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公民和政治权利，包括司法机构的独立性、司法、有罪不罚问题

法官和律师的独立性问题特别报告员莱安德罗·德斯波伊的报告*

增 编

对吉尔吉斯斯坦的访问

* 本报告的内容提要以所有正式语文分发。报告本身载于本文件附件,仅以英文和俄文分发。

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内容提要

应吉尔吉斯斯坦政府的盛情邀请，法官和律师的独立性问题特别报告员于 2005 年 9 月 18 日至 22 日和 10 月 1 日对该国进行了访问。他与政府官员进行了深入的讨论，并自由会晤了许多人士，他们向他提供了关于司法人员和法律业者在吉尔吉斯斯坦目前所面临的问题的看法。本报告便是在这些讨论的基础上编写的，目的是对司法制度和从事司法工作的主要人员目前所面临的挑战作一概述。

特别报告员承认，吉尔吉斯斯坦政府近年来努力提高法官和律师的独立性。不过，仍有一些问题对法官和律师的独立性造成负面影响。因此，司法机构仍不能作为一个完全独立的机制来运作，无法履行公平独立司法和保障保护人权的基本职责。

有关任命、任期、连任和解职的程序使司法机构无法完全独立地运作。此外，在司法人员中普遍存在腐败现象，这在某种程度上是因为薪水低所促成的。

检察部门仍然在司法工作中发挥着绝对主导的作用。检察部门仍然行使监督权力，对司法程序的预审和各审理阶段施加过分的影响。

律师可以在保障人权方面发挥根本作用。然而，由于行政部门仍然控制着律师从业和惩戒程序，而且要切实执行平等手段原则还面临着其他法律上和实际上的障碍，这削弱了律师目前的职能。

政府对立法进行了一些重要改革，批准了一些主要的国际人权条约，这表明，政府致力于解决其中的许多问题。政府还开展了制宪和立法改革这一重要进程，着手解决对于法官和律师的独立性至关重要的一些问题。特别报告员希望能充分利用这些进程，建立一个能够确保法官和律师充分独立的法律框架。

特别报告员认为，除了立法进程之外，还必须辅之以政治意愿来确保有关法官和律师独立性的立法能得到充分执行。因此，他提出了一系列建议。特别报告员希望这些建议能满足和支持所有为争取实现独立的法官和律师能够履行其保护和保障人权的基本职责的制度而奋斗的人的愿望。

Annex

REPORT SUBMITTED BY THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, LEANDRO DESPOUY, ON HIS MISSION TO KYRGYZSTAN (18 TO 22 SEPTEMBER, 1 OCTOBER 2005)

CONTENTS

Introduction

1. Pursuant to his mandate, the Special Rapporteur on the independence of judges and lawyers visited Kyrgyzstan from 18 to 22 September and 1 October 2005, at the kind invitation of the Government.

2. Prior to his visit, the Special Rapporteur received information from a number of different sources which suggested that despite important reforms the independence of judges and lawyers continued to be a cause for concern in Kyrgyzstan. This concern was further aggravated by the fact that the judiciary was not able to play its role to efficiently safeguard the rights of citizens during the events following the parliamentary elections in February/March 2005.

3. The Special Rapporteur held meetings with the Deputy Minister for Foreign Affairs, the Chairman of the Parliamentary Committee on Constitutional Law, Governance, Judicial Reform and Human Rights, officers of the Legal Department of the Office of the President, the Chief Justice of the Supreme Court, the Chief Justice of the Constitutional Court, the Ombudsman, the Head of the Judicial Training Centre, officers of the Prosecutor's Office in Osh, the chairperson and judges of the Osh Oblast Court, officers of the remand centre (sledstveunyi izolator./SIZO) in Osh and the Governor of Osh. He also met with members of the legal community and representatives of various non-governmental organizations (NGOs) including the Legal Clinic Adilet, the Bureau on Human Rights and Rule of Law, the Legal Aid Centre, the Legal Aid Lawyers, the Coalition for Democracy and Civil Society, the Youth Human Rights Group and the Civil Society against Corruption. He had consultations with the local offices of the United Nations Development Programme (UNDP), the United Nations Resident Coordinator, the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Fund for Women (UNIFEM) and the United Nations Children's Fund (UNICEF). He also met with representatives from various international organizations and national cooperation agencies, including the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI), the Department for International Development (DFID) and the Organization for Security and Co-operation in Europe (OSCE).

4. The Special Rapporteur recognizes that his mission took place during an important period of transition in Kyrgyzstan. This explains why he was unable to meet with a number of relevant government officials, individuals and organizations. However, he is very grateful to the Government for offering him this unique opportunity to examine with them the current status of recent developments regarding the judiciary and the legal profession. He appreciated their cooperation and was able to have a very frank and open dialogue which showed their awareness of the current challenges and pointed to their determination to resolve them. He feels very indebted towards each and every person he met for the information they provided and their insight into current developments and needs for future reforms. He is hopeful that his recommendations will meet and support the main aspirations of all those within the Government, Parliament, the judiciary and civil society who strive to achieve an independent, effective and transparent judiciary, and will provide ground for further fruitful exchanges and progress.

I. MAIN FINDINGS

A. General political and legal background

5. Kyrgyzstan gained independence from the former Soviet Union on 31 August 1991. The first President to be elected following independence was President Askar Akayev and the first post-Soviet Constitution was adopted on 5 May 1993. President Akayev remained in office until he was ousted from power during the so-called "Tulip Revolution", on 24 March 2005. On 10 July 2005, Kurmabek Bakiyev was elected President of the Kyrgyz Republic.

