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1. Adoption of the Agenda

The agenda was adopted without amendments (CDL-PL-OJ(2022)003ann).

2. Communication by the President

The President, Ms Claire Bazy Malaurie, welcomed the newly appointed or reappointed members of the Venice Commission in respect of Croatia, Czech Republic, Finland, Iceland, Ireland, Korea, Kosovo, Kirgizstan, Lichtenstein, Romania as well as special guests and delegations, and referred to her recent activities as President set out in the document CDL(2022)042.

3. Communication from the Enlarged Bureau

The President informed the Commission of the discussions held at the meeting of the Enlarged Bureau on 20 October 2022 which foremost concerned recent requests for urgent opinions. The Enlarged Bureau recommended to accept the request by Ukraine for an urgent opinion on the draft law on the selection of Constitutional Court judges, to be issued in November 2022. By contrast, it recommended to refuse the request for an urgent opinion by Georgia on electoral amendments and to prepare an ordinary opinion on this matter, jointly with OSCE/ODIHR, for adoption at the December 2022 session. Likewise, it agreed that an opinion on amendments to the Judicial Code of Armenia should be prepared under the ordinary instead of the urgent procedure. The Commission agreed with these proposals.

The President further informed the Commission that another, rather exceptional request had been made by the European Parliament, concerning a study on major democratic principles of governance within the EU. In the ensuing discussion, the issue of the extent to which international standards may be applied to supranational or international organisations was raised The response to this innovative request would be further discussed by the Bureau.

4. Communication by the Secretariat

Ms Simona Granata-Menghini provided practical details for the session.

5. Co-operation with the Committee of Ministers

Within the framework of its co-operation with the Committee of Ministers, the Commission held an exchange of views with Ambassador Gilberto Jerónimo, Permanent Representative of Portugal, and Ambassador Mårten Ehnberg, Permanent Representative of Sweden to the Council of Europe.

Ambassador Jerónimo stressed that the Russian aggression against Ukraine had changed the geopolitical landscape in Europe. He congratulated the Council of Europe for having been able to react swiftly and for immediately putting in place a strategy for a collective reflection on the future of the Organisation. The new action plan for engagement with Ukraine and the ongoing plans to strengthen the Council of Europe's dialogue with civil society in Russia and in Belarus were to be welcomed. Moreover, the recent report of the newly established High Level Reflection Group and its set of recommendations were of great importance to strengthen the organisation's core competencies, in particular by investing in the European Court of Human Rights (ECtHR) and ensuring the implementation of its decisions. Furthermore, the current challenging times clearly justified the organisation of a 4th Summit of Heads of State and Government, as envisaged for May 2022 in Iceland. Finally, the Ambassador thanked the Venice Commission for its participation in the Vth Assembly of the Conference of Constitutional Jurisdictions of Portuguese-Speaking Countries in June/July 2022, and he stressed that his country was committed to ensuring that any future developments and frameworks of cooperation in Europe preserve and do not duplicate the work of the Council of Europe.

Ambassador Ehnberg informed the Commission about the foreign policy priorities of the new Swedish Government. Russia's war of aggression and the defence of Ukraine's freedom and sovereignty would be the defining focus areas of Sweden's foreign policy in the coming years. This implied a primarily Swedish and European foreign policy, which was best pursued together with other countries that share common fundamental values, in the EU and, in particular, together with Sweden's Nordic and Baltic neighbours. Sweden's three central foreign, defence and security policy challenges in the coming electoral period were completion of the NATO accession process together with Finland; the Presidency of the Council of the EU starting on 1 January 2023; and support to Ukraine – politically, economically and in terms of security, within a long-term and cohesive programme for civilian reconstruction and military support. The Ambassador underlined that in this process, the values of the Council of Europe and the competence of the Venice Commission would be of great importance.

6. Co-operation with the Parliamentary Assembly

On behalf of Mr Constantinos Efstathiou, Member of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, who was prevented from participating in person, Mr Guillem Cano-Palomares from the Assembly Secretariat informed the Commission that at its 4th part-session held in the previous week, the Assembly had debated reports on the honouring of obligations and/or commitments by Türkiye, Hungary and Romania prepared by the Monitoring Committee. Concerning Türkiye, he stressed the efficient cooperation between the Monitoring Committee and the Venice Commission which had issued a timely urgent opinion on the draft amendments to the Turkish Penal Code regarding the provision on "false or misleading information", at the request of the Monitoring Committee, before their debate in the plenary on 12 October 2022. Based on that opinion, the Assembly had urged the Turkish authorities not to enact this draft amendment (Resolution 2459 (2022), par. 10.7). With regard to Romania, the Assembly had adopted Resolution 2466 (2022). In the course of the preparation of this report, the Monitoring Committee had requested the opinion of the Venice Commission on three draft Justice laws: on the status of Magistrates; on the Organisation of the Judiciary; and on the Superior Council of Magistrates. Concerning Hungary (Resolution 2460(2022), the Monitoring Committee had also requested an opinion of the Venice Commission on the legislative and constitutional package adopted by the Hungarian Parliament in 2020, which was taken into account during the preparation of the report.

The Assembly had also approved reports of the Legal Affairs Committee on the misuse of the Schengen Information System by Council of Europe Member States as a politically motivated sanction, and on preventing vaccine discrimination. Furthermore, it had debated reports on raising awareness of and countering Islamophoba in Europe and on further escalation in the Russian Federation's aggression against Ukraine; in its Resolution 2463 (2022), the Assembly condemned the so-called referendums recently held in the Ukrainian regions of Luhansk, Donetsk, Zaporizhizhia and Kherson and the Russian's attempted annexation as a clear violation of international law, calling on States to refrain from recognising any effects of them. With regard to the referendums, it also noted that they were contrary to any substantive and procedural standards for holding referendums and that they should be considered null and void.

On 14 September, the Venice Commission's President had presented to the Monitoring Committee the opinion on the legal protection of citizens in the Netherlands during its hearing devoted to the childcare allowance case; the Committee would submit a periodic report on the honouring of membership obligations by the Netherlands in 2022. Moreover, the co-rapporteurs on Bulgaria had recently participated in the election observation mission and were going to visit the country as soon as the new parliamentary delegation has been appointed; they planned to submit the report on the post-monitoring dialogue with Bulgaria in 2022.

The Legal Affairs Committee had recently held two hearings for the report on "European Convention on Human Rights and national constitutions", one of which with the Commission's

Secretary. It had also adopted two reports related to Covid-19 and declassified a mission report of its fact-finding visit to Ukraine in June 2022, for the purpose of gathering information on possible war crimes and crimes against humanity. As a recent example of cooperation with the Venice Commission, the General rapporteur on the situation of human rights defenders and member of the Legal Affairs Committee, Ms Sunna Ævarsdottir, had participated in the International Round Table co-organised by the Commission on "Civil Society: Empowerment and Accountability", held on 13 September 2022 in Strasbourg.

In addition to the above-mentioned urgent opinion on Türkiye, another opinion on the agenda of the current session of the Venice Commission had been requested by the Assembly, namely the final opinion on the constitutional reform of Belarus (requested by the Assembly's President). In this respect, it should be noted that the Assembly had recently resolved to intensify its engagement with Belarusian civil society and explored ways to regularly involve the Belarusian opposition in its activities (Resolution 2433(2022)). The Monitoring Committee was also interested in the five opinions and *amicus curiae* briefs concerning the Republic of Moldova on the agenda of the Commission, as it would debate the next monitoring report on Moldova at the 2023 January part-session.

7. Co-operation with the Congress of Regional and Local Authorities of the Council of Europe

Ms Gudrun Mosler-Törnström, Chair of the Monitoring Committee of the Congress, informed the Commission that the Monitoring Committee had met on 30 June 2022 in Istanbul. On that occasion, the Committee members had informed the Mayor of Istanbul of their intention to carry out a mission in Türkiye early next year to assess the follow-up given to the 2020 Venice Commission opinion on the replacement of elected candidates and mayors, and also its 2017 opinion on the provisions of the Emergency Decree-Law of September 2016 which concerned the exercise of local democracy. The participation of a representative of the Venice Commission in such a mission would be useful.

At its recent meetings, the Committee had adopted monitoring reports on the application of the Charter as well as reports on the observation of the municipal elections in the Netherlands, local by-elections in Albania and local elections in Belgrade and several other Serbian municipalities to be submitted to the October Congress plenary session, which would be held the following week.

The Congress President had recently issued several statements on the situation in Ukraine, in which he rejected the so-called "referendums" organised in the previous month by the Russian Federation in the occupied Ukrainian territories as null and void, strongly condemned the illegal annexation of those territories by Russia and reaffirmed the commitment to the independence, sovereignty and territorial integrity of Ukraine, within its internationally recognised borders. Ms Mosler-Törnström welcomed that the Venice Commission had also expressed itself against the undemocratic and illegal practice of sham referendums, organised during war and under military threats, contrary to European standards.

A debate on Ukraine would be held at the October Congress plenary session, which would also consider for adoption a resolution to endorse the Venice Commission's Revised Code of Good Practice on Referendums (CDL-AD(2022)015) and examine a report dedicated to the role of local authorities in upholding the fundamental right to the environment. It introduced and promoted the concept of a "green" reading of the European Charter of Local Self-government and recommended the drawing up of an Additional Protocol to the Charter to enhance the muti-level cooperation on environmental issues and to make mayors and governors aware of their responsibilities on local policies.

Finally, a Congress delegation had recently carried out a monitoring visit to Romania and would pay a monitoring visit to Slovakia on 5-9 December 2022; they had observed the cantonal elections in Bosnia and Herzegovina on 2 October (following which it called for

cantonal/local elections to be held on different dates from general elections) and would observe local elections in Slovenia on 20 November 2022.

