

Appendix # 3

ANALYTIC REPORT: INTRODUCTION OF INSTITUTE OF “HABEAS CORPUS” OR MOVING TO COURTS THE POWER OF SANCTIONING PRE-TRIAL ARREST IN UZBEKISTAN STARTING FROM JANUARY 1ST 2008

Author – Sukhrobjon Ismoilov, Chairman, “Veritas” Youth Human Rights Movement, Tashkent, Uzbekistan

Brief overview:

Starting from January 1st 2008 Uzbekistan introduced a new institute of criminal justice system “*habeas corpus*”¹, i.e. from this moment the power of Public Procurator to sanction the application of a preventive measure in the form of pre-trial arrest has been transferred to courts on criminal cases. The question of introduction of institute of “*habeas corpus*” in Uzbekistan has long been on the agenda of many well-known international organizations.² The similar calls have also been regularly made by the Uzbek human rights activists.

The main purpose of the present document is studying how the new institute of “*habeas corpus*” is entered into practice in Uzbekistan and contributing to the improvement of the given practice. In present report Veritas studies the substantive provisions of the national legislation on transferring the power of sanctioning of pre-trial arrest to the courts, researches the practice which has been carried out from January 1st till January 30th 2008, studies the basic problems with introduction of the institute of “*habeas corpus*” in Uzbekistan and presents recommendations on solution of the given issues.

The analysis of new system of sanctioning the pre-trial arrest in Uzbekistan only for the first month after it has entered into force shows that situation with the rights of persons against whom a pre-trial arrest as a form of a preventive measure had been applied, has not changed in any way. Absolute technical unavailability of the courts on criminal cases to perform their new task with sanctioning pre-trial arrest was discovered, the influence of the Office of Public Procurator on the decision making process on sanctioning pre-trial arrest remains high till now. The introduced system of sanctioning pre-trial arrest cannot serve as a guarantee of protection of the detainees from possible physical and mental violence from the side of operative employees and investigators of law enforcement agencies. Moreover, the new system of sanctioning of pre-trial arrest has broken the international standard on minimal term of detention of the person without the official sanction and presentation of charges. Now to the former seventy two hours of such allowed unsanctioned minimal term of detention forty eight more hours of unsanctioned detention can be added if investigator or the Public Procurator is able to present necessary and sufficient justifications of such additional unsanctioned detention to the court.³

To such conclusions Veritas has come through carrying out anonymous surveys among 9 officers of the Office of Public Procurator (2 district public procurators and 7 investigators of the Office of Public Procurator), 6 judges of district courts on criminal cases and 4 police investigators; through studying materials of 12 criminal cases on the question of sanctioning of pre-trial arrest in 5 regions of Uzbekistan; through detailed analysis of Law of the Republic of Uzbekistan “On changes and

¹ “Habeas corpus” – Latin, a court decision authorizing pre-trial arrest of the detainee for the periods of pre-trial investigation and trial.

² The UN Special Rapporteur on the issue of torture, the UN Committee against Torture, the UN Committee on Human Rights, the OSCE, international nongovernmental organizations American Bar Association and Human Rights Watch have regularly called the Uzbek Government to move the power of sanctioning pre-trial arrest from the Public Procurator’s office to courts.

³ Part 1 of article 226 of the CPC of the Republic of Uzbekistan in a new wording.

additions to some legislative acts of the Republic of Uzbekistan in connection with transferring to the courts the power of sanctioning pre-trial arrest“ (further referred to as “the Law”) and Criminal- Procedural Code (further referred to as the CPC); through studying experience of foreign countries with introduction of the institute of “habeas corpus”.

Section “Analysis of changes in theory and practice” of the given report deals with main changes and amendments that took place in the legislation and practice after transferring the power of sanctioning of pre-trial arrest from the Office of Public Procurator to the courts. Section “Main part” of the report outlines main problems that the new system of sanctioning pre-trial arrest faced and recommendations for solving those problems.

