such as requiring searches to be conducted by same sex officers (Article 214), or requiring examination and forensic inquiries to take place only in the presence of persons of the same sex (Articles 174 and 180) – which are in line with international standards.
81. Regarding examination, Article 174 par 2 states that the physical examination of the suspect, defendant, victim and/or witness shall only take place with their consent, “except when such examination is required to establish the truth of their statements”. Paragraph 3 of this provision refers to the possibility, in case of refusal, to carry out a compulsory examination. However, the process and conditions for ordering such compulsory examination is unclear. It is recommended **to reformulate Article 174, to specify that consent shall always be sought prior to carrying out an examination, and that, in case of refusal, the physical examination without consent shall be**

¹⁰⁵ See par 2 of the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by the UN General Assembly resolution 55/89 of 4 December 2000.

¹⁰⁶ i.e., when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim. Secondary victimization may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language, unintentionally insensitive comments made by all those who come into contact with victims, insensitive media reporting of cases. See also pars 3.3 and 12.2 of the Appendix to CoE Recommendation Rec(2006)8 and Chapter 5 of the 2009 Report on Non-Criminal Remedies for Crime Victims prepared by the Group of Specialists on Remedies for Crime Victims (CJ-S-VICT) nominated by the Committee of Ministers of the Council of Europe, under the aegis of the European Committee on Legal Co-operation (CDCJ), available at http://www.coe.int/t/dghl/standardsetting/victims/victims%20final_en%20with%20cover.pdf (hereinafter “2009 Report on Non-Criminal Remedies for Crime Victims”).

¹⁰⁷ See par 53 of CRC Committee General Comment No. 10 on Children’s rights in juvenile justice, CRC/C/GC/10, available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

- undertaken only upon the order of the examining judge.**¹⁰⁸ Exceptionally, the Draft Code could also allow physical examinations in cases of *flagrante delicto* or where there is a danger that evidence may be rapidly altered or destroyed, based on the decision of criminal investigation bodies. The latter should then be obliged to report on the physical examination to a pre-trial judge, within a short period of time such as 24 hours.¹⁰⁹
82. As regards child victims and witnesses, information related to a child's involvement in the justice process should be protected,¹¹⁰ e.g. **by maintaining confidentiality and restricting disclosure of information that could lead to the identification of a child victim/witness, anonymizing the child's personal data in documents and records, and protecting him/her from undue exposure to the public.**¹¹¹ It would be advisable to supplement the Draft Code accordingly.
83. Article 350 of the Draft Code provides that the examination of underage witnesses and victims may be held in the absence of the defendant, which is in line with international trends.¹¹² However, once the defendant is returned to the courtroom, he/she must be made acquainted with the testimony and may ask the victim/witness questions (Article 350 par 3). This may be equally intimidating and painful for the child; **alternatives may be considered to avoid direct visual contact between the accused/defendant and the child victim/witness, e.g. interviews via remote video-link.**
84. Moreover, given the sensitive nature of questioning victims of sexually related offense or domestic violence, **the intake interview or the questioning, and examination (Article 174) should also be carried out by a police officer, prosecutor or investigator of the same sex (wherever possible), unless the victim requires otherwise.**¹¹³ It is recommended to supplement Chapter 26 accordingly.
85. As regards confronting interrogated persons with contradicting statements (Article 203), such method could have a potentially traumatizing effect in certain cases, e.g. sexual violence and domestic violence, in particular if the victim is confronted with the perpetrator. Hence, **Article 203 could be amended to indicate that in cases of sexual or domestic violence, confrontations may only be decided by the examining judge if they are considered necessary for the purposes of the investigation – this would reduce the risk of secondary victimization.**

¹⁰⁸ See Rule 19 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("Bangkok Rules"), 22 July 2010, available at <http://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf>, which underline the need for searches to respect the individual's dignity and to be carried out by trained staff of the same gender. See also *op. cit.* footnote 47, par 153 (2014 ODIHR Opinion on Preventing and Combating Violence against Women and Domestic Violence in Montenegro); and par 22 of the 2013 OSCE/ODIHR Opinion on the Draft Law on Amendments and Additions to the Criminal Procedure Code of Serbia, available at http://www.legislationline.org/download/action/download/id/4337/file/224_CRIM_SRB%20CPC%204%20March%202013_en.pdf.

¹⁰⁹ *Op. cit.* footnote 14, par 81 (2014 ODIHR Opinion on Kyrgyz Anti-Domestic Violence Legislation).

¹¹⁰ *Op. cit.* footnote 83, pars 26-28 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime).

¹¹¹ *Op. cit.* footnote 14, par 69 (2014 ODIHR Opinion on Kyrgyz Anti-Domestic Violence Legislation).

¹¹² See e.g., EU Directive 2012/29/EU adopted on 25 October 2012, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en>.

¹¹³ See e.g., *op. cit.* footnote 13, Article 10 par 6 (Model Code of Criminal Procedure (2008)). See also *op. cit.* footnote 21, par 16 (1) (2011 UN Model Practical Measures on the Elimination of Violence against Women).

86. The above-mentioned measures would also be in line with recommendations made by the CEDAW Committee regarding the need to set up gender-sensitive procedures to deal with women who are victims of violence.¹¹⁴
87. Furthermore, it is also important to ensure that children are able to express their views in every decision that affects them, as stated in Article 12 of the UN CRC. This shall apply even in situations where a child is very young or in a particularly vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, is homeless etc.).¹¹⁵ **The Draft Code should include child-sensitive provisions specifying that the police, prosecutors and courts shall keep the child informed about the criminal process and seek his/her views regarding the way forward at all stages of the investigations, prosecution and court proceedings, as well as during post-trial procedures.** Moreover, child victims, and their parents or guardians and legal representatives, should be informed promptly, and in a child-sensitive manner about existing opportunities to obtain reparation from the offender or from the State through civil and other procedures.¹¹⁶ **The Draft Code should be supplemented to that effect and the criminal justice actors should be adequately and systematically trained on and sensitized about children's rights.**¹¹⁷

5. Pre-trial Measures of Restraints and Other Measures

5.1. Deprivation of Liberty (Chapter 12)

88. It is welcome that Article 13 of the Draft Code clearly states that no one may be detained beyond 48 hours without a court decision and that any unlawfully detained individual should be immediately released. This is overall in line with international standards and the requirement for a detained person to be brought promptly before a judicial authority (Article 9 par 3 of the ICCPR), although special rules apply in cases of juveniles (see par 63 *supra*).¹¹⁸
89. Furthermore, **it should be made clear that the detainee should be brought before a judge as soon as possible and that 48 hours is the absolute maximum period; this period of time should remain the exception, rather than the rule.** Article 101 par 6 of the Draft Code which states that a detainee should be delivered to court within 46 hours from the moment of detention should likewise state that this should happen as soon as possible, but no later than 46 hours after detention.
90. Article 100 mentions the circumstances under which a suspect may be deprived of his/her liberty, which are overall in line with similar legislation from other countries. Article 101 of the Draft Code further provides detailed requirements regarding the procedure for arresting a suspect and content of the detention record. While many of

¹¹⁴ See par 18 (b) of the Concluding Observations of the CEDAW Committee (15 March 2015) on the Kyrgyz Republic available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/KGZ/CO/4&Lang=En.

¹¹⁵ See par 54 of the General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf. See also pars 43-45 of the UN Committee on the Rights of the Child, General Comment No. 10 (2007) on Children's rights in juvenile justice available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

¹¹⁶ *Op. cit.* footnote 83, pars 20 and 35 (2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime); see also *op. cit.* footnote 12, Article 29 pars 1 and 2 (Model Law on Justice in Matters involving Child Victims and Witnesses of Crime (2009)).

¹¹⁷ *ibid.* (CRC Committee General Comment No. 14 (2013)).

¹¹⁸ See par 83 of the UN CRC Committee General Comment No.10 on "Children's rights in Juvenile Justice" (2007), CRC/C/GC/10; and *op. cit.* footnote 63, par 33 (UN HRC General Comment No. 35 on Article 9 of the ICCPR).

these are in line with international standards¹¹⁹, a number of key fair trial guarantees, some of which are listed under Article 49 of the Draft Code, are not reflected under this provision. For instance, while the suspect will be informed at the moment of detention about “what [he/she] is suspected of” as well as about the right not to testify against oneself and his/her right to an attorney, **this does not include his/her right to not testify against his/her close relatives or of the right to remain silent. This right is one aspect of the right not to incriminate oneself, and constitutes an essential safeguard for the defendant,**¹²⁰ **particularly at the time of arrest and before he/she had the opportunity to contact a lawyer. Hence, it is recommended to expressly mention it as one of the rights that a person deprived of his/her liberty shall be informed about.**¹²¹

91. Moreover, Article 9 par 2 of the ICCPR expressly requires that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”. It is recommended to prescribe in Article 101 that, in addition to being informed of the criminal charges (legal grounds), an arrested person shall also be informed of the reasons for the arrest (i.e., the factual circumstances) promptly after the arrest (for instance at the time of arrival at the place of investigation).
92. The reasons and grounds of arrest, as well as information about his/her rights should be given in a language that the arrested person understands.¹²² **While Article 49 refers to the right to use the services of an interpreter, Article 101 does not address this issue and should be supplemented in that respect.** For instance, in case the arrested person does not understand the language spoken, the arresting authority should immediately contact an interpreter and shall provide information on the reasons and charges justifying the arrest only upon the arrival of the interpreter.¹²³ Moreover, when children are arrested, notice of and reasons for their arrest should be provided directly to their parents, guardians, or legal representatives.¹²⁴ Similar safeguards should also apply for persons with disabilities.
93. Article 49 par 1 sub-par 5 states that a suspect shall have a defence attorney from the moment of his/her first interrogation and from the moment of detention if taken into custody and Article 107 provides that a defence attorney must be present during the interrogation of a suspect - which is in line with international standards.¹²⁵ However, **Article 101 does not expressly mention the right of a suspect to prompt access to an attorney of his/her choice with the possibility to communicate privately with the**

¹¹⁹ E.g., immediate registration of the detainee; proper recording of all information relating to actions during detention in the file of the detainee; separation of women and men, of minors, of persons suspected of having committed serious criminal offences from other detainees; the right to meet a relative, etc. See the Standard Minimum Rules for the Treatment of Prisoners (1957); the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); the Code of Conduct for Law Enforcement Officials (1978); and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982). See par 5 of the UNHRC General Comment No. 21 (1992).