Mr Andreas Kiefer, whose mandate as Secretary General of the Congress was coming to an end, thanked the Commission for the fruitful cooperation which had intensified over the years, for example in the field of elections and in the Council for Democratic Elections, which was the only tripartite body in the Council of Europe bringing together the Parliamentary Assembly, the Congress and the Venice Commission.

Many challenges remained to be addressed, *inter alia* concerning the further process in Ukraine, and in relation to the impact of artificial intelligence and to the detrimental effects of hate speech at the local level; a report on "Hate speech and fake news: the impact on working conditions of local and regional elected representatives" would be presented at the Congress session in the following week. Mr Kiefer furthermore mentioned that a call for new members in the Group of Experts on local self-government – in which the Commission was also represented – would soon be made.

8. [not covered]

9. Follow-up to earlier Venice Commission opinions

The Commission was be informed on follow-up to the following opinions (see document (CDL(2022)030).

- Cyprus: Follow-up to the opinion on three Bills reforming the Judiciary (CDL-AD(2021)043);
- Norway: Follow up to the joint opinion on the electoral legislation (CDL-AD(2010)046).

The opinion for Bulgaria on the draft amendments to the Judicial System Act concerning the Inspectorate to the Supreme Judicial Council (item 11) was a follow-up to the Urgent Interim opinion on the draft new Constitution is followed up by 1098/2022 Bulgaria – judicial inspectorate (anti-corruption) (CDL-AD(2020)035);

The opinion for Kazakhstan on the draft constitutional law "On the Commissioner for Human Rights" (item 12) was a follow-up to the opinion on the draft law on the Commissioner for Human Rights (CDL-AD(2021)049);

In addition to this information, Mr Holmøyvik presented information on the follow-up to the opinion on the Legal Protection of Citizens (CDL-AD(2021)031) of the Netherlands, on the basis of a letter received from the Dutch Government. He pointed out that this opinion had been unusual for the Venice Commission, as the Commission had not been asked to assess a specific piece of legislation, as usual, but to identify flaws in the legal protection of citizens in relation to a large group of cases concerning childcare allowance, where the rule of law guarantees had failed.

The 2021 opinion had not concluded with specific recommendations but with observations and proposals meant as food for thought in the Dutch political and legal follow-up. It seemed that the Dutch authorities had used the opinion to good effect in the way it was intended.

The Government endorsed one of the key suggestions, that the executive branch should assess and ensure the quality of legislation, not only on the drafting stage, but also in its implementation. Preparing an amendment to the General Administrative Law Act, the Government also endorsed the suggestion to strengthen the general principles of good administration in the legislation.

As concerns Parliament's access to information, the Dutch Government informed that it had changed its policies, and since 2021 parliamentary papers and policy-making letters sent to parliament were accompanied by the underlying decision notes, including the views expressed by civil servants.

The Government had also taken steps to improve the information flow and management within the executive (appointment of a Government Commissioner for Information Management, establishment of an Advisory Council on Public Disclosure and Information Management under the Open Government Act, revision of legislation).

The Government paper further outlined measures to improve information exchange within the ministries and between ministries and lower-level administrative bodies implementing the law to create a culture of transparency and professionalism among civil servants, so that they feel safe to express criticism and to communicate to the highest level unintended effects of policy and regulations.

The Government had also invited the proposed State Commission on the Rule of Law to make practical recommendations on how to improve the communication between the judiciary and the other branches of government on possible unwanted effects of regulations.

The Venice Commission additionally addressed the use of Artificial Intelligence when making administrative decisions, several new policies and guidelines were being elaborated within the executive to ensure that AI technology did not lead to discrimination and respects privacy and other fundamental rights. The internal supervision of data processing and the use of algorithms appeared to have been strengthened in the Netherlands.

Finally, the Government addressed the issue of constitutional review, which the Constitution of the Netherlands currently does not allow. The introduction of constitutional review is being contemplated.

Mr Vermeulen informed the Commission that until the 2021 Opinion, the Venice Commission had been known only in academic circles in the Netherlands. This had changed a lot. In the childcare affaire, tens of thousands of parents had suffered from a rigid “all or nothing” approach of the tax authorities. Only after several years, in 2019, the Council of State had changed its jurisprudence on this issue. The Opinion had primarily focussed on the parliamentary and executive powers and made only suggestions, rather than firm recommendations.

Nonetheless, the Opinion was held in high esteem in the Netherlands and had a strong impact on national discussion. The prohibition of constitutional review (Article 120 of the Constitution) had been debated for decades but the Opinion had been able to steer this discussion wisely. As concerns the judiciary, a reflection process was under way and a new approach was being developed with individual justice at the core. It might become possible that laws could be tested against unwritten principles, such as proportionality.

Ms Bazy Malaurie pointed out that it had been important that the Commission had been able to engage in dialogue with all stakeholders. The rule of law was embodied not only in texts but it was an also issue of daily practice of all state powers.

10. Andorra

Draft opinion on the Law on the creation and functioning of the Ombudsman

Ms Barić insisted that the delegation visiting Andorra had not seen any indication of undue pressure on the Ombudsman. However, the ombudsman institution should not depend on the goodwill of a current government, but it should enjoy sufficient guarantees also when the government was less favourable. Notably, in line with the Venice Principles, the institution should be established also on the constitutional level. The rapporteurs were aware that this was difficult in Andorra, which had not changed its Constitution since its adoption 30 years ago. On the legislative level, the Ombudsman should be endowed with a sufficiently high rank and the institution should have sufficient resources. The Ombudsman should be able to propose his or her own draft budget. The appointment and removal procedures should be

changed in line with the Venice Principles. Functional immunity should be available also after the end of the mandate and it should be extended to the staff of the Ombudsman. Access to all documents should be stipulated in the law and, even if this was the case in practice, the Ombudsman should have a right of access to all places of detention and unrestrained contact with the detainees. In Andorra, civil society was not sufficiently aware of the functions of the Ombudsman. These relations should be strengthened. The Ombudsman should be able to interact with the judiciary, duly respecting their independence, either through *amicus curiae* procedures, strategic litigation, constitutional complaints or other involvement. Referring to the Venice Principles, the Opinion indicates that it is not for the Venice Commission to identify the exact reforms that are need for the Ombudsman to become a National Human Rights Institution.

Mr Joan Forner Rovira, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Andorra to the Council of Europe, thanked the Commission for the opinion and insisted that the Andorran authorities wanted to strengthen the ombudsman institution. As the Ombudsman institution was established only in 1999, it was not yet included in the Constitution adopted in 1993. Amending the Constitution would be very difficult and including the Ombudsman in the Constitution is not something that can be achieved in the near future. However, it was good to have this requirement on record. In practice, the Ombudsman already visits prisons and mental hospitals, but it would be good to have this included also in the Law. A lack of resources was indeed a serious problem for the Ombudsman who had only three staff members. An adequate budget was required.

Ms Err proposed adding a reference to the need for training of staff, notably on mediation. Ombudsman staff needed not only legal knowledge but also on mediation. Mr Newman underlined that not all specialised ombudspersons (e.g. on access to information, on ethics, provincial ombudspersons, etc.) could be established in the Constitution. Flexibility was required.

The Commission adopted the opinion on the Law of Andorra on the creation and functioning of the Ombudsman (CDL-AD(2022)033).

11. Bulgaria

11.1 Draft opinion on the draft amendments to the Judicial System Act concerning the Inspectorate to the Supreme Judicial Council (SJC)

Mr Qerimi explained that the proposed amendments formed part of a wider process of reform of the justice system in Bulgaria, which had been assessed several times by the Venice Commission in the past. The draft law proposed (i) a new power of the Inspectorate to submit to the SJC the draft amendments to the Codes of Ethical Conduct for Judges, Prosecutors and Investigators; and (ii) a new competence of the Inspectorate to organise and deliver trainings on anti-corruption, integrity, independence and conflict of interest.

Drawing on prior recommendations, the draft opinion reiterated the necessity to review the institutional model and define more clearly the mandate of the Inspectorate before vesting new powers on it. The more specific conclusion was that (i) the powers of the Inspectorate and the SJC had to be delimited more clearly in order to preserve the constitutional mandate of the SJC on matters of discipline and judicial appointments, and (ii) the method for the selection of the Inspector General and of the Inspectors should be defined with the involvement of the judiciary, through the SJC, by nominating candidates and by deciding on the accountability of the Inspectors. The opinion concluded that the introduction of new powers of the Inspectorate should naturally follow these more foundational or conceptual changes.

Mr Emil Dechev, Deputy Minister of Justice of Bulgaria, explained that the proposed amendments aimed at strengthening the role of the Inspectorate to the SJC in preventing and combating corruption in the judiciary, a measure envisaged in the National Recovery and Resilience Plan of the Republic of Bulgaria.

Mr Dechev further explained that the introduction of an explicit power of the Chamber of Judges and the Chamber of Prosecutors of the SJC to adopt the Codes of Ethical Conduct for Judges, and Prosecutors and Investigators strengthens the independence and effectiveness of each Chamber. He clarified that the draft Codes adopted by the Chambers will be approved by the plenary session of the SJC and that the SJC will ensure the participation of judges in the elaboration process of the Codes as recommended by the Venice Commission.

In relation to the amendments concerning the new functions of the Inspectorate to organise and conduct anti-corruption training, as well as trainings on integrity, independence and conflicts of interest, Mr Dechev noted that, the necessary budget has been approved for the implementation of this activity which will be carried out independently of the training courses conducted by the National Institute of Justice.

The Commission adopted the opinion on the draft amendments to the Judicial System Act of Bulgaria concerning the Inspectorate to the Supreme Judicial Council (CDL-AD(2022)022).