Analysis of changes in theory and practice:

Pre-trial arrest as a preventive measure in criminal justice system

Definition of pre-trial arrest:

Pre-trial arrest (arrest or holding in custody) is a compulsory measure of criminally procedural system (a preventive measure) consisting of preliminary and temporarily restriction of freedom of the accused (the arrested suspect) which is applied by law enforcement bodies and court under the order stipulated by criminal-procedural laws with a view to implement the tasks of the criminal legal proceedings and on the basis of criminal-legal grounds and conditions.

Article 25 of the Constitution of the Republic of Uzbekistan says:

“Everyone has the right to freedom and inviolability of a person. Nobody can be subjected to arrest or holding in custody other than on the basis of the law”.

Part 2 article 18 (Protection of the rights and freedom of citizens) of the CPC of the Republic of Uzbekistan in a new wording stipulates:

“Nobody can be subjected to arrest or holding in custody other than on the basis of the court sentence”.

Part 1 of article 29 (Power of court) of the CPC of the Republic of Uzbekistan in a new wording says:

“To power of court includes: consideration of petitions, complaints and motion of protest concerning the application of a preventive measure in the form of pre-trial arrest by holding in custody with obligatory informing of the court which passed the decision on application of preventive measure; ...”

Part 1 of article 36 (Power of investigator) of the CPC of the Republic of Uzbekistan in a new wording:

“...Investigator has the right: ... to make a decision on involving a person in criminal case as the accused and on application of preventive measures against him, except for application of pre-trial arrest, ...to enter a petition for application of a preventive measure in the form of pre-trial arrest, ...”

As in Uzbekistan there are three law-enforcement bodies with power of pre-trial investigation, in this report the term "investigator" stands for investigators of the Office of Public Procurator, the Ministry of Internal Affairs (further referred to as the MIA) and the National Security Service (further referred to as the NSS).

The new Law now provides the following order of the application of pre-trial arrest as a preventive measure:⁴

“... At the presence of the circumstances stipulated in the law and application of pre-trial arrest as a preventive measure during pre-trial investigation Public Procurator, investigator with the consent of the Public Procurator takes decision about filing a petition on application of pre-trial arrest as a preventive measure.

The decision on filing the petition on the application of pre-trial arrest as a preventive measure the bases which necessitated the pre-trial arrest of the detained suspect or accused and impossibility of the application of other preventive measures are stated. The necessary materials supporting the petition are enclosed with the decision.

Having checked the petition on the application of pre-trial arrest as a preventive measure the Public Procurator in case he approves it submits the decision on filing a petition and other supporting materials to the court. If the petition is raised concerning the detained suspect or accused the decision and supporting materials should be presented to the court not later than twelve hours prior to the expiration of the term of detention...”⁵.

In practice implementation of the above specified order of the application of pre-trial arrest as a preventive measure by all investigatory divisions of the Office of Public Procurator, the MIA and NSS looks as follows.

Investigator of any of the above mentioned three law enforcement bodies takes a decision on raising a petition on application of pre-trial arrest as a preventive measure. Such decision with supporting materials is represented to the Public Procurator for checking the validity of the petition on the application of pre-trial arrest as a preventive measure. Thus the detained suspect or accused against whom the petition on the application of pre-trial arrest raised is also under a police escort brought to the Office of Public Procurator. In case the Public Procurator approves the decision of the investigator, the Public Procurator submits the decision and corresponding materials to the district court on criminal cases. Thus the detained suspect or accused against whom the petition on the application of pre-trial arrest raised is also under a police escort brought to the court.

Thus, the work load for the Office of Public Procurator is increased because it has to perform part of the tasks of maintaining the institute of “habeas corpus” by checking the validity of the petition on the application of pre-trial arrest before this issue reaches the court. Veritas thinks that due to a new system of double check of the question of the application of pre-trial arrest (first checked by the Office of Public Procurator, and then by the court on criminal cases) visibility of effective functioning of the institute of “habeas corpus” in Uzbekistan is created. Though it actually remains only as visibility, strongly exhausts resources and energy of the Office of Public Procurator, vainly increases the paper work and bureaucracy.

