UNIVERSITY OF BIRMINGHAM

JUDICIAL REFORM IN MEMBERS OF THE COMMONWEALTH OF INDEPENDENT STATES: JUDICIAL INDEPENDENCE AND IMPARTIALITY STANDARDS WITH REFERENCE TO THE EXHAUSTION OF DOMESTIC REMEDIES RULE AND INCIDENCE OF TORTURE

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Abstract

Analysis of the success of judicial reforms in ex-Soviet countries is an area that has received comparatively less academic attention than in other countries where judicial reform efforts were undertaken around the same time. In addition, the far-reaching impact of judicial independence and judicial impartiality standards on the protection of other human rights standards and on complaints to international human rights bodies, is an area that has been acknowledged but not adequately explored. This thesis attempts to address these gaps by examining the history and theories of judicial independence and impartiality, and analysing why these standards are routinely violated by governments. This thesis then seeks to understand the impact of *de facto* judicial independence and impartiality standards by examining the effects of those standards have on the content of applications to circumvent domestic remedies and on the incidence of torture. It finally seeks to scrutinize the reasons behind the relative success of judicial reform efforts in some countries, against the comparative failures of other reform efforts in the various countries involved in this study, whilst identifying themes of judicial independence and impartiality across the region.

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Contents

Introduction

'All animals are equal, but some animals are more equal than others'.[1]

In the last few years, international problems with judicial independence and impartiality standards have crept into the public consciousness. In the United Kingdom, the Secret Barrister's book, which has become a bestseller,[2] has highlighted a significant difference in accusatory bias between judges and magistrates.[3] In Poland, international attention has been captured by various judicial reforms which have granted politicians significantly increased power over the judicial branch. The new laws could force the resignation of 40% of the sitting judges in the Polish Supreme Court, and require Presidential assent for others to remain.[4] Concerns about the impact of these reforms have resulted in international requests that Warsaw suspend or retract the reforms, and the possibility of sanctions from the European Commission.[5] Finally, in the weeks before this thesis was submitted, concerns about the partisan bias demonstrated by Brett Kavanaugh during his Senate Judiciary Committee hearing (alongside concerns about numerous allegations of sexual assaults made against him) have raised significant concerns about his independence and impartiality as a new member of the US Supreme Court.[6] This thesis explores very similar issues, but in a different geographical location, where there has been relatively little press coverage or academic analysis of problems with judicial independence and impartiality standards.

This thesis endeavours to understand the extent of judicial reforms in member states of Commonwealth of Independent States, to investigate the complexities of judicial independence and impartiality, to compare the experiences of the countries in the study, and

[1] George Orwell *Animal Farm: A Fairy Story* (Penguin Modern Classics 2000) 114.
[2] Hannah Summers 'All MPs to be sent Secret Barrister book after campaign' *The Guardian* (London, 1 April 2018) <https://www.theguardian.com/law/2018/apr/01/all-mps-to-be-sent-secret-barrister-book-after-campaign> accessed 22 September 2018.
[3] In 2016/17 cases before the Crown Court the conviction rate was around 52.2%, whereas before the magistrates court the conviction rate is 64%, amounting to a discrepancy of around 12%, *see* The Secret Barrister *The Secret Barrister: Stories of the Law and How It's Broken* (Macmillian 2018) 64.
[4] Daniel Boffey 'EU hearing puts Poland in dock over judicial changes' *The Guardian* (London 26 June 2018) <https://www.theguardian.com/world/2018/jun/26/eu-hearing-puts-poland-in-dock-over-judicial-changes> accessed 22 September 2018.
[5] BBC 'Poland Judiciary Reforms: EU takes disciplinary measures' (*BBC* 20 December 2017) <https://www.bbc.co.uk/news/world-europe-42420150> accessed 22 September 2018.
[6] The Independent 'Brett Kavanaugh's career has become a symbol of America's growing lack of interest in social progress' *The Independent* (London 7 October 2018) <https://www.independent.co.uk/voices/editorials/brett-kavanaugh-christine-blasey-ford-supreme-court-confirmation-sexual-assault-allegations-donald-a8573016.html> accessed 10 October 2018.

to understand the far-reaching effects of judicial independence and impartiality standards in practice. This study does so by examining the far-reaching effects of judicial independence and impartiality standards on the content of submissions to circumvent domestic remedies and the effect on the incidence of torture in the respective State.

The fall of various military dictatorships in South America between the 1980s and early 2000s sparked significant international interest in judicial reforms in those countries.[7] Concerns were raised about a number of issues within the judicial systems of South American States. Those concerns included allegations of endemic judicial corruption throughout the continent and significant governmental interference under previous military regimes.[8] At around the same time countries in Eastern Europe experienced analogous opportunities for judicial reform. The fall of the Soviet Union, and the end of the Cold War, resulted in fifteen newly independent States;[9] however the opportunity for judicial reforms in those countries attracted far less international interest. This thesis attempts to fill some of those research gaps and examine the experiences of judicial reforms in a number of former Soviet spaces.

The thesis primarily seeks to explore judicial reforms efforts to improve judicial independence and impartiality as standards integral to the proper functioning of democratic governance, and indispensable in the protection of human rights. It will do this by acknowledging and analysing the complexity of judicial independence and impartiality, as

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[7] Edgardo Buscaglia and Maria Dakolias *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador* (World Bank 1996); Elin Skaar 'Judicial independence and human rights policies in Argentina and Chile' (CMI Working Paper 2001); Edgardo Buscaglia 'Corruption and judicial reform in Latin America' (1996) 17(4) Policy Studies 273-285; Peter DeShazo and Juan Enrique Vargas *Judicial Reform in Latin America: An Assessment* (CSIS 2006); Keith S Rosenn 'The Protection of Judicial Independence in Latin America' (1987) 19(1) The University of Miami Inter-American Law Review 1-35; Rebecca Bill Chavez 'The Appointment and Removal Process for Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence' (2007) 49(2) Latin America Politics and Society 33-58; William Ratliff and Edgardo Buscaglia 'Judicial Reform: The Neglected Priority in Latin America' (1997) 550 The Annals of the American Academy of Political and Social Science 59-71; Felipe Sáez Garcia 'The Nature of Judicial Reform in Latin America and Some Strategic Considerations' (1998) 13(5) American University International Law Review 1267-1325; Linn Hammergen 'Twenty-Five Years of Latin America Judicial Reforms: Achievements, Disappointments, and Emerging Issues' (2008) 9(1) Whitehead Journal of Diplomacy and International Relationship 89-104.

[8] Linn Hammergren 'Fighting judicial corruption: a comparative perspective from Latin America' in Transparency International *Global Corruption Report 2007: Corruption in Judicial Systems* (Transparency International 2007) 138.

[9] Those countries are Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. *See* Justin Burke 'Post-Soviet world: what you need to know about the 15 states' *The Guardian* (London, 9 June 2014) <https://www.theguardian.com/world/2014/jun/09/-sp-profiles-post-soviet-states> accessed 22 September 2018.

part of efforts to understand why efforts to monitor and measure judicial reforms have experienced limited success, and to acknowledge the myriad of ways in which both standards are undermined in practice.

The experience of judicial reforms in CIS member states is particularly informative for a number of reasons. All of these States had a near universal historical experience of judicial independence and impartiality standards under the former Soviet Union, as discussed in Chapter Four of this study. In addition, all of those States experienced a near singular moment of independence after the fall of the Soviet Union. These unique circumstances provide an instructive framework to understand the comparative successes and failures of judicial reforms efforts in those countries. This thesis will then analyse the far-reaching impact that judicial independence and impartiality standards have in those states. It will do so by exploring the relationship between those standards and submissions before international human rights body to circumvent domestic remedies, and the relationship between those standards and the incidence of torture in a country. By examining the impact that judicial independence and impartiality standards have in these areas the thesis will demonstrate the integral nature of judicial independence and impartiality in the human rights framework, not only as an element of the separation of powers, but as a guardian of human rights standards.

The use of CIS states is in part because of their shared history, and near singular moment of newly found independence, which encouraged various democratisation reform programmes in the area. As explored in detail in Chapter IV, the Soviet legacy was one where nearly all aspects of judicial independence and impartiality were routinely and systematically compromised by the Soviet government and by judges themselves. However, as discussed in Chapter V, the success of reforms in the the States in this study have varied considerably, despite the shared foundations for those reform efforts. The shared history of the countries in this study, but the varied experience after gaining independence provides valuable insight into the conditions necessary for successful judicial reform.

There are numerous factors that have contributed to the relative successes or failure of judicial reform programmes in the CIS member states in this thesis. The disparity in the success of various judicial reform efforts is in part because of the varying investment in reform programmes, and the historical differences in those countries after the fall of the Soviet Union. In particular, economic deprivation, nuclear disaster, and civil war have

drastically hindered judicial reforms programmes in some CIS states. Furthermore, as explored in Chapter V, the relative executive support, or lack thereof, for judicial reform programmes in the CIS member states in this study has had a significant impact on the success of those efforts. In some instances, where respective legislative branches have failed to enact adequate legislative changes, judicial independence and impartiality are not adequately protected. The support for judicial reform in reality also has a significant impact on judicial independence and impartiality standards. In practice, the executive governments of the countries in this study have shown varying degrees of willingness to relinquish power to the judicial branch to give proper effect to judicial independence and impartiality. The support for reform efforts and other factors have resulted in a situation whereby, despite the shared history of the countries in this study, very different hurdles have effected reform efforts to varying degrees. In addition, as explored in detail in Chapter V, in many instances these countries demonstrate significant disparity between legislation on paper and reality achieved in practice. In particular, whilst legislative reforms have been introduced to bring national laws in line with international standards, in reality many of those standards are not respected in practice. The support for reform efforts and other factors have resulted in a situation whereby, despite the shared history of the countries in this study, very different hurdles have affected reform efforts to significantly varying degrees.

CIS member states also provide an interesting case study because of their geographical location. The proximity of CIS member states to Western Europe has encouraged engagement with various international and regional organisations, including the Organisation for Security and Cooperation in Europe, the Council of Europe, and the European Bank of Reconstruction and Development, which have all contributed to monitoring and reporting on judicial reform efforts in those countries.

CIS member states further provide an informative study given that, perhaps surprisingly, there has been relatively little research on judicial independence and impartiality standards in those countries. This thesis takes the opportunity to consolidate the existing data, and compare and contrast the varying experiences across those countries.

One of the earliest attempts at supporting democratising efforts in the region was the establishment of the Commonwealth of Independent States (CIS) in 1991.[10] The CIS organisation originally consisted only of Belarus, Russia, and Ukraine,[11] but other members later joined, later culminating at its peak with a total of twelve members.[12] However over the last decade participation in the organisation has dwindled and Georgia,[13] Turkmenistan,[14] and Ukraine,[15] have each withdrawn their membership, leaving only nine states. Those member states have ratified, and continue to be bound by, various CIS treaties, including the CIS Convention on Human Rights and Fundamental Freedoms.[16] The Convention demands a variety of human rights standards as part of efforts to build democratic governance in CIS States,[17] including the right of all CIS citizens to be heard before an independent and impartial court.[18] The decision to ratify and be held accountable to those standards, and the varying socio-economic and political experiences of these countries (as discussed in detail in Chapter Seven) provides significant insight into the factors behind the success and failures of judicial reforms efforts. Given these unique circumstances, this thesis will focus on the majority of the current CIS member states, and will provide analysis on reform efforts in Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan.[19]

The methodology adopted in this thesis compromises the use of sources from international and regional organisations including the United Nations, the Organisation for Economic Cooperation and Development, and the Council of Europe. It also relies on reports and data

[10] Paul Kubicek 'The Commonwealth of Independent States: an example of failed regionalism' (2009) 35 Review of International Studies 237, 237.
[11] Ibid.
[12] Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan; *see* Sergei A. Voitovich 'The Commonwealth of Independent States: An Emerging Institutional Model' (1993) 4 EJIL 403, 405.
[13] BBC 'Russians Begin Georgia Handover' (*BBC* 14 August 2008) <http://news.bbc.co.uk/1/hi/world/europe/7560100.stm> accessed 22 September 2018.
[14] Kubieck (n11) 248.
[15] Illia Ponomarenko 'Ukraine withdraws all envoys from CIS bodies' *Kyiv Post* (Ukraine 19 May 2018) <https://www.kyivpost.com/ukraine-politics/ukraine-withdraws-envoys-cis-bodies.html> accessed 22 September 2018.
[16] CIS Convention on Human Rights and Fundamental Freedoms (1996) IHRR 1 212.
[17] Ibid preamble.
[18] Ibid Article 6(1).
[19] Due to the constraints of this thesis, Russia and Moldova have not been included. This is in part because of the wealth of information already available on human rights standards in Russia, and in part because of the Moldova's recent declaration that it would be withdrawing from the Commonwealth of Independent States after being very inactive in the organisation (*see* Kemal Baslar 'The Commonwealth of Independent States: Decayed Within A Decade' (1998) Turkish Yearbook on International Relations 92, 123; UA Wire 'Draft Resolution on Withdrawal from the CIS registered in Moldovan Parliament (*UA Wire,* 19 January 2018) <https://uawire.org/the-draft-resolution-on-withdrawal-from-the-cis-was-registered-in-the-moldavian-parliament> accessed 22 September 2018).

from various international and regional non-governmental organisations (NGOs). The use of data from international and regional NGOs presents significant advantages and disadvantages. NGOs have proven to be an important contributor to human rights data compilation,[20] and perform a number of important functions in the international human rights sphere, including standard-setting, monitoring, and implementation.[21] As part of those functions, an important role has been the exposure of human rights conditions in areas of the World where regimes have sought to suppress the free exchange of information.[22] However, despite this important role, it is important to note that NGOs do not operate in a vacuum. International, regional, and domestic NGOs have 'socio-political roots',[23] and do not operate in an entirely objective and neutral manner.[24] Therefore, whilst information from international and regional NGOs utilised throughout this thesis has proven to be an invaluable source of data, it must be acknowledged that this information is not always entirely impartial. Nonetheless, given the limitations of this project and the relative lack of available data from other sources, reports from international and regional NGOs has proven to be an invaluable source of information for this thesis.

The first chapter will explore the history of judicial independence and judicial impartiality, tracing those standards back to as early as 399 BC, and exploring the recent revival of international interest in both qualities after World War II and the fall of the Soviet Union. It will then address the various theories of judicial independence and judicial impartiality and set them in the context of the separation of powers and the rule of law. Finally, the chapter will examine the importance of judicial independence and impartiality both as human rights unto themselves, and as the domestic protection mechanisms for other human rights standards.

