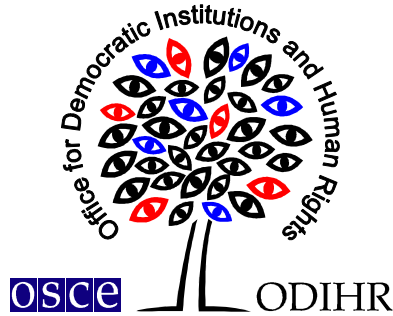




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# Report and Recommendations on Uzbek Code of Criminal Procedure

October, 2003

## **Introduction**

In recent years, the United Nations Human Rights Committee and Committee Against Torture have issued reports highlighting human rights abuses in the criminal process of Uzbekistan. The United Nations Special Rapporteur on Torture issued a report in 2003 which concluded that torture is “systematic” in Uzbekistan. All of these reports point out the lack of procedural mechanisms to guarantee freedom from arbitrary arrest and detention, to effectively challenge the admission of evidence obtained by torture, and a general lack of equality of arms in the criminal process.

The Special Rapporteur’s Report made twenty-two recommendations which cover a range of legislative and policy issues. It is the intent of this report to focus on making recommendations for specific changes to the Uzbek Criminal Procedure Code which should not only provide greater protections against torture but should provide greater protections for criminal defendants throughout the criminal process. This report seeks to build on the above-mentioned United Nations reports by highlighting the pertinent Code sections which need to be changed and suggesting additional sections which will aid implementation of international standards. It is envisioned that these recommendations will engender an open discussion and that the real work of writing legislation will be done by working groups composed of Uzbek legal professionals, scholars, and legislative specialists, with the input of local and international non-governmental organizations with an interest and expertise in human rights.

The report and follow-up activities are a joint project of the American Bar Association Central European and Eurasian Law Initiative Criminal Law Program (ABA/CEELI), Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR), the National Human Rights Center, and the United Nations Development Program/Development Support Services Program (UNDP/DSSP).

## **International Standards: Application and Interpretation**

Uzbekistan is a signatory to a number of international human rights treaties which pertain to criminal justice and criminal procedure. The most important of these are the United Nations International Covenant on Civil and Political Rights (1966)(hereinafter, the ICCPR); the Optional Protocol to the ICCPR (1966), which creates a procedure by which any person may challenge violations of his rights by State parties to the ICCPR; and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)(hereinafter the CAT). These treaties were ratified by Uzbekistan and entered into force in 1995.

Article 2 § 2 of the ICCPR requires States:

*...each State Party to the present Covenant undertakes to ... adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

This language creates an affirmative duty on signatories to comply in full with the ICCPR provisions immediately. The signatory state, not international bodies such as the Human Rights Committee (hereafter HRC or the Committee), bears responsibility for ensuring and promoting the ICCPR standards domestically and defining broad language within the UN's and the Covenant's minimum standards of human rights protection.<sup>1</sup>

In addition to negative obligations precluding state authorities from interfering with or depriving individuals of civil and political rights, the provisions of the ICCPR also impose positive obligations upon states. State parties must establish procedures and mechanisms which effectively ensure protection of ICCPR rights. Therefore, the Covenant standards must be incorporated into domestic law and implemented in practice.

Several monitoring mechanisms provide guidance as to the implementation of treaty standards. The HRC and Committee Against Torture issue "Concluding Observations" based upon periodic reports submitted by member states, giving state-specific diagnostic guidance. The HRC also issues "General Comments," statements that clarify Covenant provisions in general. The Committee also expresses "views" on complaints submitted to it under the Optional Protocol to the Covenant. In addition, the Report of the UN Special Rapporteur on Torture gives Uzbekistan specific legislative and policy recommendations to decrease the incidence of torture in the criminal process.

Decisions of the European Court of Human Rights (hereafter the ECHR) are also relevant, even though Uzbekistan is not a member of the Council of Europe and therefore not bound by the court. Rendering decisions on individual complaints filed under the 1953 European Convention of Human Rights, the ECHR was the first international court set up to decide issues of human rights. Since the ICCPR seeks to protect the same rights and since the ECHR has the most judicially developed body of detailed jurisprudence, it provides applicable guidance for understanding international standards.<sup>2</sup>

## **Criminal Procedure and Rule of Law**

An underlying recommendation applying to all aspects evaluated in this report is greater protection against arbitrariness. Protection against arbitrary arrest, detention, or other limitations on liberty is central to the rule of the law and international human rights standards.

Article 9 (1) of the ICCPR provides for arrest or detention solely on legal grounds and according to procedures established by law. These laws and procedures must conform to international standards. Domestic laws or procedures which are vague, over-broad, or in violation of other fundamental rights such as freedom of expression do not meet international standards. Elements of inappropriateness, injustice and lack of predictability can make a detention that conforms with domestic laws arbitrary, according to the HRC.<sup>3</sup>

In addition, the public must have notice of these laws and procedures. Notice requires both public access to law and that the laws be precise enough to allow citizens to conform their conduct accordingly.<sup>4</sup> Granting too much unfettered discretion to law enforcement agencies without rules to safeguard against abuse violates Article 9(1).<sup>5</sup>

This requirement pertains not only to criminal codes but also to criminal procedure codes and to any administrative rules or procedures which guide the policies of law enforcement or other government agencies which affect the fundamental rights of citizens.<sup>6</sup> Vague statutory rules, which in practice are governed by unpublished internal rules, are not “law,” and are per se incompatible with international human rights.

It is a general recommendation of this report that all internal government and law enforcement rules which affect the rights of the accused in the criminal process be published, like other laws, in national newspapers to provide widespread access to the citizenry. A provision mandating such publication should be added to the Code of Criminal Procedure.

## **Analysis and Recommendations**

This report focuses on four subject areas in the Uzbekistan criminal legislation: Arrest and Detention, Pretrial Investigation, Fair Trial, and the Death Penalty. The report does not suggest that these subjects are the exclusive areas where reform of the Uzbek Code of Criminal Procedure is needed, nor does the report discuss necessary revisions of other relevant Codes, except where they directly relate to sections of the CCP. The recommendations intend to focus on the most pressing issues regarding the Code and to give guidance for discussion of future policy and legislative action.

## **1. Arrest and Detention**

### **A) International Standards**

Preventing arbitrary deprivation of liberty is fundamental to protecting human rights. ICCPR Article 9 protects the right to “liberty and the security of the person.” It requires domestic laws to define when deprivations of liberty are permissible, to outline the applicable procedures, to establish a safeguarding review by an independent judiciary capable of taking action against arbitrary detention, to allow individuals to challenge their detention, and to provide access to compensation in instances of unjust detention.<sup>7</sup>

ICCPR Article 9 (1) prohibits arbitrary arrest or detention and requires that deprivation of liberty occur only on grounds and through procedures “as are established by law.” These requirements apply both to procedures governing arrest or detention and to procedures followed by a court when ordering further detention.<sup>8</sup> To be legitimate, laws and procedures must be clear, precise, made available to the public, consistently applied, and must not grant unlimited discretion to law enforcement authorities.<sup>9</sup> In addition, the HRC found that the absence of an arrest warrant may be considered as one indicator of an arbitrary arrest.<sup>10</sup>

Article 9(2) requires officials promptly to inform arrested persons of the legal grounds for their arrest and of any charges against them. A legitimate criminal arrests requires a reasonable suspicion, supported by objective and articulable facts, that an individual has committed a crime. Reasonable suspicion requires a basis in admissible facts capable of satisfying an objective observer both that a crime has been committed and that the suspect may have committed the crime.<sup>11</sup> Furthermore, inappropriate, unjust, or unpredictable circumstances of otherwise lawful arrests may violate Article 9. For example, the HRC has found violations in detaining individuals for ulterior or political motives under a guise of lawful arrest.<sup>12</sup>

