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Human Rights and the Professional Responsibility of Judges and Prosecutors in the Work of CCJE and CCPE

Observations to the CCJE-CCPE Joint Report on “Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe”

1. Purpose

These observations aim to raise awareness on the role that judges and prosecutors play in violating human rights in Council of Europe member states. This topic seems to receive little to no attention in reports by the Bureau of the Consultative Council of European Judges (CCJE) and the Bureau of the Consultative Council of European Prosecutors (CCPE).

Judges and prosecutors are the guardians of the right to a fair trial; yet we observe that in a number of Council of Europe member states they pursue and allow politically motivated investigations, charges and convictions. Neglect of the duty to refuse evidence that can be reasonably believed to have been obtained through torture or ill-treatment, and of the duty to investigate and prosecute these human rights abuses, can also be observed.

This report pays particular attention to how human rights abuses, in which prosecutors and judges are involved, affect human rights defenders. It is conceived as a complementary contribution to the 2016 report “Challenges for judicial independence and impartiality in the member states of the Council of Europe” by the CCJE and CCPE¹, which fails to deal with this aspect. It concludes with a number of suggestions for work by both Councils in this field.

2. Lack of attention to the role of judges and prosecutors in human rights abuses in member states

2.1. Introduction

In the past decade, judicial authorities, judges as well as public prosecutors, have been increasingly involved in silencing human rights defenders across the globe. The UN Special Rapporteur on Human Rights Defenders in 2013 reported that she had seen “the space for civil society and defenders visibly shrink in certain regions of the world”, accompanied by “the consolidation of more sophisticated forms of silencing of their voices and impeding their work, including the application of legal and administrative provisions or the misuse of the judicial system to criminalise and stigmatise their activities.”²

¹ Information Documents SG/Inf(2016)3rev (24 March 2016), accessed 26 March 2017 at [http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\(2016\)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp)

² Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, presented at the Human Rights Council Twenty-fifth session, 23 December 2013, A/HRC/25/55. See also: UN Human Rights Council, Protecting human rights defenders: resolution, adopted by the Human Rights Council, 12 April 2013, A/HRC/RES/22/6 and UN Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 21 March 2016, A/HRC/31/L.28.

This trend can unfortunately also be observed in a number of Council of Europe member states. These observations do not claim to present a full overview of the phenomenon, but several case studies with a focus on procedures aimed at human rights defenders, show that in some countries judiciary and prosecution service are enormously responsive to government policies. Judges and public prosecutors ignore human rights standards and use their powers for politically-motivated convictions and charges against regime critics³.

In particular, human rights defenders (such as lawyers, civil society organisations and journalists who voice support for the poor and vulnerable of society) and the organisations, through which they work, have come under increasing pressure from political authorities and victims of judicial harassment⁴. Measures employed by governments against them are many and include, for example, death threats, torture, defamation and restrictions on access to (foreign) funding and their freedom of expression. Judges and public prosecutors are also engaged to discredit human rights defenders. In *Jafarov v Azerbaijan*, for example, the European Court of Human Rights affirmed that charges brought against Mr. Rasul Jafarov, a prominent human rights defender of Azerbaijan, served the sole purpose of punishing him for his human rights activities⁵. Specifically, the Court criticized the Azerbaijan courts for their failure to base their actions against Mr. Jafarov on sufficient evidence.

The European Court of Human Rights has emphasised that “in a democratic society both the courts and the investigation authorities must remain free from political pressure”⁶. But when governments abandon the rule of law, including the separation of powers, they can exert significant power over judicial authorities. In this context, the political environment, in which judicial authorities operate, and certain structural arrangements introduced by the executive branch to influence the independence of courts and public prosecutors play a vital part in the politicisation of judicial systems.

³ See for example *H.M. v Turkey* App. no 34494/97 (ECHR, 8 November 2006); *Alekseyev v. The Russian Federation* App nos 4916/07, 25924/08 and 14599/09 (ECHR, 21 October 2010); *Dilipak and Karakaya v Turkey* App nos 7942/05 and 24838/05 (ECHR, 4 March 2014); *Mammadov v Azerbaijan* App 15172/13 (ECHR, 22 May 2014); *Şiray v. Turkey* App no 29724/08 (ECHR, 11 May 2014); *Svinarenko and Slyadnev v The Russian Federation* App no 32541/08 and 43441/08 (ECHR, 17 July 2014); *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECHR, 17 March 2016); *Karelin v Russia* App no 926/08 (ECHR, 20 September 2016); *Kasparov v The Russian Federation* App no 53659/07 (ECHR, 11 October 2016); *Rozhkov v The Russian Federation* App no 38898/04 (ECHR, 31 January 2017); *Vakhitov v The Russian Federation* App nos 18232/11, 42945/11, and 31596/14 (ECHR, 31 January 2017); *Vorontsov and Others v The Russian Federation* App nos 59655/14, 5771/15, and 7238/15 (ECHR, 31 January 2017); *Navalnyy v The Russian Federation* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECHR, 2 February 2017); European Parliament, Resolution on the situation of human rights in the North Caucasus (Russian Federation) and the criminal prosecution against Oleg Orlov (21 October 2010) at

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0390+0+DOC+XML+Vo//EN>> accessed on 10 December 2016; Parliamentary Assembly, Resolution 2035 (29 January 2015); Amnesty International, ‘Turkey: End pre-trial detention of Özgür Gündem guest editors’ <<https://www.amnesty.nl/actueel/turkey-end-pre-trial-detention-of-ozgur-gundem-guest-editors>> accessed on 10 December 2016; International Commission of Jurists, *Turkey: the Judicial System in Peril: a Briefing Paper* (ICJ: Geneva, 2016); Judges for Judges, ‘Turkey’ <<http://www.rechtersvoorrechters.nl/category/turkije/>> accessed on 10 December 2016; Observatory for the Protection of Human Rights Defenders, ‘Turkey: Arbitrary detention and judicial harassment of Dr. Istar Gozaydin’ (30 December 2016) <<http://www.omct.org/human-rights-defenders/urgent-interventions/turkey/2016/12/d24138/>> accessed on 10 December 2016.

⁴ See for example *Svinarenko and Slyadnev v The Russian Federation* App no 32541/08 and 43441/08 (ECHR, 17 July 2014); *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECHR, 17 March 2016); *Karelin v Russia* App no 926/08 (ECHR, 20 September 2016); *Vorontsov and Others v The Russian Federation* App nos 59655/14, 5771/15 and 7238/15 (ECHR, 31 January 2017); *Navalnyy v. The Russian Federation* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECHR, 2 February 2017). See also European Parliament, Resolution on the situation of human rights in the North Caucasus (Russian Federation) and the criminal prosecution against Oleg Orlov (21 October 2010) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0390+0+DOC+XML+Vo//EN>> accessed on 10 December 2016 and Netherlands Helsinki Committee and Helsinki Foundation for Human Rights, <http://www.nhc.nl/news/news_2015/Fair_trial_for_Azerbaijan___s_prisoners_of_conscience.html?id=290&highlight=+trial> accessed 10 December 2016.

⁵ *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECHR, 17 March 2016).

⁶ *Guja v Moldova* App no. 14277/04 (ECHR, 12 February 2008) para 86.

Ideally, judges should be selected and promoted based on their merits by an independent, impartial and purely judicial body (a judicial council) selected by its peers⁷. A way to align judges with government policies can be, for example, an arbitrary (mass) removal from the bench without following clear, objective and fair rules and without allowing judges to exercise basic formal rights in disciplinary proceedings⁸. No secure tenure (such as lengthy probationary periods, case-assignments, short-term appointments and the absence of retirement age or pension schemes)⁹, working conditions (such as the non-protection from physical threats by outside influence)¹⁰ and the level of corruption within a judiciary, combined with an insufficient budget for the judiciary and the lack of an independent body overseeing judicial discipline¹¹, can also have an impact on a judge's impartiality.

Similar approaches can be used to dominate the prosecution service¹². Like judges, public prosecutors owe the public a deep and abiding commitment to the rule of law, in particular to respect the right to a fair trial¹³. Public prosecutors shall therefore be autonomous in their decision-making. The functional independence from their hierarchy should be guaranteed¹⁴ and, while cooperating with other institutions, they should perform their professional duties free from external pressures or interferences from the government or parliament¹⁵.

2.2. Professional integrity obligations

Human rights standards, such as equality before the law, the presumption of innocence and the right to a fair and public hearing¹⁶, are relevant to judges and public prosecutors at all stages of their work¹⁷. A number of international regulations therefore underline the important role played by judicial authorities in upholding the rule of law and furthering human rights.

As regards the judiciary, key resources are *inter alia* the "Magna Carta of Judges" of the CCJE, the UN's Bangalore Principles of Judicial Conduct ("Bangalore Principles"), the "Kyiv Recommendations on Judicial Independence" of the Organisation for Security and Co-operation in Europe (OSCE) and the Universal Charter of the Judge of the International Association of Judges ("IAJ Charter")¹⁸. The

⁷ Cf. CCJE, *Opinion no 10 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society* (adopted at the 8th meeting, Strasbourg, 21-23 November 2007) 7; IAJ Charter, article 2; Kyiv Recommendations, paras 3, 7 and 13; Venice Commission, *Report adopted by the Venice Commission at its 70th Plenary Session: Judicial Appointments, Opinion No. 403 / 2006, CDL-AD (2007) 028*, para 6. See also Basic Principles on the Independence of the Judiciary, paras 10 and 13; IAJ Charter, article 9; Magna Carta of Judges, rules 5 and 13.

