

III Expert Forum on Criminal Justice for Central Asia

Final Report



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Dushanbe, Tajikistan**

*Organization for Security and Co-operation in Europe
Office for Democratic Institutions and Human Rights*

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OSCE Centres in Ashgabat, Astana, and Bishkek
OSCE Office in Tajikistan
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I. BACKGROUND AND INTRODUCTION



The third Expert Forum on Criminal Justice for Central Asia took place on 17-18 June 2010 in Dushanbe, Tajikistan. It was organized by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and OSCE field operations in the region. The idea of these meetings originated at the regional Summer Schools on Criminal Justice convened by ODIHR in 2006 and 2007. Building on the experiences of these events and taking into account its priorities in the region, ODIHR organized the first Expert Forum on Criminal Justice for Central Asia in 2008 in Zerenda, Kazakhstan. About 50 officials and justice professionals from the region shared their experiences and debated topical issues with experts from other OSCE participating States. The following year, the second Expert Forum brought together nearly 70 participants at Lake Issyk-Kul, Kyrgyzstan.

The third Expert Forum for Central Asia in Dushanbe was again devoted to current issues faced by criminal justice systems in the Central Asian region and sought to propose solutions based on the experiences and best practices from other OSCE participating States. The Forum brought together over 120 policymakers, researchers and criminal justice professionals from all participating States of Central Asia, with the exception of Turkmenistan, as well as international experts from Georgia, Italy, Poland, Russia, Spain, Ukraine, the United States and the United Kingdom.

The 2010 Forum agenda covered a broad range of issues in the area of criminal justice, including those concerning judicial authorization of pre-trial detention; formalism and substantive guarantees in the initiation of a criminal case; judicial oversight over criminal investigation; evidentiary rules and adversarial procedure; lay participation in the administration of justice; reform of legislation on administrative offences; abbreviated and simplified criminal procedures; and alternatives to criminal prosecution. The Forum comprised six plenary sessions and six working group sessions. Its annotated agenda is annexed to this report. Most Forum sessions were organized in the format of panel discussions, where panellists made short presentations and participated in a moderated discussion with the audience.

This report does not provide an exhaustive account of every presentation and intervention made at the Forum. Instead, it summarizes these discussions and highlights the key messages and conclusions from the thematic plenary and working group sessions. These conclusions help ODIHR ensure that its rule of law priorities for Central Asia meet real needs and address existing challenges. It is hoped that they will also be used by other actors – both domestic and international – who are active in promoting and supporting reforms in the criminal justice sector in Central Asia.

2. KEY MESSAGES AND CONCLUSIONS



➤ Pre-trial detention should become an exceptional measure of restraint in the region, in accordance with international standards.

- Laws should set a higher threshold of eligibility for pre-trial detention.
- Judges should be required to consider alternatives to pre-trial detention and the reasons for rejecting them should be spelled out in their judgments.
- The severity of impugned crimes alone may not constitute grounds for imposing pre-trial detention; judicial decisions should motivate the choice of detention on the basis of other grounds clearly stated in the law. The list of these grounds should be exhaustive and comply with international human rights law.
- The detention hearing should be open to the public on the same basis as other court hearings and all unrepresented arrested individuals should be appointed legal counsel.
- The monitoring of judicial authorization procedures by non-governmental organizations (NGOs) makes a positive contribution to the implementation of existing legislation.

➤ To achieve full compliance with international standards, the scope of judicial inquiry should be expanded beyond the mere choice of the measures of restraint, as currently practiced in the region,

and include also a judicial review of the legality of arrest.

➤ Investigative police activities which are regulated outside the scope of criminal procedure through special laws should be unified with criminal investigations in codes of criminal procedure to achieve better protection of human rights and prevent abuses. This process should go hand in hand with the expansion of judicial oversight over the investigation.

➤ Countries of the region should continue to expand judicial review at the pre-trial stage beyond the authorization of pre-trial detention.

- In particular, the introduction of judicial review of other intrusive police measures would bring the national legislation of the Central Asian countries closer to international standards.
- Courts should be empowered and required to review the legality of arrests and the available evidence before making the decision to remand a person in custody. These proceedings should take place only in the presence of the arrested, who should be entitled to legal counsel.
- The burden of proof that a person should be kept in custody must rest with the prosecutor.

➤ Evidentiary rules should not reward police and investigator misconduct. The exclusion of evidence at trial is one effective means to combat misconduct and abuses in the course of a criminal investigation.

➤ Defence lawyers should be given procedural opportunities to collect evidence independently of investigators. Greater equality of arms during the investigation could be achieved by allowing lawyers to collect evidence *inter alia* through deposition of witnesses and experts directly before judges.

➤ The adoption of the new Criminal Procedure Code in Tajikistan constitutes a step forward; however, the government should address its shortcomings to achieve better compliance with fair trial standards.

- In particular, the provisions prohibiting contesting the measure of restraint during trial and allowing for the application of pre-trial detention based solely on the gravity of an alleged offence should be abolished.
- The application of bail should not be conditioned on full compensation of the material damage caused by the impugned crime.

➤ Historically, jury trials provided an independent check upon politically motivated prosecution and corrupt judiciaries. Today, lay participation in criminal trials remains an important feature of many democratic justice systems and is also regarded as a tool to strengthen public trust in the judiciary.

➤ Serious consideration should be given to reforming the legislation on administrative offences in the region. These efforts should go hand in hand with strengthening administrative justice systems.

- Offences which entail custodial measures should either become part of criminal law or a separate category of minor offences, where the procedure would include all international

human rights law guarantees triggered by the potential deprivation of liberty.

➢ Expedited proceedings, especially plea bargaining agreements, should not be used in criminal justice systems where pre-trial proceedings are plagued by ill-treatment and forced confessions, and where access to professional legal aid is limited.

- Where introduced, expedited proceedings should allow a genuine incentive to co-operate with the prosecution. Severe sentencing policies and low acquittal rates may often leave no choice for the defendants but to enter into expedited agreements.
- The participation of legal counsel should be mandatory and access to such counsel should be ensured in all expedited proceedings.
- Penal orders for minor crimes should be explored as means to save time and resources for dealing with more serious cases.

➢ The broadening of alternatives to criminal prosecution is a positive development for criminal justice systems in the region, as it helps to humanize penal policies, prioritize the rehabilitation of offenders, and uphold victims' interests.

- The advantages of restorative justice should be further explored by creating the conditions for the development of mediation services in addition to simple reconciliation.
- The requirement of a confession as one of the mandatory criteria for the commencement of reconciliation proceedings should be abolished.
- Reconciliation should be available at all stages of criminal proceedings. Reconciliation agreements at early stages of criminal proceedings not only help the parties but also cut costs and save scarce police resources.
- Police performance indicators should not count reconciliation agreements as a failure of the police to investigate crimes.
- The termination of criminal proceedings on non-rehabilitating grounds should not result in any negative legal consequences for the defendant other than limiting his/her right to claim compensation from the state.
- Juvenile justice systems should make broad use of mediation and reconciliation.

3. SUMMARY OF THE DISCUSSIONS



Criminal Justice Reform and the Rule of Law

Rule of law lies at the core of a democratic society and, as such, is central to the justice system. Rule of law is a concept that permeates and inspires international human rights instruments and has been routinely referred to by domestic and international courts, including the European Court of Human Rights.

This session discussed the progress in incorporating the rule of law into the fabric of criminal justice in transitional states, as well as determining the key indicators of such progress. The panellists, who hailed from Kazakhstan, Uzbekistan, the Russian Federation, the United Kingdom and the United States, represented both emerging and established democracies. They shared with the audience their wealth of knowledge and ideas for overcoming reform-related challenges in transforming criminal justice systems with authoritarian pasts into human rights – based systems.

The discussion made it clear that success in criminal justice reform hinges heavily on the extent to which the rule of law is accepted and practiced by all actors in the justice system. This cannot be achieved through legislative reform alone, without further measures to ensure proper implementation. The judiciary plays a pivotal part in this process, and it was stressed throughout the session that the respect for human rights and the rule of law should be the yardstick of judges' work.