The second chapter will deal with one of the primary submissions of this thesis; the complexity of judicial independence and judicial impartiality, and the routine violations of those standards. Despite the long-standing recognition of both judicial independence and

[20] Peter Van Tuijl 'NGOs and Human Rights: Sources of Justice and Democracy' (1999) 52(2) Journal of International Affairs 493, 496
[21] Ibid, 497.
[22] Ibid.
[23] Roger Charlton and Roy May 'NGOs, politics, projects and probity: a policy implementation perspective' (1995) 16(2) Third World 237, 245.
[24] Ibid.

impartiality, in practice the exact nature of those standards has remained elusive.[25] In fact, judicial independence has been described as 'one of the least understood concepts in the fields of political science and law'.[26] This chapter will examine why human rights, and judicial independence in particular, are targeted and undermined by executive branches of government wishing to stay in power. It will then examine the various aspects of judicial independence and judicial impartiality and attempt to identify various preconditions necessary for those standards to be realised in practice. Finally, it will address the inherent conflicts within judicial independence and judicial impartiality and explore the effects that those conflicts have on monitoring efforts.

The third chapter will explore the far-reaching impact of judicial independence and judicial impartiality have on other aspects of human rights discourse. In particular the chapter will examine the history of the exhaustion of domestic remedies rule, its use in the international human rights sphere, and the extensive effect of judicial independence and impartiality standards on submissions to circumvent domestic remedies in respondent countries. The chapter will then explore the history of torture and examine the impact that standards of judicial independence and impartiality standards have had on the incidence and of torture.

The fourth chapter will begin the case studies of this project. It will examine the foundations of judicial independence and impartiality in modern CIS states by analysing the standards achieved under the former Soviet regime. The chapter will draw on the methods developed in chapter two and attempt to understand the various elements of institutional and individual independence in the Soviet Union to build a detailed picture of judicial independence and impartiality in the country.

The fifth chapter will track the changes thematically, studying the various aspects of institutional independence, individual independence, and judicial impartiality across all CIS member states. It will identify areas where reforms have been generally successful, areas where reforms have generally failed, and also identify areas where the experiences of CIS member states have varied. The thematic approach will allow the chapter to identify key

[25] *See* Chapter Two 'Violations and Monitoring Judicial Independence and Judicial Impartiality in Practice', pp 41-53.
[26] Christopher Larkins 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 American Journal of Comparative Law 605, 607.

areas necessary for reform across the region, and to identify the factors that have contributed to the comparative success or failure where the experiences of the countries in the study have diverged.

The sixth chapter will examine the content of submissions to circumvent domestic remedies in CIS member states in an effort to understand the perception of judicial independence and impartiality standards in the country. It will examine the content of individual complaints, and also the content of State replies, in an effort to identify areas where judicial reforms have been unsuccessful and to understand the impact that those failures have had on the discourse between individuals, CIS states, and international human rights bodies.

The seventh chapter will explore the relationship between the incidence of torture in CIS member states and judicial independence and impartiality standards in practice. It will do so by first acknowledging the Soviet legacy of torture, and then analysing legislative reform efforts in CIS member states to prohibit torture. The chapter will then examine the incidence of torture in those States and explore the relationship between the use of torture and the failure to achieved adequate standards of judicial independence and impartiality.

Finally, the last chapter will provide an in-depth breakdown of the various successes and failures in each country in this study, comparing their relative experience, and tracking legislative reforms against the reforms achieved in practice.

Part I: Exploring Judicial Independence and Judicial Impartiality, and their Relationship with the Exhaustion of Domestic Remedies Rule and Torture

1. An Introduction to Judicial Independence and Impartiality: Histories, Theories, and Importance

1.1 A History of Judicial Independence and Judicial Impartiality

The right to appear before an independent and impartial tribunal has a long and established history.[27] The importance and focus attached to the doctrine of judicial independence and impartiality, and scrutiny of the standards that this entails in practice, has varied over time. However, the right to appear before an independent and impartial tribunal has received particular attention at three distinct periods in history: primarily during the Jacobean era early legislative attempts to establish *de facto* judicial independence were undertaken after a conflict between branches of power;[28] secondly after World War II the importance of *de facto* judicial independence became a priority for the international community;[29] and finally, after the fall of the Soviet Union, renewed focus on democratisation brought judicial independence into the fore once again.[30]

As early as 399 BC Socrates explored ideas of judicial impartiality and identified this as one of the core tenets of judicial responsibility.[31] In his famous exchange with Confucius and Euthyphro, Socrates declared that, given this duty to honour standards of impartiality, it would be 'unholy' for a son to prosecute his own father for murder given the inherent conflict of interest involved.[32]

[27] Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales 'Judicial Independence' (Commonwealth Law Conference, 2007 Nairobi) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj_kenya_clc_120907.pdf> accessed 4 March 2018; *see generally* Archibald Cox 'The Independence of the Judiciary: History and Purposes' (1995-1996) 21 The University of Dayton Law Review 566.
[28] Roland G Usher 'James I and Sir Edward Coke' (1903) 18(72) The English Historical Review 664-675.
[29] Gretchen Helmke and Frances Rosenbluth 'Regimes and the Rules of Law: Judicial Independence in Comparative Perspective' (2009) 12 Annual Political Review of Science 345, 346 and 354.
[30] Linda Camp Keith *Political Repression* (University of Pennsylvania Press 2012) 114.
[31] Justice Steven H David 'Four Things: Socrates and the Indiana Judiciary' (2013) 46(4) Indiana Law Review 871, 871.
[32] John M. Cooper (ed) *Plato: Complete Works* (Hackett Publishing Co 1997) 29.

In comparison, the right to appear before an independent tribunal has a shorter, but nonetheless well-established, history. This right has been recognised at least as far back as the Magna Carta,[33] where, according to chapter 39

> no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled. Nor will we proceed with force against him except by the lawful judgement of his equals or by the law of the land.[34]

Whilst judicial independence under the Magna Carta was deemed essential to limit the untrammelled power of the executive branch,[35] this protection only extended to the rights of 'free men'.[36] In 13th century Britain the term 'free men' represented only a very small minority of British citizens, and therefore the protections of the Magna Carta extended only to archbishops, bishops, earls, barons, knights, or members of the free peasantry.[37] Villeins, or members of the unfree peasantry, representing the vast majority of the 13th century population,[38] received little protection under the rights contained within the Magna Carta,[39] and had no guarantees with respect to the right to appear before an independent and impartial tribunal.[40]

Despite these practical limitations, the Magna Carta has continued to have significant influence on the understanding of standards of judicial independence and impartiality for hundreds of years.[41] After King James IV ascended to the English throne in 1603 and became King James I of England,[42] he sought to consolidate his power under the claim of his 'divine right' to rule.[43] As part of efforts to achieve this unilateral rule, King James established new prerogative courts with powers exercised only at his discretion.[44] These powers had the effect

[33] John A Vickers *Thomas Coke: Apostle of Methodism* (Wipf and Stock 2013) 213.
[34] Magna Carta (1297) chapter 39.
[35] Vickers (n7) 213.
[36] Magna Carta (n8) chapter 39.
[37] Max Radin 'The Myth of Magna Carta' (1947) 60(7) Harvard Law Review 1060, 1072.
[38] British Library 'Magna Carta' (*British Library* 28 July 2014) <https://www.bl.uk/magna-carta/articles/magna-carta-people-and-society> accessed 21 February 2018.
[39] Although the Magna Carta did limit the fines that could be imposed on villeins, and further limited the rights of royal officials to seize the goods and property of villeins. *See* Peter Linebaugh *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press 2009) 87-88.
[40] Ibid.
[41] *See generally* Cox (n1).
[42] Neil Rhodes, Jennifer Richards, and Joseph Marshall *King James VI and I: Selected Writings* (Ashgate Publishing 2003) 1.
[43] Chester Kirby and Ethyn Kirby 'The Stuart Game Prerogative' (1931) 46 English Historical Review 239, 239.
[44] Cox (n1) 568.

of granting the Ecclesiastical High Commission significantly increased powers, and it instead became known as the Court of High Commission.[45] In response, the judges of the common law courts rebelled against the new powers awarded to the prerogative courts,[46] on the basis that the Court of High Commission was interfering with the rightful jurisdiction of the common law courts.[47] The judges were summoned before King James I to answer for this rebellion, who demanded that the jurisdictional conflict come to an end, and that the powers of the prerogative courts be accepted.[48] The judges of the lay courts, led by Sir Edward Coke, justified their rebellion by relying on ideas of judicial independence and impartiality originating from the Magna Carta.[49] In his defence of their actions, Lord Justice Coke concluded that the right to an independent judiciary, alongside other rights contained in the Magna Carta, were a necessary bulwark against the tyranny of the executive, and a foundation of the English legal system.[50] In a series of judgments on the jurisdictional crisis, Coke consolidated this position, concluding that decisions of law and therefore the ability to pass judgment, lay solely with the 'Courts of Justice',[51] rather than with the King.[52]

Coke's efforts to protect the jurisdiction of the common law courts and the 'due process of the law' did not go unrewarded.[53] Shortly after Coke's death in 1634[54] Parliament enacted the Habeas Corpus Act,[55] which served to safeguard individual liberty by protecting against unlawful or arbitrary imprisonment without due process before the courts.[56] The Act of Settlement, enacted in the early 18th century,[57] sought to further consolidate judicial independence by providing greater protections for judicial tenure, and ensured that judges should not be removed from office except upon the address of the Houses of Parliament,

[45] Catherine Drinker Bowen *The Lion and The Throne: The Life and Times of Sir Edward Coke* (Little Brown US 1991) 295.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] John Hostettler *Sir Edward Coke: A Force for Freedom* (Barry Rose Law Publishers 1997) 129.
[50] Vickers (n7) 213.
[51] Prohibitions Del Roy 12 Co. Rep. 63, 77 Eng. Rep. 1342 (K.B. 1610).
[52] Ibid.
[53] Edward Coke *The Second Part of the Institutes of the Laws of England* (W Clarke and Son 1809) 50; Keith Jurow 'Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law' (1975) 19 American Journal of Legal History 265, 266.
[54] Drinker Bowen (n19) 145.
[55] Habeas Corpus Act 1640; this was later revised in the Habeas Corpus Act 1679. The Habeas Corpus Act established that the command of the monarchy was no limit to the inherent standards of *habeas corpus*.
[56] Ibid.
[57] Act of Settlement 1700.

removing judicial office from the discretion of the monarchy.[58] Later in the 18th century, across the Atlantic, discontent about judicial tenure at the discretion of the monarch was one of the factors for revolution in the United States,[59] and resulted in similar protections for judicial independence standards being enacted under Article III of the United States Constitution.[60] These various legislative provisions lay the foundations of modern understanding, and realisation, of judicial independence.

Those foundations were then built upon in the early 20th century. The essential nature of judicial independence received renewed focus once more after the horrors of World War II.[61] It was clear that the monopoly of power bestowed on the Nazi party in Germany was due in part to the purposeful usurping of judicial independence by Hitler and the Third Reich.[62] The results of this monopoly and untrammelled exercise of power, and the horrors that it resulted in, threw into sharp focus the need for judicial branches to act as bulwarks against the unchecked power of executive branches.[63] This renewed recognition was reflected in the negotiation and drafting of international conventions in the years after World War II, and ensured that this right was recognised in several significant international conventions enacted during this period.[64] In particular, the right to appear before an independent tribunal was enshrined in 1948 in the Universal Declaration of Human Rights,[65] and also considered to be a priority for politicians when drafting the United Nations Charter in 1945.[66] During the drafting of the UN Charter, members of the international community identified judicial

[58] Courts and Tribunal Judiciary 'Independence' (*Judiciary.gov.uk* 2018) <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> accessed 21 February 2018.
[59] Cox (n1) 570.
[60] United States Constitution 1787, Article III.
[61] Hon. Giovanni E. Longo 'The Human Right to an Independent Judiciary: International Norms and Denied Application Before a Domestic Jurisdiction' (1996) 70(1) St. John's Law Review 111, 113-114.
[62] The deprivation of judicial independence in Nazi Germany was achieved through a number of acts of legislation, including the *Gesetz zur Behebung der Not von Volk und Reich 1993* (Enabling Act 1993) which permitted the Weimar Constitution amendment. The Enabling Act gave the German cabinet the power to enact laws without the approval of the Reichstag, and during his speech in the Reichstag advocating the passing of the law Hitler stated 'the security of tenure of the judges on the one side must correspond on the other with an elasticity for the benefit of the community when reaching judgments. The centre of legal concern is not the individual but the Volk', *see* HW Koch *In the name of the Volk: Political Justice in Hitler's Germany* (Tauris & Co Ltd 1989) 35.
[63] Koch (n36) 35.
[64] International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 14(1); Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(II) (UDHR).
[65] Universal Declaration of Human Rights (n64) Article 10.
[66] Daniel C Prefontaine Q.C. and Joanne Lee 'World Conference on the Universal Declaration on Human Rights' (Montreal) 7th, 8th, and 9th December 1998.

independence as a necessary precondition for ensuring that 'justice and respect for obligations arising from treaties and sources of international law… [is] maintained'[67] in domestic jurisdictions.

In the following decades, the right to appear before an independent and impartial tribunal was transposed into a significant number of international and regional human rights conventions. Most notably, the International Covenant on Civil and Political Rights (hereafter the ICCPR) expressly provides for the right to a fair and public hearing before a competent, independent, and impartial tribunal.[68] Regional human rights conventions, including the African Charter on Human and Peoples' Rights,[69] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[70] and the Inter-American Convention on Human Rights[71] all include provisions for the protection of standards judicial independence and impartiality.

This trend was also reflected in domestic legislation, and after the enactment of the Universal Declaration of Human Rights, standards of judicial independence and impartiality were transposed into the domestic constitutions and laws of the majority of States.[72] In particular, after the Universal Declaration of Human Rights was enacted, States that had not formerly included protections for judicial independence and impartiality in domestic law seemed to integrate these standards with relative ease.[73]

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[67] Charter of the United Nations (adopted 14 August 1941, entered into force 26 June 1945) 1 UNTS XVI, preamble.
[68] International Covenant on Civil and Political Rights (n64) Article 14(1).
[69] African Charter on Human and Peoples' Rights (adopted 27 June 1982, entered into force 21 October 1986) (1982) 21 ILM 58, Articles 7(1) and 26.
[70] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 6(1).
[71] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 08/27/79 No. 17955, Article 8(1).
[72] One of the integral purposes of constitutions being the establishment of the 'fundamental charters of democratic government' *see* Edwin Meese III 'Towards a Jurisprudence of Original Intent' (1988) 11 Harvard Journal of Law and Public Policy 5, 6; Robert M Howard and Henry F Carey 'Is an Independent Judiciary Necessary for Democracy?' (2003-2004) 87 Judicature 284, 286.
[73] Donald T. Fox and Anne Stetson 'The 1991 Constitutional Reform Prospects for Democracy and Rule of Law in Colombia' (1992) 24 Case Western Reserve Journal of International Law 139, 150; R. Ludwikowski 'Constitution Making in the Countries of Former Soviet Dominance: Current Development' (1993) 23 Georgia Journal of International and Comparative Law 155, 175; Peter E. Quint 'The Constitutional Law of German Unification' (1991) Maryland Law Review 475, 503-504; Rajendra Ramlogan 'The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?' (1994) 8 Emory International Law Review 127, 182-190; Robert G Vaughn 'Proposals for Judicial Reform in Chile' (1986) 16 Fordham International Law Journal 577, 583-601; Longo (n35) 113.