⁸ See also Basic Principles on the Independence of the Judiciary, paras 17-20; ICCPR, article 14. IAJ Charter, articles 8 and 11; Kyiv Recommendations, para 25; Magna Carta of Judges, rule 6.

⁹ See also Basic Principles on the Independence of the Judiciary, paras 11 and 12; IAJ Charter, article 8; Magna Carta of Judges, rule 7; IAJ Charter, article 8.

¹⁰ See also Basic Principles on the Independence of the Judiciary, para 11.

¹¹ See also Basic Principles on the Independence of the Judiciary, para 7; IAJ Charter, article 13; Kyiv Recommendations, paras 6, 26 and 27; Magna Carta of Judges, rule 5.

¹² UN Guidelines on the role of prosecutors (1990), rules 1-2, 7, 20; IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, rule 6; UN Office on Drugs and Crime, *The status and role of prosecutors: a UN Office on Drugs and Crime and International Association of Prosecutors guide* (2014) 25-27.

¹³ IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, rule 3(e and f).

¹⁴ *Schiesser v Switzerland* App no 7710/76 (ECHR, 4 December 1979); *Ergin v Turkey* App no 47533/99 (ECHR, 4 May 2006); *Kolevi v Bulgaria* App no 1108/02 (ECHR, 5 February 2010).

¹⁵ *Vasilescu v Romania*, App no 53/1997/837/1043 (ECHR, 22 May 1998) paras 40-41; *Pantea v Romania* App no 33343/96 (ECHR, 3 September 2003) para 238; *Kolevi v Bulgaria* App no 1108/02 (ECHR, 5 February 2010) paras 148-149; *Moulin v. France* App no 37104/06 (ECHR, 23 February 2011) para 57.

¹⁶ Cf. Universal Declaration of Human Rights, UNGA Res 217 A (10 December 1948), article 10; Basic Principles on the Independence of the Judiciary, para 6; IAJ Charter, article 1; Magna Carta of Judges, rules 1 and 16.

¹⁷ Cf. Basic Principles on the Independence of the Judiciary, Preamble; IAJ Charter, article 1.

¹⁸ See for example Minimum Standards of Judicial Independence of the International Bar Association (1982)

Bangalore Principles, for example, note that the protection of human rights “depends upon the proper administration of justice”, a competent, independent and impartial judiciary, and that human rights education is key to deliver justice¹⁹. Judges shall ensure that the defendant is represented by a lawyer, make decisions based on the application of legal rules, through legal reasoning and findings of facts that are based on evidence and analysis, safeguard the equality of arms between prosecution and defence, perform judicial duties without bias or prejudice towards any person or group on irrelevant grounds and avoid the use of contempt proceedings to restrict legitimate public criticism of the courts²⁰.

Public prosecutors can be confronted with human rights abuse, for example, when they supervise investigations of the police or other investigation bodies, order arrests or pre-trial detentions and attend trial procedures. The UN Guidelines on the Role of Prosecutors note that public prosecutors are to “respect and protect human dignity and uphold human rights” to ensure due process and the smooth functioning of the criminal justice system²¹. Public prosecutors shall therefore ensure that investigating services respect legal principles and fundamental human rights, individuals are brought promptly before a judge, evidence, which can discharge a person standing trial, is not held back and the interests and the protection of the life, safety and privacy of witnesses are taken into account²². Furthermore, the Council of Europe, among others, underlines that respecting human rights is crucial to guarantee professionalism, integrity and fairness within the prosecution²³. For instance, public prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when charges against the suspect seem unfounded or the prosecution is based on

<<http://www.ibanet.org/Document/Default.aspx?DocumentUid=bbo19013-52b1-427c-ad25-a6409b49fe29>> accessed on 10 December 2016; Montreal Declaration Universal Declaration on the Independence of Justice of the International Association of Judicial Independence and World Peace (1983) <<http://www.jiwp.org/montreal-declaration>> accessed on 10 December 2016; the UN Basic Principles on the Independence of the Judiciary (1985) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> accessed on 10 December 2016; Judges' Charter in Europe of the European Association of Judges (1997) <<http://www.legislationline.org/documents/id/8556>> accessed on 10 December 2016; the Universal Charter of the Judge of the International Association of Judges (1999) <<http://www.iaj-uim.org/universal-charter-of-the-judges/>> accessed on 10 December 2016; the Bangalore Principles of Judicial Conduct (2002) at <http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> accessed 10 December 2016; the Burgh House Principles on the Independence of the International Judiciary of The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals (2004) <<http://www.ila-hq.org/download.cfm/docid/D18ED684-4653-49A8-9857773C7D5C9C69>> accessed on 10 December 2016; Commission for Democracy Through Law (Venice Commission): Judicial Appointments (2007) at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e)> accessed on 10 December 2016; Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)> accessed on 10 December 2016; Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability of the Organisation for Security and Co-operation in Europe (2010) <<http://www.osce.org/odihr/KyivRec?download=true>> accessed on 10 December 2016; Magna Carta of Judges (Fundamental Principles) of the Consultative Council of European Judges (2010) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1707925&direct=true>> accessed on 10 December 2016; London Declaration on Judicial Ethics and Judicial Ethics: Principles, Values and Qualities of the European Network of Councils for the Judiciary (2010) <https://www.ency.eu/images/stories/pdf/ethics/encj_london_declaration_recj_declaration_de_londres.pdf> and <<https://www.ency.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>> both accessed on 10 December 2016; Bologna and Milan Global Code of Judicial Ethics of the International Association of Judicial Independence and World Peace (2015) <<http://www.jiwp.org/global-code-of-judicial-ethics>> accessed on 10 December 2016.

¹⁹ Bangalore Principles, Preamble.

²⁰ Bangalore Principles, principle 5 and para 5.2; Bangalore Implementation Measures, para 9.5; Magna Carta of Judges, rule 11.

²¹ UN Guidelines on the role of prosecutors, rule 14.

²² See for example UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Guidelines on the role of prosecutors, principle 16; UN Office on Drugs and Crime, *The status and role of prosecutors: a UN Office on Drugs and Crime and International Association of Prosecutors guide* (2014) 38.

²³ ECHR, art 5-6; Committee of Ministers, *Recommendation Rec(2000)19, The Role of Public Prosecution in the Criminal Justice System* (6 October 2000).

illegally obtained evidence²⁴. In particular, public prosecutors shall refuse to use evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods²⁵.

2.3. Practices with regard to human rights defenders

Despite all this, it has become common practice in some countries that judges and public prosecutors violate basic procedural rights and other fundamental rights of human rights defenders. For instance, it is reported that human rights defenders who face trial are given only little time to prepare their defence and denied access to relevant files and submissions of the prosecution²⁶. Besides, it has become common practice that complaints of defence lawyers, who criticised the unjust course of the proceedings against their clients, are treated as contempt, leading to their disbarment²⁷. Additionally, judges dismiss motions of human rights defenders on vague and unsubstantiated grounds²⁸ and align their viewpoints with those of the prosecution service. This includes granting arrest as requested by the prosecution, without reviewing its lawfulness, imposing travel bans to preventing regime critics from leaving the country, issuing judgements that copy the prosecution's written submissions, approving trial transcripts that do not reflect the actual course of the proceedings and arbitrarily sentencing human rights defenders to imprisonment and death²⁹. In some countries, judges also unlawfully prevent the public, the media and civil society organisations from attending and monitoring politically sensitive court hearings (e.g. through changing the courtroom at last minute and using small courtrooms)³⁰. Such improper judicial actions against

²⁴ UN Guidelines on the role of prosecutors, rules 12 and 14.

²⁵ CCPE, Opinion No.9 (2014), para 24; UN Guidelines on the role of prosecutors, rule 16; UN Guidelines on the role of prosecutors, rule 16.

²⁶ See for example *Dilipak and Karakaya v Turkey* App nos 7942/05 and 24838/05 (ECHR, 4 March 2014); *Navalnyy and Yashin v The Russian Federation* App no. 76204/11 (ECHR, 20 April 2015); *Yaroslav Belousov v The Russian Federation* App nos 2653/13 and 60980/14 (ECHR, 4 October 2016). See also Human Rights Watch, 'Russia: Protests Go on Peacefully' <<https://www.hrw.org/news/2012/02/27/russia-protests-go-peacefully>> accessed on 10 December 2016 and Netherlands Helsinki Committee and Helsinki Foundation for Human Rights, <http://www.nhc.nl/news/news_2015/Fair_trial_for_Azerbaijan___s_prisoners_of_conscience.html?id=290&highlight=+trial> accessed 10 December 2016; OSCE, Office in Baku, 'Trial Monitoring Report: Azerbaijan' (2011) 38 <www.osce.org/baku/100593> accessed 10 December 2016.

²⁷ See for example Human Rights Watch, 'Crimea: Defence Lawyers Harassed, Drop Bogus Charges Against Crimean Tatars' (30 January 2017), <<https://www.hrw.org/news/2017/01/30/crimea-defense-lawyers-harassed>> accessed on 30 January 2017; Netherlands Helsinki Committee and Helsinki Foundation for Human Rights at

http://www.nhc.nl/news/news_2015/Fair_trial_for_Azerbaijan___s_prisoners_of_conscience.html?id=290&highlight=+trial accessed on 10 December 2016; OSCE, 'Trial Monitoring Report: Azerbaijan' (2011) 38 <www.osce.org/baku/100593> accessed on 10 December 2016.