Despite many reforms in this area, full independence of the judiciary in the post-Soviet region is yet to be achieved. According to one panellist, a key obstacle may have to do with the obedient "nomenklatura culture" of many judges, who are used to relying on instructions from their superiors. These superiors, in turn, assess the performance of judges in their courts through the prism of personal loyalty, rather than formally defined criteria. Another problem lies with popular misconceptions of independence as something negative, a synonym of irresponsibility and disorganization. Continuing

reform efforts should address these challenges.

With regard to other actors in the criminal justice system, one panellist emphasized the importance of achieving a clearer division of responsibilities among the police, prosecutors and the courts. Another panellist added that more investment should be made into building the capacity of police investigators to ensure that interrogation of the suspect or accused would cease to be the single most important tool for proving guilt. The importance of appropriate training for young police and prosecutors was highlighted by a third panellist, who pointed out that retiring law enforcement officers should be replaced by professionals educated in line with the values of reformed laws.

Discussions in the session also revealed that the rule of law in criminal justice systems does not amount only to maintaining strict compliance with the rules but also means upholding the values which the laws should protect and promote. Performance appraisal systems for police and prosecutors may serve as examples of existing rules which lead to questionable results. Police performance is judged primarily by the percentage of “solved” crimes, thus creating an adverse incentive for investigators to use illicit means to put pressure on the accused. For prosecutors, an acquittal at trial is regarded as an indicator of their professional ineptitude. To avoid this outcome, prosecutors apply pressure not to acquit defendants on the (already weak) judiciary. This results in a strong “accusatory bias” of criminal courts in the region.

Finally, it transpired that the rule of law should not be equated with formalism. One participant cited an example of the restorative justice movement, which advocates for a less formalistic, more conciliatory approach to criminal procedure. In recent decades, this movement brought about many positive changes related to the role and treatment of both defendants and victims in criminal proceedings.

Judicial authorization of pre-trial detention in Central Asia

The introduction of judicial authorization of pre-trial detention is an important step toward greater compliance with international standards concerning the right to liberty and security of person. In the last several years, all countries of Central Asia with the exception of Turkmenistan have transferred the power to authorize pre-trial detention from prosecutors to the judges. This session looked into the achievements of these reforms in the region and the remaining challenges.



In particular, **Nurmakhmad Khalilov** gave a briefing on the state of this reform in Tajikistan, where the new Criminal Procedure Code entered into force in April 2010. This Code introduced judicial authorization of pre-trial detention. The law sets a relatively low threshold for considering pre-trial detention – it may be applied if the accused is charged with an offence punishable by more than two years of imprisonment. A targeted monitoring exercise of the new procedure carried out by a human rights NGO revealed that judges readily authorize pre-trial detention without properly examining all relevant circumstances, including

the threat to the community and the risk of absconding. Lawyers frequently do not take part in the detention hearing. Contrary to international standards, the law allows judges to impose pre-trial detention based solely on the gravity of the charges. Mr Khalilov concluded that introducing judicial authorization of pre-trial detention in Tajikistan was an important step, but so far it has not resulted in a more human-rights oriented approach to pre-trial detention, and the latter remains the dominant measure of restraint. More should be done by the authorities to expand the use of alternative measures of restraint foreseen by the new Code, including the written obligation not to leave, personal guarantees, bail and house arrest.



Daniyar Kanafin presented preliminary results of an ODIHR assessment project on judicial review of review of arrest and detention in Kazakhstan. This project, in which Mr Kanafin participated as senior expert, included monitoring of detention hearings, a survey of practitioners, and an analysis of available case materials and statistical data. Over 250 hearings were monitored throughout the country. It transpired that courts granted 96 per cent of motions to authorize pre-trial detention. In 97 per cent of the hearings the detained individuals were represented by lawyers, primarily by appointed counsel. The project revealed some shortcomings in the way judges approach their tasks, including informing those arrested about their rights, establishing whether any illegal means of interrogation were used against them, and examining all relevant circumstances necessary for a substantiated decision. Mr Kanafin also noted that one of the main challenges encountered over the course of the project was that of obtaining information regarding the time and place of detention hearings. Public access to these proceedings is not ensured in practice. The project report, which is being drafted and will be released later this year, will contain detailed recommendations for improving legislation and practice. At this point, it is already clear that the choice of pre-trial detention should be better substantiated and that judges should make use of alternatives to pre-trial detention.

Tamila Rakhmatullaeva recalled that Uzbekistan was the first country in Central Asia to introduce judicial authorization of pre-trial detention, in January 2008. Pre-trial detention may be applied to suspects and the accused for crimes punishable by over three years of imprisonment (five years for crimes committed by negligence), but the law contains a number of exceptions, which the courts readily use. The law sets a rather generous time limit for holding arrested individuals in police custody – 72 hours. This time limit may be extended by a court for another 48 hours to allow the prosecution to collect more evidence for authorizing pre-trial detention. The terms of police custody may also be de facto extended in practice by holding persons first as witnesses, and later changing their status to that of suspects. Official charges may be brought within ten days from the time of arrest. Judicial hearings on the authorization of pre-trial detention in Uzbekistan are closed, attended only by the motioning prosecutor, the arrested and the defence lawyer (if the arrested is represented). In practice, defence lawyers are often not properly notified. Their presence is not required by law. Ms Rakhmatullaeva suggested that the participation of a defence lawyer should be made mandatory by law for all detention hearings.

In the final discussion, speakers and participants made a number of suggestions to improve the law and practice in the region. It was pointed out that pre-trial detention, in accordance with international standards, should become only an exceptional measure of restraint. The law should set a higher threshold for the imposition of pre-trial detention. Judges should be required to consider alternatives to pre-trial detention and the reasons for rejecting these alternatives should be spelled out in their judgments. The severity of impugned crimes alone may not constitute grounds for imposing pre-trial detention; judicial decisions should motivate the choice of detention on the basis of other grounds clearly stated in the law. The list of grounds should be exhaustive and comply with international human rights standards. These hearings should be open to the public on the same basis as other court hearings and all unrepresented arrested should be appointed legal counsel. Finally, one of the panellists pointed out that, in order to achieve full compliance with international standards, the scope of judicial inquiry should be expanded beyond the mere choice of the measures of restraint, as currently practiced in the region, to also include a judicial review of the legality of arrest.

The panellists also encouraged further monitoring by non-governmental organizations of judicial authorization procedures in Central Asia as a positive contribution to implementing existing legislation.

Initiation of a criminal case: formalism and substantive guarantees

The initiation of a criminal case in Central Asian and most other post-Soviet justice systems marks the beginning of a criminal investigation. However, prior to the formal launch of a criminal case, police carry out certain investigative actions ("pre-investigation examination") which may infringe upon personal rights while the affected persons are effectively deprived of any procedural guarantees, since they have no formal status in criminal proceedings. Another focus of this session was the debate whether the Soviet-type "dual investigation" model (inquest followed by a formal criminal investigation) has become obsolete and, if so, how it might be reformed.



The session opened with **Gigla Agulashvili's** presentation on the reforms in Georgia, where the new Criminal Procedure Code will enter into force in October 2010. According to the speaker, pre-investigation examination and inquest were abolished in Georgia some time ago. The new Code is based on a new approach, where any information pointing to a potential crime triggers the initiation of a criminal investigation, in absence of which the police may not undertake any investigative actions. The criminal procedure is thus formalized from the outset, with appropriate powers for the police and safeguards for any persons involved. The arrest of any individuals is equated with the beginning of a criminal prosecution. The speaker also pointed out that a criminal investigation may be discontinued without any negative consequences for the performance evaluation of the investigator, while under the old Soviet model in Georgia discontinuation of a criminal case was regarded as an indicator of professional failure. Another change introduced by the new Code is the granting to prosecutors

of discretionary powers in relation to prosecution, i.e. the authority not to prosecute even where there is sufficient evidence to proceed. The Prosecutor's Office, which in Georgia was brought under the authority of the Ministry of Justice, will develop a public criminal policy document and internal guidelines for the prosecutors that will together serve as a basis for exercising this discretion. The speaker also mentioned that the new Code has been criticized for limiting the rights of victims with regard to these decisions.