Finally, in the last two decades, there has once more been revived focus on international standards of judicial independence. This restoration in focus is in part due to the 'renewed emphasis on constitutionalism in the democratising world of the post-Cold war era'.[74] This emphasis has been precipitated by a recognition within the international community of the 'growing gap between promise and practice'[75] with respect to domestic judicial independence standards from 1993 onwards.[76] This new iteration of interest in judicial independence has reflected this change in focus and consequently taken on a revised form, and alongside efforts to place emphasis on the importance of judicial independence, there have also been increased efforts to measure the *de facto* realisation of those standards in domestic jurisdictions.[77] In this vein, efforts have moved from mere arbitrary standard setting to more effective efforts to understand how and when those standards are realised in practice.[78]

In the last few decades, numerous influential international institutions have placed particular emphasis on the importance of judicial independence. A significant part of this focus has been within the context of economic development. The Inter-American Development Bank, for example, has repeatedly noted the significance of judicial independence in the democratisation process.[79] Similarly, the World Bank has noted the crucial role that judicial independence plays within democratic governance, and within the development process. In particular, it has been noted that judicial independence is a necessary precondition for the legal sector to function effectively, which is turn necessary for creating an 'environment conductive to economic activity' thereby engendering investment and jobs in developing states.[80] The International Monetary Fund has placed similar emphasis on the importance of

[74] Camp Keith *Political Repression* (n30) 114.
[75] Ibid 155.
[76] Ibid.
[77] See for example, the American Bar Association 'ABA Rule of Law Initiative' (*American Bar Association*, 2016) <https://www.americanbar.org/advocacy/rule_of_law.html> accessed 15 February 2016; Bureau of the Consultative Council of European Judges (CCJE) 'Report on judicial independence and impartiality in the Council of Europe Member States in 2017: Prepared by the Bureau of the CCJE following the proposal of the Secretary General of the Council of Europe' (*Council of Europe,* 7 February 2018) <https://rm.coe.int/2017-report-situation-ofjudges-in-member-states/1680786ae1> accessed 22 February 2018.
[78] Shale Horowitz and Albrecht Schnabel 'Human Rights and Societies in Transition: Causes, Consequences, Responses' in Shale Horowitz and Albrecht Schnabel (eds) *Human Rights and Societies in Transition: Causes, Consequences, Responses* (United Nations University Press 2004) 4.
[79] J Mark Payne, Daniel Zovatto G, and Mercedes Mateo Diaz *Democracies in Development: Politics and Reform in Latin America* (Revised Edn, Inter-American Development Bank, 2007) x and 118; Edmundo Jarquin and Fernando Carillo *Justice Delayed: Judicial Reform in Latin America* (Inter-American Development Bank 1998) vii.
[80] Legal Vice Presidency of The World Bank 'Legal and Judicial reform: Strategic Directions' (*The World Bank,* January 2003)

judicial reform efforts within the development process, noting that 'incomplete reform of judicial systems… may explain a significant part of the productivity gaps' within developing European nations.[81] The United Nations has also emphasised the importance of judicial independence within the human rights context,[82] declaring in 1996 that the independence of the judiciary would be a 'human rights priority' for the international community.[83]

In addition, other international organisations have undertaken programs to actively monitor standards of judicial independence in domestic jurisdictions. The American Bar Association established the 'Rule of Law Initiative'[84] program in 2007, as part of efforts to monitor and promote rule of law standards after the fall of the Berlin Wall.[85] The Organisation for Security and Cooperation in Europe (hereafter OSCE) has also undertaken programs in efforts to increase standards of judicial independence and impartiality in Eastern Europe, South Caucasus, and Central Asia.[86] Through the OSCE Office for Democratic Institutions and Human Rights' Rule of Law initiatives the organisation has undertaken various activities to promote and monitor judicial independence standards, including engaging in trial monitoring and supporting domestic judicial and legislative reforms.[87]

The Council of Europe (hereafter CoE) has also undertaken efforts to report on judicial independence standards in all CoE member states.[88] In 2016 the CoE adopted the 'Plan of Action on Strengthening Judicial Independence and Impartiality',[89] a scheme designed to identify ongoing problems in judicial independence in member states, to safeguard and

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<http://documents.worldbank.org/curated/en/218071468779992785/pdf/269160Legal0101e0also0250780SCODE09.pdf> accessed 22 September 2018, 2.

[81] World and Economic Financial Surveys 'Regional Economic Outlook: Europe Hitting Its Stride' (*International Monetary Fund,* 2017) 39.

[82] United Nations 'The Independence of the Judiciary: a Human Rights Priority' (*United Nations*, 2016) <http://www.un.org/rights/dpi1837e.htm> accessed 15 February 2016.

[83] Ibid.

[84] American Bar Association 'ABA Rule of Law Initiative' (n77).

[85] American Bar Association 'Our Origins & Principles' (*American Bar Association* 2015) <https://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html> accessed 17 July 2018.

[86] Office for Democratic Institutions and Human Rights 'Rule of Law' *Organisation for Security and Cooperation in Europe,* 2018) <https://www.osce.org/odihr/rule-of-law> accessed 22 February 2018; *see also* Office for Democratic Institutions and Human Rights 'Strengthening Judicial Independence and Public Access to Justice' (*Organisation for Security and Cooperation in Europe,* 2010) <https://www.osce.org/odihr/70836?download=true> accessed 22 February 2018.

[87] ODIHR 'Rule of Law' (n62).

[88] Bureau of the Consultative Council of European Judges (CCJE) (n77).

[89] Council of Europe 'Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, CM(2016)36 final' (*Council of Europe,* 2016) <https://rm.coe.int/1680700285> accessed 22 September 2018.

strengthen judiciaries in those states, and to reinforce and build public trust in the judiciary.[90] To achieve these aims the CoE adopted a number of measures, including allowing The Venice Commission, the Consultative Council of Judges, and The Group of States Against Corruption to provide specific guidance to member States either on request or in accordance with their mandate.[91] In addition, the CoE established an in-house evaluation mechanism of the independence and impartiality of judiciaries, which results in an annual report by all member states to the Consultative Council of European Judges.[92]

In 1994, the United Nations also established its own mechanism for monitoring and advising member states on domestic standards of judicial independence.[93] The position of the Special Rapporteur on the Independence of Judges and Lawyers was established by the Office of the High Commissioner for Human Rights which, in the resolution establishing the position, noted 'the increasing frequency of attacks on the independence of judges'.[94] The mandate of the Special Rapporteur allows them to inquire into allegations transmitted to them, to identify and record attacks on judges, and to identify means by which to improve the judicial systems in domestic jurisdictions.[95] To achieve this mandate the Special Rapporteur is permitted to communicate with the Government concerned in alleged violations through the individual complaints mechanism, to conduct country visits to gather information, and to present annual thematic reports to the Human Rights Council.[96] In reflection of the continuing problems with standards of judicial independence in the modern World, the mandate of the Special Rapporteur has since been extended on a number of occasions to allow the Special Rapporteur to monitor and advise on *de facto* standards of judicial independence.[97]

Despite the long history of the right to an independent and impartial tribunal, some questions remain unanswered. In particular, whilst the right to appear before an independent and

[90] Ibid 9-10.
[91] Ibid 13-14.
[92] Bureau of the Consultative Council of European Judges (CCJE) (n77).
[93] UNHCR 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers' (4 March 1994) UN Doc. E/CN.4/1994/132.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] *See* UNHRC 'Extension by the Human Rights Council of the mandates, mechanisms, functions and responsibilities of the Commission on Human Rights' (29 June 2006) UN DOC A/HRC/1/L.6, para 2.

impartial judiciary is widely and extensively accepted,[98] it remains unclear whether the right to appear before an independent and impartial tribunal has become part of customary international law.[99] Nonetheless, it has widely been accepted that this right, along with other civil and political provisions included in the Universal Declaration on Human Rights,[100] has become part of the body of general principles of international law.[101]

1.2 Theorising Judicial Independence: The Separation of Powers and Rule of Law Doctrines

The right to appear before an independent and impartial tribunal finds its foundations in both the separation of powers and rule of law doctrines. The separation of powers doctrine has long been cited as one of the cornerstones of a democratic society,[102] integral to the full and proper functioning of State powers. The separation of powers model originated in ancient Greece,[103] and the concept has since evolved throughout the centuries,[104] emerging as a widely accepted facet of the democratic model.[105]

Whilst the doctrine of the separation of powers was discussed by Aristotle,[106] Rousseau,[107] and Locke,[108] it was most famously explored in Montesquieu's *The Spirit of the Laws*. In this tome, Montesquieu argued that for democratic governance to be realised, the legislative, executive, and judicial branches of the State must remain independent and distinct from one another.[109] This requires that each organ of the State have distinct and exclusive authority,

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[98] *Chevron Corporation and Texaco Corporation v The Republic of Ecuador* (30 March 2010) UNCITRAL PCA Case No 2009-23; OSCE Office for Democratic Institutions and Human Rights *Legal Digest of International Fair Trial Rights* (OSCE/ODHIR 2012).
[99] *See generally* Bruno Simma and Philip Alston 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988-1989) 12 Australian Yearbook of International Law 82-108.
[100] Universal Declaration of Human Rights (n64).
[101] *See* Simma and Alston (n99) 102-107.
[102] International Commission of Jurists *International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1* (International Commission of Jurists 2007) 1, 18.
[103] Maurice JC Vile 'The Separation of Powers' in Jack P Greene and JR Pole (eds) *A Companion to The American Revolution* (Blackwell Publishers 2000) 686.
[104] Ibid 689.
[105] Howard and Carey (n72) 286
[106] Aristotle *Politics* (CreateSpace Independent Publishing Platform 2015).
[107] Jean-Jacques Rosseau *The Social Contract* (Wordsworth Editions 1998).
[108] John Locke *Two Treatises of Government 1690* (Cambridge University Press 1988).
[109] Charles de Secondat, Baron de Montesquieu (translated by Thomas Nugent) *The Spirit of Laws* (Batoche Books, 2001) 173; *See generally* Edward H Levi 'Some Aspects of Separation of Powers' (1976) 76(3) Columbia Law Review 371-391.

such that no one power will be able to exceed the power of the other two,[110] and that there is an effective system of checks and balances between each branch.[111] The ultimate purpose of these checks and balances is to effect a system which safeguards liberties and guards against the tyranny of one branch over the others.[112] As a result, this should negate the possibility of one branch becoming supreme over the other branches of government.[113]

The separation of powers doctrine is still essential to the democratic governance process. The Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the independence on judges and lawyers have both concluded that

> '(t)he separation of powers and executive respect for such separation is *sine qua non* for an independent and impartial judiciary to function effectively'.[114]

Judicial independence is therefore an integral element of the separation of powers doctrine.[115] To achieve effective separation of powers in practice, the judicial branch must provide an essential check on the power of the legislative and executive branches of government in order to prevent corruption and despotism.[116] In turn, the judiciary must be awarded such independence to make adjudications of law with respect only to legislation, without fear of reprisal or punishment from the legislative and executive branches for unwelcome judgments.[117]

The right to appear before an independent and impartial judiciary additionally finds its roots in the doctrine of the rule of law, which in turn finds its origins in Greek philosophy.[118] Plato concluded that the 'where the law is subject to some other authority… the collapse of the

[110] Montesquieu (n109) 173.
[111] Ibid 172.
[112] Ibid 173.
[113] Ibid.
[114] UNCHR 'Report of Special Rapporteurs on the Situation of Human Rights in Nigeria' (1997) UN Doc E/CN.4/1997/62 Add.1, para 71.
[115] Judge J Clifford Wallace 'Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives' (1998) 28(2) California Western International Law Journal 341, 343.
[116] Maria Dakolias and Kim Thachuk 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18 Wisconsin International Law Journal 353, 360.
[117] Ibid.
[118] John M Cooper (ed) *Plato: Complete Works* (Hackett Publishing Co 1997) 29.

state… is not far off'.[119] Cicero concurred with this, noting that 'we are all servants of the laws in order that we may be free'.[120]

The rule of law doctrine demands the supremacy of the law over the will of the individual, executive branch, or legislative branch.[121] The parameters of the rule of law doctrine were explored, and the doctrine popularised, by Dicey in his analysis of constitutionalism. In this analysis, Dicey stressed that there were three essential features necessary for the rule of law to be realised in practice. Primarily he concluded that no man should be above the law, so that all laws are applied to all men and no law discretionally applied.[122] The second principle was that all individuals should be equal before the law, regardless of their status within society.[123] Finally, he concluded that the rule of law was contingent on the principles of the legal system being representative of the ordinary customs and traditions of the laypersons, and being recognised in the ordinary manner by the courts of the land.[124]

The rule of law therefore demands that the legislative and executive should be constrained by legal norms clearly established and announced in advance.[125] As a result, the rule of law is equally binding on both the ordinary citizen and the public actors of the state.[126] It further denotes that the exercise of power by those in authority should only be permitted by clear and established legal rules.[127] The consequence is that government is subject to the law, and the creation of law is in-of-itself regulated.[128]

For the rule of law to be effective in practice, however, there must be an enforcement mechanism in place to ensure respect for those standards. As a result, the rule of law doctrine is contingent on judicial independence.[129] The rule of law cannot be secured without an independent judiciary to defend and enforce it, and to ensure its effective function.[130] An

[119] Plato *The Laws* (Dover Philosophical Classics) Paras 716a-d.
[120] M Tullius 'Cicero for the Defense' (1969) 55(10) American Bar Association Journal 932, 937.
[121] Denise Meyerson 'The Rule of Law and the Separation of Powers' (2004) 4 Macquarie Law Journal 1, 1.
[122] Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan St Martin's Publishers, 1961) 42.
[123] Ibid.
[124] Ibid.
[125] Meyerson (n121) 1.
[126] Arthur L Goodhart 'Rule of Law and Absolute Sovereignty' (1958) 106(7) University of Pennsylvania Law Review 943, 946.
[127] Ibid.
[128] John Finnis Natural Law and Natural Rights (OUP 1980) 61.
[129] Ibid.
[130] Ibid; Joseph Raz *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 198-201, 217.

independent judiciary therefore emerges as the necessary guardian of the rule of law doctrine, as well as a crucial component of the separation of powers doctrine.