²⁸ *Navalnyy and Yashin v The Russian Federation* App no. 76204/11 (ECHR, 20 April 2015); *Navalnyy and Ofitserov v The Russian Federation* App nos 46632/13 and 28671/14 (ECHR, 4 July 2016); *Karelin v Russia* App no 926/08 (ECHR, 20 September 2016); *Navalnyy v. The Russian Federation* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECHR, 2 February 2017); *Kasparov and Others v The Russian Federation* App no 51988/07 (ECHR, 13 December 2016); *Lashmankin and Others v The Russian Federation* App nos 57818/09 and 14 others (ECHR, 7 February 2017); PACE, Committee on the Honouring of Obligation and Commitments by Member States of the Council of Europe, *The functioning of democratic institutions in Azerbaijan* (24 June 2015) <http://www.hfhr.pl/wp-content/uploads/2016/09/Azerbaijan_judiciary.pdf> accessed on 10 December 2016; *The functioning of democratic institutions in Turkey* (23 May 2016) <<http://website-pace.net/documents/19895/2436341/20160523-TurkishInstitutions-EN.pdf/cc4c76b9-1602-4d77-9038-e79aec4f9484>> accessed on 10 December 2016.

²⁹ *Dilipak and Karakaya v Turkey* App nos 7942/05 and 24838/05 (ECHR, 4 March 2014); *Gerasimov and Others v The Russian Federation* App nos 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11 (ECHR, 1 October 2014); *Navalnyy and Yashin v The Russian Federation* App no. 76204/11 (ECHR, 20 April 2015); *Frumkin v The Russian Federation* App no 74568/12 (ECHR, 6 June 2016); *Karelin v Russia* App no 926/08 (ECHR, 20 September 2016); *Yaroslav Belousov v The Russian Federation* App nos 2653/13 and 60980/14 (ECHR, 4 October 2016); *Kasparov and Others v The Russian Federation* App no 51988/07 (ECHR, 13 December 2016); *Navalnyy v The Russian Federation* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECHR, 2 February 2017); PACE, Committee on the Honouring of Obligation and Commitments by Member States of the Council of Europe, *The functioning of democratic institutions in Azerbaijan* (24 June 2015) <http://www.hfhr.pl/wp-content/uploads/2016/09/Azerbaijan_judiciary.pdf> accessed on 10 December 2016; *The functioning of democratic institutions in Turkey* (23 May 2016) <<http://website-pace.net/documents/19895/2436341/20160523-TurkishInstitutions-EN.pdf/cc4c76b9-1602-4d77-9038-e79aec4f9484>> accessed on 10 December 2016.

³⁰ Bangalore Principles, para 6.4.

human rights defenders may even amount to torture or ill-treatment when judges and public prosecutors use evidence obtained by unlawful forms of coercion³¹ and use metal or glass cages in the dock³².

3. Comments to the CCJE and CCPE joint report

The Bureau of the Consultative Council of European Judges (CCJE) and the Bureau of the Consultative Council of European Prosecutors (CCPE) have published a joint report on “Challenges for judicial independence and impartiality in the member states of the Council of Europe” for the attention of the Secretary General of the Council of Europe. The purpose of the report is to provide an overall picture on how justice systems could be developed in member states, as a follow-up to the 2015 report by the Secretary General, “State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe”. It explores the ways in which formal constitutional and statutory safeguards of the independence of judges and public prosecutors are implemented in member states of the Council of Europe.

The joint report notes that it is “possibly necessitating further research and corroboration”³³. Indeed, the report clearly falls short of providing a comprehensive overall picture of judges and public prosecutors of all member states and overlooks topical issues related to the judiciary and prosecution, such as the apparent politicisation of judicial authorities in several countries of Europe, which poses a threat to their judicial independence and impartiality. The growing number of politically-motivated charges and convictions against human rights defenders in some member states is not addressed by the report. Only less than half of the 47 member states of the Council of Europe is covered by the report, meaning that the report lacks to provide an overall picture of the status quo of the judicial authorities. Furthermore, the report appears to rely mostly on information provided by member states and barely considers relevant media reports and information from civil society organisations³⁴. As a result, vital information is missing on, for example, the status of judges and prosecution services in Azerbaijan, the Russian Federation and Ukraine. This concerns *inter alia* the selection process and discipline of judges and public prosecutors in Azerbaijan and the Russian Federation³⁵, the administration of courts in Azerbaijan and the Russian Federation³⁶, the independence of the prosecution services in the Russian Federation and Ukraine³⁷, budgetary autonomy, remuneration and security of tenure in Azerbaijan and the Russian Federation³⁸, and the enforcement of judgements in Azerbaijan, the Russian Federation and Ukraine³⁹.

³¹ CCPE, Opinion No.9 (2014), XV; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15; UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, General Recommendations <<http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>> accessed on 10 December 2016, para 26.

³² *Tanli v Turkey* App no 26129/95 (ECHR, 10 July 2001); *Nuray Şen v Turkey* App no 25354/94 (ECHR, 30 June 2004); *Khodorkovskiy and Lebedev v The Russian Federation* App nos 11082/06 and 13772/05 (ECHR, 25 October 2013); *Svinarenko and Slyadnev v The Russian Federation* App nos. 32541/08 and 43441/08 (ECHR, 17 July 2014); *Yaroslav Belousov v The Russian Federation* App nos 2653/13 and 60980/14 (ECHR, 4 October 2016).

³³ CCJE and CCPE, *Challenges for judicial independence and impartiality in the member states of the Council of Europe* (24 March 2016), para 3.

³⁴ CCJE and CCPE, *Challenges for judicial independence and impartiality in the member states of the Council of Europe* (24 March 2016), p 106.

³⁵ CCJE and CCPE, *Challenges for judicial independence and impartiality in the member states of the Council of Europe* (24 March 2016), pp 19 and 29.

³⁶ CCJE and CCPE, *Challenges for judicial independence and impartiality in the member states of the Council of Europe* (24 March 2016), p 36.

³⁷ CCJE and CCPE, *Challenges for judicial independence and impartiality in the member states of the Council of Europe* (24 March 2016), p 41.

³⁸ CCJE and CCPE, *Challenges for judicial independence and impartiality in the member states of the Council of Europe* (24 March 2016), pp 52, 74 and 80.

³⁹ CCJE and CCPE, *Challenges for judicial independence and impartiality in the member states of the Council of Europe* (24 March 2016), p 69.

Moreover, the report does not take into consideration examples of important cases of the European Court of Human Rights that illustrate the grave misconduct of judges and public prosecutors in trials against human right defenders (such as using evidence obtained through torture and other ill-treatment)⁴⁰.

Generally, judges and public prosecutors are supposed to set an example to society in the protection of human rights, meaning that their actions should respond to human rights standards⁴¹. If the judiciary and the prosecution is controlled by the government (e.g. through appointment, promotion and removal procedures made on the basis of personal and political considerations), judicial authorities are unlikely to oppose unlawful orders by superiors and raise human rights issues. In such cases, international monitoring or audit procedures documenting the involvement of judicial authorities in human rights abuse addressing their failure to comply with human rights standards could conceivably take over the failing role of the national system; however such procedures do currently not exist.

4. Case studies

4.1. Azerbaijan

4.1.1. Status quo of judicial authorities

Both the judiciary and the prosecution service are largely dependent on the executive branch in Azerbaijan the Azerbaijani constitution provides the president with broad authority over the legislative and judicial branch⁴².

Of particular concern are the reported high levels of corruption within the judiciary, leading to a judiciary that is biased and extremely responsive to government policies, especially in trials against human rights defenders⁴³. The strong ties between the government and the judiciary are shown by, *inter alia*, the selection process of judges at both lower and higher courts. According to article 130 para. 2 of the Azerbaijani Constitution, justices of the Constitutional Court, Supreme Court and appellate courts are nominated by the head of state and appointed by parliament that consists of the president's and pro-government parties⁴⁴.

The president also exerts significant power over the prosecution service. He appoints, for example, the prosecutor general, who is the head of the prosecution service and has broad reporting duties to the president, with the consent of parliament and has the authority to approve all territorial and specialized prosecutors who are appointed by the prosecutor general⁴⁵.

⁴⁰ See for example *Svinarenko and Slyadnev v The Russian Federation* App nos. 32541/08 and 43441/08 (ECHR, 17 July 2014).

⁴¹ Egbert Myjer, Barry Hancock and Nicolas Cowdery (eds), *International Association of Prosecutors: Human Rights Manual for Prosecutors* (2nd edn, WLP 2008) 2.

⁴² The PACE Report on the functioning of democratic institutions in Azerbaijan, for example, condemned 'the lack of independence of the judiciary' that remained 'a concern in Azerbaijan, where the executive branch is alleged to continue to exert undue influence.

⁴³ Deborah Hardoon and Finn Heinrich, 'Global Corruption Barometer 2013: Report' (Transparency International 2013) at <<https://www.transparency.org/gcb2013/report>> accessed 10 December 2016; PACE, *Report of the Committee on Legal Affairs and Human Rights, Judicial corruption: urgent need to implement the Assembly's proposals* (adopted on 29 January 2016).