¹²⁰ See Article 67 (1) (g) of the Rome Statute of the International Criminal Court, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

¹²¹ See e.g., par 54 in the case *Stojkovic v. France and Belgium*, ECtHR judgment of 27 October 2011 (Application no. 25303/08); and par 74 in the case of *Navone and others v. Monaco*, ECtHR judgment of 24 October 2013 (Application nos. 62880/11, 62892/11 and 62899/11).

¹²² *Op. cit.* footnote 63, pars 26-27 (UN HRC General Comment No. 35 on Article 9 of the ICCPR).

¹²³ *ibid.* par 27 (UN HRC General Comment No. 35 on Article 9 of the ICCPR).

¹²⁴ *ibid.* par 28 (UN HRC General Comment No. 35 on Article 9 of the ICCPR).

¹²⁵ *Op. cit.* footnote 8, par 34 (UN HRC General Comment No. 32) which states that the right to communicate with counsel in Article 14 of the ICCPR “requires that the accused is granted prompt access to counsel”.

attorney.¹²⁶ Additionally, according to international recommendations, access to legal assistance should be provided free of charge if the person does not have sufficient means to pay for such assistance.¹²⁷ Moreover, Article 101 does not provide sufficient guidance to ensure that the right of *prompt* access to a lawyer¹²⁸ from the moment of detention, is implemented in practice. In some countries, authorities are obliged by law to immediately notify the defence counsel in cases of arrest and to allow the suspect to receive a private and confidential visit from his/her counsel before the first interrogation (except in exceptional circumstances to be authorized by a judge).¹²⁹ Furthermore, statements obtained in violation of these rules may lead to an unfair conviction and hence their inadmissibility as evidence should be ensured (see also comments on the admissibility of evidence under par 111 *infra*).¹³⁰ It is recommended to supplement Article 101 (and other provisions of the Draft Code as appropriate) accordingly.

94. Article 106 of the Draft Code obliges the investigator to notify a member of the suspect's family or lawyer regarding a suspect's detention or to allow the suspect to make a free phone call. This is an important safeguard to prevent incommunicado detention and acts of tortures or other human rights violations.¹³¹ It is also positive that Article 106 envisions the notification of an embassy in case the detained person is a foreigner. **As regards refugees, asylum-seekers and stateless persons, it is considered good practice to allow them to contact the representative of a competent international organization or other entity, such as an available national refugee body, ombuds office, human rights commission or NGOs.**¹³² The drafters should consider supplementing Article 106 accordingly.
95. It is positive that the detention record under Article 101 par 2 of the Draft Code also contains information on the physical condition of the detainee; however, this provision does not mention whether this involves a medical examination. Article 49 par 1 sub-par 15 refers to the right "to get medical examination and assistance from a doctor after the suspect is detained"; however, this principle is not reflected under Article 101. **To reduce the risk of possible acts of torture or ill treatment during detention, it is recommended to require a mandatory medical examination by a doctor from the moment of detention, or at a minimum to provide the detainee with the right to ask for such an examination, under this provision.** This would also be in line with

¹²⁶ *Op. cit.* footnote 20, par 9 (2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic). See also *op. cit.* footnote 9, par 34 (UN HRC General Comment No. 32).

¹²⁷ See Principle 17 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 9 December 1988, available at <http://www.un.org/documents/ga/res/43/a43r173.htm>.

¹²⁸ *Op. cit.* footnote 9, par 34 (UN HRC General Comment No. 32) which states that the right to communicate with counsel in Article 14 of the ICCPR "requires that the accused is granted prompt access to counsel".

¹²⁹ See e.g., Article 46 of the Criminal Procedure Code of the Russian Federation; Articles 255(1) and 256 of the Albanian Criminal Procedure Code; available at www.legislationline.org.

¹³⁰ See e.g., the case of *Salduz v Turkey*, ECtHR judgment of 8 August 2002, Application 36391/02. See also the Association for the Prevention of Torture, "Legal Safeguards to Prevent Torture - The Right of Access to Lawyers for Persons Deprived of Liberty", March 2010, available at http://www.apt.ch/content/files_res/LegalBriefing2_Lawyers.pdf.

¹³¹ Human rights monitoring bodies generally consider that legislating for safeguards, such as prompt access to a lawyer, the right of a person to have the fact of his detention notified to a third party of his choice (relative, friend, consulate) and the right to request a medical examination, is one of the best ways for States to fulfil their obligation regarding such effective measures and to prevent torture and other breaches of fundamental human rights during detention. See par 11 of the UN HRC General Comment 20 of 10 March 1992; and par 13 of the UN Committee Against Torture General Comment 2 of 24 January 2008. See also the UN International Convention for the Protection of All Persons from Enforced Disappearance, which has not been signed or ratified by the Kyrgyz Republic but provides for such safeguards in article 17(2).

¹³² See e.g., *op. cit.* footnote 13, Article 172 par 3 sub-par (g) (Model Code of Criminal Procedure (2008)). See also *op. cit.* footnote 63, par 58 (UN HRC General Comment No. 35 on Article 9 of the ICCPR).and the Guideline 7 (vii) of the UNHCR Detention Guidelines (2012), available at <http://www.refworld.org/pdfid/503489533b8.pdf>.

recommendations made to the Kyrgyz Republic by international human rights bodies.¹³³

The drafters may consider specifying a strict timeline within which such medical examination should be carried out, as done in criminal procedure codes of other countries.¹³⁴

96. Additionally, the detention record should ideally mention the time of the medical examination, of the notification of family members or attorney or free phone call by the suspect, as well as of the meeting with the legal counsel and its duration. **The prosecutor, as the entity in charge of monitoring criminal proceedings under Article 35 par 1, should also receive the record immediately (and not within 24 hours as stated in Article 101 par 4) to ensure that he/she can adequately fulfil his/her monitoring capacity.**
97. Article 102 refers to the possibility to carry out personal search on a detainee. Given their potential encroachment on human rights and fundamental freedoms, personal searches shall be carried out in full respect of human dignity and the principles of proportionality and non-discrimination.¹³⁵ In particular, searches of individuals should in principle be undertaken by an officer of the same sex.¹³⁶ **While this is specified in Article 214 on bodily searches, it is recommended to make a reference to this provision in Article 102.**
98. Regarding the detention itself, while Article 105 states that the conditions of detention in temporary containment cells are determined by the “laws of the Kyrgyz Republic”, it would be preferable if it would at least lay down the broad principles governing such detention. Particularly, **it should expressly provide for the separation of minors (although the detention of minors should, as a rule, be avoided, see par 62 *supra*) from adults¹³⁷ and of women from men while in custody, as required by international standards.**¹³⁸
99. Finally, it is particularly welcome that Article 104 of the Draft Code (and Article 141, which has the same content) provides the possibility for persons subjected to illegal detention to seek damages as per the proceedings envisaged by Chapter [46]¹³⁹ of the Draft Code.

¹³³ *Op. cit.* footnote 20, par 9 (2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic).

¹³⁴ See e.g., Article 63-3 of the French Code of Criminal Procedure which states that the medical examination shall be carried out within three hours of the request made by the arrested person.

¹³⁵ See par 67 of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, ECtHR judgment of 28 May 1985 (Application nos. 9214/80 9473/81 9474/81) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416#{"itemid":\["001-57416"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416#{). See also par 8 of UN Human Rights Committee General Comment No. 16: Article 17 (Right to Privacy), 8 April 1988, available at <http://www.refworld.org/docid/453883f922.html>.

¹³⁶ See Rule 19 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“Bangkok Rules”), 22 July 2010, available at <http://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf>, which underline the need for searches to respect the individual’s dignity and to be carried out by trained staff of the same sex.

¹³⁷ Article 37 (c) of the UN CRC and Article 10 (b) of the ICCPR. See also UN HRC General Comment No. 13 on Article 10 of the ICCPR which states that “Under article 10, paragraph 3, juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned”; see also Rule 8 of the 1955 Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at <http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf>.

¹³⁸ *Op. cit.* footnote 22, par 62 (2008 OSCE Guidebook on Democratic Policing). See also *ibid.* Article 8 (a) and (d) (1955 Standard Minimum Rules for the Treatment of Prisoners) which states that “[m]en and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate”; Article 37 (c) of the UN CRC; Article 29 of the UN Guidelines for the Protection of Juveniles Deprived of their Liberty (1990). See e.g., *op. cit.* footnote 13, Article 172 (Model Code of Criminal Procedure (2008)).

¹³⁹ Due to inconsistencies in the numbering, it is understood that this refers to Chapter 65 (Special Part) which addresses the issue of compensation.

