

The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan

A Briefing Paper

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I. Introduction

1. In any emergency or crisis situation, judicial oversight of the exceptional measures taken by the State is essential to the rule of law and the protection of human rights.¹ As anti-COVID-19 pandemic measures have affected many spheres of functioning of the State and society, they have affected justice systems to the extent that their normal operation was interrupted, suspended or adjusted to the new circumstances. While such measures may have been seen as necessary to effectively tackle the pandemic, the limited operation of the courts, as well as limitations on access to legal advice, have implications for access to justice and the right to a fair trial. They also raise questions of the capacity of the judicial system to provide redress for possible violations of human rights related to the pandemic and the consequent emergency measures. In this regard, States' obligations under international human rights law, which continue to apply in times of crisis, must be central to their COVID-19 response.²
2. In this briefing paper, the ICJ outlines measures affecting the court system and access to justice which have been introduced in response to COVID-19 in a number of countries of the Commonwealth of Independent States (CIS), and which by their nature touch upon legal obligations of States under international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and for member States of the Council of Europe, the European Convention on Human Rights (ECHR). In particular, in this paper the ICJ considers access to the justice and the court systems in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan. It considers the issue of the legislative framework governing the restrictive measures, as well as the problems of access to lawyers and courts in relation to the COVID-19 restrictions.
3. This briefing paper should be read in conjunction with the ICJ's general briefing note on COVID-19 and the Courts,³ which explains relevant international laws and standards in more detail.

II. Protection of human rights during states of emergency

4. During emergency situations, international human rights law continues to apply. All persons must have access to legal advice, and to fair and effective judicial proceedings, including to challenge the legality of emergency measures. Where there is declared public emergency which threatens the life of the nation, international human rights law allows for States to derogate from certain human rights obligations, subject to certain conditions including necessity, proportionality, non-discrimination, and time-limitedness.⁴ Yet, certain rights can never be derogated from.⁵ International human rights standards and jurisprudence have considered the right to challenge the lawfulness of detention before a tribunal, court or judge

¹ ICJ Geneva Declaration Commentary, pp.62-66.

² Legal commentary to the ICJ Geneva Declaration: upholding the rule of law and the role of judges and lawyers in times of crisis, <https://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/>.

³ ICJ Guidance on the Courts and COVID-19 (7 April 2020), <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/>.

⁴ ICCPR, Article 4.

⁵ Non-derogable rights include: in the case of the International Covenant on Civil and Political Rights: the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for failure to fulfil a contractual obligation, freedom from retroactive criminal liability, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion (Articles 6, 7, 8.1, 8.2, 11, 15, 16 and 18). European Convention for the Protection of Human Rights and Fundamental Freedoms: the right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude and freedom from retroactive liability (Articles 2, 3, 4.1 and 7). See also Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

as an effectively non-derogable right.⁶ The Working Group on Arbitrary Detention, among others, has underlined that the right to challenge the legality of detention or to petition for a writ of habeas corpus or remedy of amparo must in all circumstances be guaranteed.⁷

5. The Human Rights Committee, under the ICCPR, has issued a Statement on derogations from the Covenant in connection with the COVID-19 pandemic.⁸ Among other things it reaffirms that, "States parties may not resort to emergency powers or implement derogating measures in a manner that is discriminatory, or that violates other obligations that they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed. Nor can States parties deviate from the non-derogable provisions of the Covenant ... or from other rights that are essential for upholding the non-derogable rights found in the aforementioned provisions and for ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and the right of victims to obtain an effective remedy". The Human Rights Committee has emphasised that, "Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times".⁹
6. The UN Human Rights Council has adopted, unanimously, a President's statement on Human Rights implications of COVID-19, which among other things reaffirms that, "emergency measures taken by Governments in response to the COVID-19 pandemic must be necessary, proportionate to the evaluated risk and applied in a non-discriminatory way, have a specific focus and duration, and be in accordance with the State's obligations under applicable international human rights law".¹⁰
7. Among the countries considered in this briefing paper only Kyrgyz Republic followed the process for notification of derogation from its relevant human rights obligations under the treaties. It has notified the UN Secretary General of derogations to the International Covenant on Civil and Political Rights.¹¹
8. All of the countries considered in this briefing paper have legal frameworks that define the procedure for declaration of the state of emergency. Only Kazakhstan and Kyrgyzstan invoked these provisions and declared the state of emergency.¹² Azerbaijan considered this

⁶ See, inter alia: Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 14 and 16; General comment No. 35- Article 9 (Liberty and security of person)

, CCPR/C/GC/35, 23 Oct 2014, para 67; and Concluding Observations of the Human Rights Committee on Albania, UN Doc. CCPR/CO/82/ALB, 2 December 2004, para. 9; Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, Habeas corpus in emergency situations, (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), and Advisory Opinion OC-9/87 of 6 October 1987, Judicial guarantees in states of emergency, (Arts. 27(2), 25 and 8 American Convention on Human Rights); Article 27 of the American Convention on Human Rights; Articles 4 and 14 of the Arab Charter on Human Rights; Article 17.2(f) of the International Convention for the Protection of All Persons from Enforced Disappearance; Principle 32 of The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle M (5)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Article 9 of the Declaration on the Protection of All Persons from Enforced Disappearance and Commission on Human Rights, Resolution 1992/35 on Habeas Corpus, 28 February 1992.

⁷ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, 15 December 2003, paras. 62 and 85 and Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1994/27, 17 December 1993, para. 74.

⁸ Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 April 2020, <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>

⁹ General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial, CCPR/C/GC/32 (2007), para 6. See also General Comment No. 29: States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11 (2001), paras 11 and 16.

¹⁰ <https://undocs.org/A/HRC/43/L.42>. See

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25914&LangID=E> (29 May 2020).

¹¹ Kyrgyzstan: Notification under Article 4 (3) of The International Covenant On Civil And Political Rights, 31 March 2020, <https://treaties.un.org/doc/Publication/CN/2020/CN.129.2020-Eng.pdf>

¹² Order of the President of Kazakhstan "On the introduction of a state of emergency in the Republic of Kazakhstan", 15 March 2020. https://www.akorda.kz/ru/legal_acts/decrees/o-vvedenii-chrezvychaynogo-polozheniya-v-respublike-kazahstan; Decree of the President, "On the introduction of the state of emergency on the territory of the city of Jalal-Abad and Suzak district of the Jalal-Abad region of the Kyrgyz Republic", 24 March 2020,

http://www.president.kg/ru/sobytiya/16385_podpisan_ukaz_ovvedenii_chrezvichaynogo_pologheniya_naterrit_orii_goroda_dghalal_abad_isuzakskogo_rayona_dghalal_abadskoy_oblasti_kirgizskoy_respubliki

possibility¹³, but did not declare it. Russia on the federal level declared the “high alert regime” leaving it to regions to decide on the preventive measures.¹⁴ In Ukraine the government declared the emergency situation, which is different from the state of emergency.¹⁵ Uzbekistan did not introduce a state of emergency.¹⁶ While only one of the states followed the process for notification of derogations under international treaties, and only two introduced the state of emergency under national law, which contains legal framework for temporary restrictions, including on the freedom of movement, different countries established specialised headquarters or commissions charged with the powers to adopt, coordinate and implement preventative anti-COVID-19 measures. The legal framework and the status quo are considered in somewhat greater detail below.