⁴⁴ See for example Amnesty International, 'Critical human rights situation in Azerbaijan further worsening ahead of 2015 election' (30 October 2015) <https://www.amnesty.nl/nieuwsportaal/pers/critical-human-rights-situation-in-azerbaijan-further-worsening-ahead-2015-electi> accessed on 10 December 2016; Radio Free Europe/Radio Liberty, 'Never Been Worse': Opposition, Election Monitors Boycott Vote In Azerbaijan' (31 October 2015) <<http://www.rferl.org/a/azerbaijan-parliamentary-elections-boycott/27337398.html>> accessed on 10 December 2016.

⁴⁵ Constitution, article 133 para 4; Prosecutor's Office Act, articles 43-44; GRECO, Evaluation IV Report (2014), op. cit., 29.

Additionally, article 131 para. 2 of the Constitution allows the president of Azerbaijan to directly appoint the president of the Supreme Court, the NAR Supreme Court, appellate courts and serious crime courts. Justices of lower courts are also appointed by the president, on the proposal of the Judicial Legal Council (JLC), a permanent and self-governing but not purely judicial body⁴⁶. The JLC functions as an advisory body to the president, with no powers of appointment and promotion of judges, and has been headed by the Minister of Justice since its creation in 2005. The general assembly of judges, as against recommendations made by the joint project of the EU and the Council of Europe on judicial reform in Eastern Europe ("Eastern Partnership")⁴⁷, plays only a minor role in the composition of the JLC and the selection process of Azerbaijani judges. In addition to the Minister of Justice and another member appointed by him, the JLC consists of two members appointed by the president of Azerbaijan and parliament respectively, nine judges (the president of the Supreme Court, two judges of each the Supreme Court and appellate courts who are nominated by the general assembly of judges and appointed by the Supreme Court, one judge of the Constitutional Court, one judge of the NAR Supreme Court nominated by the general assembly and appointed by the NAR Supreme Court, two judges of magistrates' courts nominated by the general assembly of judges and appointed by the Minister of Justice), one lawyer appointed by the board of the national bar association and one member appointed by the prosecutor's general office⁴⁸. The judiciary is further controlled by the executive branch through lengthy probationary periods of three years for judges who are appointed for the first time⁴⁹. Depending on their performance, which shall be evaluated at the end of the term, judges can be re-appointed. The European Court of Human Rights⁵⁰ and the European Commission for Democracy through Law (Venice Commission)⁵¹, however, questioned such probationary periods as they are likely to limit judicial independence and recommended to appoint judges on a permanent basis until retirement.

4.1.2. Human rights defenders⁵²

The significant control over judicial authorities by the Azerbaijani government led to a judiciary and a prosecution service that increasingly uses and misuses procedural institutions to discredit human rights defenders. This is reflected by, for example, the high number of pre-trial detentions against human rights defenders requested by the prosecution service that are being almost automatically granted by courts and against which defence lawyers barely appeal due to their disbelief in a

⁴⁶ Law on Courts and Judges, article 93 para 1; Law on Judicial Legal Council, article 1, 4 para 1.

⁴⁷ They concluded that the judicial appointment system "could be rendered much more transparent if the general assembly of judges were vested with the powers of election or appointment instead of being an advisory body empowered merely to propose candidates for a final determination to be made by different institutions residing in other branches of State power". See EU and the Council of Europe, Eastern Partnership, 'Enhancing Judicial Reform in the Eastern Partnership Countries. Working Group report on 'Efficient Judicial Systems' (March 2013)

<http://www.coe.int/t/DGHL/cooperation/cepej/cooperation/Eastern_partnership/FINAL%20efficient%20judicial%20systems According to Article 130 of the Constitution, %20EN%20March%202013.pdf> accessed on 10 December 2016.

⁴⁸ Law on Judicial Legal Council, article 6.

⁴⁹ Based on an amendment to the Law on Courts and Judges that was adopted on 11 February 2015.

⁵⁰ *Henryk Urban and Ryszard Urban v Poland* App no 23614/08 (ECHR, 30 November 2010). In that case, the European Court of Human Rights recalled that 'in determining whether a body can be considered as "independent" – notably of the executive and of the parties to the case – regard must be had, *inter alia*, to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.' See also *Campbell and Fell v the United Kingdom* App no 80 (ECHR, 28 June 1984); *Findlay v the United Kingdom*, App no 22107/93 (ECHR, 25 February 1997); *Incal v. Turkey*, App no 22678/93 (ECHR, 9 June 1998); *Brudnicka and Others v Poland* App no 54723/00 (ECHR, 3 March 2005); *Luka v. Romania* App no 34197/02 (ECHR, 21 July 2009).

⁵¹ Venice Commission, *Report on the independence of the judicial system part I: the independence of judges* (adopted on 12 and 13 March 2010) <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e)> accessed 10 December 2016.

⁵² Based on the report by Dominika Bychawska-Siniarska (edited by Stefanie Lemke) *The Functioning of the Judicial System in Azerbaijan and its Impact on the Fair Trial of Human Rights Defenders* (Netherlands Helsinki Committee and Helsinki Foundation for Human Rights 2016) <http://www.hfhr.pl/wp-content/uploads/2016/09/Azerbaijan_judiciary.pdf> accessed on 10 December 2016.

working appeal system in Azerbaijan⁵³. In *Rasul Jafarov v. Azerbaijan*⁵⁴, the European Court of Human Rights sharply criticised Azerbaijani courts for this practice. The European Court of Human Rights also condemned the way in which human rights defenders are introduced in courts in Azerbaijan. For instance, the human rights defender Intigam Aliyev was brought in handcuffs to the courtroom and was kept in a metal cage during his hearings, a practice which does not only undermine the equality of arms of the defendant but also meets the threshold of inhuman and degrading treatment⁵⁵.

In other cases, defence lawyers of human rights defenders, in contrast to article 91 of the Azerbaijani Criminal Procedure Code, which guarantees basic procedural rights to the accused⁵⁶, were given only little time to prepare the representation of their clients as they received indictments right before the beginning of the preliminary hearing⁵⁷. In *Huseyn and others v Azerbaijan*, the European Court of Human Rights affirmed that neither the applicants, prominent human rights defenders of Azerbaijan, nor their lawyers 'had been given sufficient access to the prosecution's evidence after the pre-trial investigation had been completed and before the trial had commenced nor had they enjoyed such access after the trial had commenced, despite their repeated complaints to that effect'. The European Court of Human Rights then concluded that these restrictions gave rise to 'serious problems' as to the adequacy of the time and facilities afforded to the defence⁵⁸.

Azerbaijani courts were also criticised for excluding (foreign) observers (including media, civil society organisations and embassies) from courtrooms to prevent them from attending or reporting on trials against human rights defenders. Judges deliberately chose small courtrooms for hearings and dismissed motions to hold hearings in a bigger room for no apparent reason, or held trials in courtrooms that were packed with people who were not related to the case and were unknown to the defendant and their lawyers⁵⁹.

4.2. The Russian Federation

⁵³ Based on interviews conducted with Azerbaijani lawyers, see Dominika Bychawska-Siniarska (edited by Stefanie Lemke) *The Functioning of the Judicial System in Azerbaijan and its Impact on the Fair Trial of Human Rights Defenders* (Netherlands Helsinki Committee and Helsinki Foundation for Human Rights 2016) <http://www.hfhr.pl/wp-content/uploads/2016/09/Azerbaijan_judiciary.pdf> accessed on 10 December 2016.

⁵⁴ *Rasul Jafarov v Azerbaijan* App no 69981/14, (ECHR, 17 March 2016).

⁵⁵ *Svinarenko and Slyadnev v The Russian Federation* App no 32541/08, 43441/08 (ECHR, 17 July 2014); *Vorontsov and Others v The Russian Federation* App nos 59655/14, 5771/15, and 7238/15 (ECHR, 31 January 2017).

⁵⁶ According to article 91 of the Azerbaijani Criminal Procedure Code, the accused should enjoy basic procedural rights, including the right to 'sufficient time for the preparation of his defence', to 'participate in investigative procedures or other procedures conducted at his own request', to 'acquaint himself with the records of investigative or other procedures in which he takes part, to make observations on the accuracy and completeness of the written record' as well as to 'require the inclusion of the necessary circumstances in the appropriate record', to 'take cognizance of the case file from the end of the investigation or the discontinuation of the criminal proceedings and to make copies of the necessary documents relating to it', and to 'acquaint himself with the record of the court hearing and to add observations to it'.

⁵⁷ Based on interviews conducted with Azerbaijani lawyers see Dominika Bychawska-Siniarska (edited by Stefanie Lemke) *The Functioning of the Judicial System in Azerbaijan and its Impact on the Fair Trial of Human Rights Defenders* (Netherlands Helsinki Committee and Helsinki Foundation for Human Rights 2016) <http://www.hfhr.pl/wp-content/uploads/2016/09/Azerbaijan_judiciary.pdf> accessed on 10 December 2016.

⁵⁸ *Huseyn and others v Azerbaijan* App nos 35485/05, 45553/05, 35680/05, 36085/05 (ECHR, 26 July 2011) para 175.