Alexander Banchuk, from Ukraine, participated in the drafting of a new Criminal Procedure Code, which was submitted to the government last year. The new CPC was drafted to replace the current Code of 1961. However, the government at the time did not submit the draft CPC to the Parliament and its prospects under the current government are uncertain. Mr Banchuk suggested that the formal initiation of criminal proceedings may run counter to the presumption of innocence and puts the person concerned in a state of legal limbo: while the person against whom a criminal case has been launched does not yet have the formal status of a suspect, s/he may be subjected to measures that infringe constitutional rights, such as a travel ban. In addition, the extant legal framework allows for the circumvention of criminal investigation altogether by giving law enforcement powers to carry out pre-investigation examination, "administrative audits", and other activities which allow for the obtaining of the same information without giving the persons in question any procedural rights.

Professor **Leonid Golovko** put the debate into a larger theoretical framework by pointing out an inherent contradiction in the Soviet criminal procedure which is retained by most post-Soviet systems, including that in Russia. On one hand, the initiation of a criminal case constitutes the beginning of formal criminal proceedings, which allows investigators to perform procedural actions. On the other hand, the initiation of a criminal case requires the obtaining and assessing of certain information (elements of a corpus delicti), which is practically impossible to achieve without some investigative activities. In the speaker's opinion, this conflict results from the Soviet rejection of the continental procedural model based on a clear separation of police and judicial functions. In this model, the

role of the police is only to collect factual information and to present it to the magistrate (in modern systems, judge or prosecutor) who has to assess it and decide whether to proceed with a prosecution. Any police activities which involve the infringement of constitutional rights must be authorized by the judiciary. Instead, the Soviet system introduced an artificial distinction between "procedural" and "non-procedural" investigative actions, which resulted in doctrinal confusion and generated many problems raised in this session. In order to resolve the systemic crisis in post-Soviet justice systems, a comprehensive effort should be made to (re)allocate the police and the judiciary their proper functions.



Judge **Dariusz Sielicki** presented an overview of Poland's model of criminal procedure. He pointed out that no collection of evidence may be conducted without prior formalization. The Polish investigation procedure begins with the receipt of information concerning the commission of a criminal act, which is followed by a pre-investigation examination. This is subject to a set of stringent

rules which do not allow any interference with human rights at this stage. Therefore, procedures such as wiretapping, searches and seizures are strictly prohibited. The subsequent phase is that of a full-scale formal investigation, the results of which are admissible as evidence in court. A full-scale investigation may be launched based on the standard of preponderance of evidence. The rejection of a motion to launch an investigation may be appealed in court. Unlike in the United States, where the presentation in court of pre-trial depositions is extremely rare, in Poland all collected information is presented to the court.

Much discussion was devoted to investigative police activities which are regulated outside the scope of criminal procedure through special laws on special police actions. There was a broad agreement among the panellists and many participants that these activities should be unified with criminal investigations in codes of criminal procedure to achieve better protection of human rights and prevent abuses. This process should go hand in hand with the expansion of judicial oversight over the investigation – the subject of the next session.

Judicial oversight over criminal investigation

Judicial oversight over criminal investigation acquires special importance as a country seeks to build a criminal justice system based on the rule of law and respect for human rights and fundamental freedoms. The intrusive character of investigative actions warrants close attention to ensure that such actions do not interfere with human rights to a greater extent than permitted by law. This is one of the most important functions of the judiciary in democratic justice systems.



The discussion in this session addressed both theoretical issues and practical questions of implementation. Participants agreed that judicial oversight over investigation is making its first steps in Central Asia which should be followed by its further expansion. It was mentioned that the broadest judicial authorization of investigative actions was introduced in Kyrgyzstan in 2007, but these reforms were subsequently scaled back. In Kazakhstan, currently five out of 27 investigative actions are authorized by judges.

Panellists pointed out that judicial oversight should be exercised with regard to all investigative measures and special police actions which interfere with human rights and freedoms. Judicial control is particularly relevant for any deprivation of liberty allowed by the law, including involuntary hospitalization in psychiatric institutions and placement in special boarding schools for juveniles. It was emphasized that the introduction and expansion of judicial oversight over investigation needs to be approached in a systematic manner and addressed in conjunction with the reform of law enforcement bodies.

The moderator noted that, despite the introduction of judicial oversight over investigation in Central Asia, there is a worrying trend in rising numbers of authorizations granted, as judges approach this task as a mere formality. Professor **Sergei Pashin** commented on a similar experience in the

Russian Federation, explaining this trend by the “bystander” attitude of judges and their tendency to follow state (prosecution) interests in their decision-making. A participant from Kazakhstan also pointed out that the prosecutor also plays a role in rejecting insufficiently substantiated requests by investigators in motions for pre-trial detention.

The Forum participants also discussed the experiences of other countries with judicial deposition of evidence at the pre-trial stage. **Alisher Madzhitov** emphasized that such procedures would enable lawyers to realize their right to gather evidence without being dependent on investigators – who side with their procedural opponents. Professor **Stephen Thaman** used examples from Italy, Spain and the United States to show that judicial deposition of evidence was also important for prosecutors, who can rely on it, *inter alia*, in cases when there is a need to preserve important witness testimonies.

On the subject of specialized judges for overseeing investigative proceedings, judge **Andrea Cruciani** informed the participants about the work of such judges in Italy, where they authorize all intrusive investigative measures. These judges do not participate in trials on the merits. The introduction of specialized pre-trial judges was generally supported by the participants, but some expressed concerns about the efficiency of this approach in large, sparsely populated areas. Since some court districts in such countries have very small populations, it would hardly be feasible to install a specialized pre-trial judge in each of them. At the same time, a specialized judge would be unable to serve a number of districts due to the prohibitively great distances between them. The German experience of introducing specialized judges in selected densely populated areas was invoked by a panellist as a potential solution to such challenges.

As a general recommendation it was suggested that the countries of the region should continue to expand judicial review at the pre-trial stage beyond the authorization of the pre-trial detention. In particular, the introduction of judicial review of other intrusive police measures would bring the national legislation of the Central Asian countries closer to international standards. On the issue of strengthening the role of the courts in the authorization of limitations on personal freedom it was noted that courts should be empowered and required to review the legality of arrests and the available evidence before making a decision to remand a person to custody. These proceedings should take place only in the presence of the arrested, who should be entitled to legal counsel. The burden of proof that the person should be kept in custody must rest with the prosecutor.



Evidentiary rules and adversarial proceedings

The rules governing the admissibility and exclusion of illegally obtained evidence are of critical importance to ensuring compliance with international fair trial standards. Adversarial and inquisitorial systems differ in their respective understandings of the role of the judge and other trial participants. Comparative analysis and exchanges of practical experiences facilitate finding appropriate reform approaches for the introduction of adversarial principles into

the traditionally inquisitorial criminal procedures of Central Asia. This session looked into potential solutions to the existing problems with evidentiary rules in post-Soviet justice systems.

The session began with a brief historical overview of exclusionary rules in common law and European continental traditions by Professor **Richard Vogler**. He emphasized that the exclusion of evidence is one of the effective means of combatting police misconduct and abuses in the course of a criminal investigation. Professor Vogler also discussed different approaches to evaluating expert evidence in court which are employed in contemporary adversarial systems. He concluded by reminding participants that evidentiary rules should not reward police and investigator misconduct.

Presentations by two lawyers highlighted many challenges faced by the defence in post-Soviet pre-trial procedures and proposed some solutions. **Sergei Nasonov** suggested that lawyers should have earlier access to the investigative dossier to enable them prepare for the trial. The current law allows this access only after the completion of the investigation, which seriously limits opportunities to mount a defence. **Salimzhan Musin** added that lawyers are procedurally deprived of an opportunity to collect evidence – any information they find may be formally admitted as evidence only by an investigator. Greater equality of arms during the investigation could be achieved by allowing lawyers to collect evidence *inter alia* through deposition of witnesses and experts directly before judges. Both panellists emphasized the need for judicial control over special police actions and investigative measures which invade upon privacy and infringe other constitutional rights.