5.2. Measures of Restraint

100. It is welcome that Article 108 of the Draft Code provides for a range of measures of restraint for defendants or accused, including bail, personal guarantees (concerning behaviour and appearance of the defendant), and house arrests, as potential alternatives to pre-trial detention. However, it would be helpful if the Draft Code would also clearly convey that there should be a presumption in favour of liberty, and that limitations such as detentions should be the exception rather than the rule, as stated in Article 9 par 3 of the ICCPR. Thus, **Article 117 should specify that detention should only be ordered if the purposes outlined in Article 109 cannot be achieved by less restrictive means. In addition, to ensure the proportionality of the measure of restraint, Article 111 on rulings on measures of restraint should require prosecutors, investigators or judges to substantiate why possible less restrictive measures would not achieve one of the aims mentioned under Article 109.**
101. Article 109 par 1 provides for the adoption of measures of restraint where there is “sufficient bases to suppose that the accused or defendant” will abscond, impede the objective conduct of investigation or court examination, or continue his/her criminal activity. It would help to clarify the meaning of “impeding the objective conduct of an investigation and court examination” - presumably this refers to cases where there is a concrete danger that the accused would intimidate witnesses and/or destroy or alter evidence. Moreover, in principle, a person may only be detained in the context of criminal proceedings *on reasonable suspicion of having committed an offence*.¹⁴⁰ **Article 109 par 1 should thus also specify the need for reasonable suspicion/probable cause with regard to the commission of a crime, and not only with regard to possible evasion of justice or commission of additional crimes. It is also unclear whether such conditions would apply to all types of measures of restraint since some of the following articles detailing the respective measures of restraint (for instance Article 115 on bail) provide somewhat different requirements. This should be clarified.**
102. Article 115 par 3 seems to suggest that bail shall not be exercised in cases where a person is accused of committing an especially grave crime (i.e. punishable by imprisonment of more than 10 years). This would mean that house arrest or detention in custody will be applied in these cases and that no lesser measure of restraint would be considered. However, Article 109 provides a number of circumstances in which measures of restraint can be adopted (see par 100 *supra*) and Article 110 refers to a number of elements to be considered when determining such measures, such as the severity of the offence, the identity of the accused or defendant and other circumstances such as family status and occupation to assess the necessity of such measures. This type of assessment, bearing in mind all circumstances of the case, is not foreseen in Article 115 par 3; indeed, this provision seems to imply that the risk of absconding is presumed based only on the severity of the punishment that can be meted out for the given criminal offense. It bears recalling that in principle, the danger of absconding cannot be gauged solely on this basis and that, as with less serious offences, other relevant factors

¹⁴⁰ *Op. cit.* footnote 33, par 13 (2014 ODIHR and CoE Joint Opinion on the Criminal Procedure Code of Georgia).

- would also need to be taken into account.¹⁴¹ **It is therefore recommended to remove Article 115 par 3.**
103. Further, the provisions of Article 115 on bail are rather confusing. Article 115 par 6 states that the amount of bail shall be transferred “into the possession of the government” if the accused fails to appear, went into hiding, impeded the investigation or committed an intentional crime since; **it should be clarified whether in these cases, the accused would be detained as a consequence of such behaviour. Additionally, Article 115 par 10 refers to the commutation of the bail into custody, and should ideally specify under which circumstances such a situation may occur.**
104. **Chapter 13 on measures of restraint should also be better structured; each provision should specify which authority (the investigator, the prosecutor or the examining judge) is authorized to rule on a given measure,** in particular as regards the measures outlined under Articles 112 (recognizance not to leave), 114 (transfer of a minor into supervision) or 116 (house arrest). It is also noted that according to Article 115 par 2, bail may be decided by an investigator with the consent of a prosecutor or by permission of an examining judge. Given that measures of restraint are traditionally understood as an alternative to detention, which may be ordered by a judge only, **it is recommended to exclusively authorize the examining judge to grant bail.**¹⁴²
105. Article 117 appears to also address the possible detention under custody of minors or juveniles, since it refers to the legal representative of an “accused minor”. However, as mentioned in par 62 *supra*, **pre-trial detention of juveniles shall be avoided to the extent possible and limited to exceptional circumstances; all efforts shall be made to apply alternative measures.**¹⁴³ **In cases where preventive detention is nevertheless considered necessary, juvenile courts and investigative bodies should ensure that such cases are processed in an expeditious manner, to ensure that the period of detention remains brief.**¹⁴⁴ **Separate provisions on this issue should be provided under Chapter 61 on Juvenile Justice, with appropriate references included at the beginning of Chapter 13.**
106. Article 118 par 2 provides that the time period for detention under custody or house arrest should be two months, subject to extension by an examining judge for up to one year (by agreement with the General Prosecutor). This means that the overall maximum length of detention is one year, which is acceptable. The court procedure for deciding on the legality of detention is also in line with international standards, since the presence of the accused and defence counsel is guaranteed. However, **in the procedure for extension of detention under pars 4 and 5 of this provision, it is not clear whether the defence will have access to the information contained in the motion for extension submitted to the examining judge. Since in principle, it is acknowledged that information justifying the need for the continued detention should be provided to defence counsel**¹⁴⁵, **it is recommended to supplement Article 118 accordingly;** this will ensure that counsel will be in a position to adequately challenge

¹⁴¹ See e.g., *op. cit.* footnote 52, par 33 (2013 ODIHR Opinion on the Draft Criminal Procedure Code of Armenia). See also e.g., par 98 in the case of *Tomasi v. France*, ECtHR judgment of 27 August 1992 (Application no. 12850/87) and par 105 in the case of *Piruzyan v. Armenia*, ECtHR judgment of 26 June 2012 (Application no. 33376/07).

¹⁴² *Op. cit.* footnote 52, par 35 (2013 ODIHR Opinion on the Draft Criminal Procedure Code of Armenia).

¹⁴³ See par 17 of the UN Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990, available at <http://www.un.org/documents/ga/res/45/a45r113.htm>.

¹⁴⁴ *ibid.*

¹⁴⁵ See e.g., the case of *Garcia Alva v. Germany*, ECtHR judgment of 13 February 2001 (Application no. 23541/94), stating that although some information collected during the investigation might be withheld in order to ensure that justice will not be undermined, information considered essential for the assessment of the lawfulness of detention must be made available to the defendant’s counsel.

the prosecutor's motion for extension. Article 272 par 11 should be supplemented in a similar fashion. Detainees should also be afforded effective, "prompt and regular access to counsel" to allow them to challenge the lawfulness of their *continued* detention;¹⁴⁶ it is recommended to add this safeguard to Article 117 as well.

5.3. Other Pre-Trial Measures

107. Chapter 14 of the Draft Code lists other measures related to the conduct of criminal procedures which include, among others, the freezing of assets to ensure compensation of a victim following a civil lawsuit – which is a positive measure that helps protect victims' rights. At the same time, Chapter 14 does not foresee any comparable provisional measures (freezing or seizure) to ensure that property alleged to be liable for confiscation can actually be confiscated at a later date.
108. Moreover, the Organisation for Economic Co-operation and Development (hereinafter "OECD") recently concluded that current Kyrgyz criminal legislation does not provide for the procedural confiscation of instrumentalities (i.e., property, equipment or other objects used in or destined for use to commit a criminal offence) and proceeds (i.e., any property derived from or obtained, directly or indirectly, through the commission of an offence) of certain crimes. This should be seen separately from confiscation as a criminal sanction and could be imposed for any type of offence, irrespective of its gravity.¹⁴⁷ In that respect, it is important that the Kyrgyz legal framework **provides for non-conviction based asset forfeiture, which is particularly relevant in cases where criminal prosecution becomes impossible (for instance if the accused escapes, dies or is unknown) or is unsuccessful.**¹⁴⁸ **The drafters should discuss whether to incorporate such procedural measures into the Draft Code or into another piece of legislation.** In any case, the relationship between a non-conviction based asset forfeiture case and criminal proceedings, including a pending investigation, should be clearly defined.¹⁴⁹ The recommendations made in the latest OECD Istanbul Anti-Corruption Action Plan Third Monitoring Report on Kyrgyzstan, adopted on 24 March 2015 should be taken into account.
109. The OECD also noted certain problems concerning effective investigations into corruption-related crimes in the Kyrgyz Republic, for instance the issue of accessing bank information, as well as tax and customs-related information that is in the possession of the respective authorities, prior to the initiation of a criminal case.¹⁵⁰ Certain countries provide for effective measures in this respect, such as production orders obtained against third parties (i.e., a ruling by a prosecutor or court order whereby an institution or a bank holding material is ordered either to produce this material, or provide access to it (such as in the case of bank statements). Such orders are a powerful tool by which to obtain evidence relating to bank accounts and other assets

¹⁴⁶ See, par 13 of the UN CAT General Comment No. 2 on the implementation of Article 2 of UNCAT (2008), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=1&DocTypeID=11.

¹⁴⁷ See page 44 of the OECD Istanbul Anti-Corruption Action Plan Third Monitoring Report on Kyrgyzstan, adopted on 24 March 2015, available at <http://www.oecd.org/corruption/anti-bribery/Kyrgyzstan-Round-3-Monitoring-Report-ENG.pdf>.

¹⁴⁸ See page 29 of the International Bank for Reconstruction and Development (IBRD)/ The World Bank Publication "Stolen asset recovery: a good practices guide for non-conviction based asset forfeiture" (2009), available at http://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Non-conviction-based_Asset_Forfeiture_E.pdf.

¹⁴⁹ *ibid.* page 30 (IBRD-World Bank Publication on Stolen Asset Recovery (2009)).

¹⁵⁰ See page 50 the OECD Istanbul Anti-Corruption Action Plan Third Monitoring Report on Kyrgyzstan, adopted on 24 March 2015, available at <http://www.oecd.org/corruption/anti-bribery/Kyrgyzstan-Round-3-Monitoring-Report-ENG.pdf>.

from financial institutions and other entities.¹⁵¹ The drafters **may consider introducing provisions allowing law enforcement bodies investigating corruption-related crimes (and potentially other economic crimes) to effectively access and use data collected and held by banking institutions (as an exception to the Law on Banking Secrecy), tax and customs authorities.**

6. Rules of Evidence and Proofing

110. Section 3 of the Draft Code sets out the rules relating to evidence and proofing during criminal procedure. Article 87 par 3 states that evidence obtained in violation of the Draft Code is not admissible. However, it is not clear whether any violation of the Draft Code would render the evidence inadmissible. Certain provisions in the Special Part explicitly state that pieces of evidence collected in violation of the rules provided in the said provision shall be considered inadmissible; thus, it is possible that evidence will only be inadmissible in these cases.¹⁵² This point should be clarified.
111. Article 87 par 4 specifically refers to two cases where evidence is considered inadmissible, namely in case of an admission of guilt in the absence of a defence attorney, and in cases involving hearsay evidence which is not confirmed by other evidence. Article 89 par 7 states that confession of guilt by an accused or defendant may be used as the basis for incrimination along with other evidence obtained in relation to the criminal case. **Reference to the “presence of a defence attorney” during such confession should be added under Article 89 par 7 to ensure consistency with Article 87 par 4.** Moreover, it is unclear whether other evidence collected during the interrogation of a suspect/accused in the absence of a defence attorney would be considered admissible.¹⁵³ Also, Chapter 26 on Interrogations does not expressly specify that a defence attorney shall be present during the interrogation, unless the person being interrogated unequivocally waives such a right, whereas Articles 49 (on the rights of the suspect), 51 (on the rights of the accused) and 53 (on the rights of the defence attorney) refer to the right to an attorney, including from the time of first interrogation. It is noted that the denial of access to counsel during the investigation amounts to a violation of fair trial guarantees.¹⁵⁴ Hence, **it is important to supplement Chapter 26 in that respect, and to clarify the admissibility/inadmissibility of any evidence obtained during the interrogation of a suspect/accused in the absence of a defence attorney.**
112. Also, statements obtained through torture as well as other forms of cruel, inhuman or degrading treatment or punishment, shall not be admissible as evidence in any proceedings, except in cases where a person is accused of committing such acts of torture (see par 25 *supra*). While certain provisions of the Draft Code already refer to the prohibition of torture and other forms of ill-treatment, **Article 87 par 4 should also specify that any evidence obtained as a result of such acts is inadmissible. Such**

¹⁵¹ See e.g., *op. cit.* footnote 148, pages 51-55 (BIRD-World Bank Publication on Stolen Asset Recovery (2009)) and specifically the example of the UK on pages 128 and 136.