⁵⁹ Dominika Bychawska-Siniarska (edited by Stefanie Lemke) *The Functioning of the Judicial System in Azerbaijan and its Impact on the Fair Trial of Human Rights Defenders* (Netherlands Helsinki Committee and Helsinki Foundation for Human Rights 2016) <http://www.hfhr.pl/wp-content/uploads/2016/09/Azerbaijan_judiciary.pdf> accessed on 10 December 2016.

4.2.1. Status quo of judicial authorities

In the Russian Federation, the role of public prosecutors merits particular attention. Unlike their counterparts in other European countries, they hold a general supervisory function that endows them with extremely broad rights⁶⁰. This supervision entails monitoring the implementation of laws and regulations of regional authorities, the military, heads of commercial and non-commercial organisations and others, and the compliance of these bodies with national law and human rights standards. Furthermore, prosecutors are vested with special supervisory powers in certain areas of law (e.g., anti-extremism regulations) and are entitled to enter the premises of any of the aforementioned bodies, access their documents and materials, require the production of documents, material and information, question and require explanations, and carry out reviews⁶¹. Since these requests have binding effect and “are subject to unconditional execution”, entities under supervision must comply with them immediately⁶².

The European Commission for Democracy through Law (“Venice Commission”), among others, has criticised these far-reaching competencies of the Russian prosecution service, particularly with regard to their impact on the balance of powers. The Venice Commission raised concern about its compatibility with the Council of Europe’s basic principles, especially the Parliamentary Assembly’s Recommendation 1604 (2003) on the role of the public prosecutor’s office in a democratic society governed by the rule of law⁶³. The Commission therefore concluded that ‘[the] general supervisory function appears as the primary task of the Prosecutor’s Office. This approach gives rise to misgivings. Such a broadly defined general supervisory function was a logical component of the system of unity of power and resulted from that system’s lack of administrative and constitutional courts and the institution of an ombudsman. The prosecutor therefore combined the functions of different organs within his function of general supervision. The justification for such a broad definition of the role of the Prosecutor’s Office vanishes, when other institutions to safeguard the legal order and adherence to civil rights are established. In a democratic law-governed state, protection of the rule of law is the task of independent courts’⁶⁴. According to the Venice Commission, these misgivings are reinforced by the fact that the above mentioned bodies, which the prosecution supervises, include governing bodies and the heads of commercial and non-commercial organisations without any differentiation⁶⁵. The Venice Commission recommended a couple of measures, such as providing courts and other institutions with broader powers and responsibilities, and limiting the prosecution’s competencies to the prosecution of criminal offences and defending the public interest through the criminal-justice system⁶⁶. Russian authorities, however, have not yet implemented any of these recommendations.

4.2.2. Human rights defenders

⁶⁰ Federal law “On the Prosecutor’s Office in the Russian Federation” (1992), article 1(1). The law states that ‘the Prosecutor’s Office of the Russian Federation shall be (...) exercising on behalf of the Russian Federation supervision over compliance with the Constitution of the Russian Federation and execution of the laws in force within the territory of the Russian Federation’.

⁶¹ Federal law “On the Prosecutor’s Office in the Russian Federation” (1992), articles 21 and 22

⁶² Federal law “On the Prosecutor’s Office in the Russian Federation” (1992), articles 6 and 22.

⁶³ Parliamentary Assembly, Recommendation 1604 (2003), para 7.5.

⁶⁴ Venice Commission, *Opinion on the Federal Law on the Prokuratura (Prosecutor’s Office) of the Russian Federation*, Opinion No. 340/2005, CDL-AD(2005)014 (13 June 2005).

⁶⁵ Venice Commission, *Opinion on the Federal Law on the Prokuratura (Prosecutor’s Office) of the Russian Federation*, Opinion No. 340/2005, CDL-AD(2005)014 (13 June 2005).

⁶⁶ Venice Commission, *Opinion on the Federal Law on the Prokuratura (Prosecutor’s Office) of the Russian Federation*, Opinion No. 340/2005, CDL-AD(2005)014 (13 June 2005).

Sochi Olympics and were therefore charged with damage to propriety⁷⁶. The criminal charges were widely seen as revenge for their work⁷⁷. Ms. Gazaryan and Mr. Vitishko protested against a fence that was illegally constructed in a forest, and spray-painted "This is our forest" on the fence. The fence surrounded the residence of Mr. Tkachev, the then governor of Krasnodar Region and now federal minister of agriculture. Their argument that the fence was constructed illegally was dismissed by the court as not relevant, without any further examination. During the pre-trial stage, the public prosecutor denied the very existence of the fence in response to a complaint filed by both activists⁷⁸.

Generally, it has become common practice that authorities deliberately target activists. In some cases police officers even place drugs and weapons in the home of human rights defenders for which they are later convicted⁷⁹. Although the equality of arms and the right to adversarial trial are constitutional guarantees of the Russian Constitution, they are barely respected in practice. Judges, for example, rarely examine whether the prosecution has complied with international obligations of the Russian Federation, such as the European Convention on Human Rights. They side with public prosecutors and find the accused guilty, without reassessing the evidence. Evidence obtained by investigation bodies is usually regarded as true and consistent while testimony given by the defence is dismissed as unreliable. This is reflected by the case of Valentina Cherevatenko, chair of the local non-governmental organization "Women of the Don" and laureate of the 2016 Franco-German Prize for Human Rights, who became another victim of judicial harassment in the Russian Federation. In June 2016, criminal proceedings were initiated against Ms. Cherevatenko for allegedly failing to comply with section 330.1 of the Criminal Code of the Russian Federation ("CC")⁸⁰. It was determined that Ms. Cherevatenko had known about and had failed to meet the requirements to register the "Women of the Don" as "foreign agent". The case against Ms.

olympics/> accessed on 10 December 2016; Freedom House, *Preparations for Sochi Games Include Prison Sentence for Environmental Activist* (20 December 2013) <<https://freedomhouse.org/article/preparations-sochi-games-include-prison-sentence-environmental-activist>> accessed on 10 December 2016; Human Rights Watch, *The Russian Federation: Justice Fails Environment Activist at Appeal* (12 February 2014) <<https://www.hrw.org/news/2014/02/12/the-russian-federation-justice-fails-environment-activist-appeal>> accessed on 10 December 2016; International Federation for Human Rights (FIDH), *Russia: Prolonged arbitrary detention of environmental rights activist Mr. Evgeny Vitishko* (3 December 2015) <<https://www.fidh.org/en/issues/human-rights-defenders/the-russian-federation-prolonged-arbitrary-detention-of-environmental>> accessed on 10 December 2016.

⁷⁶ See for example Amnesty International, *The Russian Federation: Release environmentalist banished to a prison colony* (15 April 2015) <<https://www.amnesty.org/en/latest/news/2015/04/the-russian-federation-release-yevgeniy-vitishko/>> accessed on 10 December 2016; Human Rights Watch, *The Russian Federation: Justice Fails Environment Activist at Appeal* (12 February 2014) <<https://www.hrw.org/news/2014/02/12/the-russian-federation-justice-fails-environment-activist-appeal>> accessed on 10 December 2016; International Federation for Human Rights (FIDH), *The Russian Federation: Prolonged arbitrary detention of environmental rights activist Mr. Evgeny Vitishko* (3 December 2015) <<https://www.fidh.org/en/issues/human-rights-defenders/the-russian-federation-prolonged-arbitrary-detention-of-environmental>> accessed on 10 December 2016; Shaun Walker, Sochi environmentalist jailed for three years for spray-painting a fence, *The Guardian* (12 February 2014) <<https://www.theguardian.com/environment/2014/feb/12/sochi-environmentalist-jailed-painting-fence-revenge>> accessed on 10 December 2016.

⁷⁷ See for example International Federation for Human Rights (FIDH), *The Russian Federation: Prolonged arbitrary detention of environmental rights activist Mr. Evgeny Vitishko* (3 December 2015) <<https://www.fidh.org/en/issues/human-rights-defenders/the-russian-federation-prolonged-arbitrary-detention-of-environmental>> accessed on 10 December 2016; Shaun Walker, Sochi environmentalist jailed for three years for spray-painting a fence, *The Guardian* (12 February 2014) <<https://www.theguardian.com/environment/2014/feb/12/sochi-environmentalist-jailed-painting-fence-revenge>> accessed on 10 December 2016,

⁷⁸ Sergey Golubok, *The Role of the Judiciary in the Prosecution of Human Rights Defenders and Non-Governmental Organizations in the Russian Federation*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016) <<http://www.defensorsviolators.info/the-role-of-the-judiciary>> accessed on 30 December 2016.

⁷⁹ This is reflected by, for example, the case of the Chechen human rights defender Ruslan Kutayev who was found guilty of (fabricated) possession of narcotics. For more information on the case, see for example: Sergey Golubok, *The Role of the Judiciary in the Prosecution of Human Rights Defenders and Non-Governmental Organizations in the Russian Federation*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

⁸⁰ "Malicious evasion of the duty to file documents required for registering non-governmental organizations that carry out the functions of foreign agents".

Cherevatenko was the first criminal case opened against a human rights defender under the new section 330.1 CC⁸¹, which is formulated in very general terms, and drew international attention. In its report on human rights in the Russian Federation, the British Foreign and Commonwealth Office, for example, raised concern about the criminal proceedings against Ms. Cherevatenko in 2016⁸². Later, her lawyer argued that the prosecution lacks a legal basis, especially that section 330.1 CC is unconstitutional and that the case is still *sub judice*. Nevertheless, both courts, the Leninskiy District Court of Rostov-on-Don and later the regional court of appeal, dismissed the arguments put forward by Ms. Cherevatenko's lawyer and limited their judicial review to the issue of the formal legality of the case⁸³.