One participant from Kazakhstan argued that defence lawyers were not professionally prepared to exercise more rights during the investigation, and giving them more powers would only cause confusion in a procedure already riddled with contradictions. She also noted that the principle of adversarial proceedings only applies at the trial stage in Kazakhstan. This opinion met with opposition from other participants from Kazakhstan, who insisted that the principle of adversarial proceedings, as it is expressed in the Criminal Procedure Code, should apply to the entire criminal process. The current model *de facto* combines inquisitorial pre-trial proceedings with adversarial trials. This results in inconsistencies and essentially defeats the purpose of the trial, since the trial is designed to merely give a stamp of approval to the investigation.



Professor **Lorena Bachmaier Winter** told the audience about the role of investigating judges in the Spanish criminal justice system. Investigating judges decide whether the evidence collected by the police is sufficient and may order additional investigative acts to be carried out. These judges also authorize intrusive investigative actions, such as searches of dwellings and other premises and the interception of communications. The speaker also gave an overview of the exclusionary rules in Spanish law and their interpretation by the courts.

In the final discussion, it was noted that neither inquisitorial nor adversarial systems exist in pure form, but every system should allow the defence lawyer to be active during the pre-trial stages *inter alia* by allowing them access to the investigation files. The focus of reforms should be on making the

protection of fundamental rights and freedoms centre stage. Judicial oversight should be expanded with that aim in mind.



Lay participation in the administration of justice

Lay participation in criminal trials is an important feature of a democratic justice system and a potential tool to strengthen public trust in the judiciary. Various models of lay participation are employed by different jurisdictions, from lay assessors hearing cases together with professional judges to trials by jury as autonomous decision-makers. In this session, participants heard about the experiences of countries with various jury models from the OSCE region.

The session opened with a presentation by

Gulnar Suleimenova, from Kazakhstan, where jury trials were introduced three years ago. Ms Suleimenova presented the preliminary results of an ODIHR assessment project on the current functioning of jury trials, in which she was the senior national expert. The project included the observation of trial proceedings by the experts, the analysis of case files, and a survey of practitioners. Ms Suleimenova described Kazakhstan's model as a "hybrid" jury model, where ten jurors hear the evidence and deliberate together with a professional judge. The project revealed that much work was done by the authorities to implement the new legislation, including the refurbishments of courtrooms. Among the main challenges highlighted by the speaker were inaccuracies in juror rolls and the lack of the appropriate skills on the part of judges, defence lawyers and prosecutors necessary to relay information to jurors in plain, yet professional, language. The final report from this project will be published later in 2010.

Sergei Nasonov informed participants that, since their introduction in the Russian Federation 17 years ago, trials by jury have made an invaluable contribution to developing the adversarial nature of proceedings not only in jury trials, but also in trials presided over solely by professional judges. The Supreme Court has consistently rejected appeals by prosecutors claiming that convictions should be overturned due to failures by the judge to invite specific witnesses. The Supreme Court reasoned in such cases that adversarial procedure presents a sufficient guarantee for both parties to present all evidence they deem important, and the role of the judge is that of an impartial arbiter. Mr Nasonov also emphasized that jury trials are exceptionally important to ensuring respect for the presumption of innocence. However, the introduction of jury trials has not proceeded without problems. One problem is the lack of transparency in the procedure of preparing juror rolls. Another negative trend is the growing number of restrictions on what can be discussed in the presence of the jury. For instance, allegations of ill-treatment cannot be brought to the attention of jurors. Mr Nasonov argued that these restrictions undermine opportunities to mount an effective defence.

The session continued with a presentation by **Gigla Agulashvili**, who stated that the full-scale introduction of jury trials is still pending in Georgia. Currently, only aggravated murder cases may be heard in jury trials and only in the Tbilisi court district. Depending on the gravity of the alleged offense,

the minimum numbers of jurors may vary, from the minimum of six, to a maximum of eight and ten for grave and especially grave crimes, respectively. An acquittal by the jury is final and not subject to appeal. Candidates for jury rolls come from voters' lists. A jury candidate should not have any intellectual or physical challenges that would present an obstacle to performing the juror's functions. Categories ineligible to serve as jurors include law enforcement and military officers, psychologists, psychiatrists and lawyers. Mr Agulashvili highlighted what he deemed to be an overly broad eligibility criterion, namely the provision that bars persons whose "previously expressed opinions" make their service as jurors "unfair".

Professor **Lorena Bachmaier Winter** noted that in her country, Spain, jury trials were reintroduced 15 years ago. However, historically, since the early 19th century, various forms of jury trials have been introduced and abolished. Only cases concerning a limited number of offences, including murder, trespassing and failure to provide aid are eligible for trial by jury. Certain crimes, including terrorism and drug dealing, are expressly excluded from the list of eligible offences. One notable difference in the Spanish model from most others is the legal requirement that a jury verdict must be reasoned and substantiated. Jurors are not required to apply legal knowledge, they are the triers of fact, and their ability to provide reasoning will ultimately depend on how well the instructions given by the judge to the jury are worded. The posing of questions to the jury has to be conducted in the open, and the presiding judge has to expressly warn the jurors from considering evidence held inadmissible. If the jury fails to present a consistent and substantiated verdict three consecutive times, the jury is disbanded. The main disadvantage of jury trials is their cost-intensiveness and complexity. Professor Bachmaier Winter also emphasized the positive contribution of jury trials to the democratic transition of the Spanish justice system.

Professor **Richard Vogler** pointed out that, historically, jury trials provided a powerful independent check upon politically motivated prosecution and corrupt judiciaries. This may explain why totalitarian regimes abolished jury trials (Russia in 1917, Germany in 1924, Spain in 1936, France in 1941, and Japan in 1943). The European Court of Human Rights acknowledged that the use of lay decision-makers is an effective means of eradicating the objective and subjective bias regarded by the Court as wholly contrary to fair trial guarantees. Professor Vogler suggested that there has been a renewed interest in jury trials around the world in the last two decades, evidenced by the (re)introduction of juries in Russia, Spain, Argentina (Cordoba), South Korea, Georgia and Japan. In the speaker's opinion, this renewed interest comes as part of an effort to rebalance the excesses of inquisitorial justice systems.

Tajikistan's new Criminal Procedure Code

The session was dedicated to the reform of criminal procedure in Tajikistan, the host of the Forum. Tajikistan has taken important steps to develop a new legislative framework that is more compliant with relevant international norms. However, many challenges remain, and open exchange of opinions contributes to ensuring further progress.



The panellists presented a detailed overview of the changes introduced by the new Criminal Procedure Code, which entered into force in April 2010. As noted by **Zafar Azizov** and **Marizo Khalifaev**, one of the important developments is the incorporation of provisions establishing judicial oversight over a number of procedural actions formerly not overseen by the court. A key example is a provision vesting the power to authorize pre-trial detention and issue search warrants in the court rather than in the prosecutor. The panellists also emphasized that the CPC also shortens procedural deadlines, introduces home arrest as a measure of restraint, provides for an accelerated trial procedure, and improves the safeguards for the equality of arms by making the role of the defence more pronounced. The new CPC no longer deems the court to be a body of criminal prosecution but establishes a proper separation of powers between the court and the prosecutor. As noted by **Shukhrat Azimov**, the new CPC expressly incorporates all treaties to which Tajikistan is a signatory into Tajikistan's legal framework.

Sergei Nasonov summarized the discussion by providing an external expert opinion of the new Code. He pointed out that significant progress has been made with bringing the provisions concerning measures of restraint in line with international standards and good practices. The expert noted a number of improvements and positive features of the new Code. However, a number of weaknesses remain that will hopefully be addressed by future amendments.

Among these are some provisions of the CPC which are not fully compliant with international fair trial standards. This relates, in particular, to the prohibition of contesting a measure of restraint during trial and a provision allowing for the application of pre-trial detention based solely on the gravity of an alleged offence. The expert also pointed out that the application of bail in the new CPC is conditioned on full compensation of the material damage caused by the impugned crime. This rule seriously restricts the use of bail and is contrary to the presumption of innocence.