1.3 Theorising Judicial Impartiality: Open and Closed Impartiality

Like judicial independence, judicial impartiality also commands great importance within the democratic model. However, whilst there is consensus that judicial impartiality is integral to the proper functioning of the State,[131] the exact nature of that impartiality has proven to be elusive.[132]

Both Adam Smith[133] and John Stuart Mill[134] promoted the impartial spectator formulation of impartiality. According to this formulation true impartiality is achieved when the person making a decision has no interest in the subject matter or outcome of the process when they make a decision on behalf of other individuals,[135] therefore permitting the judgments reached to be free from bias and prejudice. According to this standard of impartiality, judges deciding on a case would do without interest in the subject matter of the dispute therefore ensuring that the judge had no vested interest or bias in the outcome of the process. Sen identified this iteration of impartiality as 'open', given that the ultimate decision is reached by a judge external to the dispute and to the parties.[136] Importantly for Smith and Mills, the external nature of the judge from the parties involved in the dispute, and this distance that this entails, ensures that personal opinions about the parties to the dispute should not cloud the judges' reasoning.[137]

The impartiality this bestows on a judge, however, is limited. Whilst judges may make decisions free from personal opinions about the personalities of the parties involved, they nonetheless may find themselves to be partial for or against one of the respective parties as a result of inherent bias.[138] That inherent bias underlies much of human nature, and many of the

[131] Kaisa Herne and Tarja Mård 'Three Versions of Impartiality: An Experimental Investigation' (2008) 25(1) Homo Oeconomicus 27, 27.
[132] Ibid 29.
[133] Adam Smith *The Theory of Moral Sentiments* (Clarendon Press 1976) Part I, Section I, Chapter V: Of the amiable and respectable virtues.
[134] John Stewart Mill *On Liberty and Utilitarianism* (Everyman's Library 1992) 154.
[135] Adam Smith (n107) Part I, Section I, Chapter V: Of the amiable and respectable virtues.
[136] Amartya Sen 'Open and Closed Impartiality' (2002) XCIX (9) The Journal of Philosophy 445–469.
[137] Ibid 446.
[138] Donald C Nugent 'Judicial Bias' (1994) 42(1) Cleveland State Law Review 1, 34-48.

assumptions that all individuals, judges and laypersons alike, make both consciously and subconsciously every day.[139] The particular biases formed by an individual are reached as a result of that person's particular life experience and personal interests,[140] and biases vary from person to person according to those experiences, desires, and interests.[141] Therefore, whilst open impartiality ensures that judges should not have a personal interest in either the outcome of the dispute, or in the parties to the dispute, it does not, and cannot, protect against the inherent bias that a judge may have for or against a party based on their individual characteristics.[142]

To address the problems inherent to open impartiality, Rawls and Scanlon instead assert that judiciaries should adopt standards of closed impartiality. To achieve this closed impartiality, Rawls believes that relevant decision makers must be put behind a veil of ignorance to remove biases inherent in the decision-making process.[143] The impartiality is closed because the decision is undertaken by a member of the group or society involved in the dispute, but with limited information about the position of the parties to the dispute.[144] Rawls' theory acknowledges that all individuals are self-interested,[145] and make decisions based on their inherent biases, to realise an outcome that achieves the best possible outcome for the themselves. Rawls' impartiality therefore advocates that self-interested persons should make decisions whilst aware of the nature of the World they live in,[146] but with limited information about the identities and prospects of those involved in the dispute,[147] thereby removing the propensity to inherent bias. According to Rawls, this closed impartiality should ensure that the judge should be able to imagine himself or herself in the position of each member of the litigation, resulting in a decision that takes equal account of each member's needs.[148]

This type of impartiality has been referred to as 'closed' impartiality, because it requires a member of group from which the dispute has arisen to resolve it.[149] However, there has been

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[139] Ibid 50, 58.
[140] Lawrence C Becker 'Impartiality and Ethical Theory' (1991) 101(4) Ethics 698, 699.
[141] Ibid.
[142] Ibid.
[143] John Rawls *A Theory of Justice* (Harvard University Press 1971) 120-128.
[144] *See* Sen (n110) 445.
[145] Linda Babcock, George Lowenstein, Samuel Issacharoff, and Colin Camerer 'Biased Judgments of Fairness in Bargaining' (1995) 85(5) The American Economic Review 1337, 1337-1338.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Sen (n110) 445.

some degree of criticism of Rawls' theory of closed impartiality. Primarily, this criticism is premised on the fact that Rawls assumes that all individuals will act in a self-interested fashion in all circumstances.[150] In addition, Rawls' conception of impartiality is contingent on the judge being unaware of his or her position in society and therefore the impact their decision would have on his or her own interests.[151] This assumes that the judge in each instance is able to put themselves behind the veil[152] and to assess the dispute whilst being purposefully ignorant of the defining characteristics of the parties involved.[153] It further assumes that behind the veil, in the original position, all rational individuals would reach the same conclusion, rather than a number of outcomes being a reasonable outcome.[154]

Scanlon's theory of impartiality addresses some of the pitfalls in the Rawlsian conception of impartiality and is perhaps the most practical interpretation of judicial impartiality. In particular, Scanlon disputes Rawls' idea that judges can disregard defining characteristics about themselves and the parties to a dispute when making a decision to achieve impartiality.[155] Whilst, under Scanlon's conception of impartiality the judge has an awareness of the circumstances and society they find themselves in,[156] they are also aware of their relative position in society and their comparative economic and social circumstances.[157] Unlike the Rawlsian conception of impartiality, where decisions are made whilst trying to disregard relevant characteristics of the parties, under Scanlon's conception the judge is aware of their particular characteristics and those of the parties to the dispute.[158] To secure an impartial decision, the judge does not attempt to disregard this knowledge, but instead achieves impartiality by their desire to achieve an outcome that 'no one could reasonably reject'.[159]

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[150] Herne and Mård (n131) 31.
[151] Ibid.
[152] Becker (n140) 699; *See generally* James R Detert, Linda Klebe Trevino, and Vicki L Sweitzer 'Moral Disengagement in Ethical Decision Making: A Study of Antecedents and Outcomes' (2008) 93(2) Journal of Applied Psychology 374-391.
[153] Becker (n140) 699.
[154] Ronald Dworkin 'The Original Position' (1973) 40(3) The University of Chicago Law Review 500, 500-506; *see generally* Ryan Muldoon and others 'Disagreement behind the veil of ignorance' (2014) 170 Philosophy Studies 377, 378.
[155] *See generally* TM Scanlon 'Contractualism and Utilitarianism' in Amartya Sen and Benjamin Williams *Utilitarianism and Beyond* (Cambridge University Press 1982) 104-128.
[156] Ibid 110.
[157] Ibid 121.
[158] Ibid.
[159] Ibid 110.

This is not an infallible standard either. What will amount to a decision that is fair under the circumstances, precluding its reasonable rejection, is subjective.[160] Standards of reasonableness and morality will invariably vary from state to state, culture to culture, and person to person.[161] As a result, what the judge may conclude to be a reasonable decision may not be so considered reasonable by the parties to the dispute, by other members of the society, or by more broadly by other cultures and societies.

It is therefore apparent that the standard of conduct amounting to judicial impartiality is an imperfect science; and in practice absolute impartiality is a standard that cannot be achieved by any judge nor any culture. In particular it is impossible to offset the biases inherent in each individual.[162] Even Scanlon's attempt to acknowledge this reality rests on a unified conception of the 'reasonable standard'.[163] Whilst no one theory of judicial impartiality is wholly satisfactory, the various constructions proffered for judicial impartiality demonstrate that in practice judicial impartiality is an imprecise standard. As a result, attempts to measure its *de facto* implementation will be inherently limited by the lack of a clear standard against which to compare standards in practice. Nonetheless, in practice our understanding of what is necessary for a minimally acceptable standard of judicial impartiality is sufficient to allow it to be apparent when those standards are not met.[164] As a result, whilst an exacting and conclusive definition has proven elusive, incidents where standards of judicial impartiality have been undermined will nonetheless be apparent. As Justice Potter Stewart concluded, whilst we may not be able to intelligibly further expand on a definition, we may nonetheless 'know it when (we) see it'.[165]

1.4 The enduring nature of Judicial Independence and Impartiality

[160] Herne and Mård (n131) 31.
[161] Ibid.
[162] Garnett (n152) 208.
[163] Scanlon (n155) 110.
[164] See pp109-110.
[165] *Jacobellis v Ohio* 378 U.S. 184 (1964) para 179. In this case Justice Potter justified his conclusion that the material in question would not amount to 'obscene material' under the Roth test, by concluding that whilst he could not succeed in intelligibly defining the kinds of material that would satisfy this test, he would know it when he saw it.

The same importance attached to the right to appear before an independent and impartial tribunal by Socrates,[166] the Magna Carta,[167] and Coke[168] continues to be expressed today by international organisations including the United Nations,[169] CoE,[170] and World Bank.[171] This in turn has raised questions about why the standard of judicial independence and judicial impartiality, and the importance attached to this standards, has transcended centuries, continents, and cultures.[172] A number of theories have been advanced which assert a rationale for the enduring nature of judicial independence,[173] and attempt to answer questions about its prolonged and near universal acceptance.[174]

Interest driven theorists assert that the basis for the enduring nature of respect for judicial independence and judicial impartiality is due to the self-interest of powerful groups within society.[175] Interest driven theorists assert that the primary common interest for members of that group is that the continued maintenance of judicial independence and judicial impartiality standards provides those within society with a 'reliable enforcement mechanism'[176] for judgments. In particular, an independent and impartial court mechanism is necessary for protecting property rights and enforcing contractual rights.[177] Without assurances that those rights will be respected in the event of a dispute, economic investment will be reduced for fear of illegitimate expropriation of property[178] or fear of having to fund alternative and independent enforcement mechanisms of those legal rights.[179] As a result, interest driven theorists assert that those parties have a vested interest in ensuring a predictable and stable rule of law in order to maximise the efficiency of transactions to promote economic security.[180] This assertion rests on the assumption that judicial

[166] Justice Steven H David 'Four Things: Socrates and the Indiana Judiciary' (n31) 871.
[167] Magna Carta (n8) Chapter 39.
[168] Hostettler (n49) 129.
[169] United Nations 'The Independence of the Judiciary: a Human Rights Priority' (n82).
[170] Council of Europe 'Plan of Action' (n89).
[171] Legal Vice Presidency of The World Bank 'Legal and Judicial reform: Strategic (n80) 2.
[172] *See generally* John Ferejohn 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1998-1999) 72 Southern California Law Review 353-384.
[173] Theories include, but are not limited to, interest-driven theories, rule of law theories, and historical theories. Scholars have noted that whilst each theory present its own merits, in practise it is likely that the explanation for the continuing acceptance of judicial independence is a mix of all of these theories (see pp15-17).
[174] *See* pp26-29.
[175] Ferejohn (n172) 373.
[176] Ibid 372.
[177] DM Klerman 'Legal Infrastructure, Judicial Independence, and Economic Development' (2006) 19 Global Business and Development Law Journal 427, 428.
[178] Ibid.
[179] Ferejohn (n172) 372.
[180] Ibid.

independence and impartiality ensures judicial predictability,[181] which in turn encourages economic growth and economic investment.[182]

Whilst interest driven theorists provide some convincing justification for the enduring nature of respect for judicial independence and impartiality standards, a number of criticisms have been levied against this reasoning. Commentators have expressed discontent with the assertion that continued respect for judicial independence and impartiality is reliant on the ongoing support of a powerful interest group.[183] In particular, there is criticism that this reliance gives way to the assumption that judicial independence and impartiality are reliant on the continued support of this standard from members of the powerful interest group.[184] In particular, commentators have criticised the resulting assumption that should the support for judicial independence and judicial impartiality from that powerful interest group dissipate, then in turn standards of judicial independence and impartiality will no longer be respected.[185]

The result of the interest driven theories is that continued respect for judicial independence and impartiality is therefore dependent on the continuing and constant self-restraint of members of the powerful interest group, even in instances where momentary disregard for judicial independence and impartiality would in fact be more beneficial to those members.[186] Continued respect for judicial independence and impartiality would therefore be a non-resilient and easily undermined standard, dependent on the ongoing goodwill of the powerful interest group, giving its enduring nature a fragility that has not been reflected in practice.[187]

Another theory proffered to rationalise the enduring nature of judicial independence and judicial impartiality is the rule of law theory. The rule of law theory suggests that the enduring nature of judicial independence is due to the fact that its continued existence is a

[181] William M Landes and Richard A Posner 'The Independent Judiciary in an Interest Group Perspective' (1975) 18(3) Journal of Law and Economics 875, 885.
[182] *See generally* Aymo Brunetti, Gregory Kinsunko, and Beatrice Weder 'Credibility of Rules and Economic Growth: Evidence from a Worldwide Survey of the Private Sector' (1998) 12(3) World Bank Economic Review 353-384.
[183] Ferejohn (n172) 374.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] *See generally* Lars P Feld and Stefan Voigt 'Economic growth and judicial independence: cross-country evidence using a new set of indicators' (2003) 19(3) Journal of Political Economy 497-527.