6. The Constitutional Assembly was established on 25 April 2005 and is made up of a diverse range of representatives from the Government, the Parliament, the judiciary, political parties and civil society. On 9 June 2005, the Constitutional Assembly approved an initial draft containing a range of constitutional amendments. Those amendments addressed a number of issues relevant to the independence of judges and lawyers. Following his inauguration, the President chaired the Constitutional Assembly and a second draft of the constitutional amendments was disseminated for national discussion on 14 November 2005. The second draft of the Constitution was published after the Special Rapporteur had completed his mission.

7. Chapter six of the Constitution of the Kyrgyz Republic deals with the court system and the judiciary. These provisions are supplemented by the Law on the Constitutional Court of the Kyrgyz Republic (18 December 1993), Law on the Supreme Court and Local Courts (18 July 2003), Constitutional Law on the Status of Courts (8 October 1999), Constitutional Law on the Status of Judges (30 March 2001) and the Law on Advocate Activity (21 October 1999). Criminal proceedings are governed by the Criminal Code (1 October 1997) and the Criminal Procedure Code (30 June 1999), and civil proceedings by the Civil Code, parts 1 and 2 (8 May 1996 and 5 January 1997) and Civil Procedure Code (29 December 1999). Furthermore, draft versions of the Criminal Code, the Criminal Procedure Code and the Law on Advocates are currently under consideration.

8. Kyrgyzstan is a party to the following international instruments: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, International Convention on the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of the Child. It has ratified the Optional Protocol to the Convention Against Torture, the Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography.

B. The court system

9. The Constitutional Court is the highest body of judicial power for the protection of the Constitution of the Kyrgyz Republic (article 82 of the Constitution). Composed of a chairperson, a deputy chairperson and seven judges, it is empowered, inter alia, to rule on the constitutionality of legislation, decide disputes regarding the interpretation of the Constitution, issue opinions on the validity of presidential elections, issue opinions on proposed constitutional amendments and on the removal from office of the President of the Kyrgyz Republic and judges of the Constitutional Court and the Supreme Court.

10. The Special Rapporteur considers that the Constitutional Court has the potential to play a fundamental role in safeguarding human rights and fundamental freedoms. In this regard, he notes with concern that constitutional amendments were introduced in 2003 to remove the important right of individuals to petition the Constitutional Court regarding the constitutionality of official acts. The Special Rapporteur is also concerned at the proposal in the second draft of the Constitution to downgrade the Constitutional Court to a chamber of the Supreme Court.

11. The Courts of General Jurisdiction deal with criminal and civil matters at three levels that correspond to the country's administrative division into seven oblasts (regions) and 43 rayons (districts), plus the City of Bishkek.

12. The jurisdiction of the courts is as follows:

- *Rayon Courts* operate as courts of first instance. The majority of cases are heard by a single judge. The courts are not formally divided into sections. However, judges tend to specialize either in civil or in criminal matters;

- *Oblast Courts* operate as courts of second instance. The cases are heard by a panel of three judges. The courts are formally divided into civil and criminal divisions;

- *The Supreme Court* is the highest body of judicial power in the area of civil, criminal, and administrative legal proceedings and is responsible for hearing appeals from the lower courts (article 83 of the Constitution). The court is divided into a criminal, a civil and a commercial section. A panel of three judges hears ordinary appeals, a presidium of nine judges hears important appeals and a plenum issues opinions on court practice, which are binding on the lower courts;

- *The Military Court system* is authorized to hear criminal cases involving members of the military and other bodies including the National Security Service, Ministry of the Interior and the Criminal Penitentiary System of the Ministry of Justice. There are five Garrison Courts throughout the country and one Court of Appeal.

C. Other relevant institutions

13. The National Council of Justice (*Nationalnyi sovet po delam pravosudia*) was created by Presidential Decree on 14 December 2004. Situated within the presidential administration, it was created for the purpose of selecting and proposing judges for vacant posts in local courts and certifying local courts judges. It is made up of 14 members, including only five judges. The composition was initially approved by a Presidential Order on 31 May 2005 and has since been amended on two occasions. It is foreseen that the National Council of Justice will also be responsible for disciplinary procedures and reviewing complaints against individual judges in relation to breaches of judicial ethics.

14. The Judicial Training Centre was created by the Kyrgyz Judges' Association and the Department of Courts, which is part of the Ministry of Justice, in February 1998. It is mandated to provide training to judges and court personnel. The courses are designed in cooperation with officials from the Department of Courts and adopted by the Supreme Court. The courses, including on international human rights standards, are taught by higher court judges and academics. A committee of judges evaluates the courses at the annual meeting of the Association of Judges.

15. The National Ombudsman was created by the Law on Peoples' Rights Defenders on 25 June 2002. The National Ombudsman is mandated to act as an independent advocate for human rights on behalf of private citizens and NGOs and also has the power to consider individual complaints from members of the public. The Office of the Ombudsman informed the Special Rapporteur that it received approximately 14,000 complaints in 2003 and over 15,000 complaints in 2004. The Special Rapporteur was repeatedly told that the decision of the Ombudsman to run as a presidential candidate decreased public confidence in his office.

D. Main recent reforms and developments affecting the judicial system

Legislative initiatives

16. A process of important legislative reform is currently under way in Kyrgyzstan. In addition to the process of constitutional reform, a draft criminal code, a draft criminal procedure code and a draft law on advocate activity are under consideration.

Transfer of the power to issue warrants to the judiciary

17. The second draft of constitutional amendments provides for the power to issue arrest, detention, search and seizure warrants to be transferred from the procuracy to the judiciary. It is however regrettable that this provision is not envisaged to enter into force before 2010.

Introduction of juries or lay assessors

18. The constitutional amendments that were introduced in 2003 opened the way for a system of juries or lay assessors to participate in trials. As yet, there has been no agreement as to what form such participation will take and there is an ongoing debate on this subject in the country.