11.2 Draft opinion on the draft amendments to the Criminal Procedure Code

Mr Barrett presented the draft opinion, requested by the Minister of Justice of Bulgaria, which concerned two areas: (i) improving the mechanism of accountability of the Prosecutor General; and (ii) general improvements of the criminal procedure increasing their effectiveness and enhancing the position of victims of crime. The lack of effective mechanism of accountability of the Prosecutor General was a longstanding issue for Bulgaria that has been repeatedly discussed by the Venice Commission. It was also discussed extensively by the Committee of Ministers (after the ECtHR judgment in the case of *Kolevi v Bulgaria*) and the EU Commission. After the earlier unsuccessful attempts to introduce a special criminal responsibility mechanism for the Prosecutor General (the latest attempt was declared unconstitutional by the Constitutional Court in 2021), the present draft law was another attempt to ensure such a mechanism. However, it was important, above all, to ensure a revision of the current institutional design of the SJC in which the Prosecutor General exercises significant influence.

The draft law addressed that need for revision only in part, by proposing eligibility criteria for the lay members of the Supreme Judicial Council and seeking to ensure that those members did not have any subordination links to the Prosecutor General. The special investigation of the Prosecutor General would be entrusted to a high-ranking judge, who would assume the functions of the prosecutor for a limited period of time; his/her procedural activities would be subject to judicial review. It was necessary, however, to clarify the status of the special prosecutor, his or her procedural competences and subordination, as well as the scope of the judicial review.

As to the proposed general improvements of the criminal procedure, the draft law introduced positive changes by providing more procedural rights to victims, in particular the right to challenge a decision not to open an investigation for a certain category of criminal cases. The draft opinion recommended that this right should be accompanied by the possibility to have access to the materials of the preliminary inquiry which led to the contested decision.

Mr Emil Dechev, the Deputy Minister of Justice, outlined the background of the present reform, referring to the international obligations of Bulgaria articulated in the judgments of the ECtHR. As regards the mechanism for a criminal investigation of the Prosecutor General, the present draft law attempted to meet the requirements of the Bulgarian Constitution as interpreted by the Constitutional Court and was, perhaps, the best possible compromise between the requirements of supranational bodies and the Bulgarian constitutional framework.

Mr Dechev then submitted that the proposed draft law aimed to increase the efficiency of the criminal investigation framework (for example, by enhancing judicial supervision of the proceedings at the initial stage), better protec the rights of victims of crime and ensure an

effective mechanism for holding the Prosecutor General accountable. The draft law also responded to a number of specific recommendations of various European partners, which had been taken into account in its preparation.

The Commission adopted the opinion on the draft amendments to the Criminal Procedure Code and the Judicial System Act of Bulgaria (CDL-AD(2022)032), previously examined by the Sub-Commission on the Judiciary at its meeting of on 20 October 2022.

12. Kazakhstan

Draft opinion on the draft constitutional law on the Commissioner for Human Rights

Mr Sørensen explained that the opinion on the draft Constitutional Law on the Commissioner for Human Rights was prepared upon request from the Commissioner for Human Rights of Kazakhstan. In 2021, the Commission had adopted an opinion on the draft law on the Commissioner for Human Rights submitted by the Senate of Kazakhstan (CDL-AD(2021)049); however, since many recommendations formulated at that time remained unaddressed, the examined text made extensive references to the 2021 opinion.

The rapporteurs examined the draft law in the light of international standards, notably the Paris and the Venice principles. The text presented a number of improvements compared to the ordinary law in force since 2021. The mere fact that the new law is a constitutional one reflected not only the wish of the authorities to implement the new constitutional provisions but also to upgrade the status of the Commissioner for Human Rights. At the same time several articles of the draft could be further improved, notably the law should clarify the jurisdiction of the Commissioner over private entities; the Commissioner's activities should not jeopardise the operation of the judiciary; there should be additional guarantees for transparency of the process of election of the Commissioner and his/her dismissal; articles on the immunity of the Commissioner and the staff of the institution should be further developed. Mr Sørensen also mentioned the importance of sufficient budgetary resources for recruiting the staff of the institution. He referred to paragraph 88 of the opinion which listed other important outstanding issues. In her request, Ms Azimova had also formulated several specific questions concerning the functioning of the institution which were addressed in the text of the opinion. The draft law was examined by the Senate of Kazakhstan and Mr Sørensen expressed his hope that the opinion's recommendations would be duly considered before the adoption of the text.

Ms Elvira Azimova, Commissioner for Human Rights of Kazakhstan, thanked the rapporteurs for their work and informed the Commission that the new draft law extended considerably the powers of the institution. The protection of human rights was one of the priorities of state policy of the Republic of Kazakhstan and the new draft was a good example of it. It would enable the institution not just to handle specific complaints but also reinforce its independence, increase its efficiency, provide mechanisms for interaction with state bodies during the investigation of cases of violation of individual rights. The Human Rights Commissioner would also be entitled to initiate proposals for joining international treaties and make proposals for improving legislation, to participate in public councils upon invitation. Ms Azimova was of the opinion that there were several articles of the law that could be further improved and expressed her hope that the Venice Commission's opinion would help the parliamentarians to address these outstanding issues.

The Commission adopted the opinion on the draft constitutional law on the Commissioner for Human Rights of Kazakhstan (CDL-AD(2022)028).

13. Republic of Moldova

13.1 Draft joint opinion on the draft Law on the Supreme Court of Justice (SCJ)

Mr Gaspar introduced the draft opinion, requested by the Minister of Justice of the Republic of Moldova, which addressed the following issues: the uniformisation of the application of the law; the restructuring of the SCJ (number and composition of judges); and the evaluation of judges (pre-vetting and vetting).

The extraordinary evaluation of judges of the SCJ, was the most controversial part of the reform. The Venice Commission had repeatedly stated that "pre-vetting" of candidates and integrity checks exercised through the evaluation of asset declarations were quite common and uncontroversial in principle, whereas extraordinary vetting might only be justified in case of exceptional circumstances. As regards the vetting of sitting judges, the draft opinion reiterated the relevant recommendation of the Commission's previous opinion of 2019, according to which all decisions concerning the transfer, promotion and removal from office of judges should be taken by the Superior Council of Magistracy.

As to the number and composition of judges of the SCJ, the provision introducing a mixed composition of the SCJ should only be applied gradually and *pro futuro* without affecting the SCJ sitting judges by diminishing the number of career judges to 11. In addition, taking into account the future size of the Supreme Court, the proportion 7 (non-career judges) – 13 (career judges) seemed more adequate. The open attitude of the Moldovan authorities to take these changes into consideration was to be welcomed.

Finally, regarding the issue of uniformisation of the application of the law, this objective merited support but needed to be pursued in compliance with international standards on the independence of the judiciary. Moreover, for the sake of clarity and legal certainty, the consistency and specificity of the terminology employed in the draft law needed to be ensured.

Ms Veronica Mihailov-Moraru, Secretary of State at the Ministry of Justice of the Republic of Moldova, recalled that the reform of the SCJ was not a new idea. It had been voiced by several Governments and was of vital importance now, in the context of the commitment of the Moldovan Government to fight judicial corruption. While the Republic of Moldova had received candidate status for EU accession in June 2022, five out of nine conditions for opening accession negotiations concerned justice and anticorruption reforms.

The Government understood that vetting was a risky exercise and a tool of last resort but, regretfully, the Moldovan justice was in such a critical condition that no one could reasonably expect that it could change from within and therefore vetting was, exceptionally, warranted. To avoid any risks and preserve the judicial independence, the 2019 opinions of the Commission on the SCJ reform, as well as similar opinions concerning Albania, Ukraine and Kosovo, had been taken into account.

Prior to the plenary session, the Ministry of Justice had submitted detailed comments on the draft opinion in writing, many of which had been taken into account in the present draft. It should be stressed again that the vetting according to the proposed mechanism – with full involvement of the SCM in the process – did not require any amendment of the Constitution; that the Constitution did not require a disciplinary procedure for dismissal of a judge as a result of vetting; that in light of the case-law of the ECtHR, the sanctions for failing vetting seemed to be proportionate; and that the reduction of the number of SCJ judges – from 33 to 20 – was in reality very limited, since only 21 judges were currently working at the SCJ.

The Commission adopted the joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) on the draft Law on the Supreme Court of Justice of the Republic of Moldova, previously examined at the Meeting of the Sub-Commission on the Judiciary (CDL-AD(2022)024).

13.2 Draft joint opinion on the draft electoral code

Mr Goran Petrov, election advisor at ODIHR, informed the Commission that the Central Electoral Commission (CEC) had prepared the draft code, which had then been revised by the Committee of Legal Affairs of the Parliament. It was a comprehensive piece of legislation based on the current code. Amendments concerned in particular the composition of election commissions, voting arrangements and periods including voting abroad, as well as referendums. It was an important part of the package or legislative amendments directed towards the European integration process. The draft brought a number of improvements and the drafting process had been transparent and open to the various stakeholders who could propose amendments. Positive developments included the introduction of a rule on stability of electoral law, adjusting the procedures for appointment and nomination to the CEC to enhance its impartiality, introducing some specific measures to increase voter list accuracy, prohibiting the organised transportation of voters by political parties on election days, defining and clarifying what constitutes campaign coverage in the broadcast media.

A number of problems continued or remained, leading the opinion to recommend, *inter alia*: making clear reference as to what constitutes objective criteria for the provision of two-days of voting and ensuring the integrity of election materials overnight; removing vague grounds for the dismissal of CEC members, clarifying the procedure for their appointment; removing from the responsibility of the CEC the task of reviewing appeals on alleged false information in print and online media, unless other important criteria are introduced, and until its institutional capacity and expertise are ensured; reviewing the list of grounds for de-registration of candidates; specifying the exhaustive list of circumstances which could lead to the de-registration of political parties; elaborating on or at a minimum making reference to the election processes held in the Autonomous Territorial Unit of Gagauzia; reintroducing the possibility to produce ballot papers in national minority languages.

The comments received from the Committee of Legal Affairs demonstrated its willingness to make a number of changes to the draft code.