'result of collective or public interest'.[188] The rule of law theory rationalises judicial independence and judicial impartiality as a necessary foundation for consistent, established, and familiar laws in a state.[189] The rule of law theory thereby ensures that the legal system is not arbitrary or unpredictable,[190] thereby ensuring that all individuals are only accountable to the pre-existing and intelligible standards.[191] This, rule of law theorists rationalise, is beneficial to all members of society,[192] given that it ensures that it 'maintain values of stability, notice, and equality before law'.[193] By ensuring that the rule of law is upheld[194] and the supremacy of the law is maintained,[195] this results in a society whereby all individuals, powerful or otherwise,[196] must conform to the law.[197] This is particularly important when one of the parties to litigation is a government agency.[198]

The rule of law theory seems to be an extension of the rationale preponed by interest driven theorists. Whilst interest driven theorists suggest that the enduring nature of judicial independence and impartiality is a result of the benefits bestowed on a powerful interest group, justifying efforts by the interest group to maintain that independence and impartiality, rule of law theorists assert that the enduring nature of judicial independence and impartiality is a result of the benefits bestowed on the whole of society. The assertion that judicial independence and judicial impartiality bestows certain benefits on powerful interest groups and societies as a whole, finds support from a number of international monetary organisations, including the World Bank,[199] the International Monetary Fund,[200] and the Inter-American Development Bank.[201] These organisations have all highlighted judicial independence and impartiality as an integral factor to sustained development, given its integral nature to the facilitation of economic investment. Empirical evidence further

[188] Ferejohn (n172) 37.
[189] Joseph Raz 'The Rule of Law and its Virtue' in Joseph Raz *The Authority of the Law* (Second Edn, Routledge, 2008) 210, 214.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ferejohn (n172) 368.
[194] Wallace (n89) 343.
[195] J Quigley 'The Soviet Union as a State under the Rule of Law: An Overview' (1990) 23 Cornell International Law Journal 205, 206.
[196] Larkins (n26) 608.
[197] Wallace (n89) 343.
[198] Larkins (n26) 608.
[199] Legal Vice Presidency of The World Bank 'Legal and Judicial reform: Strategic Directions' (n80) 2.
[200] World and Economic Financial Surveys *Regional Economic Outlook: Europe Hitting Its Stride* (International Monetary Fund 2017) 39.
[201] Payne, Zovatto, and Diaz (n79) x and 118; Jarquin and Carillo (n79) vii.

supports this conclusion, and it has been extensively demonstrated that increased respect for standards of judicial independence and judicial impartiality has a significantly positive impact on economic growth and real GDP growth per capita.[202]

The rule of law theory, however, encounters similar limitations to those faced by interest-group theorists. The rule of law theory is contingent on the executive exercising significant self-restraint for the good of the people, even when faced with a temptation to frustrate judicial rulings for its own gain.[203] Critics of this theory assert that this assumption both overestimates the restraint of the executive,[204] and further underestimates the strength and stability of the independence of the judiciary.[205] In practice, judicial independence is a standard that has expressed both durability and continuity, rather than the inherent delicacy that these vulnerabilities would entail.[206]

A final explanation proffered for the continued stability and enduring nature of judicial independence and impartiality are historical theories of judicial independence. Historical theories of judicial independence seek to explain its ongoing stability as being based on specific historical political conflicts.[207] Historical theories look to the particular problem that the introduction of judicial independence and impartiality sought to resolve. According to the historic reasoning of philosophers such as Aristotle and Socrates,[208] and later by Coke[209] and the Magna Carta,[210] an independent and impartial tribunal is necessary to achieve *de facto* separation of powers, and to establish a bulwark against overreach and ultra vires actions by the executive and legislative branches.[211] Historical theorists assert that the rationales that justified the introduction of judicial independence and impartiality throughout history, continue to justify its utilisation and respect in practice to this day.[212] Historical theories of judicial independence can be seen as supplementary to rule of law and interest driven

[202] Feld and Voigt (n187) 525; WJ Henisz 'The Institutional Environment for Economic Growth' (2000) 12(1) Economics and Politics 1-31; *see also* Burnetti, Kinsunko, and Weder (n156) 353-384.
[203] Ferejohn (n172) 373.
[204] *See generally* Michael Stokes Paulsen 'Most Dangerous Branch: Executive Power to Say What the Law Is' (1994-1995) 83 Georgetown Law Journal 217-346.
[205] *See generally* Feld and Voigt (n187) 515-517.
[206] Ibid.
[207] Ferejohn (n172) 376.
[208] Justice Steven H David (n31) 871.
[209] Ibid.
[209] Hostettler (n49) 129.
[210] Magna Carta (n8) Chapter 39.
[211] Dakolias and Thachuk (n116) 353.
[212] Ferejohn (n172) 377-378.

theories;[213] historical theories do not seek to supplant those theories but instead seek to put them into context. Thus, historical theories of judicial independence seek to rationalise why the explanations proffered by the rule of law and interest driven theories have remained, and continue to remain, convincing over extended periods of time.[214] In practice, therefore, the continued and enduring respect for standards of judicial independence and impartiality is likely a result of an amalgamation of the reasonings professed by all of these theories.[215]

1.5 The continuing importance of Judicial Independence and Judicial Impartiality

The right to appear before an independent and impartial tribunal continues to be as important today as when those concepts were explored centuries ago by Socrates and the Magna Carta. Its integral nature to the realisation of the separation of powers means that judicial independence has realised the status of an 'essential guardian of the rule of law',[216] and has been recognised as an 'essential feature of liberal democracy'.[217]

International organisations and academic commentators continue to recognise the importance of ensuring the right to appear before an independent and impartial judiciary in the modern World, and its integral nature to the proper functioning of State democracy has received almost universal acknowledgment. The United Nations believed that judicial independence was so integral to proper state governance that it declared that it would be a 'human rights priority' in 1996.[218] Within the context of development and sustainable economic development the World Bank,[219] the International Monetary Fund,[220] and the European Bank

[213] Ibid 376.
[214] Ibid.
[215] Ibid.
[216] Henry J Steiner and Philip Alston *International Human Rights in Context: Law, Politics, Morals* (OUP 1996) 711.
[217] Peter H Russell 'Towards a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives From around the World* (University of Virginia Press 2001) 1, 12.
[218] United Nations 'The Independence of the Judiciary: A Human Rights Priority' (n82).
[219] Legal Vice Presidency of The World Bank (n171) 2; *see generally* James H Anderson and Cheryl W. Gray 'Transforming Judicial System in Europe and Central Asia' (*World Bank,* ABCDE Conference January 2006) <http://www1.worldbank.org/publicsector/anticorrupt/feb06course/transforming%20Judicial%20Systems%20in%20ECA.pdf> accessed 22 September 2018; Rudolf V. Van Puymbroeck *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (The World Bank 2001).
[220] World and Economic Financial Surveys (n81) 39.

for Reconstruction and Development,[221] have all emphasised the crucial role that judicial independence and judicial impartiality play in securing a stable and reliable domestic market. A number of civil society organisations and international non-governmental organisations have also established a number of projects that seek to set and monitor judicial independence standards. In particular the American Bar Association set up the Rule of Law Initiative to monitor judicial independence standards across the globe, noting that 'countries that lack the rule of law very often fail to meet the most basic needs of their populations'.[222] OSCE Europe through the Office for Democracy and Human Rights established the Kyiv Recommendations in 2010, noting that judicial independence is 'an indispensable element of the right to due process, the rule of law, and democracy'.[223] More recently, in 2016, the CoE established the 'Plan of Action of Strengthening Judicial Independence and Impartiality' which notes that judicial independence and judicial impartiality 'is of primordial importance'[224] and that it is of the utmost importance that such independence and impartiality exists 'in fact and is secured by law'.[225]

The importance of judicial independence and judicial impartiality rests on primarily rests upon two foundations. Firstly, judicial independence and judicial impartiality is, in of itself, a human rights standard that is worthy of adherence and respect in its own right.[226] The CoE notes that '(o)nly an independent and impartial judiciary can provide the basis for the fair and just resolution of legal dispute'.[227] An independent judiciary ensures that all citizens are held

[221] The European Bank for Reconstruction and Development (EBRD) has particularly emphasised the importance of judicial independence within the context of Rule of Law. Within the EBRD 'Law in Transition' project, judicial reform to secure judicial independence was identified as one of the three foundations of the rule of law, alongside education and advocacy. *See* Emmanuel Maurice and others 'Law in Transition: Ten Years of Legal Transition' (*European Bank for Reconstruction and Redevelopment,* 2002) <http://www.ebrd.com/downloads/research/law/lit022.pdf> accessed 22 September 2018, 5; 59-60.
[222] The American Bar Association 'Rule of Law Initiative: About Us' (*American Bar Association,* 2018) <https://www.americanbar.org/advocacy/rule_of_law/about.htm> accessed 3 March 2018.
[223] Office for Democratic Institutions and Human Rights 'ODIHR and Judicial Independence: The Kyiv Recommendations' (*Organization for Security and Co-operation in Europe,* 2014) <https://www.osce.org/odihr/109880?download=true> accessed 3 March 2018, 1.
[224] Council of Europe 'Plan of Action' (n89) 7.
[225] Ibid.
[226] Charter of the United Nations (n67) Article 10; American Convention on Human Rights (n71) Article 8(1); African Charter on Human and Peoples' Rights (n69) Articles 7(1) and 26; UN Congress on the Prevention of Crime and the Treatment of Offenders 'Basic Principles on the Independence of the Judiciary: UNGA Res 40/32 and 40/146' (endorsed 29 November 1985) UN Doc A/CONF.121/22/Rev.1; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (Protocol 1) Article 75(4); International Covenant on Civil and Political Rights 1966 (n64) Article 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (n70) Article 6(1).
[227] Council of Europe 'Plan of Action' (n89) 7.

equal in the eyes of the law regardless of the particular characteristics of the individual,[228] and that any individual can only be liable under established legislation or precedent.[229] The standard of judicial impartiality further demands that a judge must have no vested interest in the outcome of the case, and no relationship with the parties, to decide the dispute.[230] This ensures that each individual will only be held to the standard of the rule of law, rather than to the whim or wrath of the individual judge.[231] Judicial independence and impartiality thereby ensures that justice in a State is 'intelligible, clear, and predictable'.[232]

Secondly, judicial independence and impartiality is indispensable in the protection of human rights standards within a State. This is due to the crucial role that judicial independence and impartiality plays in upholding *de facto* separation of powers and rule of law standards. Lord Phillips acknowledged this reality noting that the executive branch typically exercises the greatest amount of power within government,[233] and that the it is the most frequent government litigator within the court system.[234] By ensuring that each individual can only be held to standards already established under the law, the judiciary acts as bulwark against the ultra vires exercise of power by the executive and legislative branch.[235] In particular, an independent and impartial judiciary should ensure that human rights and fundamental individual liberties are 'beyond the reach of any government'.[236]

This was the conclusion reached in the Vienna Declaration and Programme of Action, where it was determined that:

[228] Courts and Tribunal Judiciary 'Independence' (n58). Characteristics can include, but are not limited to, race, religion, sex, sexual orientation, political affiliations, socio-economic status etc.
[229] Dakolias and Thachuk (n116) 353.
[230] ECOSOC 'Civil and Political Rights, including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: Bangalore Principles on Judicial Conduct 2002' (10 January 2003) UN Doc E/CN.4/2003/65, value 1.2.
[231] Dakolias and Thachuk (n116) 353.
[232] Tom Bingham *The Rule of Law* (Allen Lane 2010) vii.
[233] Lord Phillips of Worth Matravers (n27) 2.
[234] Ibid.
[235] Carlo Guarnieri and Patrizia Pederzoli *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press 2002) 152-154; Christopher Forsyth 'Of Fig Leaves and Fairytales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial' (1996) 55(1) The Cambridge Law Journal 122-140.
[236] Cox (n1) 571.

> (t)he administration of justice… especially an independent judiciary… are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy.[237]

The United Nations, in the resolution establishing the position of the Special Rapporteur on the Independence of Judges and Lawyers, noted the link between the weakening of safeguards for the judiciary and the gravity and frequency of human rights violations.[238] The Office for the High Commissioner for Human Rights reiterated this conclusion, determining that an independent and impartial judiciary is

> (an) essential prerequisite for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.[239]

As a result, without judicial independence and judicial impartiality, victims of human rights violation have no viable domestic forum in which to hold a deviant government to account; elevating the right to appear before an independent and impartial tribunal to a crucial bastion in the effective protection of human rights standards.

1.6 Conclusion

Some aspects of judicial independence and impartiality continue to raise important questions. The nature of judicial impartiality, to what extent it can and should be enforced, and its inherent limitations,[240] remain the subject of significant academic discourse. Similarly, some equivocacy about the precise rationale for the enduring nature of judicial independence and judicial impartiality remains.

Nonetheless, regardless of these continuing ambiguities, the right to appear before an independent and impartial tribunal is an undisputed standard of democratic governance.[241]

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[237] World Conference on Human Rights 'Vienna Declaration and Programme of Action' (25 June 1993) A/CONF.157/23; UNGA 'High Commissioner for the Promotion and Protection of all Human Rights' (7 January 1994) UN Doc A/RES/48/141.
[238] OHCHR 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyer: Resolution 1994/41' (March 1995) E/CN.4/RES/1999/41.
[239] Ibid.
[240] See pp 12-16; *see generally* Ferejohn (n172).
[241] Payne, Zovatto, and Diaz (n79) x and 118; Jarquin and Carillo (n79) vii.

Judicial independence and judicial impartiality has therefore been recognised as an essential human rights standard in its own respect;[242] but, in addition, it has been further recognised as an essential guardian in the enforcement and protection of other human rights standards.[243] This dual purpose bestows judicial independence and judicial impartiality a critical importance in the democratic regime, essential for achieving separation of powers and rule of law standards.[244]

The protection of judicial independence and judicial impartiality is therefore a crucial element of human rights protection with in a State, necessary to protect minority groups and individuals from executive overreach. Without adequate judicial independence standards in practice, the effective protection and enforcement of other human rights standards is put at risk. The crucial and decisive nature of judicial independence and judicial impartiality therefore make those standards indispensable for the effective functioning of democratic government.

[242] Charter of the United Nations (n67) Article 10; American Convention on Human Rights (n71) Article 8(1); African Charter on Human and Peoples' Rights (n69) Articles 7(1) and 26; UNGA 'Basic Principles on the Independence of the Judiciary' (n226); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (n226) Article 75(4); International Covenant on Civil and Political Rights 1966 (n64) Article 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (n70) Article 6(1).
[243] World Conference on Human Rights (n237); UNGA Res 'High Commissioner for the Promotion and Protection of all Human Rights' (n237).
[244] Montesquei (n109) 173; Dicey (n122) 42.

2. Violations and Monitoring Judicial Independence and Judicial Impartiality in Practice

2.1 Introduction

Despite a long and illustrious history,[245] there have been significant problems associated with the practical implementation of judicial independence and judicial impartiality. Whilst academics and international organisations have recognised the integral role that judicial independence plays in the democratic process,[246] this recognition has not engendered clarity about how the international community can ensure this standard is respected in reality.

There are two significant issues associated with the practical implementation of judicial independence and impartiality. Firstly, judicial independence standards around the World are not effectively implemented and respected.[247] In the Basic Principles on the Independence of the Judiciary, the United Nations has noted that frequently there still exists 'a gap between the vision underlying those principles and the actual situation'.[248] Problems securing effective implementation of judicial independence have been particularly apparent in transitional States.[249] Secondly, attempts by international organisations to monitor judicial independence and judicial impartiality have faced significant obstacles, which have undermined those efforts. The result is that, whilst judicial independence and judicial impartiality have both been recognised as cornerstones of democratic governance,[250] they have not been effectively achieved in practice, and efforts to monitor those standards have had limited practical significance.