Budgetary control

19. In both the first and the second drafts, constitutional amendments provide for the courts to be independently responsible for their budgets. The Supreme Court and the Constitutional Court are already responsible for their own budgets; however, neither the *oblast* nor the *rayon* courts currently control their own budget, which is managed by the Department of Courts within the Ministry of Justice.

Moratorium and abolition of the death penalty

20. Both drafts of the constitutional amendments include a proposal to abolish the death penalty. The moratorium, which was initially introduced in 1998, is extended on an annual basis, but only applies to the execution of death sentences. This implies that the courts continue to sentence people to death in Kyrgyzstan. The death penalty is retained for murder, rape of a female minor, and genocide (articles 97 (2), 129 (4) and 373 of the Criminal Code). According to official statistics provided by the Ministry of Justice to OSCE, 17 persons were sentenced to death between 30 June 2004 and 30 June 2005. The identity and the number of persons thus sentenced is not made public.

E. Conduct of judicial proceedings

Powers of arrest, detention, search and seizure

21. The Criminal Procedure Code currently authorizes the prosecutor to issue warrants for arrest, detention, search and seizure. In this regard, the Special Rapporteur welcomes the provision contained in the second draft of constitutional amendments, which transfers this power from the prosecutor to the judiciary. However, he regrets that this guarantee will not be implemented prior to 2010.

Pretrial detention

22. The Criminal Procedure Code provides that a suspect can be detained for a period of 72 hours, after which he must be released or charged with a criminal offence. During this period, detainees are held in detention centres (IVS) under the authority of the Ministry of the Interior. After they have been charged, they should be transferred to remand prisons (SIZOs) under the authority of the Ministry of Justice. However, the Special Rapporteur received information that detainees are often held for longer periods in the IVS.

Access to a lawyer in pretrial detention

23. The Constitution provides that a person has the right to defence, either by himself or by a defence lawyer, as from the moment of his/her arrest (art. 16). However, the Criminal Procedure Code delays this guarantee to the moment of the first interrogation or the moment of actual arrival at the institution in charge of conducting preliminary investigation (art. 40). As a result, during all that time, the arrested person remains without any protection. The investigator is obliged to inform detainees of their right to legal counsel at the time of detention. However,

the Special Rapporteur received information about law enforcement officials withholding information about the right to legal counsel and pressuring detainees to waive their right to legal counsel. The Special Rapporteur was also concerned about information that lawyers have to obtain permission from the investigator before they are allowed to gain access to their clients.

Exercise of defence rights

24. Investigators appoint the defence for those detainees who do not have their own lawyers. This procedure has given rise to a proliferation of so-called "pocket lawyers" who depend on the investigators to take on cases. As a result, they can be influenced to act in a manner that fails to provide their clients with an effective defence and even to encourage them to take steps that will assist the prosecution. Another important problem is the difficulties that defence lawyers face when attempting to effectively defend the rights of their clients. For instance, investigating bodies hamper their access to the evidence collected during the investigation. Defence lawyers also experience difficulties in presenting evidence during trial hearings.

Legal aid

25. The Constitution provides for the right to free legal aid in criminal matters (art. 88). The legal aid system is governed by a regulation adopted on 24 May 2003. It provides that in order to receive free legal assistance, an individual must obtain a certificate that confirms his eligibility for legal aid, which is a time-consuming procedure. Many lawyers do not participate in the scheme because the rate of pay is extremely low and they are only paid for the time they spend actually representing the client in court. In order to be paid, legal aid lawyers produce a document prepared by an investigator or a judge specifying how much time they devoted to the case.

Shortage of qualified lawyers

26. There is a general shortage of lawyers throughout the country, in particular in rural areas. According to statistics published by ABA/CEELI, in 2004 there were 1,192 advocates for a population of 4.8 million, the majority of them practising in a few areas including in Bishkek, Osh oblast and Chui oblast.

Confidentiality

27. The Criminal Procedure Code recognizes the right of lawyers to meet with clients in privacy and without limitation. Furthermore, the Law on Advocacy provides that communications related to advocate activity are protected from inspection. In practice, law enforcement officers regularly remain during communications between clients and lawyers, although they generally leave if requested by the lawyer. However, in many situations, there are simply no facilities where lawyers and clients can meet in private.

Presumption of innocence

28. The Constitution guarantees the presumption of innocence (art. 85). In this regard, the Special Rapporteur noted with concern that criminal defendants, including those who are charged with non-violent offences, are often required to sit behind metal bars in the courtroom.

Allegations of torture, cruel, inhuman or degrading treatment

29. The Constitution provides that no one may be tortured or subjected to ill-treatment or inhuman or degrading punishment (art. 18). However, there is concern about a general failure to ensure prompt, impartial and full investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment, as well as a general failure to prosecute, where appropriate, the alleged perpetrators. In particular, prosecutors often appear unwilling to initiate criminal prosecutions in this regard, and the Special Rapporteur was not able to obtain information on any criminal prosecutions that have been brought for torture or ill-treatment.

Reliance on confessional evidence

30. The Constitution provides that evidence obtained in violation of the law shall not be relied upon in court (art. 89). However, the Special Rapporteur received information that this prohibition is not routinely respected by the courts. In this regard, there is currently no definition of inadmissible evidence or detailed rules on the procedure for the exclusion of inadmissible evidence at the pretrial stage and during the trial stage of criminal proceedings.

Summary procedure

31. The draft version of the Criminal Procedure Code provides for a procedure for rendering summary judgement in cases where the defendant admits to the charges. The Special Rapporteur is concerned that the introduction of such a procedure could encourage the ill-treatment of detainees in order to obtain confessions.

Remittal for supplementary investigation

32. It is common for the courts to remit cases for supplementary investigation as opposed to rendering final decisions. This procedure questions the certainty of judicial proceedings and the principle of equality of arms. It can also go against the right to be tried within a reasonable time.