Acquittals are rare in criminal trials. The UN Human Rights Committee expressed concern "about the low acquittal rate and the high percentage of acquittals overturned on appeal" in the Russian Federation⁸⁴. On average, only 0.4 per cent of criminal trials lead to an acquittal⁸⁵. There is also a growing number of criminal proceedings against civil society leaders for criticizing political authorities online, such as in blogs and social networks. They are frequently charged with extremism⁸⁶. Additionally, judicial authorities use arrest and pre-trial detention as a tool to silence environmental defenders and other activists. In many cases, judges base their decision to extend arrest exclusively on police reports to keep human rights defenders in arbitrary and prolonged detention. These actions do not only violate the right to liberty and the right of security of person but can also put the health of the suspect at risk⁸⁷. The European Court of Human Rights has therefore repeatedly condemned the Russian Federation, in particular with regard to article 5 § 3 of the European Convention of Human Rights. The Court highlighted that authorities cannot extend detention solely on the gravity of charges and using stereotyped formulae, without addressing the suspect's specific situation and without examining whether a sufficient legal basis to justify the detention is given⁸⁸.

In contrast to the approach of the ECtHR, Yuriy Dmitriyev, leader of the Karelian branch of the prominent Russian human rights NGO *Memorial* was arrested by the Petrozavodsk City Court in December 2016. Mr. Dmitriyev was charged with allegedly producing child pornography by posting a photo of his minor stepdaughter on a social network⁸⁹. It is reported that the photo in question

⁸¹ Sergey Golubok, *The Role of the Judiciary in the Prosecution of Human Rights Defenders and Non-Governmental Organizations in the Russian Federation*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

⁸² UK Government, 'Human Rights Priority Country Update Report: January to June 2016' (updated on 21 July 2016) <<https://www.gov.uk/government/publications/russia-human-rights-priority-country/human-rights-priority-country-update-report-january-to-june-2016>> (accessed on 10 December 2016).

⁸³ Sergey Golubok, *The Role of the Judiciary in the Prosecution of Human Rights Defenders and Non-Governmental Organizations in the Russian Federation*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

⁸⁴ UN Human Rights Committee 'Concluding Observations of the Human Rights Committee on the Seventh Periodic Report of the Russian Federation', CCPR/C/RUS/CO/7 (28 April 2015), § 17.

⁸⁵ Sergey Golubok, *The Role of the Judiciary in the Prosecution of Human Rights Defenders and Non-Governmental Organizations in the Russian Federation*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

⁸⁶ See, for example the case of Ivan Moseyev, director of Pomor Institute for Indigenous Peoples of the Northern Arctic Federal University in Archangelsk, was convicted of extremism for his negative comments on ethnic Russians during a heated live online discussion. For more information, see Sergey Golubok, *The Role of the Judiciary in the Prosecution of Human Rights Defenders and Non-Governmental Organizations in the Russian Federation*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

⁸⁷ The inadequate and defective medical assistance in pre-trial detention centers was repeatedly addressed by, for example, the human rights defender Igor Nagavkin who is the head of the Volgograd branch of the prominent Russian non-governmental organization "For Human Rights". Mr. Nagavkin was charged with theft and arrested on 1 October 2016. On 15 November 2016, his arrest was extended until January 2017 by the Central District Court of Volgograd. According to Mr. Nagavkin's lawyer, Mr. Nagavkin remained in custody due to a police report, stating that the suspect would endanger life of other people and commit other crimes, without giving any further explanation for this assumption. See for example <<http://www.kavkaz-uzel.eu/articles/291201/>> (accessed on 10 December 2016).

⁸⁸ See for example *Snyatovskiy v Russia* App no. 10341/07 (ECHR, 13 December 2016), §§ 52-53.

⁸⁹ As reported (in Russian) at <<https://7x7-journal.ru/newsitem/90125/>> (accessed on 10 December 2016).

was posted without Mr. Dmitriyev's knowledge and consent⁹⁰. The investigation bodies did not include any circumstances in their case assessment that could have supported the position of Mr. Dmitriyev, such as his low risk of escape and lack of tampering with evidence. Russian media reported that Mr. Dmitriyev's arrest had been an act of revenge against his research on personal details of officers of the former People's Commissariat for Internal Affairs ("NKVD") known for its political repressions under Stalin⁹¹.

Furthermore, Russian authorities use the Code of Administrative Offences ("CAO"), containing many broad and vague definitions, against civil society activists. In practice, they may face large fines for their human rights work and have trouble to exercise their right to judicial review⁹². Amendments to the CAO have led to increased fines in recent years, in particular for activities that are common to civil society groups. Large fines are imposed on those who do not comply with the regulations of the "Foreign Agents' Act"⁹³.

After compiling an administrative offence record (*protokol ob administrativnom pravonarushenii*), the fine, depending on the nature of the offence, can be imposed by either the investigation body itself or a judge. Generally, testimony given by the police is barely subject to judicial scrutiny. The administrative offence report sets out the criminal charges and is also the main piece of evidence against the suspect. Judges do not question and assess whether the evidence collected by the police during initial investigations was gathered lawfully. The CAO itself does not contain any detailed rules of evidence either, such as which types of evidence are admissible to initiate proceedings against a suspect. Two written statements by police officers, confirming that they saw the suspect participating in an unauthorized demonstration, may be sufficient to open criminal investigations. During an administrative offence hearing, the judge is also the sole authority in charge of investigating facts. A prosecuting party is absent which can undermine the defendant's right to a fair hearing. Although this practice was affirmed by the Russian Constitutional Court⁹⁴, the European Court of Human Rights concluded that the lack of a prosecuting party in administrative offence proceedings in the Russian Federation violates article 6 of the European Convention on Human Rights, particularly in cases where the defendant faces a long prison term and judges do not reassess the existing evidence, examine additional evidence and review the case as a whole.⁹⁵ Despite this, Russian authorities have not made or discussed any changes to the CAO. In practice, judges refuse to call defence witnesses⁹⁶ and adjourn hearings to enable the investigation body to obtain the evidence needed for the conviction⁹⁷. The CAO does not require the full disclosure of

⁹⁰ As reported (in Russian) at <<https://7x7-journal.ru/item/90170>> (accessed on 10 December 2016).

⁹¹ Reported by Novaya Gazeta (in Russian) at <<https://www.novayagazeta.ru/articles/2016/12/21/70964-papa-skazal-cto-so-vsem-razberetsya>> (accessed on 10 December 2016).

⁹² K. Koroteev, *The Use of Administrative Offence Proceedings to Prosecute Civil Society Activists and the Absence of Efficient Judicial Protection*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016) <<http://www.defendersorviolators.info/use-of-administrative-proceedings>> accessed on 30 December 2016.

⁹³ Representatives of an organisation who do not register with the "foreign agents' roster" can be fined between 100,000 to 300,000 roubles (EUR 1,530 to 4,590). Additionally, organisations can be fined between 300,000 to 500,000 roubles (EUR 4,590 to 7,650) for failing to register as "foreign agent" and to display the 'foreign agent label' on their publications.

⁹⁴ Russian Constitutional Court, *Astakhova, Vinogradov and others*, no 2157-O, (25 September 2014).

⁹⁵ *Karelin v Russia* App no 926/08 (ECHR, 20 September 2016).

⁹⁶ Motions to hear defence witnesses are usually dismissed on the grounds that the evidence given in the administrative offence record is consistent with the course of the events and that no further evidence is needed, that the defendant tries to avoid responsibility for the crimes that she or he allegedly committed by calling defence witnesses, and that defence witnesses are unreliable. Defence witnesses are also not called when the judge decides not to hear the witnesses of the prosecuting party. See for example K. Koroteev, *The Use of Administrative Offence Proceedings to Prosecute Civil Society Activists and the Absence of Efficient Judicial Protection*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

⁹⁷ See for example <<http://iphronline.org/russia-new-foreign-agents-ruling-against-prominent-group-20140523.html>> (accessed on 10 December 2016).

evidence during pre-trial proceedings either (e.g., at a preliminary hearing), meaning that evidence can theoretically be fabricated at any stage of the trial. Moreover, judges rarely grant interim reliefs under the CAO⁹⁸. When criminal proceedings are opened against a civil society organisation for, for example, its alleged failure to register as 'foreign agent', judges do not postpone or suspend this administrative decision. Instead, the organisation is forced to report, label publications and participate in audit procedures while the trial is pending⁹⁹. There are also no limits for judicial deference to the executive branch. In many cases, judges therefore affirmed controversial decisions made by government bodies (as the case of the International Society of Memorial shows¹⁰⁰).

Lastly, it has become common practice that judicial authorities fail to ensure adequate protection for witnesses in criminal trials, especially when victims of anti-LGBT violence are concerned¹⁰¹. LGBT activists have been subject of considerable discrimination and faced enormous hurdles in seeking justice in the Russian Federation since a law banning the dissemination of information promoting "non-traditional sexual relationships" came into force in 2013¹⁰².