The surveys conducted on this account among investigators of various law enforcement bodies in Uzbekistan have revealed an interesting tendency. As a result of increasing of the work load because of the new system of sanctioning pre-trial arrest many investigators tend to avoid application of pre-trial arrest as a preventive measure trying to replace this type of a preventive measure with other lighter preventive measure (for example, release on parole).

⁴ Law of the Republic of Uzbekistan “On changes and additions to some legislative acts of the Republic of Uzbekistan in connection with transferring to the courts the power of sanctioning pre-trial arrest“.

⁵ Parts 2, 3, 4 of article 243 of the CPC in a new wording.

The CPC and resolution of the Plenum of the Supreme Court of Uzbekistan provide an opportunity of presence and giving testimony by investigator, defender (lawyer or public defender) of the suspect or accused (or legal representative of the minor suspect, accused) during interrogation by the Public Procurator of the suspect or accused. This rule is also valid while checking by the Public Procurator and court on criminal cases the validity of the decision of investigator on raising a petition on the application of pre-trial arrest as a preventive measure.

Monitoring of Veritas shows that whereas inspectors and investigators often appear for providing testimonies during interrogation by the Public Procurator of the detained suspect or accused, the appearance of the defender or the legal representative of the minor suspect, accused is rarely provided.

To whom pre-trial arrest can be applied?

Part 1 of article 243 of the Republic of Uzbekistan of the CPC in a new wording:

“Pre-trial arrest as a preventive measure can be applied only on the detained suspect or accused“ (and also on the defendant and condemned – the RRG’s comment).

The first sentence of part 3 of article 226 (Terms of detention) of the CPC of the Republic of Uzbekistan in a new wording says: *“Under exceptional cases the court can apply pre-trial arrest on the suspect”*.

Part 1 of article 242 of the CPC of the Republic of Uzbekistan in a new wording:

“Pre-trial arrest as a preventive measure can be applied on cases on deliberate crimes for which the Criminal Code sets punishment in the form of imprisonment for the term more than three years, and on cases on crimes accomplished on imprudence for which the Criminal Code sets punishment in the form of imprisonment for the term more than five years”.

According to part 2 of article 242 of the CPC under exceptional cases at the presence of one of the following circumstances:

- The accused, the defendant has hidden away from investigation and trial;
- The person of the detained suspect is not established;
- The accused, the defendant breaks the previously applied preventive measure;
- The detained suspect or accused, the defendant has no constant residence place in the Republic of Uzbekistan;
- The crime is accomplished while serving punishment in the form of arrest or imprisonment,

pre-trial arrest can be applied on cases on deliberate crimes for which punishment in the form of imprisonment is set for the term not exceeding three years of imprisonment, and also on cases on crimes accomplished on imprudence for which punishment in the form of imprisonment is set for the term not exceeding five years of imprisonment.⁶

According to part 2 of article 240 of the Republic of Uzbekistan of the CPC in a new wording a preventive measure in the form of pre-trial arrest applied at the stage of pre-trial investigation can be annulled or changed by the Public Procurator, and also by investigator with the consent of the Public Procurator at absence of the bases for further holding of the person under pre-trial arrest with obligatory informing of the court which has passed the decision on the application of pre-trial arrest as a preventive measure. The annulment or change of a preventive measure in the form of pre-trial

⁶ Part 2 of article 242 of the CPC of the Republic of Uzbekistan.

arrest does not interfere with power of the Public Procurator or investigator to address the court with a petition on the application of pre-trial arrest concerning the same person.

Article 247 of the CPC of the Republic of Uzbekistan in a new wording provides order of prolongation of the term of holding a person in pre-trial custody under arrest. According to this article of the CPC, decision of the Public Prosecutor on raising petition for prolongation of the term of holding a person in custody is also examined by corresponding courts and corresponding decision is passed afterwards.