Mr Holmøyvik praised the significant progress of the Republic of Moldova in the last few years, which included a very good co-operation with the Venice Commission, as well as the holistic approach of reforms, including as regards the judiciary addressed under item 13.3. Since, in the past, decisions of the ECtHR had shown that the CEC had not always acted professionally in the electoral field, he reminded that good legislation should not only be adopted but also implemented. It should be made clear that the reference to false information in the electoral code corresponded to the same notion in the audio-visual code.

Ms Olesea Stamate, Chairperson of the Committee on Legal Affairs, Appointments and Immunities of the Parliament of the Republic of Moldova, summarised the main innovations of the draft code, including the mechanism for the nomination of the CEC, the financing of campaigns, the collection of signatures, the sanctions as well as the complaints and appeals procedures. The authorities had carefully analysed the comments in the draft opinion and would take them into account, in particular concerning the competition to be held between candidates to the CEC and the inclusion of the electoral bodies of the Autonomous Region of Gagauzia into the law. The question of the termination of the mandates of the present members of the CEC remained open; it was planned to apply the new rules from 2026 on in order for the mandate of the current members not to be terminated early.

The Commission adopted the joint opinion of the Venice Commission and ODIHR on the draft electoral code of the Republic of Moldova (CDL-AD(2022)025).

13.3 Draft opinion on amendments to the Audiovisual Media Services Code; 13.4 Amicus curiae Brief on the clarity of provisions on combating extremist activity

Ms Bilkova presented both the draft opinion and the draft *amicus curiae* brief as there was an important overlap between them. The opinion had been requested by the Bloc of Communists

and Socialists, an opposition faction in the Moldovan Parliament. The *amicus curiae* brief had been requested by the President of the Constitutional Court of the Republic of Moldova. Both documents concerned the ban on certain political symbols. The opinion, in addition, also dealt with restrictions imposed on the media.

Concerning the ban on political symbols, in April 2022 the definition of extremist activity, contained in the Law on Countering Extremist Activity, had been expended to encompass the public display or manufacture of *"the generally known attributes or symbols used in the context of acts of military aggression, war crimes or crimes against humanity, as well as propaganda or glorification of these actions".* While the law did not provide a list of such attributes and symbols, there was a general understanding in Moldovan society that they encompassed three symbols linked to the Russian aggression against Ukraine, namely the Saint George's Ribbon and the letters "Z" and "V". The public display, production or dissemination of certain symbols had also been newly criminalised under the Contravention Code.

The draft opinion and *amicus curiae* brief noted that the ban on political symbols constituted an interference with the right to freedom of expression. However, they came to the conclusion that this interference could be justified under the classical three-part test of lawful restrictions including the requirements of legality, legitimacy and necessity in a democratic society. The ban had a relatively clear legal basis; it pursued several legitimate aims including the protection of national security; it was plausible to argue that there was a pressing social need to prevent the display of symbols linked to the act of aggression and to international crimes; and the sanctions foreseen by the regulation were not disproportionate. That said, minor changes were recommended, which mainly related to the need to better define certain terms, such as propaganda, glorification or symbols created by stylisation of the other symbols.

The draft opinion was more critical with respect to the restrictions imposed on the media, which were introduced by amendments to the Audiovisual Media Services Code in June 2022. Under this regulation, media outlets were prohibited from broadcasting programmes inciting hatred or containing disinformation, propaganda of military aggression, extremist content or content of a terrorist nature, and from broadcasting any informative, informative-analytical, military and political content coming from outside the EU, the states that have ratified the European Convention on Transfrontier Television and some other countries (with the exception of films and entertainment programmes that have no "militaristic content"). The breach of these prohibitions entailed sanctions, including the revocation of the broadcasting licence.

This regulation again interfered with the right to freedom of expression. The draft opinion concluded that in this case, the three-part test of legality, legitimacy and necessity in a democratic society was not fully met. The restrictions had a legal basis, but the regulation contained various unclear terms such as "militaristic content" or "content of a terrorist nature". Moreover, while the regulation pursued the legitimate aim of protecting national (information) security, it went too far by applying the prohibition to media production originating in more than 150 states, most of which certainly did not constitute any threat to the Republic of Moldova. Furthermore, the sanctions foreseen by the regulation were quite harsh and might be considered disproportionate.

Ms Liliana Nicolaescu-Onofrei, Chair of the Media and Culture Committee of the Parliament of the Republic of Moldova, stressed that the two laws under consideration had been adopted in an exceptional crisis situation, following Russia's attack on Ukraine. The increasing use of the political symbols in question had led to rising tensions in the Moldovan society, and the longstanding vulnerability of the Republic of Moldova for disinformation activities from external sources had become most critical due to Russian propaganda intensified since its attack. This situation had called for a rapid response by the lawmaker.

While it needed to be borne in mind that the – sometimes unclear – terms employed in the laws under scrutiny needed to be systematically interpreted and to be understood in the light of other relevant provisions of the Moldovan legislation, the authorities agreed with the recommendations contained in the draft opinion. That said, replacing the reference in the Audiovisual Media Services Code to states having ratified the European Convention on Transfrontier Television, so

as to make it clear that only programmes from states which constituted a security threat to the Republic of Moldova were targeted, was a challenging task. A similar provision had existed previously in the Audiovisual Code (introduced by Law No. 257/2017, but not included in the new Audiovisual Media Services Code of 2018) and had been recognised as constitutional by the Constitutional Court.

Mr Vlad Batrîncea, Vice-President of Parliament, member of the Bloc of Communists and Socialists (BCS) parliamentary faction, stressed that even though he represented the opposition, he would like to avoid political discussions and rather focus on legal issues. In his view, there was a worrying trend in Moldova in terms of quality of the law and this could also be seen in the matter at hand. Several terms in the two laws under scrutiny, such as for example the term "propaganda", were not well defined and carried the risk of legal uncertainty and left room for possible manipulation. Regarding the interference of the law with right to freedom of expression, it should also be recalled that according to the case-law of the ECtHRthis right extended to information or ideas which may be found offending, shocking, and disturbing. Moreover, the new provisions of the Audiovisual Media Services Code failed to provide for a clear mechanism for determining programmes which would fall under the prohibition to broadcast.

Following these interventions, a discussion emerged among members on the terms "war in Ukraine" which were used repeatedly in both the draft opinion and the draft *amicus curiae* brief. The Commission decided to replace those terms by the phrase "Russia's aggression against Ukraine" consistently in both documents.

The Commission adopted:
- the opinion on amendments to the Audiovisual Media Services Code and to some Normative Acts of the Republic of Moldova, including the ban on symbols associated with and used in military aggression actions (CDL-AD(2022)026) and
- the *amicus curiae* brief for the Constitutional Court of the Republic of Moldova on the clarity of provisions on combating extremist activity (CDL-AD(2022)027).

13.5 Draft joint amicus curiae brief relating to the offence of illicit enrichment

Ms Anne-Lise Chatelain (OSCE/ODIHR) presented the draft joint *amicus curiae* brief relating to the offence of illicit enrichment. This *amicus curiae* brief had been requested by the President of the Constitutional Court of the Republic of Moldova. It outlines some of the key challenges in relation to the criminalisation of illicit enrichment across the Council of Europe and OSCE region, as also shown by the abundance of national case law and noting also that the practice various greatly as regards the scope and nature of the constitutive elements of the offence.

The draft *amicus curiae* brief focuses on three main questions. First, as regards the principles of the presumption of innocence, legality of the offence and *ne bis in idem* from the perspective of the European Convention on Human Rights and international standards, the draft *amicus curiae* brief outlines that the criminal office of illicit enrichment would not be contrary to the principle of the presumption of innocence, if it was interpreted as requiring from the prosecution proof of possession of goods of which the value substantially exceeds the means acquired and proof that these could not have been obtained lawfully; allowing the defendant to rebut any *prima facie* case established against him/her by adducing evidence sufficient to raise doubts regarding the submission of the prosecution in respect to the proof of the material elements of the offence; providing the defendant with the opportunity, consistent with the procedural standards required for a fair trial, to exonerate her/himself from the accusations against her/him. Regarding the issue of legality, the draft *amicus curiae* brief emphasises the importance of ensuring the accessibility and foreseeability of the provision, also in light of potential inconsistent case-law that may show the need to clarify the constitutive elements of the offence. On the issue of *ne bis in idem*, the *amicus curiae* brief concludes that the consecutive elements of the offence of illicit enrichment differ substantially from that of bribery and other similar offences, but that it needs to be seen on a case-by-case basis whether the defendant has been acquitted or convicted in respect of a similar crime.

As to the second question, on the *ultima ratio* principle, the rapporteurs outline that it would *a priori* not be contrary to the discretion left to individual states to determine the scope of their criminal policy, but that it is ultimately for the Constitutional Court of the Republic of Moldova to decide whether the Constitution allows for a ruling on the observance of the *ultima ratio* principle by the Parliament.

As to the third question, on the applicable standard of proof, the draft *amicus curiae* brief notes there is no mention of any peculiarities regarding the proceedings for the investigation and prosecution of the offence of illicit enrichment, and therefore such proceedings should be concluded under the general rules provided by the Criminal Procedure Code of the Republic of Moldova.

The Commission adopted the joint *amicus curiae* brief of the Venice Commission and OSCE / ODIHR for the Constitutional Court of the Republic of Moldova relating to the offence of illicit enrichment (CDL-AD(2022)029).

All of the above opinions and *amicus curiae* briefs for the Republic of Moldova were prepared under the Quick Response Mechanism in the framework of the EU/CoE joint programme "Partnership for Good Governance", co-funded by the Council of Europe and the European Union and implemented by the Council of Europe.

14. Mexico

Draft opinion on the draft constitutional amendments concerning the electoral system

Mr Darmanovic informed the Commission that the request had been received from Mr Lorenzo Cordova Vianello, President Councilor of the National Electoral Institute (INE). On 21, 22 and 23 September 2022, a delegation of the Commission visited Mexico and met with the Speaker of the Congress of Deputies, a group of senators from Morena, Mr Lorenzo Cordova Vianello, President Councillor of the INE, authorities of the Electoral Tribunal of the Federal Judicial Branch of Mexico, as well as with representatives of civil society and the academia.