¹⁵² Article 171 par 6 on grounds for and general rules of the “view” procedure (entry and examination of premises without a court order); Article 213 par 9 on grounds and the order of procedure for search and seizure; Article 238 par 3 on special re-enactment; Article 241 par 3 on controlled purchase; Article 275 par 3 on judiciary procedure for validating lawfulness and reasonableness of investigative actions and special investigative actions.

¹⁵³ See page 24 of the Report of the 2014 OSCE/ODIHR Fifth Expert Forum on Criminal Justice for Central Asia (2014), available at <http://www.osce.org/odihr/147611?download=true>, referring to an exclusionary rule, similar to that in the Russian Code of Criminal Procedure that 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.

¹⁵⁴ See *op. cit.* footnote 11, pages 119-120 (OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012)).

exclusion shall apply not only to evidence obtained from a defendant who was subjected to torture or ill-treatment, but also to statements made by tortured or ill-treated third persons that may be used as evidence against an accused.¹⁵⁵

113. The drafters may also consider **extending the exclusionary rule to any evidence obtained or known to the investigation authorities because of a confession or other evidence obtained as the result of an act of torture or ill-treatment**¹⁵⁶ (see also comment under pars 117-118 *infra* on mechanisms to exclude such evidence from criminal proceedings). The same should apply to evidence derived from other inadmissible evidence. Article 87 should be supplemented accordingly.¹⁵⁷
114. International good practices generally require that in civil and criminal proceedings, particularly in cases of sexual and domestic violence, **evidence relating to the sexual history of the victim shall not be permitted, unless it is directly related to the case.**¹⁵⁸ Moreover, no adverse inference should be drawn from a delay between the alleged commission of the sexual offence and the reporting thereof.¹⁵⁹ In this way, victims of violence against women may be protected from secondary victimization during the judicial process, particularly in cases of sexual or domestic violence.¹⁶⁰ **Article 87 par 4 should be supplemented in that respect.**
115. Furthermore, **Article 87 par 4 should also expressly exclude evidence obtained from privileged communications, such as those between the accused and his/her defence counsel, a priest (and related secret confession), his/her doctor/psychologist or psychiatrist, as well as testimony of family or close relatives (unless they willingly chose to testify).**
116. It is noted that the Draft Code does not seem to expressly recognize the admissibility of electronic evidence before court – except by generally recognizing “scientific-technical means in the process of proof” (Article 98). Given the increased use of information and communication technologies (ICT) tools when committing crimes, Section 3 should be amended to include this type of evidence as well (see also additional comments on the collection of electronic evidence and digital forensics in pars 125-127 *infra*). Regarding the handling of electronic evidence, the quality of procedures applied to maintain the integrity of digital information, from the moment of its creation to the point when it is introduced in court is essential to ensure that it will be admissible as evidence in court.¹⁶¹ In many jurisdictions, the party seeking to introduce electronic evidence must usually demonstrate the integrity of the evidence; this applies to both the *physical device* housing the data (when received or seized), and to the *stored data* residing on the

¹⁵⁵ UN CAT, *P.E. v. France*, Communication No. 193/2001, 21 November 2002 para. 6.3, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2F29%2FD%2F193%2F2001&Lang=en; *op. cit.* footnote 9, par 6 (UN HRC General Comment No. 32).

¹⁵⁶ *Op. cit.* footnote 17, par 29 (2014 Report of the UN Special Rapporteur on torture and other ill-treatment).

¹⁵⁷ See e.g., *op. cit.* footnote 13, Article 230 par 6 (Model Code of Criminal Procedure (2008)).

¹⁵⁸ See *ibid.* Article 235 par 6 (Model Code of Criminal Procedure (2008)).

¹⁵⁹ See *op. cit.* footnote 21, par 15 (e) (2011 UN Model Practical Measures on the Elimination of Violence against Women). See also Section 3.9.7.2. of the 2012 UN Women Handbook for Legislation on Violence against Women, available at http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf; pages 100-101 of the UNODC Handbook on Effective Prosecution Responses to Violence against Women and girls (2014), available at http://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf; and *op. cit.* footnote 89, Article 54 (CoE Istanbul Convention).

¹⁶⁰ *ibid.*

¹⁶¹ See page 23 of the UNODC on Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime (2009), available at http://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf.

device.¹⁶² **The Draft Code should likewise address the identification, collection and analysis of electronic evidence. The provisions of the Draft Code should also clarify how to proceed with the electronic evidence gathered, particularly in cases where a crime could not be proved.** Moreover, particularly in the fight against cybercrime, electronic evidence received from outside the country also needs to be considered, although many countries apply the same principle to assess electronic and physical evidence.¹⁶³ While the general principles applicable to the evaluation of evidence listed in Article 97 of the Draft Code should be applied to the handling and analysis of electronic evidence as well, it would perhaps help **to specify explicitly that electronic evidence is also accepted as a form of evidence.**

117. Article 306 of the Special Part provides details on the mechanism whereby inadmissible evidence is excluded – which is a particularly welcome addition to the Draft Code. At the preliminary hearing, the court has to decide, among others, on the exclusion of evidence. It is positive that under Article 306 par 4, in case the defence alleges that evidence has been obtained in violation of the Code, the burden of proof shifts to the prosecutor, who will then need to refute the allegation; this constitutes an important safeguard of the rights of the accused/defendant. It is unclear, however, what the procedure is for excluding inadmissible evidence listed under Article 87 par 4, in particular whether this shifting of the burden of proof would also apply in cases where evidence was allegedly obtained through torture or other ill-treatment. **In fact, as soon as there are plausible reasons to believe an individual’s allegations concerning the commission of such acts against him or her, the burden of proof should likewise shift to the prosecution under Article 306; the courts must then inquire whether there is a real risk that the evidence was obtained by unlawful means and may not admit the evidence if this is found to be the case.**¹⁶⁴
118. In this context, it is also welcome that Article 402 expressly provides that parties shall not mention inadmissible evidence during trial and that the presiding judge shall not brief the jury about such evidence.
119. Article 306 par 7 states that during trial, the court may, at the request of the parties, reconsider admitting evidence that was excluded during a preliminary hearing. The purpose of this provision is not clear, since such reconsideration would by itself jeopardize the exclusionary rule. Instead, consideration may be given to providing the possibility to appeal a court decision whereby evidence was excluded.

¹⁶² This is generally done by having the party offering the evidence demonstrate that: (i) the digital information obtained from the device is a true and accurate representation of the original data contained on the device (authenticity); and (ii) that the device and data sought to be introduced as evidence is the same as that which was originally discovered and subsequently taken into custody (integrity). A crucial first step in many digital forensics investigations is therefore to create an undisturbed forensic image (or ‘bit-for-bit’ copy) of the storage device, containing as detailed a copy of the original device as can be obtained; by operating on the image rather than the original device, the data can be examined without disturbing the original, thus providing a safeguard against any tampering or falsification. See pages 158-160 of the 2013 UNODC Comprehensive Study on Cybercrime, available at http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf.

¹⁶³ See page 166 of the 2013 UNODC Comprehensive Study on Cybercrime, available at http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf.

¹⁶⁴ See *op. cit.* footnote 17, par pars 31, 33 and 66-67 (2014 Report of the UN Special Rapporteur on torture and other ill-treatment).

7. Investigative Measures

120. Article 35 of the Draft Code states that overall, the prosecutor is responsible for monitoring the observance of the law by the bodies implementing investigations and for the criminal prosecution of government functionaries. Given the recent recommendations by international human rights bodies regarding the Kyrgyz Republic,¹⁶⁵ it would be advisable to also stipulate in **Article 35 that prosecutors have an obligation to initiate investigations and order a forensic medical examination (as is stated for the examining judge) whenever the defence presents reasonable grounds to support allegations of acts of torture or ill-treatment or even *ex officio* where there are reasonable grounds to believe that torture or other ill-treatment was committed.** In this context, the failure to fulfil such obligations could in principle also fall under the definition of torture since international standards specify that state officials who fail to exercise due diligence to prevent, investigate, prosecute and punish persons whom they know or have reasonable grounds to believe will commit acts of torture or ill-treatment are classified as perpetrators of torture.¹⁶⁶ **Consideration may also be given to requiring the prosecutor to immediately inform the National Centre of the Kyrgyz Republic for the Prevention of Torture and/or the Ombuds Office, or other independent body of such allegations.**

7.1. Forensic Inquiry

121. Chapter 25 of the Draft Code (Special Part) provides detailed rules on ordering a forensic inquiry and the appointment of forensic experts. Under these, the defence may request a forensic inquiry (Article 180) and the appointment of a forensic expert (Article 181 par 6 sub-par 1). However, **it is important that the reports made by the forensic experts appointed by the defence are given the same evidentiary weight as reports submitted by the officially appointed forensic expert, in order to ensure respect for the principle of procedural equality.**¹⁶⁷
122. Exhumation may take place even if the deceased's relatives object to this (Article 176 par 1). At the same time, **Article 176 par 10 imposes the costs of exhumation and reburial on the relatives. This may entail an undue burden on the relatives in cases where the exhumation was ordered by the examining judge against their will. It would be advisable to provide for an exception in such cases.**
123. As to the provision on the rights of persons subjected to forensic inquiry, they are overall well formulated and in line with international good practices. The Draft Code also provides for adequate safeguards to protect the rights of persons committed to medical institutions for forensic examination.
124. It is welcome that under Article 181 par 12, in cases of allegations of torture or other ill-treatment, the examining judge shall order, within 24 hours, an official medical examination. This obliges the pre-trial judges to react to any such allegations made by a suspect/accused or by a defence lawyer and is in accordance with recommendations made to the Kyrgyz Republic by international human rights bodies.¹⁶⁸ However, **such duty may also go further, by obliging the examining judge to order such a medical**

¹⁶⁵ *ibid.* pars 6 and 13 (2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic).