The terms of putting a person under custody according to parts 1, 2 and 3 of article 245 of the CPC of the Republic of Uzbekistan in a new wording:

- Primary pre-trial arrest term – for no more than 3 months, applied by court under the petition of district Public Procurators or the Public Procurators equal to them;
- Secondary term – up to 5 months, can be prolonged by court under the petition of the Public Procurator of the Republic of Karakalpakstan or the Public Procurator of the region, Tashkent city and the Public Procurators equal to them;
- Following prolongation – up to 7 months, can be prolonged by court under the petition of the Deputy General Public Procurator of the Republic of Uzbekistan;
- Following prolongation – up to 9 months, can be prolonged by court under the petition of the General Public Procurator of the Republic of Uzbekistan;
- Following prolongation – up to 1 year, can be prolonged by court under the petition of the General Public Procurator of the Republic of Uzbekistan in cases of investigation of affairs of special complexity concerning the persons accused of committing heavy and gravest crimes. The further prolongation of the pre-trial term is not allowed.

Main part and recommendations:

(1) Instituting position of special judges on supervision over pre-trial investigation

According to part 5 article 243 of the CPC of the Republic of Uzbekistan in a new wording, the petition for application of pre-trial arrest as a preventive measure is considered by an individual judge of the district court (or city court) on criminal cases, district, territorial military court in a place where the crime was committed or where the pre-trial investigation took place, and at absence of the judge of the specified courts or at presence of the circumstances excluding the judge's participation in the consideration of the given petition on the application of pre-trial arrest as a preventive measure - other corresponding court under the indication of the chairman of the Supreme Court of the Republic of Karakalpakstan on criminal cases, regional court on criminal cases, Tashkent city court on criminal cases, Military Court of the Republic of Uzbekistan.

Monitoring of Veritas and surveys conducted with the target groups have shown that in practice the basic principle of the institute of “habeas corpus” - the principle of decision of the question on application of pre-trial arrest by an independent judicial body is gravely roughly broken. Absence of a special judge, authorized to solve only question of the application of pre-trial arrest as a measure, sometimes in practice results causes the same judge who passed decision on the application of pre-trial arrest then hear the criminal case concerning the same person. Or often one of the judges decide to apply pre-trial arrest against the detained suspect or accused, and his other colleague-judge from the same court (district, city, etc.) then hears the criminal case against the same person. Obviously in such situation of the division of powers no judge will be interested in passing the verdict of “not guilty” on the defendant in order not to damage his personal or his colleague's professional career.

Some countries in the world have instituted position of a special judge who makes decisions on the issue of application of pre-trial arrest and supervises over observance of the rights and personal freedoms during pre-trial investigation. For instance:

- In Germany - a judge on pre-trial investigation;
- In France - a judge on human rights and pre-trial arrest;
- In Italy - a judge on pre-trial investigation.

Recommendations:

Instituting a position of a special judge on pre-trial investigation will allow:

- To exclude an opportunity of the prejudiced treatment of the judge against the defendant;
- To provide specialization of the judges on the question of sanctioning pre-trial arrest;
- To relieve the judges who hear main criminal cases from additional function;
- To provide the urgent order or deciding the issue of the application of pre-trial arrest against the detained suspect or accused. It is necessary to provide and include in the Law a position of a duty-judge on pre-trial investigation who will be on the duty even on weekends and holidays.

(2) Other preventive measures

The newly introduced system of “habeas corpus” in Uzbekistan provides the court only with the exclusive right of deciding the issue of application of pre-trial arrest as a preventive measure. Other preventive measures (chapter 28 of the CPC of the Republic of Uzbekistan), other compulsory measures during pre-trial investigation and trial (chapters 26-27 of the CPC of the Republic of Uzbekistan), and also other measures limiting in some ways the rights of the suspect (accused), except for court, can also be applied by investigator, pre-investigation inquirer and the Public Procurator (house arrest, a compulsory placement into a medical institution for conducting judicial-psychiatric examination, leaving on parol, a personal guarantee, guarantee of a public association or colleagues of the detained suspect or accused, searching and seizing different objects in personal premises, releasing on the security, interception of messages and telephone communication, placing the minor under supervision, a pledge on appropriate behavior, supervision of the commandment over behavior of military suspect or accused, discharge from an official position, etc.).