Additional suggestions for improvements to strengthen the equality of arms were made during the discussion, including eliminating the right of courts to initiate criminal cases and limiting the influence of prosecutors in cassation proceedings (abolishing the "prosecutor's opinion", which, in effect, allows the prosecutor to present his case twice). Overall, the session confirmed that the adoption of the new CPC in Tajikistan constitutes a step forward and encouraged the government to continue addressing the challenges in compliance with fair trial standards.



Reform of legislation on administrative offences

This topic merits discussion in the context of criminal justice for at least two reasons. First, the continuing liberalization of criminal law in Central Asia pushes a growing number of offences from the criminal into the "administrative" realm. At the same time, serious issues with regard to the lack of due process in handling administrative offences persist, while the stakes for the affected individuals and businesses may be high. This session examined the issues involved in reforming the legislation on administrative offences, and discussed

possible approaches to such reforms.

Sergei Nasonov, from the Russian Federation, highlighted some of the existing problems that must be addressed in his country. In his opinion, there is an overwhelming tendency not to document police custody from the moment of apprehension of the person in question, in an effort to extend the procedural limits. Provisions on administrative detention are used by the police to gain time and carry out criminal investigations, without allowing any formal guarantees to the suspects. The resulting information is then accepted as evidence in criminal proceedings. A special challenge is presented by offenses that may be qualified as either criminal or administrative. For example, drug dealers in Russia are routinely subjected to police custody under the pretext of having committed an administrative offence.

Salimzhan Musin argued that the line between the criminal and administrative offences in Kazakhstan is being blurred. This gives law enforcement agencies a greater choice of tools, without sufficient safeguards against their abuse. The Code of Administrative Offences offers significantly lower due process safeguards than the Criminal Procedure Code, yet the sentences, especially in the commercial sphere, are disproportionately harsh. This imbalance needs to be remedied by raising the standards of due process for administrative offences. The situation as it stands calls into question the approach of “decriminalizing” certain offences by transferring them from criminal to administrative. For example, in relation to tax offenses, administrative offence laws offer insufficient rights and safeguards for businesses.



Turning to potential solutions, **Alexander Banchuk** pointed out that what largely falls under “administrative” offences in post-Soviet systems is treated in Europe either as a separate branch of law, or as a part of criminal law. Where the first model is used, the main sanction applied to such offences is a fine. Under the second model, procedural aspects are governed by the criminal procedure, and there is a choice of sanctions that may only be applied with judicial authorization. Both models have their advantages. Ukraine has opted for the first model, whereby only offences that breach administrative norms would be treated as administrative and punishable by fines or community service, while Estonia and Moldova have opted for the second model. Mr Banchuk suggested that reforms in post-Soviet countries should “clean up” the Code of Administrative Offences in the following sense. Separate rules should apply to breaches of substantive administrative norms such as environmental regulations or food safety standards. These breaches should be sanctioned by the responsible administrative agencies, which may apply a range of non-custodial sanctions directly, with administrative and judicial remedies available to the affected persons who dispute these decisions. Offences which entail custodial measures should either become part of the criminal law or a separate category of minor offences, where the procedure would contain all international human rights law guarantees triggered by the potential deprivation of liberty. Mr Banchuk argued that such steps would restore the original purpose of administrative law and bridge the existing disconnect between the legislation on administrative offences and substantive administrative law.

Following a lively discussion of these ideas, Judge **Dariusz Sielicki** presented an overview of the administration of justice in respect to minor offences in Poland. In 1989, Poland conducted a comprehensive reform in this area. Prior to the reform, these cases were heard by quasi-judicial “collegia” composed of executive officials. The reform abolished these collegia, and any case concerning a minor offence is currently dealt with by an impartial tribunal. The system functions well, but challenges remain, including a heavy caseload of courts. Proposed solutions to deal with the caseload include automatic scheduling of court hearings, audio recording of proceedings, summarized sentences, videoconferencing, testimony via telephone, and limiting the grounds for challenging sentences.



Abbreviated and simplified criminal procedures: trends and prospects

Faced with clogged courts and rising financial burdens on the state, countries are devising strategies to improve efficiency in the administration of justice. Along with the decriminalization of minor offences and alternatives to criminal prosecution, abbreviated and simplified proceedings present a viable solution to both reducing waiting times for defendants and relieving the burden on public resources. This session discussed the arguments for and against procedural shortcuts, with special attention to plea bargaining.

The session opened with a presentation by **Gigla Agulashvili**, from Georgia, where a comprehensive reform of criminal procedure has taken place recently. One of the key innovations introduced in Georgia is plea (charge and sentence) bargaining. Plea bargaining may be opted for by the prosecutor, either at the prosecutor's own initiative or following a motion by the defence. The seriousness of the offence committed does not have a bearing on the defendant's eligibility for plea bargaining. Where the defendant pleads guilty, the prosecutor may request a lesser sentence and/or reduce the charge. In doing so, the prosecutor must consider the overall harshness of the sentence and the seriousness of the alleged offense, as well as the public interest in the case, including the efficiency and effectiveness of the use of public resources. A plea agreement is a voluntary and participatory exercise and may only be crafted with the defendant's consent and the full participation of the defence. A plea agreement may be invalidated by the court where the information from a co-operating defendant is of a partial nature and does not genuinely contribute to the investigation and ultimate solving of the crime committed. On the other hand, where the information provided by a co-operating defendant proves exceptionally important to solving an especially grave crime or a crime committed by a public official, the prosecutor may request that the court fully exonerate the defendant. A plea agreement is final and not subject to appeal.

Mr. Agulashvili went on to explain that the introduction of plea bargaining in Georgia did not proceed without criticism, with critics claiming that the innovation institutes a system of state-endorsed “justice for the rich,” where those with deeper pockets would be able to achieve impunity. In fact, in over 5,000 cases that went to court in 2009, more than 50 per cent resulted in plea agreements.

During the first quarter of 2010 this ration increased to over 70 per cent. Plea bargaining agreements that involve some monetary sanction now account for up to one per cent of the state of budget of Georgia, making it an important income-generating activity. The panellist suggested that it would be desirable to minimize the importance of the pecuniary factor in plea bargaining.

The speaker also emphasized another issue that warrants attention - the absence of an express requirement to consider the victim's position in a plea deal. Under the CPC as it stands now, the prosecutor is only required to inform the victim, thus a deal may be reached regardless of the victim's stance. The only avenue available for the victim is to seek damages in a civil lawsuit. Finally, the lack of transparency presents a problem, since plea agreements are treated as confidential and no details may be disclosed.

The next speaker, Professor **Sergei Pashin**, presented a historical overview of abbreviated and simplified procedures in the Russian Federation. According to the speaker, Russia has a "special procedure", which involves taking guilty pleas in lieu of trial in cases involving offences punishable by less than 10 years of imprisonment. This procedure allows for plea bargains in which the prosecutor and defendant, with the mandatory assistance of a defence attorney, agree that the defendant will plead guilty in exchange for a recommendation of a lesser sentence. Another type of bargaining, the so-called "pre-trial cooperation agreement," was introduced in the summer of 2010. A pre-trial cooperation agreement may be reached following a motion by the defendant, if approved by the investigator and subsequently by the prosecutor. The defendant has to present a detailed offer to cooperate with the investigation. Finally, for "white collar" crimes concerning business activity, the law makes a provision mandating the closure of the criminal case where the defendant has fully restored the damage inflicted. However, in numerous instances courts have refused to close cases on the grounds of the offence not falling squarely into the category of "business-related". Professor Pashin also criticized the general tendency toward supplanting justice with efficiency. For example, prohibiting a court to acquit a defendant who has entered a guilty plea, coupled with the lack of legal awareness on the part of the defendant, may result in sentences being imposed on down innocent people.

Professor **Stephen Thaman** then presented a comparative overview from a range of OSCE participating States, including the United States, Germany, Italy and Spain. He noted the general tendency toward making plea bargaining applicable cases involving increasingly serious offences. He also told the audience about the increasing use of penal orders for crimes that are punishable by fines. In such procedures, the prosecutor would recommend the resolution of the case with a particular fine (and perhaps other conditions) and the defendant would have a certain number of days (typically seven to fifteen) to object. If no objection is made by the defendant, the fine is imposed and the conviction becomes final.