Mexico is a unique country for its electoral management bodies. The 2014 electoral reform reinforced the INE and the Electoral Tribunal which contributed largely to organisation of elections in an efficient and transparent manner. On 28 April 2022, the ruling party Morena brought and initiative to change various articles of the Mexican Constitution on electoral matters. Among the proposed changes, the Federal Executive proposed the creation of a new national electoral authority whose members would be directly voted in by 'the people', to cut public funding and media time for political parties; and reconfigure the Congress by cutting its size to 300 members and electing them by nation-wide lists from parties rather than districts. Mr Darmanovic pointed out that this was the first time that the President whose political supporters had the majority in the Congress initiated such ambitious constitutional changes in the electoral field. In his opinion any electoral system could be improved; however, any such changes should take into account the possible impact of such constitutional amendments, as well as their immediate implications for the electoral system, administration of elections and complaints and appeals procedures.

The draft opinion contained a number of observations and recommendations concerning the electoral administration. The main observation was that the proposed amendments to the Constitution do not provide sufficient guarantees for the independence and impartiality of the new electoral management body (INEC) and of the judges of the Electoral Tribunal. It also pointed out that the proposed procedure for direct election of the Councillors of the INEC and judges of the Electoral Tribunal should be reconsidered as it was not in line with the international standards and best practices in the electoral field as concerns a balanced representation of different political forces in the electoral management bodies. The proposed centralisation might compromise the impartial and independent operation of the electoral administration at different levels of the Mexican Federation; moreover the elimination of lower-

level electoral management bodies and the creation of ad hoc structures with temporary staff would have a negative impact on the quality of elections at different levels.

Mr Lorenzo Cordova Vianello, President Councillor of INE pointed out that the draft constitutional reform would completely reshape the electoral system of Mexico. Since its establishment, the electoral institute organised 330 different electoral processes. In the past ten years the elections have been competitive allowing for a regular change of political forces in power. According to different public polls INE enjoyed the trust of the majority of voters. Mr Vianello agreed that there were certainly several problems in the existing legal framework and stressed that any system could be improved but the positive experience acquired in the past years should be taken into account during the preparation of any reform.

Messrs José Alfonso Suárez del Real y Aguilera, Ambassador and Head of Mission of Mexico at the Council of Europe, and Christopher Ballinas Valdés, Director General of Human Rights of the Government of Mexico stressed that the authorities were grateful for the opportunity to have exchanges with the Commission on the issue of the constitutional reform in the electoral field. The opinion of the Venice Commission would be duly considered by Parliament and other competent bodies. The proposed reform was subject to an intense public debate. There was a need for reforming the existing system and bringing it closer to citizens. Proposed measures, such as a limitation of financing of political parties and of candidates, a direct election of members of INE and judges of the Electoral Tribunal, more clear definition of powers of the new electoral administration were aimed at enhancing transparency, increasing trust of the voters in the system and optimising the use of public resources. Mr Suárez del Real y Aguilera invited the Commission to make the written comments of the authorities public together with the text of the opinion.

The Commission adopted the opinion on the draft constitutional amendments concerning the electoral system of Mexico (CDL-AD(2022)031).

15. Serbia

Draft opinion on three draft laws implementing the constitutional amendments on the judiciary

Mr Kuijer explained that the Minister of Justice of Serbia, Ms Maja Popović, had submitted to the Venice Commission five draft laws aimed at implementing the constitutional amendments on the judiciary and the prosecution service. The draft opinion submitted to the October Plenary dealt with the three draft laws regarding the judiciary; two draft laws regarding the prosecution service would be examined separately.

The constitutional amendments had been examined by the Venice Commission in 2021. After the referendum of January 2022, the Ministry started working on the implementing legislation. The process of drafting was sufficiently transparent and inclusive; in any event, it remained an internal process within the Ministry. In general, the draft laws were clear and well-structured. Now the draft laws have been released for the public consultations. However, any legislative reforms should be accompanied by the adequate supporting measures.

On the substance of the draft law on the organisation of the courts and the draft law on judges the rapporteurs expressed concern over the powers of the court presidents in the matters of court administration, which are too broadly defined and sometimes overlap with the equally broadly defined powers of the Ministry. The Ministry of Justice should select lay judges. As regards the disciplinary sanctions and procedures, the list of offences for which judges may be brought to liability is too broad, some of those offences are overlapping, with disproportionate focus on procedural delays. Such delays may result not from the judges' incompetency but from the structural problems of the judiciary. The law should exclude dismissal in case of repeated minor offences. The dividing line between disciplinary and dismissal proceedings was not entirely clear, and the guarantees in the dismissal proceedings should be at least equivalent to the disciplinary proceedings.

The draft law on the High Judicial Council (the HJC) raised two important issues. Thus, shortlisting of the eight candidates by the parliamentary committee dominated by the representatives of the ruling majority could create a risk of selection of the candidates along party lines, limiting the choice for the National Assembly. This could potentially lead to the blockage by the lay members of the work of the Council. The opinion recommended reviewing the rules of selection of candidates in the Standing Committee in order to achieve pluralism within the lay component of the Council. The second major issue concerned the high quorum and the special decision-making majority in the Council. In order to avoid blockages, the law should provide explicitly that the failure to attend by a member of the meetings of the HJC should lead to the termination of his or her mandate by a simple majority.

The Sub-Commission on the Judiciary had examined the draft opinion at its meeting on 20 October 2022 and the rapporteurs proposed a number of modifications following the meeting with the Minister of Justice.

Minister Popović expressed her gratitude for the support provided by the Venice Commission to the ongoing judicial reform in Serbia, helping to bring the Constitution and the legislation in line with the principles of the rule of law. The ongoing reforms has the potential of bringing significant positive changes. The process of drafting of the implementing legislation was transparent and inclusive, and the wide public consultations, which had started in September, would continue. The Minister thanked the Commission for the very constructive recommendations, which the Ministry would seriously consider. The last word in this process would naturally belong to the National Assembly. A number of improvements would have to be made in the draft laws, in particular in the matters related to the handling of personal data; disciplinary proceedings, the incompatibility criteria, judicial ethics and the advisory role of the Ethics Commission. The Minister agreed that the law should describe basic rules of ethical behaviour, that the Minister should not select lay judges, and that the concept of the repeated disciplinary violations should be elaborated further. Judges should not be responsible for the structural deficiencies, rules on the court procedures should be prepared jointly by the Ministry and the HJC, the law should better distinguish between the judicial administration and court administration, and describe better the relationship between disciplinary and dismissals procedures. However, possible restrictions for the members of the political parties to become lay members may raise issue of constitutionality and would not be entirely effective. Inclusion of practicing lawyers as lay members may lead to the conflicts of interests. The Minister stressed that the decision-making procedure within the HJC should help avoiding corporatism; judges should not decide amongst themselves.

Mr Tuori thanked Minister Popović for the very constructive approach and commitment to implement the recommendations of the opinion. The reform is an ongoing process, the first phase ended with the successful constitutional reform, the rapporteurs are ready to continue working with the Serbian authorities on the implementing legislation.

The Commission adopted the opinion on three draft laws implementing the constitutional amendments on the judiciary in Serbia (CDL-AD(2022)30).

The draft opinion was prepared under the Expertise Co-ordination Mechanism in the framework of the EU/CoE joint programme "Horizontal Facility II", co-funded by the Council of Europe and the European Union and implemented by the Council of Europe.

16. Ukraine

16.1 Draft joint amicus curiae brief on certain questions related to the election and discipline of the members of the High Council of Justice of Ukraine

Ms Suchocka informed the Commission that the draft joint amicus curiae brief of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe (on certain questions related to the election and discipline of the members of the High Council of Justice of Ukraine, was requested by the Acting President of the

Constitutional Court of Ukraine. First, as regards the role of international experts as members of the Ethics Council, which has also been discussed in a previous opinion, the *amicus curia* brief outlines that the role of the Ethics Council is very limited, with it only making recommendations, not final decisions. Therefore, the *amicus curiae* brief concluded that the inclusion of international experts on the Ethics Council did not pose a threat to the independence of the judiciary nor interfered with the sovereignty of Ukraine. Second, as regards the vetting of sitting members of the High Council of Justice, one of the most strongly discussed issues, Ms Suckocka outlined that while the evaluation of candidates is in principle not a problem, vetting of sitting members of the High Council of Justice can be only introduced under specific circumstances, as a measure of last resort (in case of systemic problems which cannot be solved through an ordinary disciplinary mechanism). Third, numerous members of the High Council of Justice have resigned following the establishment of the Ethics Council bringing the remaining number of members below the quorum. It was for the appointing bodies to overcome this situation through loyal cooperation. In the absence of loyal cooperation by one of the appointing bodies is missing, there should be a mechanism to unblock the situation. Furthermore, it is stressed that the international element affects only the *composition* of the High Council of Justice; in all other respects, the High Council of Justice functions as a national institution without any international involvement. All the decisions of the Ethics Council can furthermore be appealed to the Supreme Court, so the final decision always remains with a national body. Finally, the rapporteurs refer to the involvement of foreign expertise in the judiciary of other countries, concluding that the provisions under review do not pose a threat to the sovereignty of Ukrainian State, bearing in mind that it was a sovereign choice of Ukraine and the chosen mechanism is an extraordinary and temporary solution.

The Commission adopted the joint *amicus curiae* brief of the Venice Commission and DG-I on certain questions related to the election and discipline of the members of the High Council of Justice of Ukraine (CDL-AD(2022)023).

16.2 Urgent joint opinion on the draft law on local referendum in Ukraine

Mr Alivizatos informed the Commission that the urgent joint opinion of the Venice Commission and OSCE/ODIHR (CDL-PI(2022)001) on the draft law on local referendum in Ukraine had been requested by the Speaker of the Parliament of Ukraine on 25 August 2022 and was issued on 10 February 2022, in accordance with the Protocol on the preparation of Venice Commission urgent opinions.