9. In Azerbaijan, the law provides that the President “declares the state of emergency in separate regions of the Republic of Azerbaijan and, within 24 hours, submits an appropriate decree to the Milli Majlis [the Parliament] of the Republic of Azerbaijan for approval” in case “of natural disasters or epidemic, epizootic, severe ecological and other disasters; the commission of acts directed at violating the territorial integrity of the Republic of Azerbaijan, insurrections or coups d’état; mass disorders accompanied by violence; other conflicts threatening the lives and security of citizens, or the normal activities of State bodies”.¹⁷ The particular measures which can be adopted during the state of emergency are listed in the Law on State of Emergency; according to Article 6 of which the state of emergency cannot last longer than 60 days.¹⁸
10. The President of Azerbaijan did not invoke the power to declare the state of emergency. On 27 February 2020, an Operational headquarters was established under the Cabinet of Ministers to implement preventative measures.¹⁹ The Headquarters declared quarantine on 14 March and on 18 April extended its terms until 4 May 2020²⁰ and on 1 May until 31 May 2020²¹.
11. In Kazakhstan the President of the Republic “after official consultations with the Prime Minister and the Chairpersons of the Chambers of the Parliament of the Republic [declares]

¹³ Aliyev did not rule out the possibility to declare the state of emergency in Azerbaijan because of coronavirus, RIA Novosti, 19 March 2020. <https://ria.ru/20200319/1568840979.html> (Accessed 20 April 2020).

¹⁴ On the decisions of the meeting with Mikhail Mishustin on the prevention and control of the spread of coronavirus infection, Government of the Russian Federation, 29 January 2020, <http://government.ru/orders/selection/401/38863/>; High alert due to coronavirus introduced throughout Russia, TASS.ru, 19 March. <https://tass.ru/obschestvo/8027563>;

Order, Head of Moscow District, 12 March 2020, <https://mz.mosreg.ru/download/document/7495241>

¹⁵ According to Article 2 of the Civil Protection Code of Ukraine, an emergency situation is a situation in a particular territory or a business entity on such territory, or a water body characterized by a violation of normal living conditions caused by a catastrophe, accident, fire, natural disaster, epidemic, epizootic outbreak, epiphytity, the use of lesions, or other dangerous situation that has caused (could cause) a threat to the life or health of the population, a large number of dead and injured, inflicting significant material losses and the inability to people living in that territory or facility, conducting business activities on such territory, Communications Department of the Secretariat of the Cabinet of Ministers of Ukraine, 18 March 2020, <https://www.kmu.gov.ua/en/news/ukrayivskij-oblasti-vstanovleno-rezhim-nadzvichajnoyi-situaciyi-rishennya-uryadu>; Communications Department of the Secretariat of the Cabinet of Ministers of Ukraine, 25 March 2020, <https://www.kmu.gov.ua/en/news/uryad-zaprovadiv-rezhim-nadzvichajnoyi-situaciyi-po-vsij-teritoriyi-ukrayini>

¹⁶ Decree of the President of Uzbekistan No. P-5537, 29 January 2020. <https://lex.uz/docs/4720408>

¹⁷ The Constitution of the Republic of Azerbaijan, 1995. <https://static2.president.az/media/W1siZiIsIjIwMTgvMDMvMDkvNHQzMWNrcGppYV9lL25zdGl0dXNpeWFFRU5HLnBkZiJdXQ?sha=c440b7c5f80d645b> (Accessed 20 April 2020).

¹⁸ Law of the Republic of Azerbaijan No. 681-IIIG from 8 June 2004 “On the state of emergency”. <https://cis-legislation.com/document.fwx?rgn=7429> (Accessed 20 April 2020).

¹⁹ An operational headquarters was established under the Cabinet of Ministers, Cabinet of Ministers of the Republic of Azerbaijan, 27 February 2020. <https://cabmin.gov.az/az/article/680/> (Accessed 20 April 2020).

²⁰ Information of the Operational Headquarters under the Cabinet of Ministers of the Republic of Azerbaijan, Cabinet of Ministers of the Republic of Azerbaijan, 18 April 2020. <https://cabmin.gov.az/az/article/813/> (Accessed 20 April 2020).

²¹ Information of the Operational Headquarters under the Cabinet of Ministers of the Republic of Azerbaijan, Cabinet of Ministers of the Republic of Azerbaijan, 1 May 2020. <https://cabmin.gov.az/az/article/832/>

a state of emergency".²² On 15 March 2020, the President declared the state of emergency.²³ Initially the state of emergency should have lasted from 16 March until 15 April,²⁴ on 14 April the President prolonged it until 1 May 2020²⁵ and on 29 April 2020 until 11 May 2020²⁶. On 15 March the President created the State Commission on implementation of the regime of the state emergency under the President of Kazakhstan, charged with powers to adopt preventive measures.²⁷

12. In Kyrgyzstan the President of Kyrgyzstan "gives a warning, on the grounds specified by constitutional law, of the possibility of introducing the state of emergency, and where necessary, introduces the state of emergency in separate regions without prior declaration, providing prompt notification to the Jogorku Kenesh [the Parliament]".²⁸ The Parliament "introduces the state of emergency in cases and in accordance with the procedure envisaged in the constitutional law, approves or repeals Presidential decrees on this matter".²⁹ The terms of the state of emergency in separate regions cannot exceed 30 days, and 60 days – in the territory of all of Kyrgyzstan.³⁰
13. On 27 January, the Republican Headquarters charged with adoption of preventative measures was created. Its work was later given a negative assessment by the Security Council of Kyrgyzstan.³¹ In particular it was assessed that certain members of the Government failed to take the necessary measures, including economic, social and administrative measures in the field of the prevention of the spread of the virus, as a result of which some ministers resigned on 1 April 2020³². On 17 March 2020, the Government of the Kyrgyz Republic decided to take preventative measures.³³ On 24 March 2020 the President declared³⁴ and later prolonged the state of emergency in some regions until 10 May 2020³⁵, following the earlier extension until 30 April 2020,³⁶

²² Constitution of Kazakhstan, 1997 (rev. 2017), Article 44. https://www.akorda.kz/ru/official_documents/constitution (Accessed 20 April 2020).