Article 9(3) requires that an individual arrested for a criminal offense must be promptly brought before a judge or other officer authorized by law to exercise judicial power. This automatic, in-person hearing does not depend on a request by the detained person. In General Comment 8, the Committee stated that “prompt” appearances must occur within “a few days,” and in its 1998 Comments on Zimbabwe, the Committee stated that pre-trial custody should not exceed 48 hours without a court order.<sup>13</sup> Furthermore, this approval of initial detention or further detention must be made by a judge or someone with judicial power, not a procurator.<sup>14</sup> This hearing presents an important opportunity for the Court to inquire whether the detainee’s legal rights have been respected and whether he has been subject to torture or other ill-treatment. Finally, consistent with a presumption of innocence, Article 9(3) states that pretrial detention should not be the general rule, but should be reserved for instances where the defendant may flee from investigation, intimidate witnesses, or otherwise obstruct justice and where other restraint measures are inadequate.<sup>15</sup>

Article 9(4) provides the right of habeas corpus. Persons deprived of their liberty must be able to judicially challenge their detention at any point in the criminal procedure, including post-conviction, through the direct filing of a complaint.<sup>16</sup> This article also applies not only to those detained in the criminal process but to all persons deprived of their liberty by the State, because of mental illness, vagrancy, drug addiction, for educational purposes or immigration control.

Article 9(5) requires the State to provide an enforceable right to compensation for damages caused by any breach of Article 9 provisions. For example, this right includes compensation for detention without reasonable suspicion or unjustified pre-trial detention where release on bail would be appropriate.

## **B) Uzbek Law and Practice Regarding Arrest and Detention**

The Uzbek law does not provide adequate safeguards against arbitrary arrest and detention. Improvement is needed in the areas of protection against arbitrary arrests; automatic and timely judicial review of detention; detainees' challenging the legality of their detention; and compensation for Article 9 breaches.

**Absence of effective safeguards against arbitrary detention.** First, the CCP does not provide adequate protection against arbitrary arrests, violating ICCPR Article 9(1). CCP Article 221(4), allows as a basis for arrest when information exists to suspect a person of having committed a crime, "he has attempted to flee or has no permanent residence, or his identity has not been established." This law grants extremely wide discretion to law enforcement officers and seems to allow an arrest for any criminal offense if there is some question about a person's identity. Also, the CCP does not distinguish between the grounds for arrests with or without a warrant.

In addition, Articles 285 and 288 of the Code of Administrative Offenses allow law enforcement authorities to arrest a person for three hours to check his identity, without having to demonstrate reasonable suspicion that the person detained has committed a criminal offense. In some cases, this detention may be extended for up to 24 hours and in instances involving state border rules, may be extended up to ten days with a procurator's sanction.

Furthermore, in practice, procedures do not meet Article 9(3)'s requirement that, as the general rule, restraint measures other than detention be used unless detention is necessary to ensure the accused's presence at trial. In contrast, CCP Article 242 provides for pretrial detention for charges where the punishment exceeds imprisonment for three years without specifying that the bail determination must be individualized. It also allows pretrial detention in relatively minor charges under "exceptional circumstances," an undefined term. This term's vagueness allows unfettered discretion to detain, a decision not reviewed by a court. Furthermore, CCP Article 236 creates the presumption of detention pending trial in two categories of offenses, aggravated and especially aggravated crimes, simply because of the seriousness of the alleged offense.<sup>17</sup>

Next, the CCP does not provide judicial review of detentions as required in Article 9(3). According to CCP Article 382, the procurator is the ultimate supervisor over all aspects of the pretrial process. The inquiry officer, the head of the inquiry agency, the investigating officer and the procurator are all empowered to make an initial arrest, for which a person may be held for 72 hours. Following the 72 hours, only a procurator can authorize further detention. Since the procurator's office also prosecutes all criminal defendants at trial, it lacks the institutional objectivity necessary to meet Article 9(3)'s requirements of an impartial judicial officer. The CCP further violates 9(3) in that it does not guarantee the accused an opportunity to be heard by the procurator who decides whether or not to continue detention.

No article of the CCP allows the judge to supervise the investigatory process. Article 18 grants authority to place a person in detention to a court or a procurator but does not allow recourse to a court if the procurator makes the detention decision. CCP Article 241 allows a pretrial detainee to complain against a restraint measure to the procuracy but does not provide access to a court. As a practical matter, the first time a judge has an opportunity to review a case is when it is first sent to the court at the end of investigation. Because a detainee can not address a court until the trial date, the Uzbek CCP violates both Articles 9(3) and 9(4).

The lack of a habeas corpus procedure in Uzbek criminal proceedings is a serious violation of international standards. CCP Article 1 mandates that only the CCP may regulate the conduct of legal proceedings on criminal cases within Uzbekistan. Therefore, other potentially applicable laws allowing court challenges of law enforcement actions, including detention, cannot be used in criminal cases.<sup>18</sup>

It is also a violation of international standards that individuals subject to other forms of procedural coercion do not have recourse to a court. As in other criminal justice systems, witnesses, victims and suspects may be compelled to appear and participate in pretrial proceedings or trial. Article 9(4) provides the right of habeas corpus to such persons but Uzbek law does not allow them to challenge the legality of their detention in a court.

In addition, Chapter 31 of the CCP sets forth the circumstances under which a person can be held by a mental institution, an inquiry officer, procurator, or court for "compelled medical proceedings." Victims or witnesses of a serious crime may be held in a mental institution to determine the validity of their testimony for a period up to one month plus an additional month under "exceptional circumstances," an undefined term. This Chapter does permit an appeal to a higher instance court, however the witness, who is not entitled to counsel under the Criminal Procedure Code, may have difficulty enforcing this provision.

**Absence of provisions for compensation for unlawful detention.** CCP Chapter 38 allows for the right to obtain compensation for unlawful criminal prosecution and conviction, but not for unlawful deprivation of liberty. Such compensatory provisions can

act as a brake on and deterrent against arbitrary action. To gain compensation for rights violations in the Uzbek criminal process, a person must be able to show that he has been rehabilitated, or that he was not guilty of the crime charged. The ICCPR requires, however, that State parties provide domestic remedies for the violations of substantive rights, regardless of the guilt or innocence of the complainant.

### **C) Recommendations Regarding Arrest and Detention**

Changes to procedures governing arrest and detention would affect the following recommendations of the Special Rapporteur: (a) unambiguous, public condemnation of torture; (c) the right to habeas corpus; (h) transparency regarding conditions of detention; (i) judicial inquiry of treatment during detention; (o) strengthening the respect for human rights among law enforcement agents; (p) granting accountability for correctional facilities and remand centres to the Ministry of Justice; (r) granting the Ombudsman's Office authority to inspect deprivations of liberty; (t) closing the Jaslyk facility; and (v) demonstrating conformance to international standards for liberty.