The draft law on local referendum had taken some of the previous recommendations of the Venice Commission and ODIHR into account, notably the ones formulated in the 2020 joint opinion on the draft law 3612 on democracy through all-Ukraine referendum. However, Mr Alivizatos said that certain provisions of the examined draft could be improved. He pointed to such issues as the possibility to organisation of local referendums simultaneously with the early termination of powers of local elected officials, lack of clarity as to the issues that could be submitted to the local referendum and the proposed threshold of 50% for the validity of the referendum.

The Commission endorsed the urgent joint opinion of the Venice Commission and OSCE/ODIHR on the draft law on local referendum of Ukraine (CDL-AD(2022)038).

17. Exchange of views with the Attorney General of Ireland

Mr Paul Gallagher, Attorney General of Ireland, addressed the Commission, focusing primarily on the topics fake news and manipulation of information. He outlined that these are contemporary growing threats to the fundamental freedoms and liberties, notably the freedom of speech. Such threats are augmented by scientific developments, including Artificial Intelligence. The extent of scientific progress in this area has been significant, and the legal framework should be able to cope with those challenges. Controlling disinformation was becoming an essential bedrock for the liberal democracy, but the difficulty is that there is a common belief in the free speech and the sense that any attempt to control the speech would

inhibit that freedom. However, there is much more at stake: not how we control, but how we look at those controls in the circumstances, when the freedom of speech can be interfered by many decentralised actors who are answerable to nobody. For the time being, there is no effective regulation on AI, even though the EU Parliament has made some steps to control it. Indeed, the EU should have the capacity that enable it to take measures that are required. But these measures would be out-dated given that AI is constantly developing.

It should be clear that the capacity of science to alter our reality is immense and we have little control over these developments and little understanding of them. Moreover, AI coupled with the emergence of big data allows even the basic message communicated to large audiences to be manipulated. It presents therefore a huge control over our lives. If you can use AI, big data and social media to distort democracy and undermine free elections, the very fabrics of our society are threatened. Accordingly, the real task for human rights lawyers today is to assess these challenges.

In this context, Mr Gallagher mentioned he recent legislative changes in Ireland, which aim to protect elections. In July 2022 the Electoral Reform Act was introduced in Ireland. The Act has two significant parts to deal with the above problems. Firstly, the Act deals with control of political advertising and requires that political advertisements be expressly identified. Secondly, the Act provides for measures whereby the electoral authority will monitor the elections to prevent misinformation from distorting the election. Without those measures there will be dissemination of fake news and misleading information. Under the new Act the electoral authority has the competence to issue take-down notices to social media companies, which are required to set up complaint procedures on their sites. These new powers require confidence in the institutions, but they are essential to protect the fabric of democracy.

Mr Tuori referred to the Rule of Law Checklist which might need to be updated as regards the issue of misinformation. Mr Vardanyan stressed the importance of these issues for new democracies, where misinterpretation of facts and manipulation of information may be even more problematic. Ms Granata-Menghini pointed out that powers regarding removal of certain content identified as misinformation could be compatible with Venice Commission recommendations. New tasks of electoral authorities are emerging in that context, notably training of the staff on these issues and ensuring the transparency of controlling measures. The requirement of independence of the electoral authority remains essential to maintain public trust. Mr Newman added that this was in fact an old concern about relationship between the control and the freedom of speech and it was important to keep historical sense in dealing with those challenges.

18. Belarus

Draft final opinion on the constitutional reform in Belarus

Mr Alivizatos, Mr Tuori and Mr Dimitrov presented the draft opinion, which was requested by the President of the Parliamentary Assembly. The present draft opinion was preceded by the urgent interim opinion which the Venice Commission issued on 21 February 2022 (CDL-AD(2022)008), a few days before the Russian military intervention of Ukraine. In the urgent interim opinion, the Venice Commission criticised the lack of democratic procedure in the preparation of the constitutional amendments as well as the absence of genuine distribution of powers and the system of checks and balances in the draft amendments. In spite of the military events, the constitutional referendum took place on 27 February 2022 resulting in the adoption of the proposed amendments.

Looking at the constitutional process in Belarus in general, the recent developments in the country have been indicative of the continued deterioration of the Belarusian political regime in the direction of a model of so-called pseudo-Constitution. In that model, the documents with the title e “constitution” exist with the sole aim of legalising the monopoly of power by an individual or a political party; through such “constitutions”, dictatorial governments pretend to disguise their authoritarianism.

The general chapters of the amended Constitution, notably Chapter I ("The fundamentals of the constitutional order") and Chapter II ("Individual, society, State") provide principles and norms which overlap with each other, and their exact legal meaning remains unclear. Moreover, the provisions in Chapter I are particularly broad and vague and they can be used to nullify the rights and freedoms contained in Chapter II. For example, under Article 15 "the State shall ensure the preservation of historical truth and the memory of the heroic deeds of the Belarusian people during the Great Patriotic War". This provision seems to impose mandatory history policy and may be used to restrict the freedom of expression. Under amended Article 18, Belarus is no longer a nuclear-free state. The same Article 18 introduced a new principle that Belarus "excludes military aggression from its territory against other states", which has been grossly violated by the current political regime.

The norms relating to fundamental rights lack clarity and legal precision. Article 23 of the Constitution sets out a general clause on restricting rights and freedoms which fails to include the requirement of necessity. Limitations and derogations are not separated, nor are the legal effects of states of emergency or martial law spelled out. Absolute rights are not excluded from restrictions (or derogations). Justiciable and other social rights are not clearly separated. Political rights remain severely restricted. In fact, the democracy is placed in the framework of "the ideology of Belarussian state", which is likely to call into question the entire mechanism for protecting rights and freedoms.

A new constitutional body of unclear composition, the All-Belarusian People's Assembly (the ABPA), will have broad and heterogeneous powers. These powers encroach on the competences of the other State bodies. It appears that the Presidium of the ABPA, the composition and powers of which are not determined either, but which will certainly comprise the President, will inevitably play a decisive role at the operational level. The ABPA is therefore a plethoric body bearing the mark of communist "democratic centralism" and entailing a strong fusion and concentration of powers. Its main objective seems to be maintaining the control for the current President of the Republic and of its entourage forever, which makes it incompatible with the democratic values enshrined by the Council of Europe.

Ms Granata-Menghini informed the Commission that the rapporteurs had not been able to have any meetings with the Belarusian authorities, however it had been possible to receive written comments from the opposition in exile and from representatives of civil society.

The Commission adopted the final opinion on the constitutional reform in Belarus (CDL-AD(2022)035), previously examined at the joint meeting of the Sub-Commissions on Democratic Institutions and on Ombudsman institutions on 20 October 2022.

19. Georgia

Urgent opinion on the Amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022

Ms Kiener informed the Commission that in June 2022, the Parliament of Georgia adopted draft amendments to the Criminal Procedure Code ("the CPC") with the following most important changes: (i) the list of crimes eligible for investigation by means of covert measures was extended; (ii) the overall maximum duration of covert measures was prolonged; (iii) the existing rules on the notification of persons about the use of covert measures were relaxed. The adoption of the bill was criticised internally and at the international level. The President of Georgia vetoed the amendments and requested an urgent opinion of the Venice Commission. The Commission accepted the request and the urgent opinion was issued on 26 August 2022 (CDL-PI(2022)028).

The Venice Commission criticised the amendments in several important aspects. First, during the law-making process the necessity of the specific amendments on covert investigative measures in the current Georgian context was not sufficiently explained, and there were no

supporting materials which would demonstrate that less intrusive solutions had been considered. Second, the list of crimes eligible for covert investigation measures was extended to many offences which were not in the "serious" category established in the Criminal Code of Georgia. Whereas some of the crimes added to the list could indeed be seen as connected with threats to state security, that was hardly the case with the other crimes added to the list. Third, the possibility of numerous extensions of covert measures for certain crimes appeared excessive. That was even more so as the list of crimes eligible for covert investigation measures seemed disproportionally broad, and the rate of judicial authorisations for covert investigation measures in Georgia was high. Fourth, the bill made the procedure for the notification of covert investigation measures less strict: the amendments refer to a broad list of crimes and provide that in those cases, the notification of the use of covert investigative measures may be postponed for as many times as is necessary to avoid threat to state security, public order and in the interest of legal proceedings. The requirement of notification is not absolute; exceptions are possible where a state has a general complaints procedure to an independent oversight body with adequate powers and scope of review. However, no such oversight authority seems to exist in Georgia, and the proposed amendment risks to turn the non-notification option into the general rule rather than an exception. Fifth, the current legislation disclosed the lack of efficient judicial control and institutional oversight of covert measures. In this context, it is noticeable that the Technical Agency, which implements covert measures both within the criminal investigations and within other contexts, is under the administrative competence of the State Security Service and it is unclear if the Technical Agency operates on the basis of clear and strict regulations with appropriate system of accountability and oversight.

Against this background, the Venice Commission's concerns went beyond the draft law under assessment. The shortcomings of the amendments to the Criminal Procedural Code appeared to be symptomatic for general shortcomings in the system of covert surveillance in Georgia. That was why the Venice Commission, in addition to the recommendations regarding the amendments to the Criminal Procedure Code, recommended that the Georgian Parliament revise the overall legal framework of oversight of the covert surveillance. That would include the quality of judicial control in specific cases as well as the general oversight mechanisms. Only then should the Georgian Parliament embark on the discussion about the specific proposals contained in the draft law.

In September 2022, the Parliament of Georgia overcame the President's veto, and, regrettably, the draft law was adopted in the original version that the Venice Commission criticised.