Within the context of CIS member states, the lack of clarity concerning the practical implementation of consistent standards of judicial independence and judicial impartiality is particularly problematic, given the transitional status of those countries. Judicial independence and judicial impartiality represent integral elements of the separation of powers

[245] W Michael Reisman 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 The American Journal of International Law 866, 867.
[246] Payne, Zovatto, and Diaz (n79) x and 118; Jarquin and Carillo (n79) vii; Legal Vice Presidency of The World Bank (n80) 2.
[247] Howard and Carey (n72) 286; *See generally* Camp Keith *Political Repression* (n30) 3-8.
[248] UNGA 'Basic Principles on the Independence of the Judiciary' (n226).
[249] *See* pp12-15.
[250] World and Economic Financial Surveys (n81) 39; United Nations 'The Independence of the Judiciary: a Human Rights Priority' (n82).

model,[251] and are crucial foundations for the rule of law.[252] Without effective implementation and monitoring of those standards, broader democratisation efforts in former Soviet States are undermined. This failure may also have broader ramifications for efforts to secure human rights in the State, which are more likely to be threatened without a rights-respecting judiciary.[253]

2.2 Violations of Judicial Independence and Judicial Impartiality: Political Repression in Transitional Regimes

Despite both international and domestic legal provisions constructed to protect Judicial independence and impartiality, these standards continue to be regularly violated in States around the World.[254] Issues concerning the implementation and enforcement of human rights standards in practice are, however, not limited to judicial independence and judicial impartiality. Instead, violations of civil and political rights contained in the Universal Declaration on Human Rights,[255] the International Covenant on Civil and Political Rights,[256] and other international human rights treaties remain relatively commonplace.[257]

a) Repression of Human Rights Standards in Transitional Regimes

The problems inherent in the achievement of international human rights standards in practice are in part due to the structure of the international legal system. International law has adopted a 'horizontal legal system'.[258] Due to their horizontal nature, international law instruments do not have a central institution responsible for ensuring that standards are effectively implemented.[259] Instead, international human rights systems are heavily reliant on national

[251] See Chapter 1
[252] UNCHR 'Report of Special Rapporteurs on the Situation of Human Rights in Nigeria' (n114) para 71.
[253] Finnis (n128) 61.
[254] *See generally* OHCHR Resolution 1994/41 (n238); Howard and Carey (n72) 286; Larkins (n26) 618.
[255] Universal Declaration of Human Rights (n64).
[256] International Covenant of Civil and Political Rights (n64).
[257] See Hu Ping 'Freedom of Speech is the Foremost Human Rights' in Stephen C Angle and Marina Svensson (eds) *The Chinese Human Rights Reader: Documentary and Commentary* (Routledge 2001) 433; United Kingdom Foreign and Commonwealth Office *Human Rights Annual Report 2004* (TSO September 2004) 14; United Kingdom Foreign and Commonwealth Office *Annual Report on Human Rights 2009* (TSO March 2010) 6; Rosa Freedman *Failing to Protect: The UN and the Politicization of Human Rights* (OUP 2015) page; Rhona K Smith *Text and Materials on International Human Rights* (2nd edn, Routledge-Cavendish, 2009) 103; United Nations Human Rights Council 'Human Rights Council: Frequently Asked Questions' (*United Nations,* 2015) <http://www2.ohchr.org/english/press/hrc/kit/QA.pdf> accessed 11 November 2015.
[258] Peter Malanczuk Akehurst's Modern Introduction to International Law (7th edn Routledge 1997) 3.
[259] Ibid 3; *see also* general discussions on soft law including CM Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) International and Comparative Law Quarterly 850,

legal systems to ensure that these are administered in practice.[260] Implementation of human rights provisions in reluctant States therefore relies on moral and political pressure from other States, and the avoidance of diplomatic embarrassment, rather than on traditional methods of legal enforcement.[261]

Problems enforcing international human rights standards also occur because violations of those rights are often perceived to benefit executive and legislative regimes. Governments that perceive that their regime is under threat utilise political repression in order to retain their grip on power. Political repression is the 'use of coercive power domestically'[262] by those in political power, in an attempt to resist and withstand 'potential and existing challenges and challengers'.[263] Political repression by an executive regime typically involves the

> actual or threatened use of physical sanctions against an individual or organisation within the territorial jurisdiction of the state, for the purpose of imposing a cost on the target as well as deterring specific activities and/or beliefs perceived to be challenging to government personnel, practices, or institutions.[264]

Whilst political repression does not necessarily involve violations of international human rights standards, in practice the majority of repressive acts of government do involve such violations,[265] including the violation of the right to appear before an independent tribunal.[266] Acts of political repression therefore operate on the assumption that the use or threat of human rights violations against groups and individuals will work to deter or sanction activities that are perceived to threaten those in power.[267]

850; Kenneth W Abbott and Duncan Snidal 'Hard and Soft Law in International Governance' (2000) 54(3) International Organization 421-256.
[260] Malanczuk (n258) 5.
[261] *See generally* Antonio Cassese *International Law* (2nd edn, OUP, 2005) 11.
[262] Christian Davenport 'State Repression and Political Order' (2007) Annual Review of Political Science 1, 1.
[263] Ibid.
[264] Ibid 1-2; see also generally RJ Goldstein *Political Repression in Modern America: From 1870 to 1976* (University of Illinois 2001).
[265] Davenport 'State Repression and Political Order' (n262) 1-2.
[266] Ibid; Camp Keith *Political Repression* (n30) 6-7.
[267] Davenport 'State Repression and Political Order' (n262) 2.

Political repression, and associated human rights violations, do not take place in a vacuum. The decision to utilise repressive acts is one based on a calculation of willingness[268] and opportunity.[269] Willingness is a question of how amenable to oppression a particular regime is,[270] and is dependent on several pivotal factors. Firstly, the type of regime in place in a State has a significant impact on the likelihood of that regime using repressive tactics.[271] Within the context of democratisation efforts in CIS member states, this factor has proved to be critical given that many regime types predisposed to engaging in political repression are found in ex-Soviet countries. In particular, both consolidated autocratic regimes and semi-consolidated autocratic regimes seem particularly prone to repressive behaviour. [272]

In completely autocratic regimes, one type of regime particularly liable to utilise methods of repression is the personalist system.[273] Personalist regime systems are characterised by political and social elites who are seemingly unable to control the leader, and by the leader remaining in power despite pursuing interests that may harm the interests of the elites.[274] Azerbaijan has been identified as a personalist regime, both during the rule of Heydar Aliyev (1993-2003) and currently under the rule of Ilham Alivyev (2003-present).[275] The recurrent use of repression within personalist regimes has been attributed to the isolation in which autocratic leaders find themselves in, leading to a 'ruling clique'[276] of political actors attempting to protect themselves from outside actors through human rights violations.[277] Surprisingly, other forms of complete autocratic governance have been shown to be less likely to be involved in repressive activity.[278] This has been attributed to the fact that those in power can maintain control through established mechanisms, rather than having to utilise human rights violations.[279] Furthermore, autocracies have less need to utilise repressive

[268] Willingness is the question of how willing or inclined a government is to repress their citizens in the face of real or perceived threats; *see* Benjamin A Most and Harvey Starr *Inquiry, Logic, and International Politics* (University of South Carolina Press 1989) 23.
[269] Most and Starr (n268) 29.
[270] Ibid 23.
[271] Camp Keith *Political Repression* (n30) 22; Christian Davenport 'State Repression and the Tyrannical Peace' (2007) 44 Journal of Peace Research 485, 486.
[272] Davenport 'State Repression and the Tyrannical Peace' (n246) 486.
[273] Ibid.
[274] Svetlana Kosterina 'Ambition, Personalist Regimes, and Control of Authoritarian Leaders' (2017) 29(2) Journal of Theoretical Politics 167, 168.
[275] Steve Hess 'Personalist Regimes' in Steve Hess (ed) *Authoritarian Landscapes* (Springer 2013) 109-119.
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Ibid.

tactics, as the public will already be 'cowed and quiescent' to executive control.[280] In addition, repression is linked to the presence of domestic opposition which would be absent in the single party autocratic system.[281] Consequently single party systems are less likely to resort to using repression, given the absence of a threat to the executive power.[282]

The regime type considered most likely to be involved in repressive activities are semi-consolidated regimes and transitional regimes,[283] also common in ex-Soviet states.[284] These regimes are 'in the middle' of democracy and autocracy.[285] The susceptibility of these middling regimes, which combine elements of democracy and autocracy, to repression has been attributed to 'insufficiently' developed state infrastructure,[286] which does not permit the effective conveyance of opposition[287] and does not provide the executive with alternatives to repression.[288] In addition, in those semi-consolidated and transitional regimes there will not yet be an established mechanism to enforce respect for human rights.[289] Until such a time as a 'critical point'[290] of democracy is realised whereby governments are forced to adhere to human rights standards and refrain from repression,[291] political repression will continue to be a viable option for governments in those states. As a result, CIS member states which have both consolidated authoritarian regimes and semi-consolidated authoritarian regimes that have not yet properly transitioned to democracies, are particularly susceptible to human rights violations as acts of political repression.

The willingness of a regime to engage in political repression and human rights violations is also affected by external factors.[292] Numerous external elements that factor into this willingness have been identified, and include any alternative options available,[293] the

[280] Patrick M Regan and Errol A Henderson 'Democracy, Threats, and Political Repression in Developing Countries: Are Democracies Internally Less Violent?' (2002) 23 Third World Quarterly 119, 120.
[281] Camp Keith *Political Repression* (n30) 31-32.
[282] Ibid.
[283] Ibid.
[284] Freedom House 'Nations in Transit 2018: Confronting Illiberalism' (*Freedom House* 2018) <https://freedomhouse.org/report/nations-transit/nations-transit-2018#uzbekistan> accessed 7 July 2018.
[285] Regan and Henderson (n280) 120; *see generally* Helen Fein 'More Murder in the Middle: Life Integrity Violations and Democracy in the World, 1987' (1995) 17 Human Rights Quarterly 170-191.
[286] Regan and Henderson (n280) 124.
[287] Ibid.
[288] Ibid.
[289] Christian Davenport and David A Armstrong 'Democracy and the violation of Human Rights: A Statistical Analysis from 1976 to 1996' (2004) 48 American Journal of Political Science 538, 542.
[290] Ibid.
[291] Ibid.
[292] Most and Starr (n243) 29.
[293] Ibid.

consequences of any choice,[294] and the costs and benefits of any choice.[295] The willingness of a regime will therefore be closely related to both a 'conscious and unconscious' cost/benefit analysis of the act of political repression.[296] As a result where there is a threat to, or a perceived threat to, the leader's rule, governments are more willing to engage in acts of repression.[297] In states transitioning to democracy, and moving towards multi-party politics and a democratic voting system, there are likely to be many threats to the ruling party. As a result, in ex-Soviet states threats to the ruling regime caused by the democratisation process are likely to make regimes more willing to engage in repressive activity.[298]

The final factor which has a significant impact on a regime's willingness to engage in repression is the previous levels of repression present in the state.[299] In states where repression was previously commonplace there is less 'need' for the regime to engage in coercive behaviour to control the population,[300] although some states continue to engage in such behaviour regardless.[301] The historical effect of repression has been attributed to the 'afterlife'[302] of acts of repression, which continue to affect the behaviour of the public long after the original acts.[303] The effect of this past repression may be so powerful, that it may reduce or negate the need for future forms of repression.[304] In theory, this should mean that levels of political repression and associated human rights abuses in ex-Soviet states should be lower given the history of the repression in the USSR. In practice however, regardless of the effect of this 'afterlife',[305] Marxist-Leninist regimes continue to demonstrate serious leanings towards repression and associated human rights abuses as a method to maintain power.[306]

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[294] Ibid.
[295] Ibid.
[296] Ibid 34.
[297] Ibid.
[298] Ibid 18.
[299] *See generally* Steven C Poe, C Neal Tate, Linda Camp Keith, and Drew Noble Lanier 'The Continuity of Suffering: Domestic Threat and Human Rights Abuse across Time' in Christian Davenport (ed) *Paths to State Repression: Human Rights and Contentious Politics in Comparative Perspective* (Rowan and Littlefield Publishers 2000) 37-70.
[300] Ibid.
[301] Ibid.
[302] Raymond D Duvall and Michael Stohl 'Governance by Terror' in Michael Stohl (ed) *The Politics of Terrorism* (CRC Press 1983); George Lopez and Michael Stohl 'Problems of Concept and Measure in the Study of Human Rights' in Thomas B Jabine and Richard P Claude (eds) *Human Rights and Statistics: Getting the Record Straight* (University of Pennsylvania Press 1992) 216-234.
[303] Camp Keith *Political Repression* (n30) 24.
[304] Ibid.
[305] *See generally* Duvall and Stohl (n276).
[306] Neil J Mitchell and James M McCormick 'Economic and political Explanations of Human Rights Violations' (1988) 40 World Politics 476, 480-481.

Alongside the question of willingness, a state must also have the opportunity to engage in political repression.[307] To determine whether there is such an opportunity the state will consider 'costs and benefits'[308] of repression. The opportunity for a regime to repress is constrained by many factors, including the role of domestic and international actors and institutions in the state, such as the prominence and influence of the judiciary, non-governmental organisations, and international human rights bodies in a state.[309] These factors can drastically change how the government perceives the 'acceptability' of any repressive action[310] and the consequences for the government for electing to carry out those repressive actions in noncompliance with international and domestic treaties.[311] The democratic process, including demands of the separation of powers[312] and checks and balances on branches of government,[313] can greatly increase the costs of repression, and can minimise opportunities for a regime to engage in repressive activity by providing alternative means by which citizens can solve conflicts and voice dissent.[314]

b) Violations of Judicial Independence

When electing the means by which a regime will repress its citizens, Most and Starr have suggested that, for the most part, political actors are rational actors;[315] therefore a government will select the tool that is most effective and efficient to achieve their 'chief end, which is to stay in power'.[316] Efforts to undermine judicial independence are therefore a reflection of a state's belief that an independent judiciary represents, either directly or indirectly, a threat to the executive's maintenance of power.

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[307] Most and Starr (n243) 24-26.
[308] Camp Keith *Political Repression* (n30) 82.
[309] Ibid 82; 169.
[310] Ibid 82.
[311] Ibid; *see also generally* Steven C Poe, C Neal Tate, and Linda Camp Keith 'Repression of Human Rights to Personal Integrity Revisited: A Global Cross National Study Covering the Years 1976-1993' (1999) 43 International Studies Quarterly 291-313.
[312] Camp Keith *Political Repression* (n30) 10.
[313] Ibid.
[314] Ibid; *see also* Poe, Tate, and Keith (n311); Davenport 'State Repression and Political Order' (n271) x.
[315] *See generally* Ted Robert Gurr 'The Political Origins of State Violence and Terror: A Theoretical Analysis' in Michael Stohl and George A Lopez (eds) *Government Violence and Repression: An Agenda for Research* (Greenwood Press 1986) 45-71; Poe, Tate, and Keith (n311); Steven C Poe 'The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression' in Sabine Carey and Steven C Poe (eds) *The Systematic Study of Human Rights* (Ashgate Publishing 2004) 16-38; Linda Camp Keith and Steven C Poe 'Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration' (2004) 62 Human Rights Quarterly 1071-1097.
[316] Camp Keith *Political Repression* (n30) 8.