- 1) The Criminal Procedure Code should clearly and in detail stipulate procedures of and grounds for criminal arrest which are based upon the requirement of reasonable suspicion to believe that a crime has been committed by the arrestee. Arrests should not be allowed for minor or administrative offense.
- 2) The Administrative Code should be amended to eliminate the current practice of allowing detention solely to determine the identity of a person or for any other categories of administrative offenses.
- 3) The Criminal Procedure Code should be amended to require that a person arrested on a criminal charge be brought promptly before a judge for a public, adversarial hearing to determine the legality of the arrest and to determine whether further detention is justified. "Promptly" has been defined in international documents as no more than a few days, preferably no more than 48 hours.
- 4) Article 226 should be amended to state that time limits on pretrial detention start running from the point of deprivation of liberty rather than the point the detainee is brought to a police station or law enforcement agency.
- 5) The CCP should be amended to provide a habeas corpus provision, allowing detained people to file a complaint demanding to be brought to court to challenge the legality of their detention. The law must clearly apply to any person in custody, whether or not held for a criminal offense, and that it applies to witnesses and suspects in a criminal investigation.
- 6) The Code should further clarify the circumstances when an arrest without a warrant is permissible and these should be limited to serious offenses where there are exigent circumstances, i.e., reasonable grounds to believe that the individual poses a threat to society or to the investigation thus that getting a warrant is not practicable.

7) The standards for continued detention by a court should provide the presumption of liberty, i.e., pretrial detention should not be applied as a general rule. The prosecution must demonstrate why alternative restraint measures are inadequate to secure the appearance of the accused in proceedings and to protect witnesses. At this hearing, the judge should consider the lawfulness of the arrest, determine whether further detention is warranted and assess whether the detainee has been treated lawfully and provided with his legal rights. In particular, the court should assess whether there was any physical ill treatment or mental pressure applied to the detainee and whether the detainee's right to counsel has been respected.

8) The CCP should provide for the enforceable right to compensation for damages caused by violation of the right to be free from arbitrary arrest and detention regardless of whether or not the case resulted in acquittal.

## **2) Pretrial Investigation**

### **A) International Standards**

The right to be free from torture and coercion is perhaps the most basic human right. ICCPR Article 7 prohibits torture and cruel, inhuman, or degrading treatment unconditionally. Article 10 further ensures that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Uzbekistan's current pretrial investigative procedures leave detainees vulnerable to torture and other human rights violations.

**Custody Records.** One important safeguard against abuse during investigative procedures is a police custody record. This detailed record should be kept by custody officers independently from the criminal investigation record. While neither the ICCPR nor the ECHR explicitly require such a system, the absence of such records undermines the protections provided by the international standards.<sup>19</sup>

**Requirement to provide adequate information on arrest.** Another safeguard against unfettered power during investigative procedures is adequate information. ICCPR Article 9(2) requires officials to inform detainees of the reasons of their arrest and to inform them promptly of any charges against them. Article 14(3)(a) further states that this right must be satisfied "in a language which he understands." General Comment 8 interprets this provision to require a substantive indication of the complaint against the arrested person. Adequate information helps the accused prepare for questioning, enables him to cooperate with his defense counsel effectively, and allows him to challenge the legality of his detention altogether.

**Access to counsel.** In addition, access to competent and independent counsel from the point of detention is vital in protecting the accused. All of the recent UN reports on Uzbekistan have made the point that ensuring the presence of vigorous defense counsel early in the criminal investigative stage would provide an essential protection

against abuse of pretrial detainees. To prevent compelled self-incrimination, which arises from fear and vulnerability, it is critical that detainees are made aware of their rights and have uncompromised advocates.<sup>20</sup>

Article 14(3) of the ICCPR provides the general right to defense counsel, stating that the accused must have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing. General Comment 13 clarifies that such facilities must include access to documents and other evidence necessary for case preparation and opportunities to communicate with counsel. The article further requires respect for attorney/client confidentiality, representation that meets established professional standards, and judgment free from any restrictions, influences, pressures, or undue interference.

**Application of protection to all detained persons.** Furthermore, General Comment 8 makes clear that Articles 9(1), (2), and (4) apply to anyone whose freedom has been curtailed, whether or not he is charged with a criminal offense. Thus, especially because witnesses might well turn into suspects during the course of questioning, the rights afforded to the accused must also apply to witnesses whose freedom is restricted as part of a criminal investigation.<sup>21</sup>

## **B) Uzbek Law and Practice Regarding Pretrial Investigation**

As documented in a joint study by the Ministry of Internal Affairs and the Tashkent Collegium of Advocates, the Uzbek criminal process in practice matches neither Uzbek law nor international standards for pretrial investigations. Detainees often lack information regarding the charges against them and lack access to effective counsel.

CCP Article 22 forbids obtaining testimony from a suspect, witness, or other party through “force, threats, violation of their rights or other illegal means.” The Special Rapporteur, however, found that practice does not conform to this law. As mentioned above, detailed custody records and ensuring detainees access to counsel are important initiatives lacking in Uzbekistan that can provide greater protection against torture.

Uzbek procedures fail to meet ICCPR Article 9(2) in that notice for reasons of arrest need not be given until just before the first interrogation. Article 224 requires arresting officials to inform the person that his detention is for a criminal offense, but does not require them to give the legal basis. Article 111 of the CCP states that immediately before the interrogation of the suspect or the accused, which must take place within 24 hours, the detainee must be informed of the substance of the charge against him. CCP Article 226 grants law enforcement officials 72 hours from arrest to determine whether to bring criminal charges and to inform the detainee of these charges. Article 226 further allows officials to hold suspects without notification of charges for 10 days in undefined “exceptional cases.”

Uzbek laws further fall short of protecting against compelled self-incrimination. Uzbek law does not extend the right to counsel to witnesses before or during interrogation. Suspects have the right to counsel during interrogation but have no right to a confidential meeting with counsel prior to the interrogation. Both witnesses and suspects are obliged, however, to cooperate with the investigation and witnesses may be held criminally liable for refusing to answer questions. In common practice, a citizen is called into the militia station to be interviewed as a witness, while neither free to leave nor provided counsel. He then makes incriminating statements which are later used against him at trial.

While the CCP states that suspects and the accused do not have to prove their innocence, CCP Articles 46 and 48 require their participation in pretrial investigations. Article 48 provides that an accused is not required to provide testimony however it does not explicitly recognize a right to remain silent. While Uzbek law provides the suspect and accused with the right for counsel during interrogation, advocates report that in practice, investigators prevent them from advising their clients during questioning and actively protecting them from self-incrimination.

Uzbek pretrial investigative procedures also fail to provide adequate access to effective counsel. CCP Article 24 provides a right to counsel for a suspect, accused, or defendant. When this right attaches, however, is unclear. CCP Article 48 provides a suspect with the right to counsel either at the moment of the announcement of the resolution that he is a suspect or at the moment of his arrest. CCP Article 49 provides that a defense counsel has the right to enter the case either from the moment of detention or from the moment of bringing a charge against a citizen. Given that detention may last 72 hours before charges are brought, the article is unclear in that it does not clearly distinguish between detained and non-detained citizens. As noted in the Report of the Special Rapporteur on Torture, this confusion also exists among law enforcement officials.

Further, law enforcement bodies conducting the investigation have complete discretion to determine when detainees have access to lawyers or family members. While Article 53 gives the defense counsel the right to get authorization to meet a client from investigators, in practice, as noted in the joint report of the Tashkent advocates and Ministry of Internal Affairs, officials routinely deny advocates this opportunity. Law enforcement determines when and how access to counsel occurs, which allows them to influence which lawyer represents a detained person.

When the right to counsel attaches, competent counsel is often not provided. As documented in the joint study, there is a recurrent problem of investigators relying on so-called “pocket advocates” to play the role of defense counsel in criminal cases. These lawyers have a cooperative relationship with law enforcement and when called to represent a detained person, they frequently assist the suspect in waiving rights or offering bribes rather than providing a vigorous defense. The Ministry of Internal Affairs and Tashkent Collegium of Advocates are cooperatively preparing standards and rules for appointing counsel, aiming to provide detainees with meaningful representation. CCP

amendments are needed, however, to ensure that compliance with these standards have the force of law.