Many countries also allow discretionary dismissal of a case, applicable in the case of minor offences where the defendant has made restitution and has no serious criminal record. This introduction of a limited "opportunity principle" relating to minor offences has become very popular in Europe as



an exception to the strict “legality principle” of mandatory prosecution. Speaking of challenges, the Professor Thaman mentioned that plea bargaining may encourage an innocent defendant with a prior criminal record to enter a guilty plea even when the prosecution’s case is weak.

The presentation by Professor **Lorena Bachmaier Winter** focused on the experience of Spanish expedited and simplified proceedings. Spain chose to respond to the problem of overloaded dockets by introducing limited consensual forms of dealing with criminal proceedings. Although a limited element of negotiation is present, the resulting procedure cannot be qualified as plea bargaining, but rather presents a way of encouraging the defendant to accept his or her guilt. Since 2004, a mechanism has been in place that is firmly rooted in the legality principle and allows those accused of committing lesser crimes to plead guilty in exchange for a reduction of their sentences by one third. The prosecutor has no option to negotiate a different treatment. Pre-trial proceedings in this case run according to regular procedure but, at the trial stage, the defence has the choice to opt in or out of an oral trial. In any case, before handing down the sentence, the judge will have to ascertain whether the indictment was correctly founded, as well as whether the defendant’s guilty plea was coerced in any way. If the judge considers that the charges were higher or lower than they should have been, the agreement may be returned to the prosecutor for review.

In the course of discussion it was repeatedly emphasized that expedited proceedings, especially plea bargaining agreements, may not be used in criminal justice systems where pre-trial proceedings are plagued with ill-treatment and forced confessions, and where access to professional legal aid is limited. Where introduced, expedited proceedings should allow a genuine incentive to co-operate with the prosecution. Severe sentencing policies and low acquittal rates may often leave no choice for defendants but to enter into expedited agreements. It was also emphasized that the participation of legal counsel should be mandatory and access to such counsel should be ensured in all expedited proceedings. Finally, it was suggested that penal orders for minor crimes should be explored as a means to save time and resources for dealing with more serious cases.

Alternatives to criminal prosecution in Central Asia



With the realization of the inherent limitations of purely retributive justice and a growing understanding of the importance of victims’ rights, policy-makers are increasingly turning to alternatives to criminal prosecution. More attention is being given to the view that criminal justice systems should not only isolate and incapacitate offenders, but also prevent crimes through their rehabilitation. Alternatives to prosecution may also relieve the burden on the state budget from the high costs of incarceration. Another important issue is ensuring that victims of crime are not ignored, or even further victimized, by the justice system.

This session opened with a presentation by **Vatan Abdurakhmonov**, from Tajikistan, who

welcomed the process of liberalization of criminal law in his country. He argued that alternative means of dispute resolution have long existed in Tajikistan in the form of mediation carried out by the traditional councils of elders, and that they create a favourable ground for the development alternative solutions applicable to criminal proceedings. The speaker suggested including more provisions on alternatives to prosecution. He also argued that sentencing of convicted offenders should be more personalized and take into account the personality of the offender and the victim's expectations. Mr Abdurakhmonov pointed out that the main condition for the application of reconciliation in the new Criminal Procedure Code is the readiness to fully compensate the damage inflicted upon the victim. However, additional efforts are needed to ensure the implementation of the new CPC, since many judges believe that the more strongly the court responds to a criminal offence, the better.

Chingiz Eferganov, from Uzbekistan, noted the positive steps undertaken by Uzbekistan to liberalize its criminal procedure. The law allows reconciliation in relation to crimes which do not pose a serious social danger. Since there is an increasing tendency to refer cases to reconciliation, discussions are underway to expand the list of eligible offences. The law currently allows for reconciliation for first-time offenders who fully admit their guilt and provide full compensation to the victim, if the victim agrees to reconcile. The speaker suggested that this helps prevent future offences and the "criminal contamination" of first-time offenders. The requirement of admitting guilt as a pre-requisite for reconciliation gave rise to the discussion whether this pre-requisite is in line with international standards on mediation.

In the ensuing discussion, Professor Leonid Golovko noted that in most European countries the decision on whether to apply an alternative to criminal prosecution is made before the completion of the investigation phase, while in post-Soviet systems reconciliation is often possible in the course of the trial, resulting in its discontinuation. Professor Golovko also explained that the selection of an alternative to criminal prosecution may be conditional on factors other than reconciliation with the victim. For instance, in the case of an offender who is a drug addict, free consent to commit to treatment and rehabilitation should be the key factor. The moderator emphasized that significant differences exist between mediation as a procedure of reconciliation mediated by an independent third party and a simple reconciliation between the parties as practiced in many countries of the region, while underscoring that both are based on free consent, therefore "mandatory mediation" is an oxymoron.

Some participants cautioned against the overregulation of alternatives to criminal prosecution, stating that success in their application is contingent on flexibility and adaptability to the individual circumstances of each case. It is essential, however, that mediation procedures be regulated by law, that relevant safeguards are provided, and that professional mediators are licensed. A self-governed association of mediators (similar to a bar association) was cited as a good practice.

Professor **Leonid Golovko** then presented an overview of the body of international standards and good practices in the field of alternatives to criminal prosecution. An important source is



Recommendation 19 of the Committee of Ministers of the Council of Europe to member States concerning mediation in penal matters of 1999. The key principle that applies to the mediation process is the independence of the mediator as an impartial third party. It is also essential to ensure affordability of mediation to prevent any imbalance based on the offenders' income status. Mediators "should be recruited from all sections of society and should generally possess good understanding of local cultures and communities." The example of France was cited as a source of good practice. In France, mediation is subject to a set of elaborated procedural safeguards and mediators are licensed. The outcome of mediation must be approved by a judge. In the Netherlands, mediation is performed by a non-profit organization.

Professor Golovko remarked that in many post-Soviet countries reconciled cases reverberate negatively on police performance indicators, which are based on the number of cases sent to court. In such systems, any reconciled case is statistically regarded as a failure to investigate a crime. These outdated performance yardsticks should be abolished if one intends to develop alternatives to criminal prosecution. Professor Golovko also noted that in many countries of the region the lawmakers differentiate between "rehabilitating" and "non-rehabilitating" grounds for the termination of a criminal prosecution, including reconciliation, which is treated as a "non-rehabilitating" ground. This triggers a range of negative legal consequences for the accused (e.g. illegibility for state service). According to the speaker, the differentiation between "rehabilitating" and "non-rehabilitating" grounds may be justified only by the need to secure the right of an acquitted defendant to claim compensation from the state. The termination of the prosecution should not result in any other limitations of the defendants' rights, as such limitations would contradict the presumption of innocence.



Some post-Soviet scholars suggested giving powers to terminate criminal proceedings to the court, as they equate this decision with a conviction. Professor Golovko argued against this position, pointing out that for the reconciled defendants the presumption of innocence was not refuted through a judicial deliberation. In his opinion, legislators and law enforcement officers should change their attitudes towards reconciliation and improve the procedure to create conditions for a move from simple reconciliation by the parties to mediated procedures by an independent and impartial third party.

Judge **Andrea Cruciani**, from Italy, presented a comprehensive overview of the history and current status of alternatives to criminal prosecution in his country, where such alternatives were introduced in response to the increasing demand for justice, a backlog of unresolved cases, the congestion of detention facilities, high reoffending rates, and the failure of the traditional, retribution-based criminal justice system to effectively rehabilitate offenders. The speaker noted that initially (in 1988) mediation was only available to juvenile offenders, but the eligibility criteria were later extended to adults facing charges for lesser crimes (punishable by less than four years of imprisonment).

A number of conditions have to be met in order for the outcome of mediation to be accepted by the judge, including full restoration and compensation for the damage inflicted. In Italy, mediation services are provided by non-profit organizations that are required to sign a memorandum of understanding with the relevant local self-government body. In practice, recourse to mediation in Italy remains

rather limited. Judge Cruciani expressed the opinion that mediation should also be available for more serious crimes. He also stressed that one should not confuse mediation with plea bargaining, since mediation is not an adjudicatory procedure.