4.3. Ukraine

4.3.1. Status quo of judicial authorities

When joining the Council of Europe in 1995, Ukraine initiated a judicial reform to improve the independence of the judiciary¹⁰³. But the country struggled with the fulfilment of its commitments and missed important deadlines. In general, the Ukrainian judiciary has long been under intense political pressure from the government, parliament and other outside influence and suffered from high levels of corruption which resulted in a great loss of public confidence in the judicial system¹⁰⁴.

The mistrust in the judiciary has been deepened by the fact that judges barely face disciplinary actions for their misconduct¹⁰⁵. The World Justice Project, which measures *inter alia* the corruption

⁹⁸ K. Koroteev, *The Use of Administrative Offence Proceedings to Prosecute Civil Society Activists and the Absence of Efficient Judicial Protection*, (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

⁹⁹ *Gebremedhin [Gaberamadhien] v France* App no 25389/05 (ECHR, 26 April 2007).

¹⁰⁰ Zamoskvoretskiy District Court of Moscow, International Memorial, no 2a-7176/2016 (16 December 2016). The International Society of Memorial was registered as "foreign agent" by the Ministry of Justice, although the 'Foreign Agents' Act' and the case law of the Russian Constitutional Court exempt international non-governmental organizations, such as International Society of Memorial, from the 'foreign agents' roster'. Zamoskvoretskiy District Court of Moscow, however, dismissed International Memorial's application for judicial review due to a submission by the Ministry of Justice. In this submission, the Ministry of Justice emphasised that the national or international status of a non-governmental organization does not matter for its registration as 'foreign agent'.

¹⁰¹ See for example Civil Rights Defenders, *Human Rights in The Russian Federation* (25 June 2015) <<https://www.civilrightsdefenders.org/country-reports/human-rights-in-the-Russian-Federation/>> accessed on 10 December 2016; Human Rights Watch, *The Russian Federation: Impunity for Anti-LGBT Violence: Discriminatory "Propaganda" Law Fuels Attacks* (14 December 2014) <<https://www.hrw.org/news/2014/12/15/the-Russian-Federation-impunity-anti-lgbt-violence>> accessed on 10 December 2016.

¹⁰² See for example Alexandra Topping, Russia: LGBT activists describe victimisation, repression ... and hope, *The Guardian* (6 April 2015) <<https://www.theguardian.com/world/2015/apr/06/the-Russian-Federation-impunity-anti-lgbt-violence>> accessed on 10 December 2016.

¹⁰³ Council of Europe, Parliamentary Assembly of the Council of Europe regarding the application of Ukraine for membership in the Council of Europe, Conclusion No. 190 (1995) <http://zakon3.rada.gov.ua/laws/show/994_590> accessed on 10 December 2016.

¹⁰⁴ See for example Freedom House, *Freedom in the World: Ukraine* (2016) <<https://freedomhouse.org/report/freedom-world/2016/ukraine>> accessed on 10 December 2016.

¹⁰⁵ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016).

levels of countries worldwide, placed Ukrainian criminal courts at 78 out of 113 countries in 2016¹⁰⁶ and only 2.9 % of the Ukrainian population perceives the judiciary as a fair and just institution¹⁰⁷.

In 2014 and 2016, two judicial reforms took place. The law "On Restoring Confidence in the Judicial System of Ukraine", which came into force in 2014, sought to improve the internal and external independence of judges. It removed the former court chairmen, who reputedly took orders from the political elite to assign cases to particular judges and were in charge to determine the salary and other working conditions of subordinate judges¹⁰⁸, and enabled the judiciary to select new chairmen. Another judicial reform, which entered into force on 30 September 2016, led to constitutional changes and the introduction of the law "On the Judiciary and Status of Judges"¹⁰⁹. It partly transferred the power to select, promote and dismiss judges from the president and parliament to the high council of justice, a purely judicial body elected by its peers. The new law also furthered the merit-based promotion of judges and reorganised the Supreme Court.

The Venice Commission noted that "the time has come to proceed with this long overdue reform in order to finally move towards achieving an independent judiciary" and found that the amendments "represent an important step towards reaching this goal"¹¹⁰. However, the success of these judicial reforms will depend on the judiciary itself and whether it will be willing to implement the new rules into practice. At present, it seems that judges actively resist any changes to their profession, such as the dismissal of judges for oath breaking and conducting performance-based evaluations¹¹¹.

The reform of the prosecution service in Ukraine has been widely criticised as lacking depth by human rights and experts community¹¹². Public prosecutors are tasked with representing the state's and the victim's interest and bringing perpetrators of crimes to justice. The prosecution service is headed by the prosecutor general and his deputies who are in charge of organising investigations and the organisational, technical, financial and coordination support in regards to the process of the investigations. Although formal safeguards guaranteeing the independence of public prosecutors exist, public prosecutors, like the judiciary, are regarded as traditionally loyal to the prevailing interests of the ruling elite¹¹³. The international community therefore criticised Ukraine's public prosecutors for their lack of independence, in particular in the context of the human rights violations committed during the "Maidan protests"¹¹⁴. Generally, the prosecution service is

¹⁰⁶ World of Justice Project, 'Rule of Law Index 2016: Ukraine' (2016) <<http://data.worldjusticeproject.org/#groups/UKR>> accessed on 10 December 2016;

¹⁰⁷ See <<http://ua.korrespondent.net/ukraine/politics/1405614-korrespondent-riven-doviri-do-ukrayinskih-sudiv-nablizhaetsya-do-absolyutnogo-minimumu>> accessed on 10 December 2016.

¹⁰⁸ Freedom House, 'Freedom in the world: Ukraine' (2016) <<https://freedomhouse.org/report/freedom-world/2016/ukraine>> accessed on 10 December 2016.

¹⁰⁹ Assembly of Law Bar Association of Ukraine, 'Concept of Judicial reform in Ukraine' (adopted on 19 September 2014) <http://uba.ua/eng/projects/38/> accessed on 10 December 2016.

¹¹⁰ Venice Commission, *Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015*, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), No. 803/2015, paragraph 46, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)027-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)027-e)> accessed on 10 December 2016.

¹¹¹ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016) pp 79-80.

¹¹² See for example, 'Without staff changes, reform of the prosecutions service will remain "cosmetic" – experts say,' Radio Svoboda, <http://www.radiosvoboda.org/a/27481016.html> accessed on 10 December 2016.

¹¹³ See Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016).

¹¹⁴ See Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016).

regarded as understaffed and underfunded, leading to widespread bribery, delayed and fabricated initiations of criminal proceedings¹¹⁵.

4.3.2. Human rights defenders¹¹⁶

Overall, civil society activists have long suffered from politicised judicial authorities in Ukraine¹¹⁷. This became clear during the “Maidan protests” of 2013/2014, when many judges and public prosecutors actively supported the violent suppression of protesters in which about 100 activists were killed, another 700 were injured and several people went missing. Judges and public prosecutors received instructions from Yanukovich’s administration and court presidents to disperse the mass protests (as the testimonies of the incumbent member of the high council of justice, Mamontova I. Yu., who previously served as a chairman of the Obolonskiy District Court of Kyiv, and of the former court president of appeal Court of Kyiv Chernushenko A, show)¹¹⁸. As a result, public prosecutors excessively arrested and detained protesters, were allegedly involved in kidnapping and torturing them and called for disproportionate punishments¹¹⁹. Besides, the police operations that resulted in shootings at and killings of activists were overseen by the prosecutor general and his deputies¹²⁰.

It is far from evident that the culture of impunity, inherent to the judiciary as well as the prosecution in Ukraine, will come to an end under the post-Maidan government¹²¹. After the escape of many senior officials from Ukraine, including the former president Viktor Yanukovich and the former prosecutor general Viktor Pshonka, the prosecutor's office was tasked to investigate the crimes committed during the Maidan protests. Although the new government created several new entities to facilitate the investigations into the protests, progress has been slow.

In essence, only a few judges and public prosecutors have faced consequences for their misconduct during the Maidan protests. As of July 2016, only 14 judges and 13 public prosecutors were brought to justice¹²². On the one hand, this is due to delayed reforms, the number of investigators, who are responsible for the investigation of crimes committed during the Maidan protests, which is not sufficient based on the volume of tasks, and the organisational and financial security of the prosecution which is at an extremely low level. On the other hand, the fact that judges and public prosecutors who had served with the Yanukovich regime and contributed to the many human rights violations committed during the Maidan protests continued their work under the new government has raised serious doubts about their impartiality, especially their ability to conduct independent investigations and adequately address their own wrongdoings (as the case of the deputy chief of the department of the procedural management in Kyiv, Mr. Nichiporenko, who later featured in the official investigation in regards to improper investigation of the proceedings regarding the Maidan protests, shows).

¹¹⁵ See for example Freedom House, *Freedom in the world: Ukraine* (2016) <<https://freedomhouse.org/report/freedom-world/2016/ukraine>> accessed on 10 December 2016; Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016) p 13.

¹¹⁶ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016).

¹¹⁷ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016).

¹¹⁸ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016) pp 75-76.

¹¹⁹ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016).

¹²⁰ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016).

¹²¹ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016) p 79.

¹²² Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016) p 80.

Additionally, each change of leadership in the general prosecutor's office affected the investigations. Repeatedly interference occurred with the work of the investigators and public prosecutors by the leadership of the general prosecutor's office. Moreover, the failure to solve the personnel issues has led to a significant delay in investigations and loss of opportunities to collect evidence in uncovered episodes.