¹⁶⁶ *Op. cit.* footnote 12, par 18 (General Comment No. 2 of the UNCAT Committee). See also UNCAT Committee *Dzemaji v. Yugoslavia*, CAT/C/29/D/161/2000 (2002) available at <http://www1.umn.edu/humanrts/cat/decisions/161-2000.html>.

¹⁶⁷ See *op. cit.* footnote 20, par 13 (c) (2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic); see also e.g., pars 33-35 in the case of *Bönisch v. Austria*, ECtHR judgment of 6 May 1985 (Application no. 8658/79).

¹⁶⁸ *ibid.* par 6 (2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic).

examination *ex officio*, in cases where there are reasonable grounds to believe that torture or other ill-treatment was committed. Moreover, in light of the most recent concluding observations from human rights treaty bodies on the Kyrgyz Republic,¹⁶⁹ judges during preliminary hearings (Chapter 46) and a court/judges at the trial stage (Chapter 48) should be obliged to request an investigation in such cases. Articles 307 and 352 of the Draft Code could provide such an obligation as well as a duty to immediately order a medical examination.

125. The Draft Code does not appear to foresee the creation of a body specialised in digital forensics,¹⁷⁰ which is indispensable for the successful investigation into cybercrime (and other crimes committed using ICT).¹⁷¹ Article 213 par 18 of (Special Part) stipulates that a specialist shall be involved during search and seizure, as well as the copying of electronic information media; the handling of electronic evidence and the organization of digital forensics are, however, not set out in the Draft Code. If not already provided in other legislation, **it would thus be advisable to establish a national digital forensic agency, employing specialized ICT experts; adequate human and financial resources should be allocated and capacity development initiatives implemented to ensure the proper and efficient functioning of such an entity.**
126. Article 232 of the Special Part provides the possibility to obtain information on user connections and Article 233 to retrieve information from computers, servers and other devices as special investigative measures. However, additional investigative measures may be needed to effectively fight cybercrimes and other criminal offences committed using ICTs. **The drafters may consider supplementing the Draft Code in that respect, for instance by including provisions on the expedited preservation of stored computer data, the real-time collection of traffic data, the interception of content data, and the identification of a subscriber, owner or user of a telecommunications system or point of access to a computer system.**¹⁷² In that case, adequate substantive and procedural safeguards shall be provided, in particular as regards the right to privacy.¹⁷³
127. Article 233 refers to “covert retrieval of information”, which may also impact the operation of information dissemination systems. In that respect, the UN Human Rights Committee has considered that any restriction on the operation of information dissemination systems, including that of internet service providers, is not legitimate unless it conforms with the test for restrictions on freedom of expression under international law.¹⁷⁴ Instead of these covert measures, the investigator could request the examining judge to order, subject to adequate guarantees and safeguards, internet

¹⁶⁹ *ibid.* par 13 (2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic); and *op. cit.* footnote 20, par 15 (2014 Concluding Observations of the Human Rights Committee on the Kyrgyz Republic).

¹⁷⁰ i.e. the branch of forensic science concerned with the recovery and investigation of material found in digital and computer systems, see page 159 (2013 UNODC Comprehensive Study on Cybercrime).

¹⁷¹ *ibid.* page 157 (2013 UNODC Comprehensive Study on Cybercrime).

¹⁷² See e.g., *op. cit.* footnote 13, Articles 128 to 130 (Model Code of Criminal Procedure (2008)). See also the provisions contained in the Council of Europe Cybercrime Convention: Title 2 (Expedited preservation of stored computer data); Article 19 (Search and seizure of stored computer data); Article 20 (Real-time collection of traffic data); and Article 21 (Interception of content data).

¹⁷³ Including specifying the necessary authorization procedure; limiting their scope; defining the procedure to be followed for examining, using and storing the data obtained; and detailing the circumstances in which data obtained may or must be erased, or the records destroyed. See par 76 of the case of *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, ECtHR judgment of 28 June 2007 (Application No 62540/00), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81323#{"itemid":\["001-81323"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81323#{). See also par 63 in the case of *Uzun v. Germany*, ECtHR judgment of 2 September 2010 (Application No 35623/05), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100293#{"itemid":\["001-100293"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100293#{).

¹⁷⁴ See par 43 of the UN Human Rights Committee, General Comment No. 34 on Freedom of Opinion and Expression, 12 September 2011, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

service providers to reveal the identity of a person who has posted contents online which constitute a crime or violate the rights and freedom of others (e.g., a child's right to respect for his/her private life and protection from physical and mental integrity).¹⁷⁵ Indeed, the anonymity and confidentiality of the Internet should not prevent States from protecting the rights of potential victims, especially where vulnerable persons are concerned.¹⁷⁶

7.2. Interrogation and Confrontation

128. The rules for interrogation and confrontation provided by Chapter 26 provide a number of safeguards to ensure that fair trial guarantees are respected. At the same time, they are not fully consistent with the provisions of the General Part regarding the respective rights of wrongdoers, suspects, accused or witnesses and victims. First, it is not clear from the respective provision (Article 197) that an interrogation has to be conducted in the presence of defence counsel, whereas such right is expressly provided in the General Part for the suspect (Article 49 par 1 sub-par 5) and for a witness (Article 61 par 6 sub-par 9). As mentioned in par 93 *supra*, Article 197 should be amended accordingly.
129. It is welcome that Article 196 sets out the maximum duration of interrogation and breaks. To ensure that this can be monitored in a proper manner, **the protocol of interrogation should indicate the times of beginning and end of the interrogation and of the breaks.**¹⁷⁷
130. Article 197 states that the person summoned for interrogation shall be made aware of his/her rights and duties under this Code – which is relatively vague. It would be advisable to include a reference to the related provisions listing such rights and duties under Chapters 5, 6 and 7, or, preferably, to specifically list the rights that would be applicable during interrogation since not all such rights are relevant (see par 17 *supra*). **Article 197 par 3 states that the person shall also “be warned of the criminal liability for refusing or avoiding to give statements”. This seems to be in flagrant violation of the right to remain silent, which constitutes an essential safeguard against self-incrimination.**¹⁷⁸ **It is recommended to delete such a provision, although the liability for deliberately giving false statements should remain.** Additionally, the right to refuse to answer questions under the conditions mentioned in par 10 of the same article should also be expressly stated. Article 197 par 10 should also be clarified, since it seems to suggest that the person being interrogated may decide whether to refuse to answer a question or not, whereas some cases of disclosure mentioned therein are prohibited by law. **Moreover, this provision should include an exhaustive list of cases when the person may refuse to answer questions where this is prohibited by law, instead of merely listing a few examples.** For instance, the right of journalists to protect the confidentiality of their sources is not mentioned, although widely recognised by international bodies.¹⁷⁹ The fact that a person was informed about these rights should be explicitly mentioned in the interrogation protocol (Article 198).

¹⁷⁵ See e.g., par 49 in the case of *K.U. v. Finland*, ECtHR judgment of 2 December 2008 (Application no. 2872/02).

¹⁷⁶ See page 24 of the 2011 Report by the Research Division of the ECHR on “Internet: case-law of the European Court of Human Rights”, available at http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf.

¹⁷⁷ See e.g., *op. cit.* footnote 13, Article 104 (Model Code of Criminal Procedure (2008)).

¹⁷⁸ See *op. cit.* footnote 11, pages 99-104 (OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012)).

¹⁷⁹ See par 40 of the 1986 Document on the OSCE Vienna Follow-Up Meeting which states that “[j]ournalists ... are free to seek access to and maintain contacts with, public and private sources of information and that their need for professional confidentiality is respected.”

131. It is positive that “leading questions” are expressly prohibited during interrogation (Article 197 par 5). **Article 197 par 6 lists other prohibited methods of interrogation, referring also to “other unlawful actions”; this term is unclear and should be clarified.** It is also recommended to prohibit deception and bribery in this context.
132. Article 199 par 2 lists cases when audio and video recording is mandatory, whereas par 3 states that the investigator shall decide whether to apply audio and video recording, in cases where such recording is not mandatory. These instances should be specified in the text.
133. Article 201 on the interrogation of witnesses and victims requires the interrogating officer to explain to them their procedural rights and duties; while these include the right to not incriminate oneself and to not testify against close relatives, this provision is not fully consistent with the rights listed under Articles 42 (for victims) and Article 61 par 6 (on witnesses). **In particular, the right to have a representative (Article 42 par 2 sub-par 6) or a defence attorney present during interrogation (Article 61 par 6 sub-par 9) are not mentioned, same as the right to use the services of a translator/interpreter (Article 42 par 2 sub-par 5; Article 61 par 6 sub-par 1) and to give testimony in one’s native language.** It is recommended to supplement Article 201 accordingly (see also par 17 *supra*). Moreover, it is considered good practice to **allow victims of sexual violence and domestic violence to choose, where possible, the gender of the police officer or other criminal justice official that will carry out the interrogation.**¹⁸⁰ **Article 201 should be supplemented accordingly.**
134. During the identification process, Article 211 par 5 states that victims or witnesses must be informed of their right not to incriminate themselves and their relatives. In addition, this provision explicitly mentions that a priest shall not incriminate those who made a confession. **The same should apply to others who are under similar obligations to not disclose confidential information, such as lawyers and medical doctors.**

7.3. Search and Seizure

135. In relation to search and seizure of private premises and persons, it is welcome that Chapter 29 provides a number of safeguards¹⁸¹ which are overall in compliance with international standards. However, little is said as to the content of the court order issued by the examining judge. International human rights standards generally require that search measures need to be necessary and proportional to a legitimate aim; this means among others, that there are temporal and geographical restrictions to the powers of search, and that the authorization to conduct such searches should be subject to effective judicial review and action for damages.¹⁸² This also means that **the court order must be duly substantiated, by including sufficient grounds to support the allegation that a criminal offence has been committed and that the subject of the search is on the premises. Furthermore, while Article 162 par 3 does not permit investigative actions at night time, “except in most pressing circumstances”, Article 213 does not seem to provide such time limitation, and should be supplemented accordingly.**

¹⁸⁰ *Op. cit.* footnote 14, par 67 (2014 ODIHR Opinion on Kyrgyz Anti-Domestic Violence Legislation). See also *op. cit.* footnote 13, Article 110 par 6 (Model Code of Criminal Procedure (2008)).