²³ Order of the President of Kazakhstan "On the introduction of a state of emergency in the Republic of Kazakhstan", 15 March 2020. https://www.akorda.kz/ru/legal_acts/decrees/o-vvedenii-chrezvychainogo-polozheniya-v-respublike-kazahstan (Accessed 20 April 2020).

²⁴ *Ibid.*

²⁵ Decree of the President of Kazakhstan "On renewal of the state of emergency in the Republic of Kazakhstan", 14 April 2020. https://www.akorda.kz/ru/legal_acts/decrees/o-prodlenii-deistviya-chrezvychainogo-polozheniya-v-respublike-kazahstan?q=%D1%87%D1%80%D0%B5%D0%B7%D0%B2%D1%8B%D1%87%D0%B0%D0%B9%D0%BD%D0%BE%D0%B3%D0%BE%20%D0%BF%D0%BE%D0%BB%D0%BE%D0%B6%D0%B5%D0%BD%D0%B8%D1%8F (Accessed 20 April 2020).

²⁶ Decree of the President of Kazakhstan, 20 April 2020, https://www.akorda.kz/ru/legal_acts/decrees/o-prodlenii-deistviya-chrezvychainogo-polozheniya-v-respublike-kazahstan-1

²⁷ Decree "On the introduction of the state of emergency in Kazakhstan, President of the Republic of Kazakhstan, 15 March 2020, paragraph 2. http://www.akorda.kz/ru/legal_acts/decrees/o-vvedenii-chrezvychainogo-polozheniya-v-respublike-kazahstan (Accessed 20 April 2020).

²⁸ The Constitution of Kyrgyzstan, 2010 (rev. 2016), Article 64 section 9 (2). <http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru> (Accessed 20 April 2020).

²⁹ *Ibid.*, Article 74 section 5 (1).

³⁰ Constitutional Law of the Kyrgyz Republic "On the state of emergency" from 24 October 1998 No. 135, Article 13. <http://cbd.minjust.gov.kg/act/view/ru-ru/142?cl=ru-ru> (Accessed 20 April 2020).

³¹ The Secretariat of the Security Council of the Kyrgyz Republic, President of the Kyrgyz Republic, 2 April 2020. http://www.president.kg/ru/sobytiya/16451_sekretariat_soveta_bezopasnosti_kirgizskoy_respubliki_soobshaet (Accessed 20 April 2020).

³² *Ibid.*

³³ The Resolution of the Government of the Kyrgyz Republic No 173 from 17 March 2020. <http://cbd.minjust.gov.kg/act/view/ru-ru/157444?cl=ru-ru> (Accessed 20 April 2020).

³⁴ Decree of the President of Kazakhstan "On the introduction of the state of emergency on the territory of the city of Jalal-Abad and Suzak district of the Jalal-Abad region of the Kyrgyz Republic", 24 March 2020. http://www.president.kg/ru/sobytiya/16385_podpisan_ukaz_ovvedenii_chrezvichaynogo_polozheniya_naterrii_orii_goroda_dghalal_abad_isuzakskogo_rayona_dghalal_abadskoy_oblasti_kirgizskoy_respubliki (Accessed 20 April 2020).

³⁵ The Decree of the President of the Kyrgyz Republic, 28 April 2020, http://www.president.kg/ru/sobytiya/ukazy/16597_prezident_sooronbay_gheenbekov_podpisa_ukaz_o_prodlenii_chrezvichaynogo_polozheniya_na_otdelnih_territoriyah_strani; The decree covered the cities of Bishkek, Osh, Jalal=Abad, and At-Bashinsk district of the Narinsk region.

³⁶ President Sooronbay Jeenbekov signed a decree on the extension of emergency provisions in separate cities and districts of the country until April 30, 2020, the President of the Kyrgyz Republic, 14 April 2020. http://www.president.kg/ru/sobytiya/ukazy/16503_prezident_sooronbay_gheenbekov_podpisa_ukaz_oprodlenii_chrezvichaynogo_polozheniya_votdelnih_gorodah_irayonah_strani_do30aprelya_2020_goda (Accessed 20 April 2020).

14. In the Russian Federation, according to the Constitution, the Council of Federation [the upper chamber of the Parliament] approves the presidential decree on the state of emergency.³⁷ The Federal Constitutional Law "On the State of Emergency" mirrors this provision.³⁸ The term of an All-Russian state of emergency cannot exceed 30 days, in separate regions it cannot exceed 60 days.³⁹ On 1 April 2020, the Federal Law "On the Protection of the Population and Territories from Natural and Technogenic Emergencies" was amended⁴⁰ to authorize the Government of the Russian Federation to declare the high-alert regime or a regime of emergency situation on the federal level.⁴¹
15. No state of emergency has been declared in Russia. On 27 January, the Prime Minister issued a decision to create Headquarters on issues of control and prevention of coronavirus infection.⁴² On 19 March, all regions in Russia introduced the high-alert regime, which includes limitations on gatherings and closure of public places.⁴³ On 25 March 2020, the President announced the following week to be "days-off", which later were prolonged until the 30 April 2020.⁴⁴ The legislative framework for application of such regime of prolonged days off caused uncertainty. In some regions the high alert regime was extended until 11 May 2020⁴⁵.
16. In Ukraine, the President declares the state of emergency by a decree, which is subject to approval by the Verkhovna Rada [the Parliament].⁴⁶ The President has not invoked these powers. On 24 March 2020, the Cabinet of Ministers declared the "emergency situation" until 24 April, introducing restrictive measures,⁴⁷ which were severed on 2 April 2020⁴⁸ and later extended until 11 May 2020⁴⁹. On 26 March, the Anti-crisis headquarters on prevention of the spread of coronavirus was created.⁵⁰
17. In Uzbekistan, the President of the country is also charged with the powers to "introduce the state of emergency on the entire territory or in separate regions of the Republic of Uzbekistan and within seventy two hours to submit the adopted decision for approval by the chambers of the Oliy Majlis [the Parliament] of the Republic of Uzbekistan."⁵¹ The President of Uzbekistan did not officially announce the state of emergency.⁵² On 29 January 2020, the

³⁷ Constitution of the Russian Federation, 1993, Article 101.

³⁸ Federal Constitutional Law of 30.05.2001 No. 3-FKZ "On the state of emergency", Article 4. http://www.consultant.ru/document/cons_doc_LAW_31866/ (Accessed 20 April 2020).

³⁹ *Ibid.*, Article 9 (2).

⁴⁰ The draft law No. 931192-7 "On amendments to certain legislative acts of the Russian Federation on the prevention and liquidation of emergency situations". System of legislative activities' support. <https://sozd.duma.gov.ru/bill/931192-7> (Accessed 20 April 2020).

⁴¹ Federal Law "On the Protection of the Population and Territories from Natural and Technogenic Emergencies" of 12.21.1994 No 68-ФЗ, Article 10 (a.1). http://www.consultant.ru/document/cons_doc_LAW_5295/ (Accessed 20 April 2020).