Length of judicial proceedings

33. The Special Rapporteur noted that judicial proceedings can be extremely lengthy, questioning the right to be tried within a reasonable period of time. This is of particular concern where the defendant is remanded in pretrial detention.

Independent and reasoned judgements

34. The judgements of the lower courts tend to be short and fail to set out detailed reasoning. The Special Rapporteur also received information that senior judges instruct junior judges how to rule in particular cases. He was particularly concerned at information that the executive continues to exert direct influence over the outcome of cases of political importance.

Acquittal, rehabilitation and compensation

35. There is a notably high rate of convictions in Kyrgyzstan. According to statistics provided to ABA/CEELI by the Department of Courts, the rate of convictions was reported to be over 98 per cent between 1998 and 2002. The Special Rapporteur is concerned that this high rate of convictions is due in part to the dominant role placed by the procuracy in legal proceedings.

Criminal sanctions

36. The current criminal legislation fails to provide sufficient alternatives to imprisonment and, at the same time, provides for extremely long sentences in relation to deprivation of liberty. In this regard, the Special Rapporteur welcomes the provisions of the draft Criminal Code, which seek to provide for alternatives to deprivation of liberty and to reduce the upper limit of sentences for imprisonment.

Appellate review

37. The Constitution provides for judicial appellate review of judicial decisions (art. 85). However, the higher courts frequently fail to render a final decision and send cases back to the lower courts for review. The Special Rapporteur is concerned that this practice has a negative impact on judicial certainty and the right to receive a judgement within a reasonable time.

F. Equal access to the courts

Asylum-seekers and refugees

38. During his visit the Special Rapporteur visited Mr. Yakub Tashbayev, Mr. Rasul Pirmatov, Mr. Jahongir Maksudov and Mr. Odiljan Rahimov, four Uzbek citizens who are being detained in the remand prison (SIZO) in Osh. The four had fled the events in Andijan, Uzbekistan, in mid-May 2005. The Special Rapporteur is particularly concerned about the fate of the four Uzbeks. In this regard, he notes that four other Uzbek citizens, Mr. Dilshodbek Hadjiev, Mr. Tavakalbek Hadjiev, Mr. Hasan Shakirov and Mr. Muhammad Kadyrov were returned to Uzbekistan in June 2005, without having had access to any form of judicial procedure.

Free legal assistance

39. Articles 40, paragraph 1, and 88, paragraph 2, of the Constitution guarantee free legal aid provided by the State to citizens who lack financial resources. In order to achieve the objectives stipulated in the National Programme on Human Rights for the period 2002-2010, a "Concept on the Improvement of the System of Legal Assistance Provided by the State" was elaborated and confirmed by an order of the President. A working group has been established for this purpose.

G. Judges

40. The procedures regarding appointment, length of tenure, reappointment and dismissal of judges prevent the judiciary from operating in a fully independent manner and thus of fulfilling its fundamental role of safeguarding and protecting human rights. In addition, the Special Rapporteur received reports of widespread corruption among the judiciary.

Qualifications

41. Constitutional and Supreme Court judges must be between 35 and 70 years of age, be citizens of Kyrgyzstan, have a degree in law and at least 10 years experience in the legal profession (art. 80). Lower court judges must be between 25 and 65 years of age, be citizens of Kyrgyzstan, have a degree in law and at least five years professional experience (art. 80). The second draft of constitutional amendments maintains 10 years' work experience for Supreme Court judges and 5 years for lower court judges, but removes the minimum age requirement for lower court judges.

Training and professional development

42. The Judicial Training Centre, which was created by the Kyrgyz Judges Association and the Department of Courts in 1998, currently trains sitting judges on a non-mandatory basis, but does not have a mandate to train incoming judges. The Special Rapporteur notes that the effectiveness of the Judicial Training Centre is undermined to some extent by a lack of human and material resources.

Selection

43. Until 2004, the selection of lower court judges was governed by the Law on the Attestation Procedure of Judges of the Local Courts of 28 September 1999. Applications were considered by the Attestation Commission, under the auspices of the Ministry of Justice, which was made up of 11 members all of whom were appointed by the President. Judges that passed the attestation procedure were recommended to the President for appointment. Candidates had to pass an oral examination before the Attestation Commission, which determined by secret ballot whether the candidate had passed. The general perception was that this procedure was not carried out on an objective basis. The recently established National Council of Justice has taken over the selection procedure. Competitive examinations for vacant posts of judges are publicly announced. The Special Rapporteur obtained information that examinations are now held in the form of a computerized test, consisting of 110 questions to be answered in two hours.

Appointment and tenure

44. The President plays a dominant role in the appointment process. Supreme and Constitutional Court judgements are made by the Parliament on the nomination of the President. Their tenure is for a period of 10 years. The first draft of the constitutional amendments proposed increasing their tenure to a period of 15 years, but the second draft maintains a tenure of 10 years for Supreme Court judges, including those of its Constitutional Chamber. The President appoints lower court judges with the approval of the Parliament. Their tenure is for an initial period of seven years. The first draft of the constitutional amendments proposes reducing

the tenure of lower court judges to an initial period of 5 years subject to reappointment for a term of 15 years. The second draft set an initial period of only 3 years, subject to reappointment for a term of 10 years. Thus, the second draft of the constitutional amendments does not reflect a serious attempt to strengthen the independence of the judiciary.

Reappointment and advancement

45. The reappointment and advancement system is similar to the selection and appointment procedure. Lower court judges are required to undergo another attestation procedure for reappointment to the lower or higher level courts. The recommendation of the Court Chair and other factors are also taken into account, including notes that have been put in the judge's file by the Office of the Prosecutor. In particular, in cases where a prosecutor is of the opinion that a case has been erroneously judged, he/she can have a letter of complaint put in the judge's file. These documents are taken into account when considering the judge's application for reappointment.