¹⁸¹ Such as the issuance of an order by the examining judge, the presence of attesting witnesses, the possibility for defence counsel to be present, and detailed provisions regarding the procedure and modalities for carrying out search measures.

¹⁸² See pars 80-83 of *Gillan and Quinton v. United Kingdom*, ECtHR judgment of 12 January 2010 (Application no. 4158/05), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96585#{"itemid":\["001-96585"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96585#{).

136. In addition to presenting the search warrant (Article 213 par 9) or the seizure warrant (Article 213 par 11) prior to initiating the measure, certain additional safeguards could be provided, in line with international good practices,¹⁸³ such as **requiring the investigators to identify themselves prior to commencing the search or seizure.**
137. As concerns searches on the premises of persons who are under the duty to maintain confidentiality of certain information (e.g. lawyers' offices, offices of medical doctors), special protective measures should be in place, including the presence of a judge or of other representatives of the profession, such as those of the Bar.¹⁸⁴ In cases involving journalists, the search of their homes and workplace to identify the journalists' sources constitutes an interference with their right to freedom of expression – and should also be subject to the same requirement, for instance the presence of a judge.¹⁸⁵

7.4. Special Investigative Measures, including Surveillance Measures

138. Chapter 32 of the Draft Code deals with Special Investigative Actions, which include the state acquisition and recording of information on individuals obtained through surveillance, interception of communication or undercover operations. Given the potential encroachment of such actions on human rights and fundamental freedoms, it is important that the state ensure the utmost transparency when resorting to measures of surveillance and covert investigation methods.¹⁸⁶ Moreover, such investigative action shall, in light of its intrusive character, the lack of public scrutiny and the ensuing risk of misuse of power, be subject to certain conditions and safeguards.¹⁸⁷
139. Chapter 32 already contains certain safeguards.¹⁸⁸ First, it states that only the examining judge, i.e. an independent body, can order such measures upon the request of the investigator (Article 220 par 2); the order also has to be substantiated (Article 221 par 6). It is noted, however, that subsequent provisions defining some of these measures and describing the related procedure, do not always mention the authority ordering such investigative action. As already mentioned, given the potential implications for human rights, **it should be clarified throughout that all special investigative measures require judicial authorization.**

¹⁸³ *Op. cit.* footnote 22, par 15 (2008 OSCE Guidebook on Democratic Policing).

¹⁸⁴ See e.g., Article 56-1 of the French Criminal Procedure Code which requires the presence of a judge and of the President of the Bar, with the latter having the power to oppose the seizure of any document, which should thereupon be sealed; the seizure shall be reviewed within five days by a court to decide whether the document seized may be considered as admissible evidence or whether it should be returned to the attorney (see the ECtHR judgment in *Niemietz v. Germany*).

¹⁸⁵ See e.g., Article 56-2 of the French Code of Criminal Procedure. See also e.g., pars 63-68 in the case of *Tillack v. Belgium*, ECtHR judgment of 27 November 2007 (Application no. 20477/05).

¹⁸⁶ See pars 91-92 of the 2013 Report of the UN Special Rapporteur on Freedom of Opinion and Expression available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf which notes how important it is for States to be transparent about the use and scope of communications surveillance techniques and powers, particularly in relation to internet service providers.

¹⁸⁷ See par 63 of *Uzun v. Germany*, ECtHR judgment of 2 September 2010 (Application No 35623/05), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100293#{"itemid":\["001-100293"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100293#{).

¹⁸⁸ Chapter 32 of the Draft Code also includes detailed provisions on the conditions and circumstances in which the authorities are empowered to resort to such measures (Article 220 pars 3 and 6), clearly defines their scope (Article 221) and states a limit on their duration (two months as per Article 223); identifies the authorities competent to permit and carry out such measures (Articles 220 par 8 and 222); specifies the procedure to be followed for examining, protecting and using the data obtained, as well as their destruction (Articles 225, 226 and 228) in overall compliance with international standards; see par 76 of *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, ECtHR judgment of 28 June 2007 (Application No 62540/00), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81323#{"itemid":\["001-81323"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81323#{). See also *op. cit.* footnote 187, par 63 (*Uzun v. Germany*, ECtHR judgment of 2 September 2010).

140. Article 220 of the Draft Code (Special Part) limits the scope of such measures to grave and particularly grave crimes (as defined by the Criminal Code) and also refers to offences planned and committed by an organized group or a criminal organization. It is unclear **whether these conditions are cumulative or not. For the sake of legal certainty, this should be clarified.**
141. Article 223 par 2 states that, in exceptional cases, the examining judge may extend the period for the special investigative measures from two months (the maximum duration stated under Article 223 par 1) to six months. However, **the procedure and conditions for requesting extension under Article 223 par 2 are not clear. It is recommended to stipulate that the request for extension shall fulfil the same requirements as the initial request (Article 222), i.e., be duly motivated and justified.** Article 223 should be supplemented accordingly.
142. It is noted that under Article 226, where evidence of offences other than those for which the order was obtained or evidence of certain facts to be proven in another criminal case is discovered, it may be used in the case under consideration, following the consent of the investigator and head of the investigative unit (Article 226 par 1). While there is no consistent approach of different jurisdictions on this matter,¹⁸⁹ it would nevertheless be preferable if such use would be decided by an independent body, such as the examining judge, given the invasive nature of the special investigative measures. Consequently, **Article 226 should state that the examining judge must be immediately or promptly (for instance within 24 hours) contacted to allow the collection and use of such evidence.**¹⁹⁰
143. It is welcome that Article 227 of the Draft Code requires that persons subjected to such special investigative measures shall be notified about them in writing, within six months from the day when such actions were discontinued. **It is unclear, however, whether such persons would have access to appropriate remedies, as Article 227, and Chapter 32 in general contain no reference to Chapter 65 on compensation for damages. It is recommended to supplement the Draft Code in that respect.**
144. Moreover, in the context of surveillance measures and other covert investigations, the rights of third parties which may have been indirectly affected by the said measures always need to be taken into account. **Such third persons should also have access to remedies if they become aware of such measures and may request the destruction of information gathered, provided that it is no longer of use in the context of the criminal proceedings.**
145. Article 221 par 11 further prohibits special investigative actions against lawyers except where there are reasons to believe that they may be planning or have committed a grave or particularly grave crime. At the same time, **it is unclear how information that would inadvertently involve such persons would be excluded from the criminal proceedings in all cases. For instance, in cases of audio recording, this could be done by stating that as soon as the investigator realizes that the communication involves one of these protected persons, the recording shall immediately cease and the modalities for disposing of the recorded information should be specified in the law; this could include for instance a judicial procedure whereby the protected**

¹⁸⁹ See e.g., regarding specifically electronic surveillance, *op. cit.* footnote 161, page 23 (UNODC Report on Current Practices in Electronic Surveillance).

¹⁹⁰ See, for instance, the example of Spain, *ibid.* page 23 (UNODC Report on Current Practices in Electronic Surveillance).

person could contest such recording.¹⁹¹ The drafters should consider introducing these additional safeguards. The same should apply regarding information retrieved from computers – such as letters or emails from a lawyer (Article 233) and audio and video monitoring of a location that would involve the lawyer (Article 234).

146. While Article 222 pars 3 and 6 of the Draft Code details the need to substantiate the motion to request a special investigative measure and the content of the magistrate's order, subsequent articles provide somewhat different requirements¹⁹² and it is unclear whether these requirements located in different articles are cumulative or alternative. Preferably, **the content of the motion and order should not be repeated in subsequent articles, to avoid inconsistency.**
147. Article 236 deals with covert examinations of non-residential premises or other property such as an office, workshop, building, facility, warehouse, transport vehicle, etc. However, Article 236 par 5 seems to suggest that a dwelling (serving for residential purpose) can also be subject to such measures in exceptional cases; hence, the title of Article 236 is misleading. Moreover, it is unclear whether such exceptional cases also include situations of urgency mentioned in Article 220 par 5, linked to the commission of an act of terrorism. **This should be clarified – if this is the case, it is recommended to make a cross-reference to the said provision in Article 236. If the covert examination of a dwelling can also be carried out in other cases, such cases should be specified and given the invasive nature of the measures, shall be accompanied by additional safeguards, such as oversight by a higher independent body.** Similarly, as regards specifically the covert collection of samples, including DNA samples and fingerprints (Article 237), which by definition are very invasive, additional protective safeguards should also be put in place.
148. It is generally acknowledged that, in certain circumstances, it may be necessary to resort to certain under-cover/covert inquiries or investigations to identify and investigate offences.¹⁹³ However, the use of such proactive policing methods should be subject to certain limitations. In particular, such methods should not instigate the commission of a crime; more specifically, state officials should not persuade or talk a person into committing a crime.¹⁹⁴ Article 239 of the Draft Code addresses measures “simulating criminal activity” but falls short of providing such limitations. It is recommended **to supplement Article 239 in that respect, in a similar fashion as done under Article 241 par 3 of the Draft Code which prohibits “provocation”.**
149. It must be noted that in certain jurisdictions, it is a criminal offence to either intercept communications, or conduct covert surveillance without a warrant - subject to a number of exceptions, including for example where the officer is acting on good faith that the

¹⁹¹ See e.g., pars 51-58 in the case of *Preteanu v. Romania*, ECtHR judgment of 3 February 2015 (Application no. 30181/05); see also pars 71-74 in the case of *Kopp v. Switzerland*, ECtHR Judgment of 25 March 1998 (Application no. 23224/94).