⁴² On the decisions of the meeting with Mikhail Mishustin on the prevention and control of the spread of coronavirus infection, Government of the Russian Federation, 29 January 2020. <http://government.ru/orders/selection/401/38863/> (Accessed 20 April 2020).

⁴³ High alert due to coronavirus introduced throughout Russia, TASS.ru, 19 March. <https://tass.ru/obschestvo/8027563> (Accessed 20 April 2020).

⁴⁴ Decree, President of the Russian Federation. <http://kremlin.ru/acts/news/63065> (Accessed 20 April 2020).

⁴⁵ Decree, Head of Moscow District, 28 April 2020, <https://mosreg.ru/download/document/1064225>

⁴⁶ The Constitution of the Ukraine, 1996 (rev. 2016), Article 106 section 21. <https://portal.rada.gov.ua/uploads/documents/27396.pdf> (Accessed 20 April 2020).

⁴⁷ Government introduced emergency situation regime in entire territory of Ukraine, Government Portal. 25 March 2020. <https://www.kmu.gov.ua/en/news/uryad-zaprovadiv-rezhim-nadzvichajnoyi-situaciyi-po-vsij-teritoriyi-ukrayini> (Accessed 20 April 2020).

⁴⁸ New restriction measures for the period of quarantine explained Government Portal, 4 April 2020. <https://www.kmu.gov.ua/en/news/rozyasnennya-shchodo-novih-obmezhuvalnih-zahodiv-na-period-karantynu> (Accessed 20 April 2020).

⁴⁹ <https://www.kyivpost.com/ukraine-politics/government-extends-quarantine-until-may-11-expects-covid-19-peak-in-2-weeks.html>

⁵⁰ Parliament held a meeting on countering the spread of coronavirus, Verkhovna Rada of Ukraine, 26 March 2020.

<https://portal.rada.gov.ua/ru/news/Novosti/Soobshchennyya/page/ru/news/Novosti/Soobshchennyya/191703.html> (Accessed 20 April 2020).

⁵¹ Constitution of Uzbekistan, 1992 (rev. 2011), https://www.constituteproject.org/constitution/Uzbekistan_2011?lang=en (Accessed 20 April 2020).

⁵² Announcement was made via official telegram channel on COVID-19: <https://t.me/koronavirusinfouz> (Accessed 20 April 2020).

President created a Special Commission on preparation of programme of preventive measures against spread of the coronavirus in Uzbekistan.⁵³ The Commission is charged with organization of preventative measures in Uzbekistan.⁵⁴ The latter are published in its official telegram-channel,⁵⁵ which leaves open the question as to the legal nature of the decisions published mainly on this social network rather than other official sources mentioned by the Law on Normative Legal Acts.⁵⁶

III. Preventative measures and the right of access to a lawyer

18. The essential role that lawyers play in the protection of human rights becomes even more vital in times of crisis or states of emergency.⁵⁷ In particular, lawyers play an important role in protection of the right to a fair trial,⁵⁸ the right to liberty,⁵⁹ freedom from torture or other ill-treatment in detention,⁶⁰ and in ensuring accountability and effective remedies for violations of human rights. Under Article 14(3)(b) of the ICCPR, everyone charged with a criminal offence is entitled "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".⁶¹ In its General Comment No. 32 (2007), the Human Rights Committee considered that the right to communicate with a lawyer of one's own choosing is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.⁶² Access to a lawyer for a person deprived of liberty must be prompt⁶³ and authorities must respect the confidentiality of all communications between lawyers and clients.⁶⁴ Furthermore, lawyers should be able to advise and to represent clients without intimidation, hindrance, harassment or improper interference.⁶⁵
19. The restrictive measures introduced in several of the States considered in this briefing paper have impacted on the lawyers' ability to freely move and have access to, for example, detention facilities, and some lawyers have had to switch fully to remote work. There were reports that these limitations resulted in inability of lawyers to meet with their clients. In Azerbaijan following the uncertainties and concerns whether the restrictions on the movement and transportation applied to the lawyers or not and their access to clients, on 2 April 2020 the Cabinet of Ministers made clear that as of 5 April 2020, advocates were included in the list of the professions authorized to carry out professional duties.⁶⁶
20. Visits to detention facilities have been prohibited in Kazakhstan and Kyrgyzstan during the COVID-19 epidemic. On 4 April, in Kazakhstan the visits to detention facilities were stopped, lawyers could only see their clients via videoconference.⁶⁷ In Kyrgyzstan, lawyers provided free legal aid remotely via telephone calls, messengers, by e-mail and via social media, including Instagram.⁶⁸ How and if this exclusive reliance on social media and digital means of legal consultation may meet the requirements of the right to have "adequate time and facilities" for preparation of a defence remains to be examined. Yet, the ICJ notes that unless such communication ensures the lawyer-client secrecy, it will interfere with a number of human rights, including the prohibition of arbitrary or unlawful interference with privacy or

⁵³ Decree of the President of Uzbekistan No. P-5537, 29 January 2020. <https://lex.uz/docs/4720408> (Accessed 20 April 2020).

⁵⁴ *Ibid.*

⁵⁵ Official telegram channel of Special Republican Commission on preparation of programme of preventive measures against spread of the coronavirus in Uzbekistan. https://t.me/axborot_kanali (Accessed 20 April 2020).

⁵⁶ Law on Normative Legal Acts, Articles 25 and 26.

⁵⁷ ICJ, Legal Commentary to the Geneva Declaration, pp112-113

⁵⁸ Article 19 ICCPR, Article 6 ECHR

⁵⁹ Article 9 ICCPR, Article 5 ECHR

⁶⁰ UN Convention Against Torture, Article 7 ICCPR, Article 3 ECHR

⁶¹ ICCPR, Article 14.3(b).

⁶² HRC General Comment No. 32, *op. cit.*, para. 40.

⁶³ *Ibid.*, para. 34. Basic Principles on the Role of Lawyers, *op. cit.*, Principle 7. General Human Rights Committee GC 35, para 35.

⁶⁴ *Ibid.* principles 8 and 22.

⁶⁵ *Ibid.* principle 16.

⁶⁶ The Cabinet of Ministers, The Decision on additional measures to prevent spread of Coronavirus (COVID-19) in the territory of Azerbaijan Republic, 2 April 2020, <https://cabmin.gov.az/az/document/4365/>,

⁶⁷ Attachment 16 to the decision of government chief physician of Kazakhstan 09.04.2020 №_ 32-ПГБр, <https://infoalmaty.kz/info> (Accessed 20 April 2020).

⁶⁸ Center for Coordination of State-Guaranteed Legal Aid Changes Work Schedule, Ministry of Justice of Kyrgyz Republic, 27 March 2020. <http://minjust.gov.kg/ru/news/view/id/2690/> (Accessed 20 April 2020).

correspondence under Article 17 of the ICCPR, and the right to a fair trial under Article 14 of the ICCPR, including the right to private communication with a lawyer.