The Commission endorsed the urgent opinion on the amendments to the Criminal Procedure Code adopted by the Parliament of Georgia on 7 June 2022 (CDL-AD(2022)037)

The urgent opinion was prepared under the Quick Response Mechanism in the framework of the EU/CoE joint programme "Partnership for Good Governance", co-funded by the Council of Europe and the European Union and implemented by the Council of Europe.

20. Türkiye

Urgent joint opinion on the draft amendments to the Turkish Penal Code regarding the provision on "false or misleading information"

Ms Kjerulf Thorgeirsdottir informed the Commission that the urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, requested by the Chair of the Monitoring Committee of PACE, had been issued on 7 October 2022. On 12 October 2022, PACE passed a Resolution on the honouring of obligations and commitments by Türkiye and referred to the urgent opinion of the Venice Commission.

The opinion focused on one article to be added to the penal code, criminalising false and misleading information. It noted that the confusion surrounding the meaning of the terms in the original version and in the different translations, as it appeared also during the online meetings with the various political parties, was a matter of concern. The opinion confirmed that these terms were not "sufficiently clear".

The opinion demonstrated that references made by the Turkish authorities to similar legislation in other European countries or at the EU level were not valid comparisons. While recognising the valid aim of tackling disinformation, the opinion considered that the provision at stake did not serve a pressing social need, as there were less intrusive measures available and the existing legal system entails provisions that already address the most dangerous aspects of disinformation.

The chilling effect that the provision would have on ordinary citizens and journalists, and subsequent increased self-censorship, were identified as highly problematic, in particular in view of the upcoming elections in June 2023. The opinion warned against the adoption of this provision, also in consideration of the disproportionate gravity of the sanctions foreseen. However, on 13 October 2022 the Turkish Parliament adopted the amendment.

The Commission endorsed the urgent joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Turkish Penal Code regarding the provision on "false or misleading information" (CDL-AD(2022)034).

21. Recommendation 2235 (2022) of the Parliamentary Assembly of the Council of Europe: elements for the reply by the Committee of Ministers

Mr Cameron stated that the background to this recommendation included the war of aggression against Ukraine but also other threats to security, which led to the Recommendation proposing a democratic security initiative. Democratic states did not go to war against each other.

A central question to be asked was how, and to what extent, the institutional proposals made by the Assembly might add value to the existing European monitoring systems (the "European security architecture"), including those of the European Union. It was important to apply a holistic approach – assessing the totality of a state's mechanisms of controls and remedies, and examining not simply the law on the books, but also how controls and remedies work in practice.

Several members had made comments on how to reconcile security and democracy to ensure that both of them are ensured. In particular, the question of the hierarchy between the three pillars of the Council of Europe (democracy, human rights and the rule of law) on the one side and security on the other side had been risen. The comments made clear that security (in the narrow sense) is a concept within, not outside of the law. It should not be seen as a superior value to the Council of Europe's pillars - democracy, human rights and the rule of law - but as a means to ensure the consolidation of these pillars, which on their turn have to be respected to ensure security.

Mr Alivizatos insisted that (public) security could not be seen as a value to defend independently from the pillars of the Council of Europe – as it was in authoritarian states like China -, and that there was no hierarchy.

In the discussion, it was made clear that the issue was not one of hierarchy but of complementarity. Like in the rule of law checklist, "enabling conditions" were at stake.

Mr Cameron concluded that security could be added among the enabling conditions of the rule of law. Apart from that, the comments to be adopted did not address the definition of

democratic backsliding which had been discussed in Committee of Ministers of the Council of Europe.

The Commission adopted the comments (CDL-AD(2022)036) on Recommendation 2235 (2022) of the Parliamentary Assembly of the Council of Europe: "Recent challenges to security in Europe: what role for the Council of Europe?"

22. Information on Conferences and Seminars

The Commission was informed on the results and conclusions of the following conferences and seminars:

- Fifth Congress of the World Conference on Constitutional Justice

Mr Buquicchio informed the Commission that the World Conference on Constitutional Justice (WCCJ), for which the Venice Commission acted as the Secretariat, had held its 5th Congress from 4 to 7 October 2022 in Bali, at the invitation of the Constitutional Court of Indonesia. The Congress had been a great success. 94 delegations from constitutional courts and equivalent institutions participated in the Congress, making a total of 583 participants. The Congress had been preceded by a bilateral Asian-African meeting of constitutional courts. During the 5th Congress, the Constitutional Court of the Russian Federation terminated its membership in the WCCJ. The General Assembly had tasked the Bureau, which would meet in Venice in March 2023, to discuss possible changes of the Statute relating to the suspension or termination of membership. On the basis of the discussions of the main topic "Constitutional Justice and Peace" and the recurrent topic of a stocktaking of the independence of the constitutional courts, the Congress had adopted the final "Bali Communiqué".

- 5th Plenary of the Assembly of the Global Network on Electoral Justice

Mr Buquicchio had also participated in the 5th Plenary Assembly of the Global Network Electoral Justice (GNEJ), held from 9 to 11 October 2022 in Bali. On this occasion, he received on behalf of the Venice Commission an award from the GNEJ for "Specific progress towards the main objectives of the GNEJ". Mr Buquicchio was honorary member of the Governing Council of the GNEJ and was elected in Bali as one of the three members of the Advisory Committee. In the framework of discussions of the GNEJ on a revision of its Statute, he had recommended introducing provisions on the suspension of membership but also support for members under undue pressure from other state powers.

- European Conference of Prosecutors

Mme Bazy Malaurie informed the Commission of the results and conclusions of the European Conference of Prosecutors, held in Palermo on 4 and 5 May 2022, where the Commission had been represented by herself, Ms Suchocka, Mr Hamilton, and Ms Granata-Menghini (CDL-PI(2022)033). One of the main conclusions referred to the need to update the standards concerning the independence of the prosecutors, and in particular the Committee of Ministers Recommendation Rec(2000)19, while recognising the variety of the systems. The Commission would therefore prepare an update of the 2010 report on the independence of prosecutors (link)

- International Seminar on Bicameralism: phenomenology, evolution, and current challenges of a "contested" institution

Mr Bustos Gisbert informed the Commission about the discussions at the International Seminar on Bicameralism, which took place in Madrid on July 4 and 5 2022, and which was co-organised by the Commission with the Centre for Political and Constitutional Studies, with the participation of the members of the Venice Commission and eminent Spanish academics. Second chambers aim to address the needs for systems to be representative, but their role should be re-assessed, in particular in the context of democratic backsliding in Europe. Hence there is a need to review the Venice Commission standards on bicameralism, in particular the

study of 2006 (CDL(2006)059rev, Report on Second Chambers in Europe "Parliamentary complexity or democratic necessity?") in order to give clear guidance to the member states.

- International Round Table on civil society: empowerment and accountability

Mr Tuori informed the Commission about the International Round Table on civil society: empowerment and accountability, co-organised with OSCE/ODIHR under the aegis of the Irish Chairmanship, which took place in Strasbourg on 13 September 2022 in a hybrid format. The first part of the Round Table focused on the inclusion of civil society in the democratic legislative process, and on the risks involved in the excessive regulation of such involvement. The second part of the Round Table dealt with the issue of accountability and financial monitoring of NGOs labelled as "foreign agents". The concept of transparency – which is used to justify the legislation on foreign agents – should be used very carefully in respect of the NGOs, because can imply control by the authorities.

The Commission was informed of the following upcoming conferences and seminars:

- 19e Conférence européenne des administrations électorales

Mr Garrone rappelle que la 19e conférence européenne des administrations électorales se tiendra à Strasbourg et en ligne les 14-15 novembre 2022 et portera sur « Intelligence artificielle et intégrité électorale ». Compte tenu du développement continu de l'intelligence artificielle, les effets de celle-ci doivent être examinés dans tous les domaines, et celui des élections ne fait pas exception. La conférence vise à examiner l'impact de l'usage des systèmes d'intelligence artificielle dans l'organisation et la tenue des processus électoraux ainsi que sur le travail des administrations électorales. La conférence portera sur :

- L'acquis du Conseil de l'Europe et les principes en jeu
- Intelligence artificielle et équité dans les processus électoraux
- L'impact de l'intelligence artificielle sur la participation et le choix des électeurs *vs* la protection des données

Les travaux de la Commission de Venise en la matière ont porté jusqu'à présent sur les nouvelles technologies – relevant ou non de l'intelligence artificielle - et les élections, tout particulièrement durant les campagnes électorales. Il convient d'étendre maintenant la discussion à l'ensemble des implications possibles de l'intelligence artificielle sur le processus électoral.

La conférence réunira non seulement des représentants des administrations électorales mais aussi des praticiens, des universitaires, des membres d'assemblées nationales ou locales, ainsi que plusieurs membres de la Commission. Elle sera tenue en format hybride.

- 16th UniDem Med seminar "on the Digital transformation of the public administration

Mr Dürr outlined that the Venice Commission is organising the 16th UniDem Med seminar on "The Digital transformation of public administration", in co-operation with the Ministry of Digital transition and administrative reform of the Kingdom of Morocco. The regional seminar will take place on 23-24 November 2022 in hybrid format (in Rabat, Morocco and online via the Zoom platform). The first day of the seminar will be dedicated to the presentation of experiences and good practices in digital transformation in the South Mediterranean region and beyond, with a focus on the respect of users' rights and in particular on equal access and inclusion. On the second day, international and regional experts will exchange with participants on how public administration can adapt and implement policies for the digital transformation of public services in terms of good governance and internal reform. At the end of the seminar, the general rapporteur will draw up a series of recommendations on the topics discussed, which will be published and disseminated within the UniDem Med practitioners' network.

23. Information on constitutional developments in other countries

Tunisie

Mme Granata-Menghini informe la Commission des développements constitutionnels après l'adoption par la Commission de Venise de l'avis urgent sur le cadre constitutionnel et législatif relatif aux annonces référendaires et électorales par le président de la République, et en particulier sur le décret-loi n°22 du 21 avril 2022 modifiant et complétant la loi organique relative à l'Instance supérieure indépendante pour les élections (ISIE), CDL-AD(2022)017, du 27 mai 2022.