The moderator remarked that while in Western European systems mediation was typically first introduced for juvenile offenders and later made available to adults, in the post-Soviet space the approach has been to introduce reconciliation for all groups of offenders, and only later differentiate its use for different offences or groups of defendants.

Discussions during the session revealed that the broadening of alternatives to criminal prosecution is seen as a positive development for the criminal justice systems in the region, as it helps to humanize penal policies, prioritize the rehabilitation of offenders, and uphold victim's interests. The advantages of restorative justice should be further explored by creating the conditions for the development of mediation services in addition to simple reconciliation. The requirement of a confession as one of the mandatory criteria for the commencement of reconciliation proceedings should be abolished. It was emphasized that reconciliation should be available at all stages of criminal proceedings. Reconciliation agreements at early stages of criminal proceedings not only help the parties but also cut costs and save scarce police resources.

It also transpired that police performance indicators should not count reconciliation agreements as failures by the police to investigate crimes. The termination of criminal proceedings on non-rehabilitating grounds should not result in any negative legal consequences for the defendant other than limiting his/her right to claim compensation from the state. Juvenile justice systems should make broad use of mediation and reconciliation.

Annex

III Expert Forum on Criminal Justice for Central Asia

7-18 June 2010
Dushanbe, Tajikistan



Annotated Agenda

The annual Expert Forum on Criminal Justice for Central Asia is a leading regional platform for professional discussions on criminal and judicial reform, human rights in criminal procedure, harmonization of national legislation with international standards of fair criminal justice. The 2010 Expert Forum brings together policy-makers, academics, and professionals from all five states of Central Asia to discuss recent developments and trends in criminal justice reform in the region and beyond.

Day One, 17 June

8.30 – 9.30

Registration

9.30 – 10.00

Introduction and opening remarks

Jumakhon Davlatov, Advisor to the President of the Republic of Tajikistan on legal issues

Ambassador Ivar Vikki, Head of the OSCE Office in Tajikistan
Carsten Weber, Chief of Rule of Law Unit, OSCE ODIHR

10.00 – 11.20

Plenary Session I

Criminal justice reform and the rule of law

This Session will put criminal justice reform in the broader context of strengthening the rule of law in transitional states. Speakers will address the roles of different branches of power in upholding the rule of law and its underlying values. The participants will be invited to discuss the results and prospects of criminal justice reforms in the post-Soviet area, identify their successes, the remaining challenges, and suggest possible solutions.

Moderators: Dmitry Nurumov, Rule of Law Co-ordinator for Central Asia, ODIHR
Vasily Vashchanka, Deputy Chief of Rule of Law Unit, ODIHR

Panellists:

Leonid Golovko, Russian Federation
Professor, Moscow State University

Daniyar Kanafin, Kazakhstan
Lawyer, Member of the Presiding Board, Almaty City Collegium of Advocates

Sergei Pashin, Russian Federation
Professor, Highest School of Economics (Moscow), Federal Judge (retired)

Mirzayusup Rustambayev, Uzbekistan
Rector of the Tashkent State Law Institute

Stephen Thaman, United States
Professor, Saint Louis University School of Law

Richard Vogler, United Kingdom
Senior Lecturer in Law, University of Sussex, Solicitor

11:00 – 11:20 Coffee break

11.40 – 13.00 **Plenary Session II**
Judicial authorization of arrest in Central Asia

This Session will discuss the current legislation and practice of judicial authorization of arrest in Central Asia. ODIHR experts will present the findings from a research project on judicial authorization of pre-trial detention in Kazakhstan carried out from December 2009 until May 2010. The participants will be also invited to assess the reform that introduced judicial authorization of pre-trial detention in the four countries of Central Asia: challenges, lessons learned, and prospects for achieving better compliance with international standards and best practices. The participants will consider, *inter alia*, the following issues:

- Should the prosecutor or the investigator address the judge to authorize arrest?
- What should be the subject matter of judicial hearing on arrest: legality and justification of arrest (*zaderzhanie*) or authorization of pre-trial detention as the measure of restraint (*predvaritel'noe zakluchenie*)?
- When should arrested individuals be brought before the judge?
- What is reasonable suspicion and how should the judge assess it in the hearing?
- What documents of the prosecution should be provided to the defence during the judicial hearing?
- Should any measures of restraint be assigned by the police?
- How should pre-trial detention be appealed? Should it be heard in open or in camera hearing?

Moderator: Dmitry Nurumov, Rule of Law Co-ordinator for Central Asia, ODIHR

Panellists: **Daniyar Kanafin**, Kazakhstan
Lawyer, Member of the Presiding Board, Almaty City Collegium of Advocates

Nurmakhmad Khalilov, Tajikistan
Centre for Human Rights, Director
Tamila Rakhmatullaeva, Uzbekistan
Lawyer, Director of Advocates' Bureau "FELIX TK"

13.00 – 14.00 Lunch

14.00 – 16.00 **Parallel Working Groups I**

Working Group I

Initiation of a criminal case: formalism and substantive guarantees

The pre-trial stage of criminal procedure in most post-Soviet countries remains largely formal and inquisitorial. The speakers in this WG will be invited to share their opinions on reforming the initiation of criminal proceedings. They will be asked to consider, *inter alia*, the following questions:

- What is the legal nature of the initiation stage of proceedings (vozbuzhdение уголовного дела): is this a human rights safeguard or an atavism of Soviet criminal procedure?
- What are the reasons for continuing erosion of the borderline between the pre-investigation examination (dosledstvennaya proverka) and the investigation in post-Soviet countries?
- When and which human rights and fair trial safeguards are applicable to pre-investigation examination?
- What rules may best regulate evidence-gathering activities of the police?
- How should various privacy-intrusive police measures be categorized?
- Should special police measures (operativno-rozysknaya deyatel'nost') be integrated into criminal procedure codes through their unification with investigative police measures (sledstvennye deistviya)?

Moderator: Daniyar Kanafin, Kazakhstan

Panellists: **Gigla Agulashvili**, Georgia
Independent Expert and Trainer, co-drafter of the new Criminal Procedure Code

Alexander Banchuk, Ukraine
Programme Manager and Board Member, Centre for Political and Legal Reforms (Kiev)

Leonid Golovko, Russian Federation
Professor, Moscow State University

Dariusz Sielicki, Poland
Judge, Circuit Court of Wroclaw, Adviser to the Ministry of Justice

Working Group 2

Judicial oversight over criminal investigation

The speakers in this WG will discuss the current scope of judicial control over criminal investigation in Central Asia and draw comparisons with other models of judicial oversight in the

OSCE area. The participants will also be invited to consider how the expansion of judicial oversight should affect pre-trial proceedings. Inter alia, the following questions may be discussed:

- Should policy-makers consider introducing specialized judges to deal with judicial control at the pre-trial investigation stage?
- Should (and to what extent) courts receive the powers to authorize special police measures and investigative actions which infringe on fundamental human rights?
- Should a judicial deposition of evidence at the pre-trial stage be introduced? What procedural decisions should be left to police investigators or be transferred to judges or prosecutors?
- What should be the role of prosecutors at the pre-investigation and investigative stages?

Moderator: Dmitry Nurumov, Rule of Law Co-ordinator for Central Asia, ODIHR

Panellists:
Andrea Cruciani, Italy
Judge, Ph.D. candidate at the Sant'Anna School of Advanced Studies (Pisa)
Alisher Madjитов, Tajikistan
Lawyer, Member of "Sipar" Collegium of Advocates
Sergei Pashin, Russian Federation
Professor, Highest School of Economics (Moscow), Federal Judge (retired)
Stephen Thaman, United States
Professor, Saint Louis University School of Law

Working Group 3 Evidentiary rules and adversarial procedure

This WG will deal with the reform of evidentiary rules. The existing system of gathering and examination of evidence originates in inquisitorial procedure and does not create an adequate basis for adversarial trials. The speakers will be asked to assess the current evidence rules and consider the introduction of a two-file system of collecting and presenting evidence and elements of parallel investigation in the criminal procedures of Central Asia. The speakers in this WG will be invited to debate the following questions:

- How should evidentiary rules at the pre-trial and trial stages be reformed to ensure adversarial criminal procedure?
- What evidence should be considered unconstitutionally obtained?
- Should a judicial deposition of evidence at the pre-trial stage be introduced?
- What should be the scope of investigative powers enjoyed by the defence in an adversarial criminal procedure?
- Should prosecutors and defence lawyers have equal access to forensic expertise?
- What are the good practices with the provision of forensic expertise?
- Is the doctrine of "fruit of the poisonous tree" applicable in Central Asian justice systems?