21. On 18 March the Federal Penitentiary Service of the Russia Federation limited the visits of relatives to places of detention throughout Russia.⁶⁹ Visits of lawyers to detention facilities were also limited.⁷⁰ Meetings with lawyers were organised in rooms designed for meetings with relatives.⁷¹ Besides, it was reported that lawyers in Russia claimed that telephones used for conversation in visitors' rooms were overheard by the staff of the place of detention.⁷²
22. In Moscow, since 31 March, conditions became more stringent: only one pre-trial detention facility admitted detainees, admittance of all parcels was stopped, transportation of suspects, the accused and participation of persons in detention in investigative activities was suspended.⁷³ On 10 April, the Mayor of Moscow introduced a ban on leaving homes except in emergency cases and transportation to/from work, if the place of work was not prohibited to visit, purchase of the food or medicine.⁷⁴ Lawyers, who are members of the Bar are authorized to move on professional needs around the city after on-line registration with lawyers' ID.⁷⁵ In general, lawyers in different regions of Russia were reported to increasingly prefer to work remotely.⁷⁶
23. In Ukraine lawyers continued to practice normally, including visiting detention facilities and courts: the quarantine introduced on 13 March 2020 in places of detention did not limit visits of lawyers.⁷⁷ The Ukrainian National Bar Association called on the government to provide masks and other protection equipment and facilitate the transportation of lawyers providing free legal aid to their clients.⁷⁸
24. In Uzbekistan, visits to detention facilities for relatives were restricted.⁷⁹ Transportation was limited for most of the population and to use personal transport, special stickers were introduced and the Ministry of Justice published a list of professions which did not require to obtain a special travel sticker.⁸⁰ The list included all government organizations and law enforcement, while members of the Chamber of Lawyers were not included on the list.⁸¹ On 9 April, Uzbekistan stopped issuing the stickers.⁸² The Ministry of Justice clarified that the law enforcement authorities could "accompany" lawyers with their vehicles to participate in "judicial and investigative activities"⁸³, besides special stickers were allocated for the management of the Chamber of Lawyers and its territorial branches which could use with

⁶⁹ , the Federal Penitentiary Service, 3 April 2020. http://fsin.su/news/index.php?ELEMENT_ID=502612 (Accessed 20 April 2020).

⁷⁰ Information of the Federal Penitentiary Service, Federal Penitentiary Service of the Russia Federation, 3 April 2020. http://fsin.su/news/index.php?ELEMENT_ID=503889 (Accessed 20 April 2020).

⁷¹ Pandemic behind the bars. How coronavirus changed the life of Russian pre-trial detention centers, BBC Russia, 6 April 2020, <https://www.bbc.com/russian/features-52184692> (Accessed 20 April 2020).

⁷² Pandemic behind the bars. How coronavirus changed the life of Russian pre-trial detention centers, BBC Russia, 6 April 2020, <https://www.bbc.com/russian/features-52184692> (Accessed 20 April 2020).

⁷³ Information of the Federal Penitentiary Service, Federal Penitentiary Service of the Russia Federation, 3.04.2020. http://fsin.su/news/index.php?ELEMENT_ID=503889 (Accessed 20 April 2020).

⁷⁴ Decree of the Mayor of Moscow No. 42-YM from 10 April 2020 "On amendments of the Decree No. 12-YM from 5 March 2020". [https://www.mos.ru/upload/documents/docs/42-YM\(4\).pdf](https://www.mos.ru/upload/documents/docs/42-YM(4).pdf) (Accessed 20 April 2020).

⁷⁵ Decree of the Mayor of Moscow No. 45-YM from 18 April 2020 "On amendments of the Decree No. 43-YM from 11 April 2020". [https://www.mos.ru/upload/documents/docs/45-YM\(2\).pdf](https://www.mos.ru/upload/documents/docs/45-YM(2).pdf) (Accessed 20 April 2020).

⁷⁶ Safe and free legal aid, Federal Chamber of Lawyers of the Russian Federation, 17 April 2020. <https://fparf.ru/news/law-chambers/pomoshch-besplatnaya-i-bezopasnaya/> (Accessed 20 April 2020).

⁷⁷ Yuaheni Gorodets: restriction on visits to places of detention, Ministry of Justice of Ukraine, 13 March 2020, <https://minjust.gov.ua/news/ministry/evgeniy-gorovets-zaprovdjeno-obmejjennya-na-vidviduvannya-ustanov-vikonannya-pokaran-ta-sizo> (Accessed 20 April 2020).

⁷⁸ The NAAU called on the government to allocate funds to provide BDA advocates with remedies, National Association of Lawyers, 9 April 2020. <https://unba.org.ua/news/5425-naau-zaklikala-uryad-vidiliti-koshti-na-zabezpechennya-advokativ-bpd-zasobami-zahistu.html> (Accessed 20 April 2020).

⁷⁹ All prisons in Uzbekistan transferred to quarantine, visits of relatives suspended - Ministry of Internal Affairs, Podrobno.uz, 26 March 2020. <https://podrobno.uz/cat/obchestvo/vse-tyurmy-uzbekistana-perevedeny-na-karantin-vizity-rodstvennikov-priostanovleny-mvd/> (Accessed 20 April 2020).

⁸⁰ The list of persons who can ride without a sticker during quarantine is updated, KUN.UZ, 9 April 2020. <https://kun.uz/ru/news/2020/04/09/obnovlen-spisok-lits-kotoryye-smogut-vezdit-bez-stikera-vo-vremya-karantina> (Accessed 20 April 2020).

⁸¹ Ibid.

⁸² Official telegram channel of Special Commission, <https://t.me/leginf/1262> (Accessed 20 April 2020).

⁸³ Frequently Asked Questions and Answers on Legal Issues, Ministry of Justice of Uzbekistan. <https://www.minjust.uz/ru/press-center/news/98981/> (Accessed 20 April 2020)

their vehicles.⁸⁴ The Ministry of Justice states that in emergency cases it would provide lawyers with vehicles of the Ministry.⁸⁵ Moreover, the Ministry of Internal Affairs allowed to carry out investigative activities via videoconference.⁸⁶

25. In Azerbaijan visits to detention facilities of the relatives of the detained and prisoners had been prohibited⁸⁷. However, lawyers were allowed to have access to the detention facilities under “the special procedure”, which was not clarified in the text of instruction of the Ministry of Justice. In some detention facilities the lawyers had been required to produce the medical document – result of the COVID-19 test in order to have access to the facility. Reportedly, this practice has been stopped as of 14 May 2020⁸⁸.