Removal and dismissal

46. The Constitution provides that judges can be removed at their personal request, on the basis of bad health, for commission of a crime based on a binding court judgement, and on other grounds provided by law (art. 81). There is no exhaustive list of "other reasons" for removal of judges or a clear procedure governing the removal. The Constitution provides that Constitutional Court and Supreme Court judges, along with the chairpersons of Local Courts, can only be removed by Parliament by a two thirds majority vote, upon a proposal of the President (art. 81). However, there is no such provision with respect to the removal of lower court judges. The Special Rapporteur was concerned to learn that although formal removals are rare, pressure can be put upon judges to force them to resign.

Salaries

47. The Constitution provides that social, material and other guarantees of independence shall be ensured to a judge according to his status (art. 80). Despite these provisions, Freedom House reported that in 2003 oblast judges received US$ 190 a month and rayon judges US$ 169. According to the Constitutional Law on the Status of Judges, the President is responsible for determining salary levels of the judiciary, and the Special Rapporteur received information that the President had effectively ordered a number of salary increases that the judges never received. The Special Rapporteur is particularly concerned that low salaries and salary arrears are a major factor contributing to the endemic corruption within the judicial system.

Judicial ethics and corruption

48. There is no unified code of judicial ethics, and judges do not receive any training on judicial ethics. Also, they are largely unaware of international principles on the issue. The Special Rapporteur was concerned about the high levels of corruption in both criminal and civil cases. In particular, low salaries and uncertain periods of tenure are thought to foster corruption. It is foreseen that the National Council of Justice will be responsible for disciplinary procedures related to breaches of judicial ethics.

H. The procuracy

The role of the procuracy

49. The functions of the procuracy do not merely entail the prosecution of defendants on behalf of the State, but, more importantly, to supervise, within the limits of its jurisdiction, the proper and uniform implementation of legislative acts (article 78 of the Constitution). This special feature can be observed throughout the whole of Central Asia and other CIS countries, and reflects the Soviet system of the *Prokuratura*. The Special Rapporteur notes with concern that the provisions of the prosecutor's office are set out in the chapter of the Constitution relating to the executive power. The second draft of constitutional amendments does not provide for alterations in this respect, but even appears to strengthen the powers of the prosecutor's office, which already plays a dominant role in legal proceedings and exerts a disproportionate amount of influence over judicial proceedings at both the pretrial and trial stages.

Right of special appeal

50. Higher-level prosecutors are authorized to make a special appeal known as a supervisory review, once a case has been closed. This right enables the prosecutor to appeal to the next court level or directly to the Supreme Court. This right can only be exercised by the prosecutor.

Equality of arms

51. The Constitution provides that judicial proceedings shall be based on the principle of equality of arms (art. 85). However, the various limitations on the independence of the judiciary, including the short length of tenure and the lack of objectivity of reappointment procedures, mean that judges regularly conduct proceedings in favour of the prosecution.

Filing complaints

52. Where a prosecutor is of the opinion that a judge has not taken a correct decision on a case, he can put a letter of complaint in the judge's file, which as mentioned above is then taken into account when considering the judge's application for reappointment.

I. The bar

53. The bar has the potential to play a fundamental role in safeguarding human rights. However, its effectiveness is currently weakened by the proliferation of so-called "pocket lawyers", inadequate legal training, a lack of awareness of international human rights standards including with regard to the legal profession, continuing executive control over admissions and disciplinary procedures, and the absence of a unified professional association. There are two types of lawyers in the Kyrgyz system; the advocate, who can represent clients in criminal cases and civil cases, and the non-advocate lawyer, who can represent clients in civil but not in criminal cases. While this section focuses primarily on advocates, it should be noted that parties to civil cases can also be represented by lay persons.

Independence

54. The Law on Advocate Activity prohibits improper interference or influence by the State in the freedom to practice law. In this regard, the Special Rapporteur received information about some isolated incidents of intimidation, such as threatening calls and visits from tax officials. He was also informed of so-called "pocket advocates" who depend on investigators to take on cases. As mentioned above, these advocates can be influenced to carry out their duties in a manner which does not provide the client with adequate legal support.

Legal education and qualifications

55. It is necessary to have a law degree to obtain a licence to practice as an advocate. The quality of law degrees varies and has suffered due to the proliferation of law faculties and the absence of an approved national curriculum. There are also reports of corruption in relation to the admission process, a factor which may be attributed to the low level of academic salaries. There is currently an initiative to begin consolidating law schools and to introduce national standards for legal education.

Admission to the bar

56. Candidates must pass an oral examination before a Qualification Commission appointed by the Ministry of Justice. The Qualification Commission is made up of nine members of which only one is an advocate. There are no established guidelines for the grading of the examinations. Furthermore, candidates with five years' professional legal experience with a relevant governmental body, including former law enforcement officers and prosecutors, do not have to take this examination. These persons are commonly called "black lawyers". The number of candidates admitted to the profession in this manner is thought to be a contributory factor to the proliferation of so-called "pocket lawyers". The draft Law on Advocate Activity proposes to introduce a written examination and qualification boards composed primarily of advocates.

Obtaining a licence

57. In order to practice as an advocate, it is necessary to obtain a licence from the Ministry of Justice. There is no role for the professional associations of lawyers in the current licensing process. As a result, it seems that the Ministry of Justice is essentially able to determine the composition of the bar, which can undermine its independence. The proposals contained in the draft Law on Advocate Activity minimize the role of the State by vesting licensing authority with qualification boards composed mainly of advocates and other legal professionals, with limited State representation.

Professional associations

58. There are a number of professional associations and most lawyers belong to at least one of these, although membership is not mandatory. The Law on Public Organizations provides that public associations must be self-governing and free from interference by State authorities.