### **C) Recommendations Regarding Pretrial Investigations**

Changes to pretrial investigative procedures reflect the following recommendations of the Special Rapporteur: (e) investigating all allegations of torture; (g) creating a monitoring mechanism; (k) prohibiting confessions without counsel present; and (l) providing access to counsel within 24 hours of detention.

- 1) The CCP should require arresting officers in a criminal case to immediately notify a detained person of the reasons for his arrest.
- 2) CCP Article 49 should clarify that the right to counsel attaches upon the moment of detention for any detained person, whether accused, suspect, or witness.
- 3) The CCP should define a detained person as anyone who is not free to leave an encounter with law enforcement, whether or not the individual is actually locked in a detention facility. The Code should reflect that the length of time an individual may be held begins to run from this point.
- 4) The CCP should stipulate that any detained person be immediately notified of his right to counsel and his right against self-incrimination by whichever members of law enforcement are making initial contacts with the citizen.
- 5) The Code should stipulate notifying a detained person that he is not required to make an oral or written statement and that he may meet with counsel confidentially prior to any interrogation.
- 6) CCP Articles 24 and 50 should reflect official instructions developed through cooperation between the Tashkent advocates and the Ministry of Internal Affairs regarding defense counsel appointment. The Code must ensure that a competent lawyer is appointed immediately to represent the interests of a person who has been taken into custody and that this lawyer is allowed to meet confidentially with the client.
- 7) Consideration should be given to requiring audio or videotaping of interrogations in, at minimum, murder cases and other cases for which a death penalty could be imposed.
- 8) A detailed and accurate system of custody records should be kept which state all important facts regarding detention, including date and time of arrest, mental and physical condition of detainee, when the person was informed of his rights, when counsel was secured for the detainee, when the detainee was offered food or medical treatment, the details of any interrogation which took place including all who were

present, when the detainee was transferred or released, and which law enforcement officials had custody of the detainee at all times.

### **3. Fair Trials**

#### **A) International Standards**

Minimum fair trial standards are set forth in Article 14 of the ICCPR.<sup>22</sup> Article 14(1) recognizes each person's equality before the courts and the right to a "fair and public hearing by a competent, independent and impartial tribunal." Article 14(2) asserts the presumption of innocence until guilt is proven. Article 14(3) outlines minimum guarantees for accused persons, including adequate time and facilities for preparing his defense. Article 14(6) requires compensation for unjust convictions. Article 14(7) prohibits trial or punishment of a crime again for which a person has already been tried. This report attempts to analyze only those standards most urgently needing attention in the Uzbek system.

**The Right to a Fair and Independent Tribunal.** Fair trial rights absolutely mandate an independent judiciary, as stated in ICCPR Article 14(1). The UN Basic Principles on the Independence of the Judiciary establish minimum standards of judicial independence and impartiality to be observed by all member states. According to these principles: State laws must guarantee an independent judiciary; an impartial judiciary must decide cases free from inducements or pressures; the judicial process should remain free from any inappropriate or unwarranted interference; and states must provide adequate resources to allow the judiciary to perform its functions.<sup>23</sup>

**The Presumption of Innocence.** Simply because a person is accused does not mean he is guilty. In everyday practice, presumption of innocence it means that a judge must approach a trial objectively, without a preconceived opinion of the defendant's guilt or innocence.<sup>24</sup> The judge must not rely upon the procurator's direction or assessment, but must undergo an independent examination of the evidence.

**Double Jeopardy.** Article 14(7) states that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Human Rights Committee jurisprudence on this point has not examined the instances of cassation and supervision evolving from Soviet law which allow procurators to seek reconsiderations of rulings and sentences. The plain language of the ICCPR, however, states that re-prosecution after acquittal is a violation of international standards.

**Equality of Arms.** ICCPR Article 14(3) guarantees defendants certain minimum standards of fair trials "in full equality." The main idea is that the prosecution and the defense should be on equal footing.<sup>25</sup> Procurators should not be afforded special privileges or preferential treatment. Thus judges must remain impartial and may not assume procurator functions during trial.

Article 14(3)(b) further specifies that an accused should have “adequate time and facilities for the preparation of his defense.” To be on equal footing, the defense must be able to participate in pretrial investigation and contribute to the case file. Further, the defense must be able to conduct its own investigation and have its experts treated equally to state experts. Similarly, if the state deprives the accused of access to defense counsel during crucial aspects of the investigative phase, it impedes his right to prepare for and ultimately receive a fair trial.

During trial, Article 14(3)(e) dictates that the defense be entitled to cross-examine witnesses against him, as well as obtain the attendance of and examine witnesses on his behalf under the same conditions as witnesses against him. This requirement applies most critically to expert medical witnesses.<sup>26</sup>

**Inadmissibility of Evidence Gained as a Result of Torture.** Evidence gained through torture must be excluded from evidence in a fair trial. ICCPR Article 7 prohibits torture and requires that all detained people be treated with respect and dignity. General Comment 20 states that to deter Article 7 violations, domestic law must prohibit the use in judicial proceedings of statements or confessions obtained through torture. Furthermore, in its Concluding Comments on Romania, the HRC stated that legislation should place the burden on the state to prove that any statements by defendants were made through their own free will, and that procedure should exclude from evidence any statements obtained in violation of Article 7.<sup>27</sup> The HRC reiterates in General Comment 13 that all aspects of domestic law must support the prohibition of self-incrimination, which the accused should be able to invoke at any point during proceedings. Finally, Article 15 of the Convention Against Torture directly addresses the issue of exclusion of evidence gained by torture, stating that no statement resulting from torture may be admitted as evidence, except against a person accused of torture as evidence that the statement was made.<sup>28</sup>

To provide specific guidance for how these exclusion proceedings may be conducted, the British and American procedures may be informative.

Under the British Police and Criminal Evidence Act of 1984 (PACE), if the defendant alleges to the court that his statement was given as a result of “oppression or in consequence of anything said or done which, in the circumstances existing at the time the confession was made, render any such confession unreliable,” the court shall not allow the confession, unless the prosecution can prove beyond reasonable doubt that the circumstances alleged did not exist. Therefore, the burden rests with the prosecution to negate allegations of the unreliability of a confession. Oppression is defined in S.76(8) of the same law as including “torture, inhuman or degrading treatment and the use of threat of violence.”<sup>29</sup>

In the United States, the Fifth Amendment to the Constitution provides that no person shall be compelled to provide evidence against himself in a criminal proceeding. A defendant may challenge the admission into evidence of any statement he allegedly

made if it was not voluntarily given or if it was given while the accused did not have full knowledge of his legal rights. These challenges are considered in pretrial evidentiary hearings where the judge hears evidence and generally makes findings of fact and rulings of law which determine whether or not the evidence will be suppressed. In the specific instances of motions to suppress confessions, most American jurisdictions place the burden of proof upon the prosecution to show voluntariness, and compliance with rules that the defendant was advised of his rights. Under Federal constitutional law, the State must provide by a preponderance of the evidence that a confession was voluntary.