Recommendations:

It is recommended to give all powers of investigator, pre-investigation inquirer and the Public Procurator on authorization of preventive measures, other compulsory measures and the operative-search actions which restrict constitutional rights of person to a special judge on supervision of the rights and personal freedoms at the stage of pre-trial investigation.

(3) Procedures of sanctioning pre-trial arrest

Part 4 of article 243 of the CPC of the Republic of Uzbekistan in a new wording says:

“If the decision on raising a petition on application of pre-trial arrest against the detained suspect or accused such decision and other supporting material should be presented to the court not later than twelve hours before the expiration of the term of detention”.

Even superficial viewing of Article 226 of the CPC of the Republic of Uzbekistan in a new wording demonstrates that in the procedure of sanctioning of pre-trial arrest in a new wording there is a setback from the established minimum international standards. The CPC in a new wording makes it possible to increase the term of minimal detention of a detainee without informing him of official charges.

Article 226 of the CPC in an old wording said:

“Detention can not be longer than seventy two hours from the moment of bringing a detainee to police station or location of other law enforcement agency” – Thus the old wording of article 226 of the CPC had been much closer to the minimal international standard under the International Covenant on Civil and Political Rights (72 hours of detention without the sanction and official presentation of charges is allowed). Uzbekistan has recognized the ICCPR in 1995.

Part 1 of article 226 of the CPC in a new wording reads:

“Detention can not be longer than seventy two hours from the moment of bringing a detainee to police station or location of other law enforcement agency. Upon submitting necessary and sufficient justifications by investigator or the Public Procurator detention can be prolonged by the decision of the court to additional forty eight hours”.

Part 10 of article 243 of the CPC in a new wording also says:

“Having considered the petition on application of pre-trial arrest against the detained suspect or accused a judge makes one of the following decisions:

- 1) Applying pre-trial arrest as a preventive measure;*
- 2) Refusing to apply pre-trial arrest as a preventive measure;*
- 3) Prolong the term of detention to no more than forty eight hours for allowing the parties more time to collect additional proofs of validity or groundlessness of application of pre-trial arrest as a preventive measure”..*

Thus, articles 226 and 243 of the CPC in a new wording authorize to detain the person without official sanction and presentation of charges for up to 120 hours.

Recommendations:

- The given term of detention is unfairly long (article 9 (3) of the ICCPR);
- In Italy this term makes 48 hours from the moment of detention, in Germany 48 hours from the moment of detention, and in France 24 hours from the moment of detention;
- It is necessary to make an amendment to the Law making it obligatory that a detained person should be immediately delivered to the judge not later than during 48 hours from the moment of actual detention.

(4) Materials of criminal case

Part 6 of article 243 of the CPC in a new wording provides that the petition on application of pre-trial arrest as a preventive measure is examined within twelve hours from the moment of the receipt of materials by the court, but not later than a deadline of detention. It means that the judge has no more than twelve hours of preliminary time for acquainting himself with the materials of the given case.

Recommendations:

It is necessary to ensure that the judge is not acquainted with the materials of the case prior to the beginning of the hearing and all materials are presented exclusively orally by the Public Prosecutor to the court at the presence of the defense party (principles of competitiveness and oral presentation during the criminal proceedings).

(5) Closeness of judicial hearing

Part 6 of article 243 of the CPC in a new wording stipulates hearing of the petition on application of pre-trial arrest in the closed session of the court. Part 4 of article 247 of the CPC (Order of prolongation of pre-trial arrest in the custody) also stipulates hearing of the petition on prolongation of pre-trial arrest term in the closed judicial session.

Recommendations:

It is necessary to exclude legal regulations on closeness of judicial hearings. Open hearings will allow the general public to carry out public control over the validity of the trial. Hearings concerning the minor, and also criminal cases concerning sexual freedom of a person opened on the basis of personal complaints of the alleged victim.