IV. Preventative measures affecting the work of courts

26. The judiciary plays an essential role in securing the rule of law by ensuring that the actions of the other branches of government respect the law.⁸⁹ This role becomes even more important in times of emergency or other crisis, and yet it is precisely in those situations that it is most often limited or threatened.⁹⁰

27. The right of access to court is a right guaranteed by Article 14 the ICCPR, Article 6 of the ECHR as well as multiple other treaties. According to the international law, all trials must be open to public which ensures transparency of proceedings and thus provides an important safeguard for the interest of the individual and society in whole.⁹¹ In exceptional circumstances, the public, including the media, can be excluded from all or part of a trial.⁹² These exceptional circumstances are restricted to when it is strictly necessary to protect the interests of justice (for example when it is necessary to protect witnesses);⁹³ when certain considerations involving private lives of the parties so require (for example, in cases involving the trial of juveniles, cases in which juveniles or children are victims or those in which the identity of victims of sexual violence needs to be protected);⁹⁴ or when it is strictly necessary for reasons of public order, morals or national security.⁹⁵ “Public health” is in fact not listed as among the possible reasons for excluding the public from hearings to which article 14 ICCPR or article 6 European Convention applies, although it is included in other lists of grounds of exception elsewhere in these treaties; it is possible therefore that a derogation is required to generally exclude (i.e. without substituting videoconferencing or newsmedia access) the public on public health grounds. Any restriction on public access must, furthermore, be strictly justified and be subject to on-going judicial supervision.⁹⁶

⁸⁴ Frequently Asked Questions and Answers on Legal Issues, Ministry of Justice of Uzbekistan. <https://www.minjust.uz/ru/press-center/news/98981/> (Accessed 20 April 2020).

⁸⁵ *Ibid.*

⁸⁶ Investigation actions in Uzbekistan will be carried out via video, Regnum, 25 March 2020. <https://regnum.ru/news/society/2895096.html> (Accessed 20 April 2020).

⁸⁷ Ministry of Justice Penitentiary Service, 19 March 2020, <http://www.penitensiar.justice.gov.az/news/1195-penitensiar-mssislrd-koronavirus-infeksiyasnn-yaylmasnn-qarsnn-alnmas-zr-ciddi-tdbirlr-davam-etdirilir.html>,

⁸⁸ Reportedly, this practice had been stopped following the Ministry of Justice’s instruction in this connection, <https://report.az/hadise/sabahdan-vekiller-istintaq-tecridxanalarina-arayissiz-buraxilacaq/>.

⁸⁹ ICJ Guidance on the Courts and COVID-19, <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/>.

⁹⁰ Legal commentary to the ICJ Geneva Declaration: upholding the rule of law and the role of judges & lawyers in times of crisis, <https://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/>; ICJ Guidance on the Courts and COVID-19, <https://www.icj.org/icj-guidance-on-the-courts-and-covid-19/>

⁹¹ General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, para. 28. See also: European Court of Human Rights, Judgment of 8 December 1983, *Axen v. Germany*, Application No. 8273/78, para. 25; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 172.

⁹² Article 14(1) of the International Covenant for Civil and Political Rights; Article 6(1) of the European Convention on Human Rights.

⁹³ ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], Applications Nos. 55391/13, 57728/13 and 74041/13, Judgement of 6 November 2018, para. 187.

⁹⁴ ECtHR, *B. and P. v. the United Kingdom*, Applications nos. 36337/97 and 35974/97, 24 April 2001, para 38.

⁹⁵ ECtHR, *Zagorodnikov v. Russia*, Application no. 66941/01, 07 September 2007, para. 26; ECtHR, *B. and P. v. the United Kingdom*, Applications nos. 36337/97 and 35974/97, Judgement of 24 April 2001, para. 39.

⁹⁶ ECtHR, *Chaushev and Others v. Russia*, Nos. 37037/03, 39053/03 and 2469/04, 25/10/2016, § 24: when deciding to hold a hearing in camera, the domestic courts are required to provide sufficient reasoning for their decision demonstrating that closure is strictly necessary within the meaning of Article 6 § 1 of the Convention; *Ramos Nunes de Carvalho e Sá v. Portugal* (GC), Nos. 55391/13 57728/13 74041/13,

28. By its decision of 19 March⁹⁷ and 23 April 2020⁹⁸, the Supreme Court of Azerbaijan recommended that the courts postpone the consideration of all cases with the exception of urgent ones and the cases which do not require oral court hearings⁹⁹ and hold hearings via the "Electronic Court" information system in civil cases and commercial disputes. On 2 May 2020, the Supreme Court extended the same recommendations until 31 May 2020 in respect of the courts that operate in some regions mentioned by the Cabinet of Ministers, while in some regions of Azerbaijan the courts resumed their activities with some restrictions as of 4 May 2020¹⁰⁰. The Supreme Court also recommended submission of the complaints by post or email and seek the consultation by internet or telephone on account of the closure of the court buildings for the public¹⁰¹.
29. In Kazakhstan all court hearings were recommended to be held via videoconference, including via mobile app TRUECONF¹⁰² or other applications and with any device.¹⁰³ For example, the ICJ observed several online court hearings in the Kazakhstan courts via an online platform.¹⁰⁴ During the period of 26-31 March the courts hold 7 thousand hearings, among which 3 thousand hearings were with the participations of the parties.¹⁰⁵ Individuals are discouraged to participate in hearings in person.¹⁰⁶ Kazakhstan aimed to hold 100% of the hearings on-line by the end of April.¹⁰⁷ A new service "on-line-reconciliation" was launched, which offers the possibility to settle a dispute without applying to court.¹⁰⁸ While such logistical readiness may be welcome, at a trial observation conducted by the ICJ, a lawyer of one of the parties was excluded from the online hearing after posting questions to a judge, which the court insisted should not be asked.¹⁰⁹ She was never allowed to return to the online hearing. There appeared to be lack of clarity regarding conduct of lawyers during an online hearing, and clearly potential concerns were raised regarding the right to a defence and the principle of equality of arms, given the ease with which participants can be excluded from online hearings.
30. In Kyrgyzstan on 19 March, the Supreme Court decided to allow only participants of the court proceedings to be admitted to courts.¹¹⁰ Since 30 March work of some courts was

06/11/2018, § 210, "...dispensing with an oral hearing should be an exceptional measure and should be duly justified in the light of the Convention institutions' case-law".

⁹⁷ Plenum of the Supreme Court of the Republic of Azerbaijan No. 5 "n measures to be taken in courts to prevent the spread of coronavirus (COVID-19) infection in the Republic of Azerbaijan," 19 March 2020. https://courts.gov.az/az/main/displaynews/AZRBAYCAN-RESPUBLIKASINDA-KORONAVIRUS-COVID-19-INFEKSIYASININ-YAYILMASI-THLUKSININ-QARSISININ-ALINMASI-MQSDI-IL-MHKMLRD-HYATA-KECIRILMSI-ZRURI-OLAN-TDBIRLR-HAQINDA_488 (Accessed 20 April 2020).