In reality however, the fact that there are a number of competing associations may be limiting the ability of the profession to play a greater role in regulating and promoting the interests and independence of the profession. The provisions in the draft law would create a single association with mandatory membership.

Professional ethics and disciplinary proceedings

59. There is no unified code of professional ethics for advocates; but a number of different sources of ethics including provisions in the Criminal Procedure Code and the Law on Advocate Activity. It is currently the Ministry of Justice, and not the profession itself, which regulates disciplinary proceedings. In this regard, the Qualification Commission has authority to hear complaints against advocates and impose penalties, including the withdrawal of an advocate's licence. The draft Law on Advocate Activity proposes to transfer this role to a commission composed of members of a Chamber of Advocates.

J. Promotion of women and ethnic minorities in the legal profession

60. The Constitution prohibits discrimination against all persons on the basis of origin, gender, race, nationality, language, creed, political and religious convictions (art. 15, para. 3). The statistics in this section are based on data provided by the Ministry of Justice to ABA/CEELI in 2003.

Women

61. One third of all judges in Kyrgyzstan are women, but most of them are assigned to civil cases. Four hundred and forty-four of the 1,192 advocates are women.

Ethnic minorities

62. The population of Kyrgyzstan is 66.9 per cent Kyrgyz, 14.1 per cent Uzbek, 10.7 per cent Russian, 1.1 per cent Dungan and 1 per cent Uighur. Other ethnic groups, including Tatars and Germans, together make up 6.2 per cent of the population. Over 91 per cent of the judiciary are ethnic Kyrgyz, as are 72.4 per cent of lawyers.

K. Working conditions of the judiciary

Human and material resources

63. In general, there is an adequate number of support staff at each level of the court system, and most judges have private offices and access to telephones and fax machines. However, there is a serious lack of adequate computer facilities and stenographic equipment.

Courtrooms

64. There is a notable lack of courtrooms in Kyrgyzstan and many of the existing courtrooms are in need of renovation. As a result, civil trials are often held in judges' private offices instead of courtrooms, a practice which has a negative impact on the publicity of trials.

Security

65. The Constitutional Law on the Status of Judges provides that the State is responsible for ensuring the protection of judges. However, security in the lower courts is limited, with a lack of guards and metal detectors. The Special Rapporteur received information about a number of assaults on court personnel in court buildings.

Availability of legislation

66. The Department of Courts sends a hard copy of each new piece of legislation to the court chairs at each level of the court system. There is also a commercially available legislative database, which includes current and new pieces of legislation. However, the vast majority of judges do not have access to this database.

Method of assignment of cases

67. The assignment of cases continues to be carried out by the chair of the court, reportedly taking into account the caseload of individual judges.

L. Transparency and accountability

Case filing and tracking

68. A uniform set of court forms to facilitate court filings has not been introduced, although some courts have posted examples of filings to assist litigants. The courts currently use a manual method of tracking the progress of cases.

Availability of judgements

69. The judgements of the Constitutional Court and Supreme Court are published in legal journals, primarily in Russian. The judgements of the Constitutional Court are also disseminated to the lower courts, whereas those rendered by the Supreme Court are only sent to judges who purchase them from their private funds. The judgements of the lower courts are not published at all and are only accessible upon request, at the discretion of the chair of the court.

Availability of trial records

70. The courts do not produce trial records as such, although court clerks make handwritten notes of proceedings. The parties to the case have an opportunity to review the notes and comment on them, although they are not required to sign or attest them. The manual method of recording hearings results in a number of inaccuracies, which can be particularly problematic for the appeal process. The chair of each court decides who may have access to the court records. The notes are not published and are only accessible upon request, at the discretion of the chair of the court.

Public and media access to judicial proceedings

71. The Constitution provides that judicial proceedings should be held in open court except in a limited number of circumstances, as provided for by law (art. 85). In practice however, the publicity of trials is not always guaranteed. This is partly due to the lack of courtrooms, and that many civil cases are therefore heard in the judge's office. Generally, however, the presence of observers and of the media seems to be left to the discretion of each judge.

M. The courts and political opposition

72. The Special Rapporteur is concerned that the judiciary continues to be influenced by the executive in cases of political importance. In particular, he received reports that a system of so-called "telephone justice" still occurs in such cases.

N. Juvenile justice

73. There is no separate system of juvenile justice. According to article 218, paragraph 3, of the Criminal Procedural Code, the right to independent legal counsel cannot be waived in the case of a suspect who is a minor. Juveniles are detained in pretrial detention for long periods and often receive harsh sentences. There is also no system of alternative penalties for juveniles, who can be kept in the same detention facilities together with adults. There is also concern about the lack of vocational training and rehabilitation programmes for imprisoned juveniles. Administrative proceedings related to minors are a further important problem. Commissions on minors' affairs set up within the local administration serve as administrative bodies to consider cases related to minors, except those dealt with by courts. These commissions have the authority to place minors aged between 11 and 14 in so-called "special schools for difficult children".

II. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

74. Kyrgyzstan is going through an important period of political transition. The ousting of ex-President Akayev has provided the country with a new opportunity to define its future on more solid democratic ground. At the same time, the changes following the events in March 2005 have been made at a rapid pace, partly even in a precipitated manner.

75. While welcoming reforms related to the administration of the justice sector, the Special Rapporteur notes with concern the continuing lack of trust of the population in the judicial system. The inability of the judiciary to fulfil its role of effectively protecting the rights of citizens has become most apparent following the March 2005 events.