In fact, an independent judiciary represents a two-fold threat to a repressive government. As Alexis de Tocqueville famously concluded, an independent judiciary is 'one of the most powerful barriers erected against the tyranny of political assemblies'.[317] An independent, rights-supporting judiciary has a unique role in the protection of individuals through the 'mediat(ion) of disputes',[318] and the prevention of 'arbitrary exercise of government power'.[319] As a result an independent judiciary can prevent the opportunity for a government to engage in other forms of repression by providing an alternative source of protection for citizens by promoting the rule of law and other rights supporting legislation.[320] The supervisory power of an independent judiciary with respect to ultra vires government action permits a judiciary to drastically change the costs to a government of engaging in other forms of repression.[321] At its most extreme an independent judiciary grants citizens 'the tools to oust potentially abusive leaders from office before they are able to become a serious threat'.[322] Judicial independence therefore drastically changes the

> menu of appropriate choices… the cost of inappropriate choices and influences the values through which the regime will evaluate the choices.[323]

By drastically changing the 'material and reputational costs' to a repressive regime utilising repressive action against its people,[324] an independent judiciary reduces and removes human rights abuses as a means by which governments can maintain power.[325] Furthermore, an independent, rights-supporting judiciary can socialise the public to human rights standards.[326] The socialising effect of a judiciary can increase public awareness of the illegality of

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[317] Alexis de Tocqueville and Arthur Goldhammer *Democracy in America: Translated by Arthur Goldhammer* (The Library of America 2004) 116.
[318] Larkins (n26) 606.
[319] Ibid.
[320] *See generally* Albert J Rosenthal 'Afterword' in Louis Henkin and Albert J Ronsenthal *Constitutionalism and Rights: the Influence of the United States Constitution Abroad* (Columbia University Press 1990) 397-403; J Mark Ramseyer 'The Puzzling (In)Dependence of Courts: A Comparative Approach' (1994) 23 Journal of Legal Studies 721-747; William Prillaman *The Judiciary and Democratic Decay in Latin America* (Praeger 2000); M Mutua 'Justice Under Seige: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 96-118; Camp Keith *Political Repression* (n30) page; Larkins (n26) 611; David Beatty 'Human Rights and the Rules of Law' in David Beatty (ed) *Human Rights and Judicial Review* (1994 Martinus Nijhoff) 1-56.
[321] *See generally* Davenport 'State Repression and Political Order' (n262).
[322] Steven C Poe and C Neal Tate 'Repression of Human Rights to Personal Integrity in the 1980's: A Global Analysis' (1994) 88 American Political Science Review 853, 855.
[323] Camp Keith *Political Repression* (n30) 27.
[324] Ibid 291.
[325] Ibid.
[326] Ibid.

repressive action undertaken by the state, with the consequence of 'cultivat(ing) a rights consciousness within the state'.[327] As a result, a state may target judicial independence primarily to maintain its arsenal of rights abuses as a way to maintain power, but further to ensure that it is not ousted by a newly rights aware public.

Many factors will allay the willingness of a government to engage in the repression of judicial independence. One of the fundamental factors affecting the willingness of the executive branch to repress judicial independence is the influence of external pressures on a government encouraging them to aspire to democracy. The source of such external pressure on domestic government include International Non-Governmental Organisations,[328] the United Nations,[329] and from other governments[330] culminating in diplomatic pressure on the executive branch to achieve greater levels of democracy, including greater levels of judicial independence.[331] External demands for greater standards of democracy in a state are influential for many reasons. Primarily, according to the World Society approach, the effect of some states adopting standards of democracy and judicial independence encourages other states to do the same,[332] to help them achieve broader legitimacy.[333] This is a particularly influential pressure in transitioning states, including former Soviet states,[334] whose governments can feel compelled to also adopt similar institutions and practices, in order to 'appear to be similar to other nation-states around the World'.[335]

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[327] Camp Keith *Political Repression* (n30) 29; *see also* Mark MacGuigan 'The Development of Civil Liberties in Canada' (1965) 27 Queen's Quarterly 270, 273; David Martin 'Roundtable Discussion' in Kenneth W Thompson and Rett T Ludwikowski (eds) *Constitutionalism and Human Rights: America, Poland, and France* (New York 1991) 101; C Neal Tate and Torbjorn Vallinder *The Global Expansion of Power* (OUP 1995); Charles R Epp *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998).
[328] *See generally* John Boli and Greg M Thomas 'World Culture in a World Polity: A Century of Non-Governmental Organization' (1997) 62 American Sociological Review 171-190.
[329] *See* Camp Keith *Political Repression* (n30) 143.
[330] *See generally* Judith Kelley 'Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-Surrender Agreements' (2007) 101 American Political Science Review 573-589.
[331] Russell (n191) 1.
[332] Wade M Cole 'Sovereignty Relinquished? Explaining Commitment to the International human Rights Covenants, 1966-1999' (2005) 70 American Sociological Review 472, 477; there is strong empirical evidence to support this assumption, *see generally* Camp Keith *Political Repression* (n30) 286-299.
[333] Christine Min Wotipka and Francisco O Ramirez 'World Society and Human Rights: An Event History Analysis of the Convention on the Elimination of All Forms of Discrimination against Women' in Beth A Simmons, Geoffrey Garrett, and Frank Dobbin (eds) *Global Diffusion of Markets and Democracy* (2007 Cambridge University Press) 314-315.
[334] Camp Keith *Political Repression* (n30) 41.
[335] Julian Go 'A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000' (2003) 18(1) International Sociology 71-95.

However, another pivotal factor which affects a regimes willingness to engage in repression of judicial independence, is electoral uncertainty.[336] In states where there is a strong, competitive political system[337] that permits multiple political parties,[338] executives have been much more willing to adopt standards of judicial independence.[339] Where a regime expects that elections will continue indefinitely,[340] and there is uncertainty about whether the regime will continue to win those elections, the executive will be more inclined to support judicial independence[341] in order to protect the policies created when the regime held power.[342] This is particularly true for newly democratising former Soviet states, which are faced with new uncertainty[343] following the move from a one-party system to more competitive political systems.[344]

However, in former CIS states, which are predominantly made up of either consolidated authoritative regimes or semi-consolidated authoritative regimes,[345] the same incentives to create and protect an independent judiciary are not yet present. In comparison, those regimes have a dominant position[346] and face fewer true threats to their power.[347] As a result, in CIS states, governments are far less likely to support and encourage judicial independence as there is little incentive for them to 'empower a neutral third party',[348] that could enable another party to challenge the regimes' policies.[349]

The problems inherent in achieving and enforcing standards of judicial independence and judicial impartiality are multifaceted. Some of the hurdles to the effective implementation of

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[336] Camp Keith *Political Repression* (n30) 186.
[337] Ibid 165.
[338] James Raymond Vreeland 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture' (2008) 62 International Organization 65, 69.
[339] Ibid.
[340] Ramseyer (n320) 746.
[341] Ibid.
[342] Ibid.
[343] *See generally* Beatriz Magaloni 'Enforcing the Autocratic Political Order and the Role of the Courts: The case of Mexico' in Tom Ginsburg and Tamir Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008).
[344] *See generally* Adebayo O Olukoshi 'Economic Crisis, Multipartyism, and Opposition Politics in Contemporary Africa' in Adebayo O Olukoshi *The Politics of Opposition in Contemporary Africa* (Nordic Africa Institute 1998) 10-13.
[345] Freedom House 'Nations in Transit 2018: Confronting Illiberalism' (n284).
[346] Thomas Ginsburg *Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 24-25.
[347] Ibid.
[348] Camp Keith *Political Repression* (n30) 129.
[349] Ibid.

judicial independence and judicial impartiality standards are shared by other human rights. This is in a large part due to the horizontal nature of the international legal system, which means that human rights systems are strong on promotion,[350] but weak with respect to enforcement and remedies.[351] The inefficacy of the international legal system is compounded by the fact that human rights violations represent an efficient method by which repressive governments can stay in power.[352] The threat to a regime posed by judicial independence, both directly as a bulwark against government overreach, and indirectly as a rights promoting body, means that it is a right often targeted by repressive governments hoping to maintain power. This is particularly problematic in CIS member states where the consolidated authoritative regime and semi-consolidated regime types make those countries more inclined to acts of political repression and rights violations, particularly in the face of moves towards democratic governance and multi-party voting.

2.3 The Difficulty of Monitoring Judicial Independence and Judicial Impartiality in Practice

The problems associated with enforcing judicial independence standards have unfortunately been met with similarly fundamental problems with monitoring those standards in practice. The problems associated with monitoring standards of judicial independence are numerous and intertwining. One significant problem is that judicial independence is a very complex, imprecise, and expanding standard,[353] which requires numerous preconditions to be effective in practice.[354] In addition, aspects of judicial independence are in conflict with each other,[355] whilst other aspects can only be achieved to a limited extent in practice.[356] These factors, amongst others, combine to make the understanding, monitoring, and reporting of judicial independence standards a very difficult and burdensome task.

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[350] Jack Donnelly 'International Human Rights: A Regime Analysis' (1986) 40(3) International Organization 599, 613.
[351] Ibid 614.
[352] See pp
[353] Russell (n191) 1.
[354] Ibid; American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (*American Bar Association*, December 2012) <https://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia_jri_vol_iv_english_12_2012.authcheckdam.pdf> accessed 19 June 2017, i.
[355] *See* pp 26-27.
[356] *See* pp 15-15.

Judicial independence requires that a judge presiding over a case does so as an impartial, non-partisan,[357] neutral third party,[358] with no interest in the outcome of the dispute. For judicial independence to be achieved the court must regard a particular case with reference only to the facts and merits of the case and the relevant law, thereby disregarding any other extraneous factors.[359] Judicial independence therefore requires that judges, and the judicial branch as a whole, are insulated from external influences over their decision making process.[360] Consequently the level of judicial independence achieved in a state can be measured by the extent to which courts are able to make decisions without extraneous influence; either threats or temptations to induce a judge to rule in a certain way.[361] What this actually demands in practice is, however, very complex. Judicial independence is not a singular concept and is made up of various component parts. In turn, those component parts require various preconditions to ensure that they are effectively achieved in practice.

The first component part of judicial independence is institutional independence, concerned with the independence of the judicial branch as a whole.[362] The second component is individual independence, concerned with the independence of individual judges.[363] This component can be further broken down into two further sub-categories; incidents of decisional independence, and incidents of corruption (or voluntary non-independence).

[357] Dakolias and Thachuk (n116) 353.
[358] Larkins (n26) 608; Martin M Shapiro *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981) 18-19.
[359] Larkins (n26) 609.
[360] Owen M. Fiss 'The Limits of Judicial Independence' (1993-1994) 25 University of Miami Inter-American Law Review 57, 59.
[361] Ferejohn (n172) 353.
[362] Ibid 355.
[363] United Nations Office on Drugs and Crime 'Bangalore Principles on Judicial Conduct' (n230) Value 1.1.

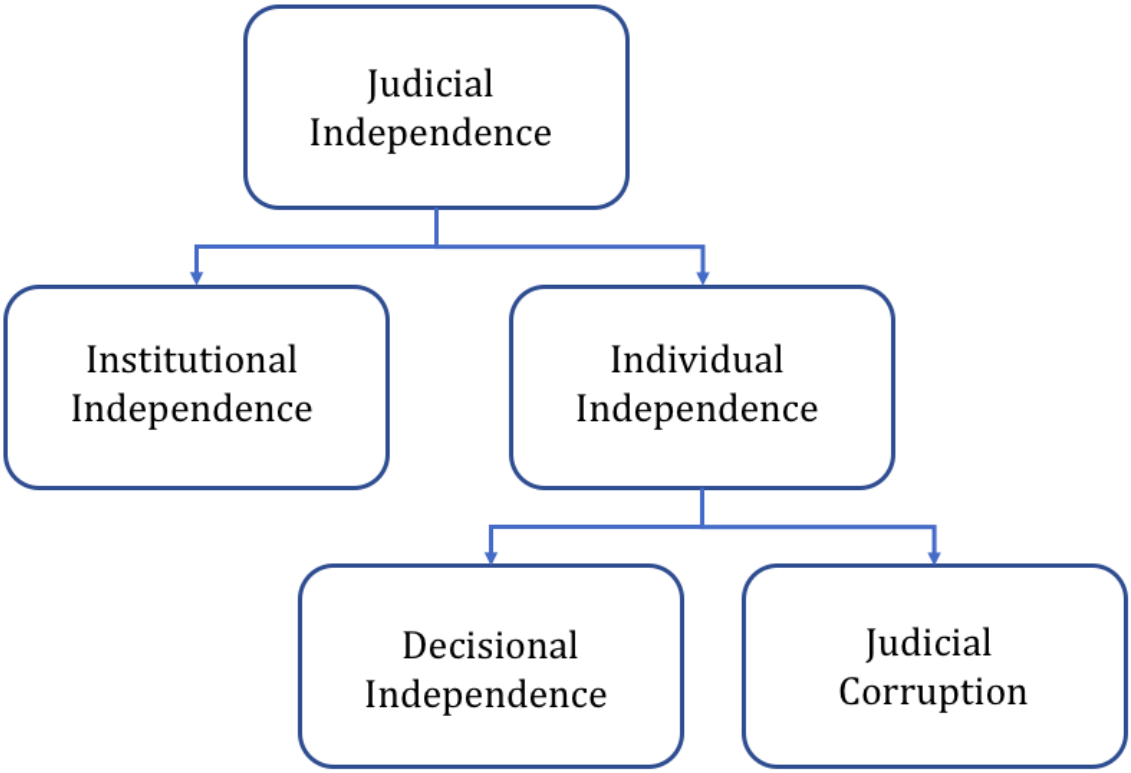

Figure 1

a) Institutional Independence

Institutional independence demands that the entire judicial branch remains free from interference in its judicial decision-making. Institutional independence is closely linked with the theory of separation of powers and requires that the judicial branch is free to operate without interference from the other branches of government.[364] This institutional independence can be compromised when the judicial branch is reliant on other members of government in order to perform its obligations thereby compromising its ability to make decisions freely.[365]

This component of judicial independence is reliant on a number of preconditions. Institutional independence primarily demands that the judiciary must have exclusive

[364] Ferejohn (n172) 355.
[365] Ibid.

authority over judicial matters.[366] This requires that the judiciary has absolute authority over the appeals process,[367] and the ability to review legislation to ensure its compatibility with any relevant constitutional or international legal obligations.[368] More generally, whilst the branches of government will necessarily interact with each other to ensure effective governance, that relationship cannot compromise standards of judicial independence, and must be properly balanced to protect judicial function.[369] In addition, to ensure institutional independence in practice, a situation cannot arise whereby the courts must rely on the executive to carry out decisions, without recourse if they fail to do so.[370] Other necessary preconditions for institutional independence include the assurance of reasonable resources to carry out its functions,[371] and of sufficient input and influence over the budget awarded to it by the legislative or executive branches of government.[372]