⁹⁸ <http://www.supremecourt.gov.az/post/view/1179>

⁹⁹ Cases of selection, extension, change, annulment of the remand in custody, administrative arrest, the complaints with regard the enforcement of the courts' judgements or other decisions, the cases examined in the special (written) proceedings and so on.

¹⁰⁰ <http://www.supremecourt.gov.az/post/view/1181>

¹⁰¹ *ibid*

¹⁰² On the regime of work of courts of the Republic during the state of emergency, Supreme Court of Kazakhstan, 16 March 2020. <http://sud.gov.kz/rus/news/o-rezhime-raboty-sudov-respubliki-v-ramkah-chp> (Accessed 20 April 2020).

¹⁰³ Citizens of Kazakhstan can apply to the court via any gadget, Supreme Court of Kazakhstan, 6 April 2020. <https://sud.gov.kz/rus/news/kazahstancy-mogut-obratitsya-v-sud-s-lyubogo-gadzheta> (Accessed 20 April 2020).

¹⁰⁴ ICJ is conducting an online trial observation in a lawyers' disbarment case in Kazakhstan, https://twitter.com/ICJ_CIS/status/1252882416705953792.

¹⁰⁵ The State of emergency is not a good time to go to the court, Supreme Court of Kazakhstan, 3 April 2020. <http://sud.gov.kz/rus/news/chp-ne-vremya-suditsya> (Accessed 20 April 2020).

¹⁰⁶ *Ibid*.

¹⁰⁷ <https://sud.gov.kz/rus/news/kazahstancy-mogut-obratitsya-v-sud-s-lyubogo-gadzheta> (Accessed 20 April 2020).

¹⁰⁸ The State of emergency is not a good time to go to the court, Supreme Court of Kazakhstan, 3 April 2020. <http://sud.gov.kz/rus/news/chp-ne-vremya-suditsya> (Accessed 20 April 2020).

¹⁰⁹ ICJ is conducting an online trial observation in a lawyers' disbarment case in Kazakhstan, https://twitter.com/ICJ_CIS/status/1252882416705953792

¹¹⁰ Supreme Court of the Kyrgyz Republic strengthens security measures, Supreme Court of the Kyrgyz Republic, 19 March 2020. <http://sot.kg/post/verhovnyj-sud-kyrgyzskoj-respubliki-usilivaet-mery-bezopasnosti> (Accessed 20 April 2020).

suspended with the exception of duty judges and staff of the courts, ¹¹¹ including the Supreme Court of Kyrgyzstan.¹¹²

31. In Russia on 18 March the Supreme Court ordered the courts to hold hearings only in urgent cases such as cases concerning imposition of restrictive measures, leaving to the courts the discretion to decide which case is urgent. ¹¹³ It was also recommended to limit the presence in the court of those who are not the parties to the court proceedings.¹¹⁴ On 8 April, the Supreme Court adopted a new decision with recommendation to courts that all the documents should be submitted on-line or by post and that the hearings should be held via videoconference.¹¹⁵
32. On 16 March 2020, the Council of Judges of Ukraine adopted a decision No. 9pc-186/20, which established a special regime of work of courts with the possibility of postponing the consideration of cases in connection with quarantine measures and prescribed other measures.¹¹⁶ On 13 April the Law "On the State Budget of Ukraine for 2020" was amended reducing salaries of judges.¹¹⁷
33. The Supreme Court of the Uzbekistan recommended to submit all documents to courts in electronic form or by post.¹¹⁸ The courts should consider only urgent cases (to decide on remand in custody, to extent, change or abolish the duration of detention, involuntary hospitalization in mental and tuberculosis treatment institution and extension of its duration, administrative detention, cases on limitations of legal capacity, and mandative proceedings).¹¹⁹
34. Courts in almost all the countries assessed for this paper were reported to experience technical problems while trying to change their way of work in a short period of time. In Kyrgyzstan, not all the courts are equipped with automated information systems, equipment of all the courts is planned to be finished in 2020.¹²⁰ A similar situation exists in Ukraine: the courts were planned to be equipped with a uniform system for videoconference in 2019, which was not done.¹²¹ In Russia courts experience problems with videoconference, some of them use Skype, Zoom and WhatsApp to hold hearings, but the practice is not uniform.¹²² This slows down the work of court system making it inefficient.

¹¹¹The courts of Osh, Jalal-Abad regions and the city of Bishkek will suspend their work because of the state of emergency, Supreme Court of the Kyrgyz Republic, 27 March 2020.

<http://sot.kg/post/sudy-oshskoj-dzhalal-abadskoj-oblastej-i-goroda-bishkek-priostanovyat-svoju-rabotu-v-svyazi-s-vvednym-chrezvychajnym-polozheniem> (Accessed 20 April 2020).

¹¹² The Supreme Court of the Kyrgyz Republic is closed on quarantine, Supreme Court of the Kyrgyz Republic, 27 March 2020.

<http://sot.kg/post/verhovnyj-sud-kyrgyzskoj-respubliki-zakryt-na-karantin> (Accessed 20 April 2020).

¹¹³ Order of the Presidium of the Supreme Court of the Russian Federation, the Presidium of the Council of Judges of the Russian Federation, of 18 March 2020 No. 808, <http://www.supcourt.ru/files/28814/>.

¹¹⁴ *Ibid.*

¹¹⁵ Resolution of the Supreme Court of the Russian Federation, Supreme Court of the Russian Federation, 8 April 2020. <http://www.supcourt.ru/files/28837/> (Accessed 20 April 2020).

¹¹⁶ The Council of judges decided how the courts will work during the quarantine, Strana.ua, 16 March 2020. <https://strana.ua/news/255229-sovet-sudej-ustanovil-rezhim-raboty-sudov-na-vremja-karantina-iz-za-koronavirusa.html> (Accessed 20 April 2020).

¹¹⁷ The Law "On Amendments to the Law of Ukraine" on the State Budget of Ukraine for 2020 was adopted, Verkhovna Rada of Ukraine, 13 April 2020.

<https://rada.gov.ua/news/Novyny/191881.html> (Accessed 20 April 2020); Decision of the Council of judges of Ukraine No. 20 dated 02 April 2019 "On the initiation of the CMU legislative changes set out in the bill No. 3279". <http://rsu.gov.ua/ua/documents/101> (Accessed 20 April 2020).

¹¹⁸ Frequently Asked Questions and Answers on Legal Issues, Ministry of Justice of Uzbekistan, *Op.cit.*

¹¹⁹ *Ibid.*

¹²⁰ President Sooronbay Jeenbekov visits the Supreme Court, familiarizes himself with the process of digitalization of the judicial system, Supreme Court of the Republic of Kyrgyzstan, 13 March 2020. <http://sot.kg/post/prezident-sooronbaj-zheenbekov-posetil-verhovnyj-sud-oznakomilsya-s-hodom-protsesta-tsifrovizatsii-sudebnoj-sistemy> (Accessed 20 April 2020).