76. In sum, the following issues should be addressed by the ongoing reform endeavours. The procuracy plays a particularly dominant role, including a supervisory role, in the administration of justice and exerts a disproportionate amount of influence over the pretrial and trial stages of judicial proceedings. Furthermore, higher-level prosecutors have the exclusive competence to instigate a supervisory review once a case has been closed. The procedures related to the appointment, length of tenure, reappointment and dismissal of judges prevent the

judiciary from operating in a fully independent manner. The bar has the potential to play a fundamental role in safeguarding human rights, yet it is weakened by the failure to implement the principle of equality of arms and continuing executive control over admissions and regulatory procedures. In addition, corruption continues to be widespread among the judiciary.

77. The Special Rapporteur considers that to have a positive impact the important legislative process under way should be complemented by the political will to fully and effectively implement legislation relevant to the independence of judges and lawyers, once it has been adopted. With this in mind, the Special Rapporteur presents a number of recommendations with the hope that they will meet and support the aspirations of all those who strive to achieve a system in which independent judges and lawyers can fulfil their fundamental role of protecting and safeguarding human rights and, as a result, restore people's confidence in the fairness and predictability of the judiciary.

B. Recommendations

78. **The Special Rapporteur welcomes the current process of constitutional and legislative reform, which he considers an important opportunity to enhance the country's adhesion to democratic principles and good governance. He calls upon the new leadership to firmly pursue and consolidate the ongoing reform process and to make sure that it is done in an inclusive manner, allowing for broad and adequate consultation.**

79. **While the first draft of the constitutional amendments proposed some improvements which would enhance the independence of the judiciary, the second draft has virtually removed these positive proposals. The Special Rapporteur therefore hopes that these negative developments will be seriously reconsidered and corrected.**

80. **Indeed, one of the major aims of the constitutional reform process under way should be to address the persistent lack of trust of the population in the judicial system. To that effect, a deep judicial reform process should be at the heart of the ongoing constitutional reform process, itself complemented by the current consultation on a number of important draft laws, including a draft Criminal Code, a draft Criminal Procedure Code and a draft Law on Advocate Activity.**

81. **The Special Rapporteur hopes that full advantage will be taken of this welcome process, in order to provide for a legal framework better equipped to ensure the full independence of judges and lawyers and enhanced respect for international human rights principles.**

82. **In this regard, the Special Rapporteur makes the following recommendations:**

- **The Constitutional Court should in no way be downgraded to a chamber of the Supreme Court. Furthermore, the right of individuals to bring complaints on the constitutionality of official acts should be reintroduced;**

- **The supervisory power of the prosecutor should be repealed. The power to issue warrants for arrest, detention, search and seizure should be transferred from the procuracy to the judiciary as a matter of priority and not be postponed to 2010, as envisaged by the draft constitutional amendments;**

- **The Special Rapporteur welcomes the current moratorium on executions and calls for the death penalty to be abolished. In the meantime, he calls on the Government to ensure that it extends the current moratorium on executions. He further calls on it to declare an immediate moratorium on the passing of death sentences and to publish information on the number and identity of persons concerned by the moratorium;**

- **The judiciary should be accorded greater control over the budgetary funds allocated to the court system. The Special Rapporteur notes that the Supreme Court and the Constitutional Court already enjoy budgetary autonomy but would welcome further autonomy for the lower courts. At the same time, a proper independent auditing of the judiciary should be guaranteed.**

83. **The Special Rapporteur is concerned that the conduct of judicial proceedings does not sufficiently conform to the principle of equality of arms, and that the prosecutor currently exerts excessive control over the proceedings at both the pretrial and trial stages. Furthermore, higher-level prosecutors can bring special appeals even after a final judgement has been rendered. It is vital that steps be taken, in law and in practice, to reduce the dominant role of the prosecutor in judicial proceedings in order to ensure a fairer balance between the respective roles of the prosecutor and the defence lawyer. In this regard, the Special Rapporteur makes the following recommendations:**

- **The constitutional guarantee on access to a lawyer as from the moment of arrest should be reflected in the Criminal Procedural Code and implemented in a consistent and effective manner. The requirement that a lawyer should obtain permission from the investigator before gaining access to his or her client should be repealed;**

- **The system for legal aid should be drastically improved to ensure that all persons who are accused of a criminal offence have access to an independent legal counsel and that advocates receive adequate remuneration for legal aid;**

- **The judiciary must ensure that evidence that may have been obtained by torture is not relied upon as evidence. As part of the legislative reform process, the law should henceforth provide a definition of inadmissible evidence and detailed rules on the exclusion of inadmissible evidence at the pretrial and trial stages of criminal proceedings;**

- **It is imperative to ensure prompt, impartial and full investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment, as well as to prosecute, where appropriate, the alleged perpetrators;**

- **The use of metal cages in courtrooms should be discontinued, particularly in the case of persons accused of non-violent offences, as this practice seriously questions the principle of the presumption of innocence;**

- **The introduction of a summary procedure, as foreseen by the draft Criminal Procedure Code, may encourage the use of torture or ill-treatment to obtain confessions. Any such procedure must be complemented by sufficient procedural safeguards;**

- **The current procedure allowing judges to remit cases for further investigation, as in cases where the prosecutor has failed to provide sufficient evidence to convict, should be repealed. In the event that the prosecution fails to present sufficient evidence to convict, the defendant should be acquitted;**

- **Steps should be taken, in the context of the reform of the Criminal Code, to introduce alternatives to the deprivation of liberty and to reduce the upper limit of prison sentences;**

- **In the interests of legal certainty and the right to a trial within a reasonable time, the procedure for appellate review should be amended to ensure that the higher courts render final decisions, as opposed to returning cases to the lower courts for further review;**

- **The right of prosecutors to bring special appeals, known as supervisory reviews, even after cases have been closed, should be repealed. This practice has a negative impact on the equality of arms and undermines the principle of legal certainty. The reopening of closed cases should be made subject to an exhaustive list of preconditions, such as the existence of new evidence on behalf of the person convicted;**