Moderator: Vasily Vashchanka, Deputy Chief of Rule of Law Unit, ODIHR

Panellists:
Lorena Bachmaier Winter, Spain
Professor, Complutense University (Madrid)
Sergei Nasonov, Russian Federation

	Lawyer, Associate Professor, Moscow State Law Academy Salimzhan Musin , Kazakhstan
	Lawyer and Member of Presiding Board, Almaty City Collegium of Advocates Richard Vogler , United Kingdom
	Senior Lecturer in Law, University of Sussex, Solicitor
16.00 – 16.20	Coffee break
16.20 – 18.00	Plenary Session III Reports from the Working Groups

Concluding discussion:

What does the principle of adversariality mean for pre-trial criminal procedure?

Moderators:	Dmitry Nurumov, Rule of Law Co-ordinator for Central Asia, ODIHR Vasily Vashchanka, Deputy Chief of Rule of Law Unit, ODIHR
19.00	Reception

Day Two, 18 June

9.30 – 11.00	Plenary Session IV Lay participation in the administration of justice
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This Session will discuss the introduction of jury trials in Kyrgyzstan and Kazakhstan and the existing forms of lay participation in other Central Asian countries. ODIHR experts will present the findings from a research project on jury trials in Kazakhstan carried out from December 2009 until May 2010. The participants will discuss, *inter alia*, the following questions:

- Does lay participation increase public trust in the administration of criminal justice?
- What models of lay participation are most suitable for the post-Soviet context?
- Does the introduction of jury trials increase the adversarial character of criminal procedure?
- Does it also make it unpredictable and thus unjust?
- What should be the respective roles of judges, prosecutors, and defence lawyers in jury trials?
- Should jurors learn about illegally obtained evidence?
- What are the best practices for juror selection?
- How should public respect for jury trials be enhanced?

Moderator: Vasily Vashchanka, Deputy Chief of Rule of Law Unit, ODIHR

Panellists:	Gigla Agulashvili , Georgia Independent Expert and Trainer, co-drafter of the new Criminal Procedure Code Lorena Bachmaier Winter , Spain Professor, Complutense University (Madrid) Sergei Nasonov , Russian Federation Lawyer, Associate Professor, Moscow State Law Academy Gulnar Suleimenova , Kazakhstan
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Associate Professor, Almaty Law Academy
Richard Vogler, United Kingdom
Senior Lecturer in Law, University of Sussex, Solicitor

11:00 – 11:20 Coffee break

11.20 – 13.00 **Plenary Session V**
The new Criminal Procedure Code of Tajikistan

This Session will discuss the recently adopted Criminal Procedure Code of Tajikistan, which entered into force in April 2010. The speakers will present their assessment of the strengths and weaknesses of the Code and the initial lessons learned. In particular, they will be asked to consider the following questions:

- Is the new Code conceptually different from the previous one and in what respects?
- Which international fair trial standards are reflected in the new CPC? What gaps still exist?
- How has the legal status of participants in criminal proceedings changed?
- How is judicial oversight of the pre-trial stages organized? Does it achieve the desired results in practice?
- How does the new Code allow for increased adversarial features of criminal trials?
- What are the problems of implementation identified so far?
- What are the training needs identified so far and how are they being addressed?

Moderator: Dmitry Nurumov, Rule of Law Co-ordinator for Central Asia, ODIHR

Panellists:
Zafar Azizov, Tajikistan
Chairman, Council of Justice
Marizo Khalifaev, Tajikistan
Director, Training Centre of Prosecutors
Shukhrat Azimov, Tajikistan
Justice, Supreme Court
Sergei Nasonov, Russian Federation
Lawyer, Associate Professor, Moscow State Law Academy

13.00 – 14.00 Lunch

14.00 – 16.00 **Parallel Working Groups II**

Working Group 4
Reform of the legislation on administrative offenses

This WG will examine the experiences in Central Asia with reforming the legislation on “administrative offenses”. The speakers will discuss the reforms undertaken in the region in the last two decades and debate whether these reforms achieved the desired purposes. The participants will also assess the impact of decriminalization policies on the legislation related to administrative offences. Some of the following questions may be considered:

- What are the lessons learned and what new strategies can be employed to achieve the desired results of liberalization?
- What fair trial standards should be reflected in the legislation on administrative offences? Where and how should they be spelled out?

- Should a new categorization of offences be introduced?
- Should a possible new Code of Minor Offenses be used to de-criminalize administrative law and restore its original legal nature?

Moderator: Vasily Vashchanka, Deputy Chief of Rule of Law Unit, ODIHR

Panellists: **Alexander Banchuk**, Ukraine
Programme Manager and Board Member, NGO Centre for Political and Legal Reforms (Kiev)

Sergei Nasonov, Russian Federation
Lawyer, Associate Professor, Moscow State Law Academy

Salimzhan Musin, Kazakhstan
Lawyer and Member of Presiding Board, Almaty City Collegium of Advocates

Dariusz Sielicki, Poland
Judge, Circuit Court of Wroclaw, Adviser to the Ministry of Justice

Working Group 5

Abbreviated and simplified criminal procedure: trends and prospects

The inefficiency, formalism and high cost of criminal proceedings coupled with overcrowding in pre-trial facilities have recently led policy-makers in the region to consider simplification of criminal proceedings to ensure the right to speedy trials and decrease the financial burden on criminal justice systems. The proposed reforms to introduce abbreviated proceedings are met with criticism from the opponents who argue that such forms of proceedings will undermine the already weak existing safeguards and create incentives for use of torture and other illegal methods of investigation. Speakers at this WG will be invited to examine, inter alia, the following questions:

- What is the rationale for the introduction of abbreviated procedures?
- What are the prospects for upholding individual rights when simplified criminal procedures are introduced in the region?
- Are there other ways to improve efficiency of criminal procedure?
- What are the advantages and disadvantages of various models of abbreviated proceedings?
- What is the experience with the new procedures introduced in Central Asia so far?
- Do these procedures comply with the main principles of criminal procedure?
- Should prosecutors and defence be allowed to negotiate the essential elements of charges when entering into such procedures?

Moderator: Daniyar Kanafin, Kazakhstan

Panellists: **Gigla Agulashvili**, Georgia
Independent Expert and Trainer, co-drafter of the new Criminal Procedure Code

Lorena Bachmaier Winter, Spain
Professor, Complutense University (Madrid)

Sergei Pashin, Russian Federation
Professor, Highest School of Economics (Moscow), Federal Judge (retired)
Stephen Thaman, United States
Professor, Saint Louis University School of Law

Working Group 6
Alternatives to criminal prosecution in Central Asia

In the last decade the strategies to decrease prison population and liberalize criminal legislation in countries of Central Asia employed various alternatives to criminal prosecution. In particular, criminal legislation was reformed to expand opportunities to use reconciliation in criminal proceedings. Currently, in some countries of the region 20 to 50 per cent of all initiated criminal cases end up in reconciliation during pre-trial or trial stages of proceedings. The broad use of such measures in relation to different categories of crimes changes the functioning of criminal justice systems. Participants of this session will be invited to discuss the following questions:

- What is the role of prosecutors, judges and defense lawyers in reconciliation?
- What legal consequences should be attached to reconciliation? Should the criminal process in Central Asian countries continue to differentiate between “rehabilitating” and “non-rehabilitating” grounds in application of alternatives to criminal prosecution?
- Who should mediate reconciliation agreements? Is it advisable to introduce formal mediation provisions into criminal procedure codes?
- Should reconciliation be possible in cases involving administrative offences that fall under judicial jurisdiction and may lead to short deprivation of liberty (administrative arrest)?
- Should plea bargaining and reconciliation agreements be subject to court approval?

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Panellists: **Vatan Abdurakhmonov**, Tajikistan
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Closing of the Forum