¹²¹ Viral agenda: how Ukrainian courts operate during quarantine, RBK-Ukraina, 1 April 2020.

<https://www.rbc.ua/rus/news/virusnaya-povestka-ukrainskie-sudy-rabotayut-1585727224.html> (Accessed 20 April 2020).

¹²² Conflict resolution via Skype and Zoom: how the courts work with coronavirus, Pravo.ru, 3 April 2020. <https://pravo.ru/story/220052/?cl=AV>; Simplified videoconference, Advakatskaya gazeta, 17 April 2020. <https://advstreet.ru/article/vks-po-uproshchyenke/> (Accessed 20 April 2020).

35. Besides, in all courts the general public was banned from attending court hearings. The exception to this was Kazakhstan which arranged for participation of public online. In Ukraine it was reported that only some courts organized online streaming of hearings,¹²³ which might compensate the physical absence of the public during the hearing.¹²⁴

V. Preliminary conclusions

36. While this briefing paper provides only a glimpse of legal frameworks used to adjust the work of the justice systems in the CIS region, some preliminary conclusions can be made.

In regard to the use of emergency legislation

37. The countries concerned have emergency frameworks but it appears that they generally tend not to invoke them, nor do they tend to follow procedures to notify of derogations under international human rights treaties. Specialised emergency bodies have been created which are not provided for by law and in some cases this has led to questions as to the status of these bodies and the place of their decisions in the hierarchy of laws. In other words, the principle of legality may be jeopardised should States adopt legislation which through a procedure which does not meet the requirements of the national legal framework.

In regard to the access to a lawyer

38. The measures introduced in most of the States significantly negatively impacted on the ability of lawyers to carry out their functions in a due manner, therefore impeding access to a lawyer. In Azerbaijan and Uzbekistan, due to non-inclusion or a delay in inclusion of lawyers on the list of the professions who are authorised to move freely, concerns were expressed over lawyers' ability to see clients, to attend courts, detention facilities and, therefore, enjoyment of human rights of those in detention under national and international law. It does not appear to be justified to introduce blanket restrictions on the use of private vehicles by all lawyers, without introducing sufficient measures to ensure that lawyers can travel to see their clients without being dependent on law enforcement personnel as it was the case in Uzbekistan. Access to means of transport by lawyers appears to be needed, where they need to travel to assist clients in detention or at trial.
39. Besides, the restrictive measures in detention facilities should not infringe the confidentiality of lawyer-client communication. Such concerns on confidentiality were reported in particular, in Kyrgyzstan and Kazakhstan, where the work of lawyers are limited to remote provision of legal services, as well as the Russian Federation.

In regard to the work of courts

40. States, where online systems were not used on a regular basis prior to the COVID-19 pandemic, appear to face significant issues in switching to online platforms in a larger scale. The COVID-19 pandemic demonstrates the need for States to allocate to further equip courts with all necessary equipment for on-line hearings. Moreover, in some States the judges appear to need to obtain further training and/or be provided with technical assistance to conduct online hearings.
41. While online sessions may be appropriate in some cases, such hearings must still find counter-balancing means to ensure the equality of arms. In particular, it remains of concern that the technical possibility of excluding a lawyer from online proceedings may be abused in disregard of the prohibition to do so in principle. Particularly in so far as national legal

¹²³ Remote Court Hearings in Ukraine: Creativity vs. Conservatism, CPLR, 13 April 2020. <https://pravo.org.ua/en/news/20874354-remote-court-hearings-in-ukraine-creativity-vs.-conservatism> (Accessed 20 April 2020).

¹²⁴ The Council of Judges of Ukraine approved recommendations on the special quarantine regime. Most of the recommendations are reasonable, but some of them are against the law, – the CPLR experts believe, CPLR, 23-30 March. https://pravo.org.ua/en/review/points/March_points_2020/#The%20Council%20of%20Judges%20of%20Ukraine%20approved%20recommendations%20on%20the%20special%20quarantine%20regime.%20Most%20of%20the%20recommendations%20are%20reasonable,%20but%20some%20of%20them%20are%20against%20the%20law,%20%E2%80%93%20the%20CPLR%20experts%20believe (Accessed 20 April 2020).

frameworks have not yet defined the procedures for online proceedings, the ICJ stresses the need to apply all the guarantees which would otherwise be put in place in order to ensure that the proceedings meeting the requirements of fairness, impartiality and equality of arms. Forceful exclusion of lawyers from online proceedings may also amount to a breach of lawyers' independence and professional guarantees.

42. Judiciaries and other State authorities need to ensure respect for international and regional standards that already provide guidance on the general parameters for substituting video-link or other forms of participation, without the person's freely given consent, in hearings for which physical presence would ordinarily be required:
- a. Physical presence is particularly essential for the accused and his or her lawyer in criminal trials, and for a person deprived of liberty in the review of his or her detention, at least where the person has not freely given consent to participation by video or other means.¹²⁵ It is difficult to see how in any circumstances proceeding with a criminal trial or detention review in which the accused or detainee is deprived of his or her right to physical presence, by imposing participation restricted to video-conferencing or other such means only, could be compatible with the right to a fair trial and right to liberty.
 - b. In other types of proceedings, judges must make an individual assessment, with reasons, on whether substituting videoconferencing for physical presence was compatible with the character of a particular hearing (i.e. physical presence may be indispensable where testimony of the person, and assessments of credibility, are key) and sufficiently counter-balanced by compensating measures.¹²⁶
 - c. Even where video-conferencing has been found, in principle, to be acceptable, the European Court has found violations where insufficient attention was given to ensuring adequate confidential access of the accused or defendant to their lawyer before and during the hearing, particularly where the client can only interact with the lawyer through a video-conferencing system installed and operated by the State.¹²⁷

¹²⁵ E.g. European Court of Human Rights, *Sakhnovskiy v Russia* (Grand Chamber, 2010 <http://hudoc.echr.coe.int/eng?i=001-101568>, para 96); *Repashkin v Russia* no. 2 (2010 <http://hudoc.echr.coe.int/eng?i=001-102282>, para 154); Human Rights Committee GC 35, paras 34, 35 and 42.

¹²⁶ *Yevdokimov v. Russia* (2016) <http://hudoc.echr.coe.int/eng?i=001-160620>, para 52.

¹²⁷ See *Sakhnovskiy* (2010 paras 98 to 107 and 2018, paras 41 to 48) and *Gorbunov and Gorbachev v Russia* (2016 <http://hudoc.echr.coe.int/eng?i=001-160993>, para 37).

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Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

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