(6) Appealing the decision of the judge on sanctioning pre-trial arrest

Part 2 of article 241 of the CPC in a new wording reads:

“The court’s decision on application of pre-trial arrest as a preventive measure at the stage of pre-trial investigation or on prolongation of the term of pre-trial arrest can be appealed against, protested in the appeal order within seventy two hours from the time of its passage. The complaint and protest are submitted through the court which has passed the definition. The court to which the complaint and protest are submitted has to send the received complaint or protest together with supporting materials to the court of appeals within twenty four hours. The court of appeals should examine the complaint or protest together with supporting materials not later than seventy two hours from the moment of their receipt”.

The CPC doesn’t mention that the detained suspect (accused) should participate during examination of the issue at the court of appeals. Part 3 of article 241 of the CPC in a new wording stipulates that submission of the complaint or protest does not stop execution of the decision on application of pre-trial arrest as a preventive measure.

Recommendations:

The right of the suspect (accused) to legal defense is broken. It is necessary to stipulate the requirement of compulsory participation of the suspect (accused) in the trial at the court of appeals.

(7) Release on the security as an alternative preventive measure to pre-trial arrest

The CPC of the Republic of Uzbekistan stipulates investigator, pre-investigation inquirer, the Public Prosecutor and courts to authorize release on the security of the detained suspect (accused) as a preventive measure.⁷ The positive moment in the CPC is that while applying release on the security not only money could be accepted as security (article 249 of the CPC) but also other types of security can also be accepted (for example real estate).

Recommendations:

⁷ Part 2 of article 249 of the CPC of the Republic of Uzbekistan.

It is necessary to allow courts to determine the sum of the release on the security and apply this measure as a preventive measure.

(8) The right to legal defense of the detained suspected and accused

Grave infringement of the right to legal defense of the detained suspect and accused is widespread. This right is broken on two levels. First, the CPC does not stipulate the compulsory participation of the defender (defense lawyer) while examining the issue of application of pre-trial arrest as a preventive measure. According to part 7 of article 243 of the CPC in a new wording the petition on application of pre-trial arrest as a preventive measure is examined with participation of the Public Procurator, defender if the latest is participating in the criminal case, and the detained suspect or accused. Second, the results of studying the short-time practice after the Law entered into force since January 2008 shows that almost in 80 % of hearings concerning sanctioning pre-trial arrest the detained suspect or accused had no defender at all (i.e. the defender of own choice has not been brought to the case), or the defender of own choice has not had enough time to join the case as family members of the detained suspect or accused were not appropriately informed about their detention by the law enforcement bodies and accordingly had not time to hire a defense lawyer on time. In 92 % of hearings concerning sanctioning of pre-trial arrest when the CPC stipulated obligatory provision of defense the detained suspect or accused were pressured to agree to be represented by the defense lawyers working in legal offices located in the buildings of the court-rooms.

(9) Guarantee from torture and other forms of cruel, inhuman and degrading treatment and punishment for the detained suspect and accused

Part 2 of article (19) of the Resolution # 17 of the Plenum of the Supreme Court of the Republic of Uzbekistan from December 19th 2003 “On Practical Application by Courts of Laws ensuring the suspects and defendants the right to defense” reads:

“Investigator, pre-investigation inquirer, the Public Procurator, judge are obliged to always ask persons brought from custody how they were treated during the pre-investigation inquiry or investigation, and also about conditions in the custody. Every case of reported torture or other illegal methods of pre-investigation inquiry or pre-trial investigation should be carefully examined, including conducting forensic examination, and by the results of such examination relevant remedies including legal remedies and bringing the perpetrators to criminal charge should be provided”.

In 86 % of the cases studied by us the Public Procurator and judge who examined petitions of the investigators on application of pre-trial arrest as a preventive measure did not fulfill the above mentioned requirement of the Resolution of the Plenum of the Supreme Court and violated it.

Recommendations:

Providing guaranteed protection from torture and other forms of cruel, inhuman and degrading treatment and punishment for the detained suspect and accused is one of the overall objectives of the institute of “habeas corpus”. While examining the decision of the investigator on petition on application of pre-trial arrest as a preventive measure and petition on prolonging the term of pre-trial arrest the Public Procurator and judge should fulfill the requirements of article (19) of the Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan.

Tashkent, Uzbekistan