- **A separate system of juvenile justice should be established as a priority. Juveniles should be tried under a specific juvenile justice system, in compliance with the relevant provisions of the Convention on the Rights of the Child, as well as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).**

84. **The Special Rapporteur is of the opinion that the judiciary must be significantly strengthened in order to enable it to act as a fully independent institution capable of protecting fundamental human rights and freedoms. In this regard, the Special Rapporteur makes the following recommendations, which should be seen in the context of the ongoing process of constitutional reform:**

- **Judicial candidates should be required to have a high level of relevant professional experience, and candidates for judicial positions in the higher courts should be required to have a prior solid judicial experience;**

- **The selection procedure should be carried out in an objective and transparent manner. In this regard, the Special Rapporteur is concerned about the position of the National Judicial Council under the Office of the President. An independent body, preferably composed of judges only, should administer the selection procedure;**

- **The Special Rapporteur is concerned at the short periods of judicial tenure, which in his view seriously undermine judicial independence. The constitutional reform process should not further decrease judicial tenure, and full consideration should be given to the progressive introduction of life tenure for judges;**

- **The reappointment procedure should be carried out on an objective basis, in a manner that is not linked to the judicial judgements made by the candidate during his or her previous period of tenure. In particular, complaints about specific judicial decisions made by the prosecutor should in no way be taken into account in the reappointment procedure;**

- **The Constitution should clearly list possible grounds for the removal of judges at all levels before the end of their term, along with a clear and transparent procedure to be followed in this regard. Furthermore, serious steps should be taken to protect judges from external pressure to resign before the end of their period of tenure;**

- **With a view to preventing corruption, salary levels of the judiciary must be progressively increased, and salaries must be paid in a timely manner;**

- **The current provisions on judicial ethics should be rationalized into a clear and accessible code that it is widely disseminated within the judiciary. Training on judicial ethics should be included in the training provided to incoming judges and any professional development course provided to sitting judges;**

- **Disciplinary procedures should be administered by an institution which is independent from the executive branch.**

85. **The Special Rapporteur considers that a series of steps should be taken to strengthen the bar, ensuring that it can play its fundamental role in protecting the human rights of clients. In this regard, he makes the following recommendations:**

- **Steps should be taken to ensure the quality and consistency of the legal education provided by universities. To this end, in close cooperation with all interested parties, a national curriculum should be developed, integrating practical legal skills, professional ethics and training on international human rights norms;**

- **A mandatory entrance examination for all candidates who wish to be admitted to the bar should be introduced. In particular, the current waiver that is applied to candidates with five years' experience with a relevant government body should be repealed. The examination should be in a written format and be administered and assessed by a body made up of members of the profession;**

- **A body comprised primarily of members of the profession should be responsible for issuing licences, on an objective basis, to new members of the profession. The current role of the Ministry of Justice accords the Government too much control over the composition of the bar;**

- **Serious consideration should be given to the creation of a single bar association to represent the profession as a whole. The creation of a unified association may assist the profession in playing a greater self-regulatory role and to more effectively promote the interests and independence of the profession;**

- **A unified code of professional ethics for advocates should be introduced and efforts should be made to train and increase awareness and understanding of professional ethics. The profession should be responsible for regulating disciplinary procedures.**

86. **The Special Rapporteur considers that it is important to strengthen the court system and other relevant institutions and to provide them with the appropriate material resources to enable them to function in an effective and transparent manner. In this regard, the Special Rapporteur recommends the following:**

- **The mandate of the Judicial Training Centre should be extended to include training for incoming judges, and serious consideration should be given to making participation in such courses mandatory. The Judicial Training Centre should be sufficiently funded to ensure that it can effectively fulfil its important role;**

- **The Office of the Ombudsman should be strengthened, in line with the Paris Principles. In particular, the Special Rapporteur considers that training programmes for staff members regarding the processing of individual complaints would be appropriate;**

- **The Special Rapporteur welcomes the ongoing discussion regarding the introduction of a jury system and lay assessors. He encourages legislators to carry out broad consultations to identify the most appropriate mechanism for Kyrgyzstan, keeping in mind the need to ensure the independence of any lay assessors;**

- **The judicial system should be equipped with sufficient computers and access to legislative databases to enable all judges to have unimpeded access to Kyrgyz laws and regulations. The judiciary and relevant court personnel should receive training in the use of such databases;**

- **Steps should be taken to increase the security of judges and court personnel in the courtroom. This could include, for example, providing guards for all levels of the court system. The court buildings should also be maintained in an appropriate state of repair;**

- **Supreme Court judgements, as is currently the case with Constitutional Court judgements, should be disseminated to the lower courts free of charge. A system should be instituted to ensure that the courts maintain accurate transcripts of all court hearings. Judgements and transcripts should be made public on a consistent and coherent basis, in accordance with the law;**

- **In order to increase the transparency of judicial proceedings, steps should be taken to ensure that there are sufficient courtrooms available so that all civil and criminal cases can be heard in courtrooms, as opposed to private offices. It is important to ensure that the constitutional and legislative guarantees on the publicity of court proceedings are uniformly implemented.**

87. **The Special Rapporteur considers that until a better balance is achieved it may be relevant to introduce affirmative action measures, with a view to enhancing the participation of women and ethnic minorities in the judiciary at all levels.**

88. **The Special Rapporteur is aware of the fact that appropriate means need to be made available for the implementation of his recommendations. In this context, he calls upon the international community to support Kyrgyzstan in the reform efforts. In this respect, he encourages the Government to proactively come forward with proposals to international donors.**

89. **Finally, the Special Rapporteur strongly supports the United Nations Country Team in Kyrgyzstan in its endeavours to establish the post of a human rights adviser.**