## **B) Uzbek Law and Practice Regarding Fair Trials**

The powers of the Uzbek procuracy in criminal proceedings go far beyond prosecution at trial. The procuracy determines pretrial restraint measures, issues all arrest and search warrants, and supervises all aspects of investigation. The Uzbek procuracy exercises an extremely wide scope of functions which are considered judicial in most other systems. This lack of independent judicial supervision violates international standards, as discussed above regarding arrest and detention. This imbalance of power interferes enormously with the principle of equality of arms and it undermines practically all other fair trial principles, including independence and impartiality of the judiciary, the presumption of innocence, and the right to effective legal assistance.

**The Right to a Fair and Independent Tribunal.** The Uzbek judiciary is neither independent nor impartial in law or practice. In its concluding observations on Uzbekistan, the HRC expressed grave concern over judicial independence, citing judges' limited 5 year appointments; the possibility of disciplinary measures against judges for "incompetent rulings"; and exposure to broad political pressure.<sup>30</sup>

**The Presumption of Innocence.** CCP Article 23 provides for the presumption of innocence, but fails to provide full protection. The Article calls for doubts to be resolved in favor of the defendant if "the possibilities to resolve them are exhausted." This wording practically ensures conviction, allowing the prosecution to go back and try to fill the gaps in its case. Article 419 specifies several instances where a court can twice return a criminal case for additional investigation, if preliminary inquiry was incomplete or if the charges against the accused change. The practice of sending cases back to additional investigation undermines the very essence of the presumption of innocence. Rather than resolving doubts in the defendant's favor, Uzbek procedures use such doubts as grounds for obtaining more evidence of the defendant's guilt or bringing more or different charges against the accused for the same conduct.

**Double Jeopardy.** Uzbek law does not adequately protect the right not to be punished twice for the same offense, provided for by ICCPR Article 14(7). As mentioned above, the institution of sending cases back for additional investigation gives the prosecution several opportunities to try to prosecute the same offense. Furthermore, the procuracy uses several appellate procedures to "correct" judges' rulings.<sup>31</sup>

One particular provision clearly violates both double jeopardy and equality of arms principles. CCP Articles 522-524 allow the procuracy to initiate a case in the supervision court on the grounds of ‘newly discovered circumstances.’<sup>32</sup> The Code specifically allows the prosecution to attempt to get the crime, for which the offender has already been convicted, re-classified as a more serious offense and/or to get a more serious punishment. The law requires no justification for the procuracy’s failure to present such evidence at the original trial. This allows a prosecutor to challenge court rulings until he gets the results he desires. Furthermore, the defendant or convicted person cannot initiate this process and the process is not subject to judicial review.

**Equality of Arms.** In theory, CCP Article 25 outlines adversarial court proceedings that conform to international standards.<sup>33</sup> According to defense attorneys, however, these basic rules are not realized in courts. Perhaps the most significant impediment to the realization of an adversarial process is the frequent non-appearance of the procurator in court. In this old Soviet practice, the judge essentially assumes the role of the procurator in his absence. CCP Article 412 states that if the procurator does not appear in court, the case will be deferred. In practice, however, this frequently does not occur and if it does occur, leads to an unnecessary delay in the proceedings.

Furthermore, there should be presumptions against waivers of counsel, but it is common for detained persons, while in custody under the control of investigators, to sign such waivers. Although CCP Article 52 states that a waiver does not preclude a request for counsel at a later date, judges commonly discourage unrepresented defendants from seeking counsel.

According to Uzbek law, the defense does not have equal rights in access to case materials. First, defense counsel does not have the right to get access to the file until the end of the investigation. This rule gives the procuracy power to determine how much time the defense will have to review materials, often precluding the defense from consulting with independent experts. In addition, it is a usual practice of law enforcement to remove or add materials immediately before trial, increasing the defense’s difficulty in preparing. Also, while CCP Article 53 allows the defense to study and hand write a copy of materials, it creates no right to photocopy them.

Furthermore, the defense has no power to affect the case file and is not specifically authorized to conduct its own investigation. CCP Article 35 specifically authorizes investigators of the procurator’s office, agencies of the internal affairs and of the national security service to conduct pretrial investigation. Article 53 CCP lists the rights and duties of advocates, but does not sanction pretrial investigation. No law explicitly allows advocates to interview witnesses.

This inequity is compounded because Article 443, which describes how evidence is admitted at trial, treats the contents of the investigator’s case file differently than evidence submitted by other parties. The court secretary reads the contents of the case file into the record and then submissions of other parties are considered, subject to a finding of relevance by the Court. While other Code sections give the defense the right

to challenge evidence and to offer its own evidence, there is no automatic relevance review of the investigator's case file and a judge is under no obligation to admit any submissions by the defense.

**Inadmissibility of Evidence Gained as a Result of Torture.** Of particular concern with regard to Uzbekistan is the use of evidence gained as a result of torture. As recommended strongly in the reports of the HRC, the CAT, and the Special Rapporteur, urgent reform is necessary to ensure that the criminal justice process allows for full litigation of claims regarding such evidence, consequences for the perpetrators, and compensation for the victims.

Both Article 26 of the Uzbek Constitution and Article 17 of the Uzbek Criminal Procedure Code prohibit the use of torture. Proposed Article 235 criminalizes the act of forcing a confession, allowing for punishment of up to five years. Article 22 disallows the use of evidence obtained through violence or threats and requires that evidence must have been collected in compliance with the provisions of the CCP in order to be admissible in Court. Article 95 allows only evidence obtained in accordance with established procedure.

On May 2, 1997, the Supreme Court of Uzbekistan issued a resolution stating that any evidence obtained in violation of the law cannot be used in support of a conviction. Unfortunately, this plenum resolution has not been codified into law and there are no existing procedures for pretrial hearings to consider advocates' motions to exclude such evidence. A preferable practice would bring these issues before an independent judge for pretrial consideration, with a procedure stipulated in the CCP and clear standards of proof.

Uzbek defense lawyers reported to the Special Rapporteur that, in practice, it is nearly impossible to litigate motions to exclude evidence gained as a result of torture. The Special Rapporteur's report states that judges continue to ignore allegations of torture, coerced confessions are frequently used as evidence in criminal cases, and these confessions often serve as the only basis for conviction.<sup>34</sup> Furthermore, while CCP Article 53 allows advocates to pose questions to experts and Article 78 allows them to challenge an expert's professional competence, the CCP does not give advocates the right to get an independent forensics expert to support their assertions in Court.

### **C) Recommendations Regarding Fair Trials**

Changes regarding fair trial procedures reflect the following recommendations of the Special Rapporteur: (d) increasing judicial independence; i) questioning detainees about how they have been treated; (j) excluding evidence obtained by torture from trial; (k) excluding confessions made without the presence of defense counsel; (l) providing access to counsel within 24 hours of detention; (m) improving the quality of counsel; (n) providing independent medical examinations;