Furthermore, the absence of judicial independence remains a serious obstacle to bringing perpetrators to justice. Although there were judges during the Maidan protests who took positions that directly contradicted the position of investigations of the prosecutor's office, there are also justices who oppose the ongoing investigations by making unlawful decisions, such as the return of indictments, delays of consideration and decision-making with obvious signs of unjustness (as cases of Dmitri Sadovnyka, a major in the anti-riot police unit, and Serhiy Arbuzov, the former deputy prime minister, who both were released from custody, show)¹²³. The presence and assistance in the courts of "Maidan judges" or even the immediate consideration of Maidan cases by such judges, who obviously have a conflict of interest, creates formidable difficulties in obtaining evidence in the criminal proceedings against the judges.

5. Recommendations

Judicial authorities have an explicit role to play in the realisation of human rights and the rule of law, especially in the right to a fair trial. This report has shown that member states of the Council of Europe erode the separation of power and systematically turn judicial authorities against civil society activists. Despite this, international, credible and transparent audit or monitoring procedures that remind judicial authorities of their professional duty to respect human rights do not exist.

Unfortunately, the joint report on "Challenges for judicial independence and impartiality in the member states of the Council of Europe" by the CCJE and the CCPE overlooks these important matters. Nevertheless, the CCJE and the CCPE are uniquely placed to take a leadership role in raising awareness of the relevance of human rights to judges and public prosecutors. Although steps were taken by the CCJE and CCPE to further the independence of judges and the prosecution in Europe, more efficient measures could be put in place to review judicial violations, especially when grave human rights abuse is concerned. This report therefore presents a set of possible measures to be taken by the CCJE and the CCPE to promote human rights standards in Europe.

According to the CCJE Terms of Reference, the CCJE shall provide advice and guidance on topical issues (through statements, opinions and reports) and, if necessary, visit countries concerned to discuss the ways of improving the existing situation through developing legislation, institutional framework and/or judicial practice¹²⁴. In this context, the CCJE also published a report in 2015, entitled "The position of the judiciary and its relation with the other powers of state in a modern

¹²³ Advocacy Advisory Panel NGO, *Accountability for violations during and in the aftermath of the EuroMaidan protests in Ukraine* (2016) pp 39-82

¹²⁴ CCJE, Status and situation of judges in member States at <http://www.coe.int/t/dghl/cooperation/ccje/cooperation/default_EN.asp?> accessed on 10 December 2016.

¹²⁴ CCJE, Terms of reference (1 January 2016 until 31 December 2017) at <https://wcd.coe.int/ViewDoc.jsp?p=&id=1389427&Site=CM&direct=true#P7_94> accessed on 10 December 2016.

democracy" (Opinion No. 18)¹²⁵. But unfortunately neither that report nor other CCJE documents explored the impact that courts and judges can have on human rights defenders¹²⁶.

Moreover, the CCJE may be asked for assistance by a body of the Council of Europe (Committee of Ministers, Parliamentary Assembly, Secretary General) or by CCJE members to look into specific problems concerning the status and the situation of judges¹²⁷. To carry out such (country) studies, the CCJE may also use sources of information of other relevant (professional) organisations including the European Association of Judges (EAJ) of the International Association of Judges (IAJ), the European Networks of Councils for the Judiciary (ENCJ) and Magistrats européens pour la démocratie et les libertés (MEDEL). Nevertheless, the biennial "CCJE Situation Report on the judiciary and judges", which explores the status quo of CCJE members and is based on questionnaires carried out by members and submissions by other judges' associations barely refers to CCJE jurisdictions in which judicial independence is heavily at stake and where judicial violations against human rights defenders are widespread (e.g., Azerbaijan and the Russian Federation)¹²⁸.

Similarly, the CCPE seems to have an underutilised potential in the prosecution in Europe. The CCPE develops common policies and legal instruments which include drawing up opinions, giving advice to the Committee of Ministers and members on topical questions, collecting information, organising conferences and undertaking studies or enquiries related to the functioning of the prosecution service in Europe¹²⁹. The CCPE also provides support to members in order to allow them to comply with European standards on particular situations concerning prosecutors, offers targeted co-operation at the request of CCPE members, prosecutorial bodies or relevant associations of prosecutors, and carries out country visits to discuss ways of improving the existing situation in the legislative and organisational fields¹³⁰. The CCPE's main fields of activity are *inter alia* assessing the professional duties and responsibilities of the prosecution towards the individual, the protection of and/or assistance to victims through and the accountability of public prosecutors in the jurisdictions of Council of Europe member states¹³¹.

The current Chair of the CCPE has emphasised the exemplary role to be played by the prosecution service in the performance of its duties in terms of upholding human rights and the principles of the European Convention on Human Rights¹³². The CCPE Opinion No.9 (2014) also pointed at the public prosecutor's professional responsibility to respect and ensure the protection of human rights¹³³.

¹²⁵ CCJE, *Opinion No. 18 (2015): The position of the judiciary and its relation with the other powers of state in a modern democracy* <http://www.coe.int/t/dghl/cooperation/ccje/cooperation/default_EN.asp?> accessed on 10 December 2016.

¹²⁶ CCJE, *Opinion No. 18 (2015): The position of the judiciary and its relation with the other powers of state in a modern democracy* <http://www.coe.int/t/dghl/cooperation/ccje/cooperation/default_EN.asp?> accessed on 10 December 2016.

¹²⁷ CCJE, Status and situation of judges in member States <http://www.coe.int/t/dghl/cooperation/ccje/cooperation/default_EN.asp?> accessed on 10 December 2016.

¹²⁷ CCJE, CCJE, Terms of reference (1 January 2016 until 31 December 2017) <https://wcd.coe.int/ViewDoc.jsp?p=&id=1389427&Site=CM&direct=true#P7_94> accessed on 10 December 2016.

¹²⁸ CCJE, Status and situation of judges in member states <http://www.coe.int/t/dghl/cooperation/ccje/cooperation/default_EN.asp?#> accessed on 10 December 2016.

¹²⁹ Framework overall action plan for the work of the CCPE, Appendix I.

¹³⁰ CCJE, Terms of reference (1 January 2016 until 31 December 2017) <https://wcd.coe.int/ViewDoc.jsp?p=&id=1389427&Site=CM&direct=true#P7_94> accessed on 10 December 2016; CCPE <http://www.coe.int/t/dghl/cooperation/CCPE/presentation/CCPE_depliant_en.pdf> accessed on 10 December 2016.

¹³¹ Framework overall action plan for the work of the CCPE, paras 3, 8 and 12 <[http://www.coe.int/t/dghl/cooperation/ccpe/presentation/CCPE\(2006\)5ERevFinal_Actionplan.pdf](http://www.coe.int/t/dghl/cooperation/ccpe/presentation/CCPE(2006)5ERevFinal_Actionplan.pdf)> accessed on 10 December 2016.

¹³² CCPE, A word from the Chair, <http://www.coe.int/t/dghl/cooperation/ccpe/presentation/president_en.asp> accessed on 10 December 2016.

¹³³ CCPE, Opinion no 9 (2014), paras 3, 15 and 94.

<[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCPE\(2014\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCPE(2014)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)> accessed 10 December 2016.

Additionally, the CCPE has received a growing number of complaints from various countries related to the status of the prosecution service and the exercise of their duties and discussed how to respond to such cases in 2016 (including setting up a task force to deal with such complaints)¹³⁴. Currently, however, no institutionalised human rights mechanism exists with the CCPE to promote compliance with professional integrity standards.

The following measures are recommended to the CCJE and the CCPE:

- (i) The CCJE and the CCPE may want to consider updating the report “Challenges for judicial independence and impartiality in the member states of the Council of Europe” in accordance with the Terms of Reference 2016-2017 of the CCJE and the CCPE, in particular, to ensure that the review pursues a comprehensive and methodologically thorough approach.
- (ii) The CCJE and the CCPE may want to consider using a wider range of methods and sources in collecting information about the functioning of the judicial and prosecution systems in the Council of Europe member states. This could include requiring member states to complete an annual questionnaire; organising country visits; considering reports and opinions of intergovernmental organisations (e.g., the UN and the OSCE), as well as decisions by the European Court of Human Rights and interventions by the Council of Europe Commissioner for Human Rights; considering reports by members of the Conference of International non-governmental Organisations of the Council of Europe and other civil society organisations; considering reports by professional associations and other relevant sources of information that could help to complete findings.
- (iii) The CCJE and the CCPE may want to consider establishing an “urgent appeal” procedure for cases in which the CCJE and the CCPE may play a role in preventing or mitigating human rights abuses by the judiciary or the prosecutors of the Council of Europe member states; this could include grave human rights violations, situations in which physical and/or mental integrity of an individual or a group is concerned (such as the risk of torture).
- (iv) The CCJE and the CCPE may want to step up information-sharing with civil society organisations, considering their reports and allowing them to contribute during the CCJE and the CCPE meetings.
- (v) Finally, the CCJE and the CCPE may want to consider organising a seminar on preventing abuse of the criminal justice system to prosecute human rights defenders in the Council of Europe member states, presenting an opinion to the Committee of Ministers.

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¹³⁴ CCPE Bureau, 25th meeting (26 May 2016) at http://www.coe.int/t/dghl/cooperation/ccpe/meetings/bureau/default_en.asp accessed 20 December 2016.