¹⁹² For instance, the content of the motion under Article 222 par 3 and the one under Article 230 par 3 (regarding the examination and/or seizure of postal and telegraphic communications); the content of the magistrate's order granting the special investigative measure under Article 222 par 6 does not seem fully consistent with Article 231 par 2 on Voice Tapping.

¹⁹³ See e.g., the case of *Ramanauskas v. Lithuania*, ECtHR [GC] judgment of 5 February 2008 (Application no. 74420/01), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84935#{"itemid":\["001-84935"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84935#{).

¹⁹⁴ See e.g., pars 34-39 in the case *Teixeira de Castro v. Portugal*, ECtHR Judgment of 9 June 1998 (Application no. 25829/94). See also par 73 of case *Ramanauskas v. Lithuania*, ECtHR [GC] judgment of 5 February 2008 (Application no. 74420/01), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84935#{"itemid":\["001-84935"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84935#{).

surveillance has been authorized.¹⁹⁵ To ensure compliance with Chapter 32 of the Draft Code, the drafters may consider introducing similar provisions to the Criminal Code.

8. Trial Proceedings

150. It is welcome that Articles 160 and 304 (Special Part) set strict deadlines respectively for the completion of the pre-trial procedure and for starting a trial, which may contribute to guaranteeing suspects', accused', defendants' rights to a speedy trial and also the right of victims to obtain redress through procedures that are, among others, expeditious.¹⁹⁶
151. According to Article 298 par 4, judges have the power to instruct the probation authority to produce a pre-trial report. **It is not clear whether such a pre-trial report is needed in all criminal cases; it is recommended to specify in which cases the judge will order this measure.**
152. At the preliminary hearing, the court may, in certain cases, decide to refer the case back to the prosecutor (Article 308). However, the consequences of the referral remain unclear, particularly when "there have been violations of the criminal or criminal procedure laws barring the trial and legal sentencing" (Article 308 par 1 sub-par 7). Since certain violations of the criminal procedure laws trigger the inadmissibility of evidence, there may be cases where all the collected evidence is considered inadmissible, and hence the judge should decide to end the criminal case instead of referring the case back to the prosecutor. The same questions arise in cases of substantial violations of the rights and legitimate interests of the defendant and victim (Article 308 par sub-par 8). **When cases are referred back, it is also unclear whether this means that the prosecutor could remedy such violations, which may jeopardize the principle of equality of arms, given that in this case, the remedy would replace the inadmissibility, and possible appeal against certain actions. The prosecutor would then be in a more advantageous position than the defence. Moreover, in order to comply with the requirement of a speedy trial, some issues could perhaps be resolved by the court without referring the case back to the prosecutor. The court may for instance directly decide to join criminal actions or inform the defendant of his/her right to request trial by jury. Furthermore, it is recommended to specify in Article 308 that such a decision should be reasoned and provide appropriate guidance as to how the established deficiencies may be remedied.**
153. The Draft Code gives broad powers to the appellate court, which may review both factual and legal issues, as well as examine new evidence; it also has the power to re-assess the evidence examined by the court of first instance. When the appellate court refers the case back to a court of first instance for re-trial (Article 444 par 4 and Article 447 par 1), **it is recommended to specify that the court of first instance that the case is referred to should have a different composition from the court of first instance that gave the initial judgment**, to avoid any reasonable doubts about its impartiality. Article 31 (or Articles 444 and 447) should be supplemented accordingly.
154. Article 421 provides for the possibility of overturning a non-guilty verdict of a jury based on the grounds listed under Article 445 par 2 of the Draft Code, i.e., where "the

¹⁹⁵ *Op. cit.* footnote 161, page 25 (UNODC Report on Current Practices in Electronic Surveillance).

¹⁹⁶ *Op. cit.* footnote 10, par 5 (1985 UN Declaration of Basic Principles of Justice for Victims of Crime).

sentence [was] entered by an unlawful composition of the court or a verdict reached by an unlawful composition of the jury”. **It is unclear whether this refers to a violation of Article 31 on the composition of the court or Article 393 on the selection of the jury, or whether it refers to issues relating to their impartiality, for instance cases of corruption. This should be clarified to avoid possible arbitrary application.**

155. As to the section on the execution of judgments, it is welcome that Article 461 relieves a convicted person from punishment or reduces his/her sentence should a subsequent law decriminalize a certain conduct or prescribe a more lenient punishment than that envisaged under the law in force at the time of sentencing.

9. Plea-bargaining and Conciliation

156. Article 280 par 1 of the Draft Code states that the defendant may file a motion for sentencing without trial (plea bargaining). It is welcome that this option only applies to “less grave” and “grave offences” with a maximum prison sentence of 10 years (Article 12 of the Criminal Code). This is in line with the practice adopted in other countries.¹⁹⁷
157. At the same time, it is noted that under the Kyrgyz Criminal Code, acts of torture (Article 305-1) and compulsion to give evidence (Article 325) are punishable by prison terms of less than ten years and hence could potentially fall within the scope of plea bargaining agreements. **To ensure that an official will always be tried for acts that may amount to torture or ill-treatment, plea agreements should be prohibited by law in such cases.**¹⁹⁸
158. Overall, the Draft Code seems to offer sufficient safeguards to ensure that the rights of the victim are duly considered in cases of plea-bargaining and conciliation (whereby the victim and the suspect or defendant agree to terminate criminal proceedings), which is welcome. For instance, in case a victim objects, the judge shall rule to terminate the court hearing on plea-bargaining and hold the trial in accordance with the general procedure (Article 281 par 4). This means that the victim’s objection can always prevent any plea bargaining agreement. While Article 281 par 1 mentions the mandatory participation of the defendant and his/her attorney at the hearings, **relevant provisions of Chapter 41 should ideally be amended to also ensure that the victim may be present or is, at a minimum, informed about the public hearing.**¹⁹⁹ In domestic violence cases, however, the victim may not actually be willing to object to plea-bargaining or to conciliation, for fear of reprisal or due to intimidation by the accused/defendant.²⁰⁰ To also cover such cases, lawmakers and stakeholders should discuss whether to expressly exclude cases of domestic violence from the procedure of plea-bargaining/conciliation.²⁰¹
159. Articles 280 par 3 and 281 par 3 seem to indicate that the judge checks only the voluntariness of the plea. He/she may thus not assess the evidence collected in the course of the investigation and shall examine only the information submitted with

¹⁹⁷ For example, in certain countries plea-bargaining is only possible for offences punishable by prison sentences of up to 5 years (Italy, France), 6 years (Spain), 10 years (Russian Federation, Montenegro).

¹⁹⁸ See e.g., *op. cit.* footnote 33, par 24 (2014 ODIHR and CoE Joint Opinion on the Criminal Procedure Code of Georgia). See also par 60 of the 2005 Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, on Mission to Georgia, 23 September 2005, available at <http://www.apt.ch/content/files/npm/eca/Georgia7.pdf>.

¹⁹⁹ See e.g., Article 303 par 5 of the Criminal Procedure Code of Montenegro.

²⁰⁰ *Op. cit.* footnote 20, par 11 (2014 Concluding Observations of the Human Rights Committee on the Kyrgyz Republic).

²⁰¹ See e.g., *op. cit.* footnote 47, par 133 (2014 ODIHR Opinion on Preventing and Combating Violence against Women and Domestic Violence in Montenegro).

regard to the character of the defendant, and mitigating or aggravating circumstances. At the same time, Article 281 par 5 provides that the judge should examine the reasonableness of the charges and inquire whether the confession of the defendant is supported by evidence collected during the investigation.

160. Generally, the main purpose of plea-bargaining is to speed up criminal proceedings by avoiding lengthy trials; hence, there should be no comprehensive examination and assessment of evidence. However, a minimum review/control by a judge remains important to ensure that the prosecution/investigation is not unduly imposing a plea-bargaining agreement on the defendant. Bearing this in mind, **it is recommended to reformulate Article 281 par 3 so that it is compliant with Article 281 par 5.** The drafters may also consider additional safeguards to protect the rights of the accused/defendants. These could include obliging judges to verify that the accused has been provided with adequate legal counsel throughout, and is informed about his/her rights (including the privilege against self-incrimination, the right to remain silent, and the presumption of innocence), and requiring the prosecution to disclose exculpatory evidence known to them during the plea bargaining process.²⁰²
161. Article 539 speaks of a “summary court procedure” that shall be conducted in cases of misconduct; in this case, the rights of the participants seem to be guaranteed. A wrongdoer may agree to be sentenced without trial where he/she does not object to the evidence and admits his/her misconduct. However, it is not clear what would happen in cases where a victim objects to sentencing without trial. This should be clarified; ideally, Article 539 could be amended to include a provision similar to Article 281 par 4.

10. Other Issues

10.1. Data Collection

162. The Draft Code provides for the registration of all crimes and misconduct in the Uniform Register of Crimes and Acts of Misconduct and **Article 154** of the Special Part lists the information that should be mentioned therein. As this would provide useful information on criminal justice matters, it is recommended **to include additional information, in line with good practices.**²⁰³ **Generally, data should, at a minimum, be disaggregated by sex (of the victim and of the perpetrator), age, type of criminal offences and should indicate the relationship between the perpetrator and the victim.** This will also help address one of the recommendations recently made by the UN Committee against Torture with regard to Kyrgyz legislation.²⁰⁴

10.2. International Co-operation

163. Article 549 of the Draft Code deals with cases where another State requests the extradition of a foreign national accused of a crime or convicted in a foreign state.

²⁰² See e.g., Article 67 (2) of the Rome Statute of the International Criminal Court. See also US caselaw e.g., *Brady v. Maryland* 373 US 83 (1963).