- 1) Defense counsel must have access to the case file during the investigative process. While procedures should not oblige disclosure which would interfere with ongoing investigation, any refusal to provide materials to defense counsel during the course of investigation should be reviewed by a judge in a pretrial hearing. Evidence should not be kept from the defense unless the procuracy can show by the high standard of clear and convincing evidence that disclosure at that stage would jeopardize ongoing investigations.
- 2) The defense should be entitled to make photocopies of all case file materials. These materials should include those disclosed during and after the investigative process, well in advance of trial to allow sufficient time to prepare.
- 3) Defense counsel must be specifically authorized to conduct its own investigation into the facts of the case. This investigation should include interviewing witnesses, without fear of being accused of interfering with State investigation.
- 4) The law allowing a judge to send a case back for additional investigation during or after trial should be abolished.
- 5) The Criminal Procedure Code should be amended to require the presence of the procurator or his representative at trial or the case should be dismissed. Judges must not assume procurator duties.
- 6) Judges must carefully question any accused person who has waived counsel or wishes to waive counsel regarding his understanding of the law and his ability to represent himself. This questioning should take place at the initial arraignment.
- 7) Independent doctors' reports must be allowed into evidence. The defense must be able to request and present independent expert witness examination of relevant evidence. The standards for admitting any expert testimony into evidence should be the same whether for State and defense witnesses.
- 8) Article 443 should be amended to treat State and defense evidence equally. Judges should review all potential evidence according to relevance standard.
- 9) The CCP must allow the defense to file a motion, in an evidentiary pretrial hearing, to exclude evidence gained by torture, by violating the right to counsel, or by otherwise violating the law. At this hearing, the defendant must be allowed to fully present evidence supporting his claim, including independent medical and documentary evidence. Once the defense alleges torture, the burden should be on the State to prove that investigation gathered the evidence without violating the accused's rights.
- 10) The process allowing a case to be re-opened for newly discovered circumstances should be more strictly limited in scope and should not be applicable in instances where a defendant was acquitted. Convicted persons must also be allowed to file

motions to reopen under this law. The Court should decide these motions on the same standard, whether the defense or procuracy makes the motion.

## **4. The Death Penalty**

### **A) International Standards**

The ICCPR Article 6 reflects the fundamental human right to life. It allows for the death penalty only for the most serious crimes and only pursuant to a final judgment rendered by a competent court. Article 6(4) also reserves the committed's right to seek pardon or commutation of the sentence, and allows amnesty, pardon or commutation in all cases. Article 6(5) prohibits sentencing persons less than eighteen years old or pregnant women to death.

The UN Economic and Social Council Resolution of May 25, 1984 on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provides a set of more specific guidelines for due process in capital cases. Among its provisions, the resolution states that clear and convincing evidence must prove guilt with no room for an alternative explanation of the facts; that capital punishment may only be carried out after a fair trial; that convicted persons have the right to appeal; that the death penalty should not be carried out while court proceedings relating to the case are pending; and that procedures should inflict the minimum suffering possible.<sup>35</sup>

All Members of the Council of Europe have abolished the death penalty. The only industrialized Western democracy still carrying out capital punishment is the United States of America. Perhaps the two biggest continuing controversies about the death penalty in the United States are concerns regarding racial bias and the great disparity in the quality of appointed counsel.<sup>36</sup> Since the death penalty's reintroduction in the United States in 1976, over 100 death row inmates have been proven innocent and released through DNA evidence not examined during the initial trial proceedings.<sup>37</sup> In a recent study of capital punishment cases in the state of Illinois, reasons for false convictions included shaky eyewitness identifications, the false witness testimony, and police misconduct.<sup>38</sup>

### **B) Uzbek Law and Practice Regarding the Death Penalty**

In Uzbekistan, a death sentence may be imposed upon conviction for four offenses: murder with aggravated circumstance (CC Art. 97(2)), the act of aggression (CC Art. 151(2)), genocide (CC Art. 153), and terrorism (CC Art. 155(3)).<sup>39</sup>

One major problem with these provisions is that they define these acts very vaguely. Except for genocide, the vague language in the provisions fails to provide adequate notice of which acts could give rise to a death penalty prosecution. It also

violates ICCPR Article 6(2) which allows the death penalty only for the most serious crimes. Just about every conceivable instance of intentional homicide could fit within one of the sections of CCP 97(2).

The code section regarding terrorism is also very vague. First, it fails to give notice to individuals of which conduct is prohibited. CCP Article 155 allows the death penalty for terrorist acts causing a person's death or "other aggravating consequences." The CCP does not define these other consequences, leaving law enforcement with virtually unfettered discretion to seek capital punishment. Also, CCP Article 155 does not actually require the State to show that the accused has committed acts of violence and it appears to infringe upon expressions of political belief which are protected under numerous international documents. Due to these irregularities, capital prosecutions under CCP 155 violate both ICCPR Article 6(2) and the above-cited UN resolution.

The lack of procedural safeguards in the Uzbek CCP discussed in the above sections render the death penalty process inherently unfair. Procedural safeguards are especially important when someone's life is at stake. When, in the context of capital punishment, the CCP fails to comply with international standards regarding fair trials, adequate appellate review, the prohibition of torture, humane treatment, and liberty and security, it also violates ICCPR Article 6.

Furthermore, international standards require heightened procedural protection in death penalty cases, above and beyond that provided in an ordinary criminal case. The Uzbek CCP provides no extra safeguards in death penalty cases, however, except for Article 51's mandate that a lawyer participate in all stages of the criminal procedure. Uzbek law does not even require the procurator to give the defense advance notice that he is seeking a death penalty. Early notice should be provided so that defense counsel may allocate appropriate resources beyond usual criminal representation.

General principles of Uzbek law provide that an incompetent person or a person who was insane at the time of commission of the crime may not be held criminally liable.<sup>40</sup> The lack of detailed procedural provisions governing how these determinations are to be made, however, and the lack of equality of arms in the process of evaluating and litigating these issues makes the process unfair. Most critically, the law does not entitle the defense to an independent expert examination or copies of the state's examination.

Existing criminal trial practices and procedures under the CCP, while inadequate in an ordinary trial, are particularly prejudicial to the defense in a capital proceeding. Because there is no separate sentencing phase in a capital case, defense counsel may have to present contradictory arguments first for innocence and then for mitigation at the same hearing. International standards call for a separation, allowing the defense first to argue innocence and force the procuracy to prove its case. Then, after conviction, a full, adversarial sentencing hearing is appropriate. Here the court may hear all mitigating evidence offered by the defense and all aggravating circumstances offered by the prosecution.

The appellate procedure also fails to meet international standards. CCP Article 484 stipulates when a judgment may be repealed or changed, including for misapplication of substantive law or for “substantial violations” of the CCP norms. Article 487 explains that “substantial violations” are violations which prevented the court from full consideration of the case and could have affected its passing a fair judgment. However, under the same article, it appears that judgments may not be reversed for any and all substantial violations, but only under limited listed conditions.<sup>41</sup>

This incompleteness in the appellate review process violates ICCPR Article 6. The CCP allows repeal for certain enumerated types of violations which do not include bias of the court, improper admission into evidence of confessions obtained under torture, violation of the right to equality of arms and adversarial proceedings, or violations of the presumption of innocence, among others. Plus, the rules specifying issues which may be raised on appeal do not include violations of international standards. Therefore the rules of appellate review fail to ensure the fairness of the capital proceedings.<sup>42</sup>

Finally, the secrecy associated with the carrying out of the death penalty also violates international standards. No code or procedural rule provides for publicly available statistics about the number of persons sentenced to death, pending execution, and executed. Moreover, the place, date, and time of executions are not available to family, defense counsel, or the public. In addition, Uzbekistan law does not allow families to take the bodies of their executed family members for burial nor are they provided information about the location of their graves. The HRC ruled in a case against Uruguay that failing to give adequate information to a mother about the whereabouts of her daughter constituted torture.<sup>43</sup>

During the preparation of this report, six men sentenced to death in Uzbekistan with complaints pending in the Human Rights Committee were executed. On July 25, 2003, Acting UN High Commissioner of Human Rights Bertrand Ramcharan issued a press release in Geneva announcing these executions and stating that a letter had been sent to the government of Uzbekistan with an urgent request to abide by its international human rights treaty obligations and to cooperate regarding the details of individuals cases pending in front of the Human Rights Committee.