Les projets d'amendements à la Constitution ont été adoptés lors du référendum qui s'est tenu le 25 juillet 2022. L'autorité électorale a annoncé qu'il y avait eu 30 % de participation et 94,6 % ont voté en faveur des amendements ; trois recours ont été interjetés, en vain. Le 19 août 2022, les amendements constitutionnels ont été promulgués. Les projets d'amendements à la Constitution n'ont pas été discutés par la commission de réforme constitutionnelle et la version initiale des amendements a été modifiée unilatéralement par le Président de la République. Les amendements ont été critiqués par la société civile.

Quant au fond des amendements, ils ont introduit une seconde chambre du Parlement – le Conseil des Régions et des Districts – qui est composée des représentants élus par les conseils régionaux. Ces conseils régionaux étaient prévus en 2014 mais ils n'ont jamais été mis en place. Ces conseils disposent de pouvoirs assez étendus, y compris la fonction législative qu'ils partagent avec la chambre basse. Par exemple, la loi de finances est adoptée à la majorité absolue des deux chambres.

Les autres éléments importants apportés par les amendements sont les suivants : (1) le droit commun réglemente les relations entre les chambres ; (2) il existe une possibilité de destitution populaire des députés ; (3) le nombre de députés est fixé par la loi et non par la Constitution ; (4) l'exécutif est dirigé par le Président qui nomme les membres du gouvernement ; (5) le Président est élu au suffrage universel direct et son mandat est limité à deux mandats ; (6) le Président peut, en cas de danger imminent menaçant la sécurité, l'intégrité et l'indépendance de l'État ainsi qu'en cas de danger qui entrave le travail ordinaire des pouvoirs publics, imposer l'état d'urgence ; (7) l'immunité du Président est large, accompagnée d'une procédure de destitution compliquée impliquant le Parlement et un tribunal spécial qui serait établi à cette fin.

En septembre 2022, les amendements à la loi électorale ont été introduits imposant des critères d'éligibilité stricts pour les candidats au parlement : les candidats doivent avoir les deux parents de nationalité tunisienne ; il ne peut y avoir de deuxième citoyenneté; les candidats ne doivent pas avoir occupé certaines fonctions publiques pendant un an avant d'être nommés ; le système électoral a été modifié : le système proportionnel est remplacé par le scrutin majoritaire à deux tours et les 33 circonscriptions électorales (27 en Tunisie et six à l'étranger) sont transformées en 161 circonscriptions électorales (151 en Tunisie et 10 à l'étranger) ; un système de parrainage est mis en place exigeant que chaque candidat doit présenter à l'ISIE son programme électoral accompagné d'une liste de 400 parrainages répondant à des conditions très complexes (notamment la parité hommes/femmes, au moins 25% de jeunes de moins de 35 ans ; un électeur ne peut parrainer plus d'un candidat).

En outre, une nouvelle loi a été promulguée en septembre 2022 criminalisant la diffusion délibérée de fausses nouvelles, de rumeurs ou d'informations trompeuses dans le but d'interférer avec les droits d'autrui, la sécurité ou à des fins de terreur. La peine est de 5 ans d'emprisonnement et d'une amende. La sanction augmente si ces actes sont commis par des agents publics.

Enfin, la Cour africaine des droits de l'homme et des peuples a examiné l'affaire Brahim Ben Mohamed Ben Brahim Belgeith c. République tunisienne, constatant le 22 septembre 2022 que les mesures exceptionnelles dans le cadre constitutionnel ont été adoptées sans aucun respect des règles constitutionnelles et au mépris de la procédure, notamment sans consultation du gouvernement et du parlement ; l'absence de la Cour constitutionnelle dans le pays n'a fait qu'aggraver la situation. La Cour africaine a ordonné à l'Etat défendeur d'abroger les décrets présidentiels pertinents et de revenir à la démocratie constitutionnelle dans un délai de deux ans ; en outre, une Cour constitutionnelle indépendante devait être établie dans le même délai de deux ans.

24. Report of the Meeting of the Sub-Commission on the Judiciary (20 October 2022)

Mr Barrett informed the Commission that the meeting of the Sub-Commission on 20 October 2022 discussed the draft opinions in relation to Moldova, Serbia and Bulgaria which were further presented and adopted at the Plenary (see above).

25. Report of the Joint Meeting of the Sub-Commissions on Democratic Institutions and on the Ombudsman Institution (20 October 2022)

Mr Alivizatos informed the Commission that the Joint Meeting of the Sub-Commissions on Democratic Institutions and on Ombudsman Institutions was held on 20 October 2022. The draft opinions regarding Belarus and Kazakhstan were discussed at the meeting and subsequently adopted at the Plenary (see above).

Mr Rogov thanked the Commission for the opinion on Kazakhstan and added that Kazakhstan had undergone another constitutional reform, according to which the President of the Republic would be elected for seven years, but for one term only.

26. Report of the meeting of the Council for Democratic Elections (20 October 2022)

Mr Darmanovic informed the Commission about the revision of the internal rules of procedure of the Council for Democratic Elections, the only tripartite body of the Council of Europe, which includes representatives of the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe. The present rules of procedure dated back to 2004. The most important change was the introduction of a rotating Presidency focusing on the co-operation between the three bodies. The revised rules provided that “the same institution cannot hold the functions of the President for more than two consecutive mandates”. The revised internal rules of procedure (CDL-EL(2022)003) would enter into force on 1 October 2023.

The joint opinion of the Venice Commission and the ODIHR “on the draft electoral code of the Republic of Moldova” (CDL-AD(2022)025), and the opinion “on the draft constitutional amendments concerning the electoral system of Mexico” (CDL-AD(2022)031) are dealt with under items 13 and 14 above.

27. Other business

Ms Bílková presented the OSCE/Moscow mechanism report on violations of international humanitarian and human rights law, war crimes and crimes against humanity committed in Ukraine since 24 February 2022.

There were two missions on Ukraine in March and May 2022 in the context of the OSCE Moscow Mechanism. Reports were presented in April and July 2022 respectively. The two reports cover the events that occurred in the territory of Ukraine, within its internationally established borders, from 24 February 2022 till 25 June 2022. The mandate of the two missions was to (i) establish the facts and circumstances surrounding possible contraventions of OSCE commitments, and violations and abuses of international human rights law and international humanitarian law; (ii) establish the facts and circumstances of possible cases of

war crimes and crimes against humanity, including due to deliberate and indiscriminate attacks against civilians and civilian infrastructure; and (iii) collect, consolidate, and analyse this information with a view to presenting it to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction.

The two reports regarding Ukraine largely overlap in their conclusions. The missions found convincing evidence showing that serious violations of international humanitarian law and international human rights law, including the violations of some of the most fundamental guarantees (right to life, prohibition of torture, prohibition of deliberate attacks against civilians) were committed in the territory of Ukraine in the first four months of the conflict. Most of these violations occurred in the territories under the effective control of the Russian Federation, including the territory of the so-called Donetsk and Luhansk People's Republics, and are largely attributable to Russia. Some of the violations moreover amount at the same time to war crimes or crimes against humanity (targeted killing of civilians, torture of prisoners of war, rape, pillage). The missions also identified several accountability mechanisms that are available, including the criminal prosecution of individual perpetrators by the ICC and by national courts.

The main added value of the reports is threefold. First, these are the first and so far the only authoritative reports on the conflict in Ukraine produced by independent experts within international organisations. Second, the reports are comprehensive in their scope, covering all events that have occurred in the territory of Ukraine over the first four months of the armed conflict. Thirdly, the reports are based on a careful evaluation of the information received from various sources.

Ms Nussberger presented the OSCE/Moscow mechanism report on Russia's legal and administrative practice in light of its OSCE human dimension commitments.

The report was prepared under the non-consensual procedure in which the Russian Federation refused to cooperate. Nevertheless, it was possible to have exchange with the non-governmental interlocutors. The mandate of the mission was (i) to assess the state of Russia's adherence, in law and in practice, to its OSCE Human Dimension commitments and to identify actions taken by the Russian Government over recent years that have led to the current human rights and fundamental freedoms situation in the country; (ii) to assess ramifications of such developments on Russian civil society, on free media, on the rule of law, and on the ability of democratic processes and institutions to function in Russia, as well as on achieving the OSCE's goal of comprehensive security.

The report included the analysis of changes in the State organisation, the hierarchical and vertical power structure in the context of gradual concentration of power in the hands of the President. Notably, the report shows the way the security agencies gradually moved under the control of the President. More broadly, no real separation of power could be found on the federative level. Furthermore, institutions created to protect human rights do not perform their functions properly and they are limited by the new repressive laws. This concerns the Constitutional Court, the Ombudsman, the Presidential Council on the Development of Civil Society and Human Rights, the Public Oversight Committees.

Apart from that, the report identified further repressive legislation that was adopted in 2022 to restrict even more the freedom of speech and the activities of civil society organisations. In that context, the report relied on multiple opinions of the Venice Commission opinions, especially on the legislation on foreign agents. One of the recommendations following from the report was to appoint the UN Special Rapporteur to deal with those issues in Russia and indeed that point was taken up by the UN Human Rights Council.

Mr Vardanyan noted that it was important to discuss the issues of international humanitarian law regarding all the Council of Europe Member States, including Armenia, where for the last

two years there have been substantive collections of evidence proving serious violations of international humanitarian law and international human rights law.

28. Dates of the next sessions

133rd Plenary Session	16-17 December 2022
134th Plenary Session	10-11 March 2023
135th Plenary Session	30 June-1 July 2023
136th Plenary Session	6-7 October 2023
137th Plenary Session	15-16 December 2023

Sub-Commission meetings as well as the meetings of the Council for Democratic Elections will take place on the day before the Plenary Sessions.