²⁰³ See Section 2.1. of the UNODC Criminal Justice Assessment Toolkit: Gender in the Criminal Justice System Assessment Tool (2010), available at <http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/E-book.pdf>. See e.g., Bastick, Megan, *Integrating Gender into Oversight of the Security Sector by Ombuds Institutions & National Human Rights Institutions* (Geneva: DCAF, OSCE, OSCE/ODIHR, 2014), available at <http://www.osce.org/odihr/118327?download=true>. *ibid.* Recommendations on pages 21-23 (2008 CoE Study on Administrative data collection on domestic violence).

²⁰⁴ *Op. cit.* footnote 20, par 25 (2013 Concluding Observations of the UNCAT Committee on the Kyrgyz Republic).

While Article 549 par 2 sets out the criteria and limitations to the power of the Prosecutor General to extradite a person, it does not mention circumstances where such extradition would violate international human rights standards. Article 3 par 1 of the UNCAT expressly **prohibits the extradition of a person to another State if there are substantial grounds to believe that he/she would be in danger of being subjected to torture (principle of non-refoulement)**. Such limitation should also be included under Article 549. Moreover, the risk of denial of the right to a fair trial should also be included as one of the grounds to refuse extradition.²⁰⁵ Finally, the possibility of appealing an extradition decision in these cases is also of crucial importance. **Article 549 of the Draft Code envisages the general right to appeal but should also stipulate that appeals and respective court decisions have an immediate suspensive effect** – which is crucial in the context of *non-refoulement*.

10.3. Criminal Proceedings against Persons Benefitting from Certain Immunities

164. Chapter 63 contains special provisions regarding criminal proceedings against a member of the Kyrgyz Parliament, a judge, a former President of the Kyrgyz Republic and a registered candidate for presidential or parliamentary elections.
165. Regarding criminal procedures involving judges, the procedural safeguards regarding prosecution (Article 519 par 2) and arrest (Article 520 par 2) generally respect their functional immunity. Indeed, judges may only be prosecuted upon the consent of the Judicial Council and not for acts committed by the judge while performing his/her judicial powers, and can only be apprehended in cases of *flagrante delicto*. In that respect, the OSCE/ODIHR would like to refer back to the recommendations made in the 2014 OSCE/ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic, regarding the need to reconsider the scope of the immunity of judges and procedural safeguards for certain intentional crimes (such as bribery, corruption or traffic of influence) even if committed during the performance of their duties as judges.²⁰⁶ In any case, consistency with the Constitutional Law “On the Status of Judges of the Kyrgyz Republic” should be ensured.
166. Regarding criminal procedures against members of the parliament, due consideration should be given to ongoing discussions on amending the Constitution of the Kyrgyz Republic to introduce new rules on lifting parliamentary immunities.²⁰⁷ Currently, Article 72 par 1 of the Constitution provides that **a deputy of the Jogorku Kenesh may not be prosecuted for opinions expressed in the course of his/her activities as a deputy, or for the outcome of voting in the Jogorku Kenesh. Article 519 par 1 of the Draft Code, should also reflect, or contain references to this limitation to prosecution of parliamentarians.** Other aspects of Article 72 par 1 of the Constitution specifying that criminal proceedings may only be initiated following the consent of the majority of the total number of deputies of the Jogorku Kenesh, except in cases involving grave offences (allegedly those subject to a sentence of over 10 years of imprisonment or death penalty as per Article 13 of the Criminal Code), are on the other hand already reflected in Article 519.

²⁰⁵ See par 6.15 of the UN HRC Communication in the case of A.R.J. v. Australia, 11 August 1997.

²⁰⁶ See pars 40-43 and 59-62 of the OSCE/ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic (2014), available at <http://www.legislationline.org/documents/id/19099> (in English) and <http://www.legislationline.org/ru/documents/id/19121> (in Russian).

²⁰⁷ See <http://www.venice.coe.int/webforms/documents/?country=45&year=all>.

167. Under Article 520 par 1, a member of the Kyrgyz Parliament may not be apprehended except in cases involving a particularly grave crime. This means that in all other cases, including those of *flagrante delicto*, or minor or administrative offences, parliamentary immunity will prevent any criminal procedural acts from being carried out. To prevent the abuse of immunity by individual deputies, consideration may be given to introducing specific rules regarding immunities of the deputies of the *Jogorku Kenesh*, such as those mentioned in the 2014 Venice Commission Report on the Scope and Lifting of Parliamentary Immunities.²⁰⁸ Accordingly, **Chapter 23 could include a clear and impartial procedure for lifting immunity that would specify that immunity does not apply to cases where a deputy is caught in *flagrante delicto*, or for minor or administrative offences (e.g. traffic violations).**²⁰⁹ Provisions relating to the suspension of criminal prosecution pending the end of the mandate of the deputy could also be added under Chapter 63 of the Draft Code.

10.4. Compensation and Remedies

168. Chapter 20 of the Draft Code permits victims to initiate civil lawsuits as part of the criminal procedure, which is positive, since this prevents secondary victimization, which often takes place when victims are required to go through several judicial processes (criminal and civil). **To ensure that victims have proper access to compensation, they should be informed as early as possible about the possibility to seek compensation and about the requisite procedure, and should also, to the extent possible, be provided with free legal assistance.**²¹⁰ Furthermore, to ensure that the absence of a criminal conviction of the defendant does not preclude victims from pursuing civil proceedings to seek remedies (on the basis of a less strict burden of proof), it is recommended **to expressly state under Chapter 20 that exoneration from criminal liability should not preclude the establishment of civil liability to pay compensation arising out of the same set of facts.**²¹¹
169. Chapter 65 of the Draft Code also foresees compensation for damages caused through unlawful action by the court or other authorities conducting criminal proceedings, “irrespective of the culpability” of the authorities acting in the criminal process; presumably, this means that the wilful intent to commit such unlawful action does not need to be proven. This is very progressive and provides every individual with the right to a remedy against state authorities for any violation of his/her fair trial rights and right to liberty and security, which is inherent to the exercise of such rights.
170. Finally, according to Article 329 par 2, the court should inform the superior prosecutor or the Ministry of Justice if the prosecutor is removed from the courtroom for misconduct. Since the defence counsel may also be removed in the same manner, the drafters may consider specifying that in such cases, the Bar should be informed.

11. Final Comments

171. Various recommendations at the international and regional levels call for a criminal justice system and its actors to be representative of the community as a whole, including

²⁰⁸ Available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

²⁰⁹ See par 187 of the 2014 Venice Commission Report on the Scope and Lifting of Parliamentary Immunities.

²¹⁰ See e.g., *op. cit.* footnote 92, pars 51-54 (2014 ODIHR Opinion on Compensation of Damages for Victims of Criminal Acts in Montenegro).

²¹¹ See e.g., pars 38-42 in the case *Ringvold v. Norway*, ECtHR judgment of 11 February 2003 (Application no. 34964/97).

in terms of gender balance and diversity,²¹² to enhance the confidence of the entire population in the system. Good practices have also shown that specialized services provided by the police, prosecution service and courts, and additional and continuous training tend to increase reporting, trust and engagement of crime victims with the criminal justice system and the overall efficiency and effectiveness of such system.²¹³ Consequently, the reform of criminal procedure legislation should be accompanied by other reforms that address the composition and organization of the criminal justice system as a whole. Particularly, **lawmakers and stakeholders should discuss establishing more specialized investigative units, prosecution services and courts, provided that sufficient funds are available. This would be in line with a recent recommendation made by the CRC Committee, which suggested establishing a system of juvenile courts with specialized staff in the Kyrgyz Republic.**²¹⁴

172. Given the scale of the changes to the rules of criminal procedure envisaged in the Draft Code, sufficient time should be provided before the Code enters into force to ensure its proper application, including via adequate training on new provisions. Further, it is not clear whether a full financial impact assessment has been carried out to analyze the funding required to ensure the implementation of all aspects of the Draft Code, in terms of financial and human costs, as well as training; it is recommended that policy-makers and other stakeholders to ensure that such a comprehensive impact assessment.
173. Finally, it is noted positively that overall, the Draft Code uses gender neutral drafting. However, on some occurrences, certain individual provisions still use only the male gender. General international practice requires legislation to be drafted in a gender neutral manner, by referring to both genders equally. Unless a result of inaccurate translation, it is thus recommended **to review the respective provisions and replace the words “he” (он) by “he/she” (он или она) and as appropriate “his” (его) by “his/her” (его или её) or another gender neutral formulation.**

[END OF TEXT]

²¹² See Strategic Objective G.1. “Take measures to ensure women's equal access to and full participation in power structures and decision-making” of the UN Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>. See also par 81 on the “Adequate Representation of Women in the Judiciary” of the 2011 Annual Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/15/PDF/G1113015.pdf?OpenElement>; par 24 of the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), available at <http://www.osce.org/odihr/KyivRec?download=true>, which state that “[g]enerally, it would be desirable that the composition of the judiciary reflects the composition of the population as a whole”; see *op. cit.* footnote 22, par 124 (2008 OSCE Guidebook on Democratic Policing.); and Preambular Paragraph, 8(a) of the UN Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in its resolution 34/169 of 17 December 1979, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>. See also pars 1-2 of the OSCE Ministerial Council Decision MC DEC/7/09 on Women’s Participation in Political and Public Life, 2 December 2009; and Document of the Seventeenth OSCE Ministerial Council, Athens, 1-2 December 2009, available at <http://www.osce.org/mc/40710?download=true>.

²¹³ *Op. cit.* footnote 14, par 50 (2014 ODIHR Opinion on Kyrgyz Anti-Domestic Violence Legislation). See also, for instance, in cases of domestic violence (page 10 of the draft of the European Union Handbook of Best Police Practices on Overcoming Attrition in Domestic Violence Cases, December 2012, available at <http://www.eucpn.org/download/?file=EUHndbookAttritionDomViol.pdf&type=3>). Regarding juvenile justice, see also *op. cit.* footnote 38, Section 12 on “Specialization within the Police” (1985 UN Beijing Rules on Juvenile Justice).

²¹⁴ See *op. cit.* footnote 71, par 67 (a) (2014 Concluding Observations of the CRC Committee on the Kyrgyz Republic).