### **C) Recommendations Regarding the Death Penalty**

Changes regarding death penalty procedures reflect the following recommendations of the Special Rapporteur: (s) treating relatives of persons sentenced to death humanely and introducing a moratorium on the death penalty; (u) responding to the appeals of the HRC.

- 1) Uzbekistan should declare a moratorium on the death penalty until its criminal procedure legislation fully complies with international human rights standards.

- 2) Stays of execution should be granted while human rights complaints are pending in international bodies.
- 3) The legislation for the offenses which are death penalty eligible should be rewritten to limit the scope of their applicability to only the most serious offenses and to clarify vague language. The language “and other aggravating consequences” should be removed from the section allowing the death penalty for acts of terrorism.
- 4) The defense should receive advance notice of the prosecution’s intention to seek a death penalty in every case. Adequate time must be afforded to allow defense counsel to prepare a factual defense as well as to present the best possible sentencing arguments.
- 5) The law should provide for an adversarial pretrial procedure to determine whether an accused is incompetent and should provide the defense the right to an independent medical examination and access to a copy of the State’s expert report when challenging either competence or presenting a defense of insanity.
- 6) The law should specifically allow for a full and fair sentencing hearing separate from the trial and should compel the Court to consider any mitigating evidence presented in this hearing.
- 7) Greater transparency must exist in the implementation of capital punishment, including making public all statistics about executions, public announcement of execution dates, and advance notice to families and defense counsel.
- 8) The bodies of executed persons should be made available for funeral by relatives, or, at a minimum, they should be told the locations of their graves.

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## Endnotes

<sup>1</sup> See generally Joseph, S., Schultz, J., and M. Castan, The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (Oxford, 2000); M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (N. P. Engel, Kehl, 1993)

<sup>2</sup>Steiner, H., and P. Alston, International Human Rights in Context, p.786 (Oxford University Press, 2000.)

<sup>3</sup> Australia v. Toonen, (488/1992), 4 April 1994, UN Doc. CCPR/C/50/D/488/1992); Albert Womah Mukong v. Cameroon, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p. 12

<sup>4</sup> In Kruslin v. France, (1989), the ECHR found that Article 9(1)'s "in accordance with law" means first that domestic law sanction any actions taken by authorities, and second that the law in question must not violate international standards. It must be accessible to the person concerned, objectively relevant to the circumstances, and compatible with the rule of law (§ 27).

<sup>5</sup> Kruslin v. France, §§35-36.

<sup>6</sup> In Silver v. UK, ECHR (1983), the Court held that administrative rules were arbitrary and "not in accordance with the law" when the rules that prevented prisoners from receiving letters lacked sufficient clarity and detail to give the recipients notice (§91). The Court also found that failing to make the prisoners aware of the rules further violated the European Convention (§93).

<sup>7</sup> M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, (N.P. Engel, Kehl 1993), p160, para2

<sup>8</sup> Van der Leer v. Netherlands, ECt HRRA A 170-A, 1990

<sup>9</sup> Joseph, p. 211. Also, the HRC states in General Comment 8 that the protections of Article 9(1) apply not only to criminal cases but to cases of detention involving mental illness, vagrancy, drug addiction, and immigration control (General Comment 8, §1).

<sup>10</sup> Hiber Conteris v. Uruguay, Communication No. 139/1983 (17 July 1985), U.N. Doc. Supp. No. 40 (A/40/40) at 196 (1985).

<sup>11</sup> Fox, Campbell, and Hartley v. UK (18/89/178). The ECHR found arrests of suspected terrorists in Northern Ireland based on prior convictions of offenses relating to terrorism to be arbitrary. The Government argued that they had further evidence but that releasing it could jeopardize ongoing investigations. The Court rejected this argument, finding that reasonable suspicion requires support of sufficient, objective facts.

<sup>12</sup> Van Alphen v. Netherlands (305/88), arrests must not include "elements of inappropriateness, injustice and lack of predictability." Here, the HRC found arresting a lawyer for filing false tax returns arbitrary, though lawful, when he was held for nine weeks in an attempt to get him to provide information about a client who had waived the attorney/client privilege. Similarly, Spakmo v. Norway (631/95) the Committee found to be arbitrary an arrest of an individual who was held in custody for eight hours after failing to follow a police order to cease demolition work. Keeping prisoners in detention after their sentences have been served is also a violation; See Bazzano v. Uruguay (5/77), Ramirez v. Uruguay (4/77), Carballal v. Uruguay (33/78), Jijon v. Ecuador (277/88).

<sup>13</sup> UN doc. CCPR/C79/Add. 89.

<sup>14</sup> In Kulomin v. Hungary (521/92), the Committee found that detention authorized by a procurator, rather than a court, violated Article 9(3) since the procurator lacked sufficient independence and impartiality.

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<sup>15</sup> A v. Australia (560/93).

<sup>16</sup> Further, according to General Comment 8 (¶1), Article 9(4) applies to any individuals who have been detained, including cases of mental illness, vagrancy, drug addiction, educational purposes, or immigration control.

<sup>17</sup> Article 15 of the Criminal Code of Uzbekistan defines the classification of criminal offences. It provides for four categories of crimes: minor offences, which allow for sentences of up to 3 years of imprisonment, as well as for unintentional crimes for up to 5 years of imprisonment; less aggravated offences which entail sentences of more than 3 years but up to 5 years of imprisonment, as well as those which were committed unintentionally for more than 5 years of imprisonment; aggravated offences, for which sentences are longer than 5 years but up to 10 years; and especially aggravated offences, which carry sentences of longer than 10 years of imprisonment or the death penalty.

<sup>18</sup> Uzbek law appears to provide an avenue to appeal the decisions of government officials to a court under the 1995 “Law on Complaining to the Court about Actions and Decisions which Violate Rights and Freedoms of Citizens.” This law appears to grant the right of appeal to court to anyone who believes his rights or liberties have been violated, but the law limits itself by negating instances where acts or decisions can be challenged through other procedures.

<sup>19</sup> In *Aydin v. Turkey* (57/1996/676/866), the ECHR found that the failure of the authorities to keep accurate custody records seriously undermined the credibility of the government where a 17 year old detainee alleged that she had been raped by officials.<sup>19</sup> The government initially denied that the complainant had ever been present at the place of detention, claiming that no records existed to prove this. Upon further investigation, however, the public prosecutor learned that there were only six entries of detentions in the custody records of that police station for that year so the absence of records concerning Ms. Aydin proved nothing.

<sup>20</sup> While the ICCPR does not directly comment on defense counsel in the investigative process, the Russian Constitutional Court has ruled that international standards and the Russian Constitution required that not only defendants but witnesses must be provided this right. In the case of *Maslov*, decided on 27 June 2000, the issue was whether the Russian Criminal Procedure Code was constitutional in that it gave suspects and accused persons the right to counsel during interrogation however denied this right to witnesses even though attendance was compulsory and the witness might well turn into a suspect or an accused during the course of questioning. Relying primarily upon rulings of the ECHR regarding the importance of the right to counsel, the Court ruled that the Russian Code violated both the Russian Constitution and the applicable international standards

<sup>21</sup> Joseph, S., page 210.

<sup>22</sup> **ICCPR Article 14:**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

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3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

<sup>23</sup> UN Basic Principles on the Independence of the Judiciary:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial

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review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

<sup>24</sup> Nowak, Article 14, mn 36.

<sup>25</sup> See *Borgers v. Belgium*, (ECHR, 1991).

<sup>26</sup> In *Fuenazlida v Ecuador* (480/91), the HRC found that the court violated the accused's Article 14(3)(e) fair trial rights by refusing his request to have his blood and semen analysed and compared with the evidence at the scene of the crime in a rape case. In *Grant V. Jamaica* (353/88), the HRC found that the court's refusal to secure the presence of the accused's girlfriend in court to testify on his behalf was a breach of the right to compulsory process, the right to obtain the attendance and examination of witnesses on his behalf. The ECHR, in *Bonisch v. Austria* (1985/92), found a violation of the equality of arms where an expert witness called by the defense was not accorded the same treatment at trial as an expert witness appointed by the court who had links with the prosecution.

<sup>27</sup> Concluding Comments on Romania (1999), UN doc CCPR/C/79/Add.111. (¶ 13).

<sup>28</sup> The definition of torture in Article 1 of CAT is as follows:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions

<sup>29</sup> For further detail on PACE, see Jones, Dr. Richard, [www.forensicmed.co.uk](http://www.forensicmed.co.uk)

<sup>30</sup> UN document CCPR/CO/71/UZB. For further discussion of the status of the judiciary in Uzbekistan, see generally the ABA/CEELI Judicial Reform Index released in May 2002, which assesses a cross-section of factors important to judicial reform in emerging democracies.

<sup>31</sup> This is a large and complex topic beyond the scope of this report.

<sup>32</sup> Article 523 specifies that this initiation can take place any time within the statute of limitations for the offence but not longer than one year after discovery of the new information.

<sup>33</sup> Article 25: Adversary system of court procedures

Consideration of cases in courts of first instance, as well as in higher courts, shall be based on the adversary principle. In the consideration of a case in the court, the functions of prosecution, defense and consideration of the case shall be separated from each other and may not be assigned to the same official.

Consideration of a case in the court of first instance may be started only when there is an indictment or a resolution on sending the case to court for application of compulsory measures of medical character.

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State and public prosecutor, defendant, legal representative of a minor defendant, defense counsel, public defense counsel, as well as the victim, civil plaintiff, civil respondent and their representatives shall participate in court sessions as parties, and enjoy equal rights to present evidence, participate in their examination, file motions, speak out their opinions on any issue which is important for correct resolution of the case.

The court shall not participate on the side of prosecution or defense and represent any interests of the prosecution.

The court shall, remaining objective and impartial, create necessary conditions for the parties to carry out their duties and exercise their rights.

<sup>34</sup> E/CN.4/2003/68/Add.2, para. 27. The Special Rapporteur's report states: "allegations that confessions have been extracted under torture are, in practice, systematically ignored in the courts, and often serve as the sole basis for conviction...requests by lawyers to establish and examine evidence that torture has taken place are said to be completely ignored. The Special Rapporteur has received information that even in cases where a defendant could name alleged perpetrators or medical certificates attested that torture had been carried out, the courts did not order any investigation into the allegations. The sole action sometimes taken by magistrates is to ask the alleged perpetrators to testify in court that they have not used illegal means during the pre-trial investigation."

<sup>35</sup> UN Economic and Social Council Resolution of May 25, 1984 on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty:

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, that offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.
4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.
5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
8. Capital punishment shall not be carried out pending any appeal or other recourse proceeding or other proceeding relating to pardon or commutation of the sentence.

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9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

<sup>36</sup> In some States, appointed counsel's caseloads are too high and budgets too low to provide zealous representation in capital cases. Some jurisdictions have high minimum standard requirements for appointed counsel in death cases while others have few if any standards. ABA has promulgated standards for defense counsel in capital cases, which can be found at <http://www.abanet.org/moratorium/DPGuidelines4-2003.pdf>.

<sup>37</sup> The American Bar Association called for a moratorium on the death penalty in 1997, stating that until each jurisdiction in the country was providing due process to every capital defendant, the process could only be seen as inherently unfair.

<sup>38</sup> The study recommended ensuring the presence of qualified defence counsel during interrogation, recording interrogations, and re-training law enforcement professionals in interrogation techniques and better training lawyers and judges regarding the particular issues in death penalty cases. The Commission's Report and Recommendations can be found at <http://www.idoc.state.il.us/ccp/ccp/reports/index.html>.

<sup>39</sup> CC Art. 97(2) sanctions capital punishment for murder with aggravated circumstances, which is further defined as murder:

- a) of two or more persons
- b) of pregnant women
- c) of person, who was in helpless state
- d) of person or his/her close relatives, who was in official or civic duty
- e) by means which are dangerous for lives of other people
- f) during public disorder
- g) with special brutality
- h) with rape
- i) with the aim of unjust enrichment
- j) with motives of ethnic or racial hatred
- k) with hooligan motives
- l) with religious motives
- m) with the aim of usage of parts of the body for transplantation
- n) with the aim to hide other crime or to facilitate its commitment
- o) by group of people or by a member of organized group
- p) which was committed repeatedly or by especially dangerous recidivist

CC Art. 151(2) sanctions capital punishment for the act of aggression, for committing an aggressive war;

CC Art. 153 sanctions capital punishment for genocide, which is giving an order to create or intentional creation of living conditions to foster full or partial physical extermination, or reduction of reproduction, or transfer of children of a group of people under national, ethnic, racial or religious grounds;

and

CC Art. 155(3) sanctions capital punishment for terrorism which resulted in death of person or other aggravating consequences. The definition of terrorism in Article 155 CC is "violence, use of force, other actions, posing danger to persons or property, or threat of use of such actions in order to force a state organ, international organization, their officials, natural or legal persons to perform or refrain from performing an activity with the purpose of complication of international relations, breach of sovereignty and territorial integrity, undermining state security, provocation of war, armed conflict, destabilization of social and political situation, terrorizing population..."

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<sup>40</sup> Criminal Code Articles 18 and 67.

<sup>41</sup> Article 487 allows for reversal of a judgment only when:

- 1) it has been passed by unlawful composition of the court;
- 2) the procedure for passing the judgement by an individual judge has been violated, or the confidentiality of the consultation of judges, while considering possible judgement, has been breached;
- 3) the case has been considered in the absence of the accused, except the situation prescribed by part three of Article 410 of the present Code;
- 4) the accused has not be allowed to study all the materials of the case upon the completion of preliminary investigation and the court, which passed the judgment, has not remedied this violation;
- 5) the unrepresented accused was not allowed to act in his own defence at the trial court proceedings;
- 6) the accused was not allowed to give a final argument;
- 7) the right of the accused to use his/her native language and use the services of translator has been violated;
- 8) the case has been investigated or considered without participation of the defence counsel, when his participation is mandatory in accordance with the law;
- 9) the preliminary investigation and court proceedings have been conducted, notwithstanding the circumstances of the case that require its dismissal;
- 10) the case file does not contain the protocol/minutes of the trial court hearing or such protocol/minutes has not been duly signed.

<sup>42</sup> The procedure for seeking clemency is also lacking. Under Criminal Execution Code Article 138 a person sentenced to death whose sentence is confirmed by the upper court is entitled to appeal for clemency from the President of the Republic of Uzbekistan. The article postpones execution until the request for clemency is considered. According to the Rules of the Procedure on Clemency (adopted by the Decree of President of Uzbekistan #UP-1839, on 11 September 1997) requests for clemency are considered by the Commission on Clemency under the President. When all information is received the Commission shall decide whether to grant or deny clemency. The Work of the Commission is not public and no guidelines exist for which cases should be granted clemency. In the event that the Commission decides to grant clemency in a particular case, under the Criminal Penalty Code, the President must approve it. The approval is issued as a presidential decree.

<sup>43</sup> *Quinteros v. Uruguay* (107/81) with regard to the mother of a woman who had disappeared after having been abducted by Uruguayan security forces.