Alongside the various preconditions necessary to ensure institutional independence, it has proven difficult to quantify to what extent those preconditions need to be secured in order to allow for *de facto* institutional independence. Whilst absolute institutional independence calls for a complete separation between the various branches of government this is, in practice, an impossibility.[373] In reality, all branches of government are reliant to some extent on the cooperation of the other branches in order to fulfil their functions.[374] Whilst each branch has its own specific sphere of influence, some functions require cooperation between branches.[375] The legislature relies on the judiciary to apply the law in the court proceedings; in turn the judiciary relies on the executive to respect the application of the law. Consequently, it can be concluded that whilst institutional independence can be achieved to greater or lesser extents, it would be 'unrealistic to suppose the judiciary wholly independent of the… political branches'.[376] In fact, aspects of institutional independence are at odds with the effective realisation of the separation of powers. The separation of powers doctrine demands that each

[366] UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Value 1.1.
[367] Ibid Value 4.
[368] Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles on the Three Branches of Government' (*The Commonwealth* 19 June 1998) <https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf> accessed 22 September 2018, Principle (I)(i); ABA ROLI 'Judicial Reform Index for Armenia 2008' (n354) 21-26.
[369] Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles' (n368) Principle 5.
[370] Ibid.
[371] UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Principle 7.
[372] ABA ROLI 'Judicial Reform Index for Armenia 2008' (n354) 33.
[373] Larkins (n26) 618.
[374] Ferejohn (n172) 357.
[375] Ibid.
[376] Landes and Posner (n181) 885.

branch of government acts as a bulwark against the overreach of the other branches.[377] As a result, there will inevitably be some justifiable interference in the affairs of the judiciary under the separation of powers doctrine; as the judiciary police the jurisdiction of the other branches, so too do the legislative and executive branch owe a duty to ensure the judicial branch only operates within its jurisdiction.[378]

As a consequence, monitoring the standards of institutional independence actually achieved in a state is a very difficult exercise. Any attempt to monitor and report on institutional independence demands that a variety of preconditions are taken into account during analysis.[379] Beyond this, there is no benchmark against which to measure the standards achieved, given that complete institutional independence can never be realised. With no absolute guideline for comparison, it is difficult to hold states to account for their failure to achieve acceptable standards. As a result, institutional independence represents a complex component of judicial independence, and difficult standard to monitor in CIS member states and across the World.

b) Individual Independence

Alongside institutional independence, judicial independence also demands that there be adequate individual independence secured in the state. Individual independence demands that a judge conclude a case based only on the facts, free from any extraneous influence, whether direct or indirect, from any quarter.[380] Therefore a judge should be able to undertake the decision-making process free from 'fear or anticipation of (illegitimate) punishments or rewards'.[381]

Individual judicial independence can be deprived in several ways. Firstly, it can be deprived without the consent of the judiciary, where judges are forced to adhere to the will of another branch of government, other powerful group, or individual. This occurs when a judge faces, or perceives that they may face, a punishment or retribution for an 'unwelcome' judicial decision. This is known as decisional independence. Secondly, individual independence may be deprived with the consent of members of the judiciary. This is known as judicial

[377] Montesquieu (n109) 173; *see generally* Levi (n109) 371-391.
[378] Ferejohn (n172) 356.
[379] See pp 44
[380] United Nations Office on Drugs and Crime 'Bangalore Principles' (n230) Value 1.1.
[381] Ferejohn (n172) 355.

corruption, and most often occurs when judges receive 'compensation' for reaching a 'favourable' decision. It is therefore the issue of consent and the type of external influence utilised (threat or reward), which delineates these two sub-categories of individual independence.

i. Decisional Independence

Individual independence is denied is through illegitimate pressure, coercion, or threats from an external source designed to compel the judicial branch to adhere to the will of another group.[382] Thus, *de facto* individual independence requires primarily that judges make decisions that are consistent with their own attitudes in the belief that they are indeed free to do so.[383] This conception of judicial independence rests on two elements: freedom to make decisions, and the perception of that freedom.[384] To ensure the freedom to make such decisions the discrete role of the judicial branch must be secured,[385] and kept 'detached from the interests of the political system'.[386]

Monitoring standards of decisional independence achieved in states has also proven to be problematic. In recent decades, the traditional understanding of individual independence has required expansion. Customarily, judicial freedom to make decisions has been narrowly understood. This construction assumes that decisional independence can be achieved in practice as long as the judicial branch is free from interference from the members of the other branches.[387] Consequently the sole precondition necessary to ensure *de facto* decisional independence was to 'restrain public official from infringing on judicial authority'.[388] This construction was based on the fact that historically illegitimate pressure exerted on the decision making process of judges has originated from the executive and legislative branches of government[389] to obligate the judicial branch to adhere to and advance a particular political agenda.[390]

[382] United Nations Office on Drugs and Crime 'Bangalore Principles' (n230) Value 1.1.
[383] Ibid.
[384] Ibid.
[385] Larkins (n26) 609.
[386] Ibid.
[387] Ferejohn (n172) 365.
[388] Ibid.
[389] Ibid.
[390] Larkins (n26) 608.

This narrow construction, however, proved to be insufficient in the modern World. In particular, since the transition to market economies, influence over the judicial decision-making has similarly emerged from other influential economic, religious, and social groups.[391] It is also apparent that external interference in judicial decision can and has originated from within the judiciary itself.[392] Therefore, over the last few decades, a broader interpretation of decisional independence has acknowledged that in practice judges must be free to make decisions without interference from any source, whether governmental or otherwise.[393] For organisations seeking to monitor levels of decisional independence this places additional burdens on their fact-finding and analysis. It is not sufficient for organisations like OSCE and the American Bar Association to simply monitor relationships between judges and members of the executive and legislative branches. Instead, those relationships, alongside the relationships judges have with other powerful groups and individuals, must be taken into account when examining the standard of decisional independence achieved in a country.

Furthermore, like institutional independence, decisional independence demands numerous preconditions that ensure that it is achieved in practice. The 'political insularity'[394] of judges requires that they are not vulnerable to outside influence and are effectively protected from being placed in a position whereby they feel compelled to adhere to the wishes of an outside actor.[395] Therefore, to ensure that this 'political insularity' is achieved in practice, monitoring bodies must take into account all of these various preconditions in order to reach an informed conclusion.

It has been widely acknowledged that one such precondition of decisional independence is an objective and transparent judicial selection and appointment process.[396] A transparent merit-based appointments system, as well as an objective system of promotion, ensure appointed judges are free to make decisions without feeling indebted to, or biased towards, those who

[391] Ferejohn (n172) 369.
[392] United Nations Office on Drugs and Crime 'Bangalore Principles' (n230) Value 1.4; *see also generally* ABA ROLI 'Judicial Reform Index for Armenia 2008' (n354) 58.
[393] Ferejohn (n172) 366.
[394] Fiss (n360) 58.
[395] Ferejohn (n172) 365.
[396] UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Principle 10; Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles' (n368) Principle I.

have appointed them to office[397] or promoted them.[398] Another integral factor to insulate judges from inappropriate influence over their decision-making is adequate judicial tenure.[399] Lifelong tenure, or tenure until a mandatory retirement age, has been widely accepted as the most effective way to ensure that the judges' are extricated from external influences,[400] by ensuring that sitting judges are 'beyond the reach of the executive's opprobrium'.[401] Fixed term tenure with periodic reappointment, however, leaves judges vulnerable given that judges who issue decisions that disadvantage those in power run the risk that they will not be re-appointed to office.[402]

In tandem with adequate tenure, proper judicial discipline is an integral precondition to the effective functioning of decisional independence. Whilst judges must be held to standards appropriate for their office,[403] those standards must be pre-determined, and any hearing must be held fairly and expeditiously.[404] This again ensures that judges are able to reach decisions without fear that an unpopular or controversial decision will result in them being unfairly or unjustly disciplined. If not properly secured, judicial discipline is often utilised as a method to remove independent judges from office for reasons of political expediency.[405] As a necessary corollary, decisional independence also demands that judges enjoy immunity for any decisions taken during the exercise of their judicial functions,[406] again ensuring that judges do not have to fear reprisals for 'unwelcome' decisions. If these preconditions are not effectively secured in practice, the decisional independence of judges is vulnerable to external interference. However, the plurality of these preconditions makes it very difficult for international organisation to monitor whether decisional independence has been achieved in reality.[407]

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[397] Institute for Democracy and Electoral Assistance (IDEA) 'Judicial Tenure, Removal, Immunity, and Accountability' (*International IDEA* August 2014) <http://www.constitutionnet.org/files/judicial_removal_0.pdf> accessed 26 August 2015, 2.
[398] UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Principle 13; Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles' (n368) Principle I.
[399] UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Principle 11.
[400] Ibid Principle 12.
[401] Brian Opeskin 'Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges' (2015) 35(4) Oxford Journal of Legal Studies 627, 635.
[402] Ibid 627.
[403] UNGA'Basic Principles on the Independence of the Judiciary' (n226) Principle 19.
[404] Ibid Principle 17.
[405] Transparency International *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007) xxiv.
[406] UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Principle 16.
[407] Larkins (n26) 615.

The final factor which further complicates efforts to monitor and identify incidents where decisional independence has been compromised is the culture that surrounds these incidents. Judges are unlikely to concede that they reached a particular judgment because of pressure from an outside source.[408] Instead, judges are inclined to conceal 'their lack of autonomy',[409] making it very difficult for international organisations to monitor and report on standards of decisional independence achieved in a state. The reticence of judges to communicate incidents where their decisional independence has been compromised is made more difficult where judges face threats to their livelihoods[410] and to their lives.[411] In Argentina, for example, the judicial branch was frequently the target of 'partisan political attacks'[412] including at least five purges of the Supreme Court between 1946-1983,[413] where the judges were repeatedly expelled from office. As a consequence, the illegitimate pressure exerted over judges coerces them into compromising their decisional independence not only with respect to one particular decision, but also forces those judges into later concealing that coercion for fear of retributive action.[414]

ii. Corruption

The second way in which judicial independence can be undermined is through voluntary non-independence, or judicial corruption. Judicial corruption occurs when members of the judiciary are willing participants in the activity that jeopardises their independence. Transparency International characterised corruption as the 'misuse of entrusted power for private gain',[415] and it typically involves incidents where officials are induced to break laws and regulations with the promise of reward for that indiscretion.[416]

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[408] Albert P Melone 'Legal Professionals and Judicial independence in Transitional Society: The Case of Bulgaria' (Interim Meetings of the Research Committee on Comparative Judicial Studies, Florence, August 1994).
[409] Ibid.
[410] Larkins (n26) 622.
[411] *See generally* Amnesty International 'Guatemala: intimidation must not stop justice' (*Amnesty International,* 2001) <http://www.amnesty.org.uk/press-releases/guatemala-intimidation-must-not-stop-justice> accessed 12 March 2015.
[412] Ibid.
[413] Ibid.
[414] Ibid.
[415] Transparency International 'FAQs on Corruption' (*Transparency International*, 2015) <https://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/> Accessed 26 August 2015.
[416] Rasma Karklins 'Typology of Post-Communist Corruption' (2002) 49(4) Problems of Post-Communist 22, 24.

Judicial corruption can arise when individual judges have 'inappropriate connections with… the executive and legislative branches of government'[417] or with other groups, including corporate interests.[418] These inappropriate connections mean that a judge's decision-making process is compromised, to the extent that a judge is unwilling to make a decision based on the rule of law, but rather makes a decision in order to protect or strengthen that relationship with the expectation that the decision will be rewarded. A 'pliable' judiciary can provide the unlawful or illegitimate actions, including 'embezzlement, nepotism, crony privatisations or political decisions',[419] with a cloak of legal legitimacy. Judicial corruption can also occur when judges are approached with extraneous inducements,[420] such as monetary bribes or holidays, in order to influence the outcome of a case or to expedite a judgment or ruling.[421] Judges may also approach parties to a case, or their representatives, extorting payment for a 'favourable' judgment in a case.[422]

A necessary precondition to protect against judicial corruption is judicial accountability, which demands that there is proper oversight over judicial activities to ensure that judicial actions are beyond reproach,[423] and that decisions are based solely on facts and the rule of law.[424] However, the balance between judicial accountability and judicial independence is one that is fraught with tensions.[425]

Despite this tension, it is clear that judicial corruption is a significant impediment to the *de facto* realisation of judicial independence. Judicial corruption has both the capacity to destroy the reputation of an individual judge, and to 'erode(s) respect for the law'.[426] The United Nations has concluded:

[417] United Nations Office on Drugs and Crime 'Bangalore Principles' (n230) Value 1.3.
[418] Transparency International 'FAQs on Corruption' (n415).
[419] Transparency International 'Global Corruption Report 2007' (n405) xxiii.
[420] United Nations Office on Drugs and Crime 'Bangalore Principles' (n230) Value 1.1.
[421] Transparency International 'Global Corruption Report 2007' (n405) xxiv.
[422] Ian Ayres 'The Twin Faces of Judicial Corruption: Extortion and Bribery' (1996-1997) 74 Denver University Law Review 1231, 1232.
[423] United Nations Office on Drugs and Crime 'Bangalore Principles' (n230) Value 3.1, Value 4.2.
[424] Ibid Values 4.1-4.16.
[425] *See* pp26-27
[426] Wallace (n89) 342.

> Corruption is universal. Nowadays all states, whether developed or developing, suffer from the same phenomenon to varying degrees.[427]

As with decisional independence, incidents of judicial corruption can be difficult to identify. Judges are similarly unlikely to admit that they reached a decision because of a bribe or through extortion,[428] and it can be challenging to bring those incidents to light given the inherently secretive nature of corruption.[429] This is in part because incidents of judicial corruption are rarely one-off events.[430] Instead corruption has been likened to a cancer,[431] which spreads across the judicial branch and spreads to other branches of government, including the legislative and executive.[432] This results in a twofold issue: it allows corruption to become endemic throughout the entire political system if its progress is not arrested at the initial stage,[433] and it creates a culture of secrecy where enough people are involved in the corrupt activities that continued compliance with the culture is effectively secured because any revelation of corrupt activities would further risk revealing one's own indiscretions.[434] As a result, efforts to expose judicial corruption face 'closed ranks'[435] and a culture of secrecy which may hinder or prevent those violations from coming to light.

c) Monitoring and Measuring Judicial Independence: A Difficult Task

It is therefore for a multitude of reasons that judicial independence has proven to be a very difficult standard to monitor in practice. Its definitional complexity means that judicial independence is not a simple or binary concept. Instead judicial independence is reliant on there being institutional and individual independence in place. In addition, for individual independence, there must be *de facto* decisional independence and effective protections against judicial corruption. As a result, any attempts to measure the *de facto* standards of judicial independence in a state must determine whether all aspects of judicial independence have been secured to make any informed conclusions.

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[427] UNCHR (Sub-Commission) 'The Realization of Economic, Social, and Cultural Rights: Final Report on the Question of Impunity of Perpetrators of Human Rights Violations' (27 June 1997) UN Doc E/CN.4/Sub.2/1997/8, para 71-80.
[428] Ayres (n422) 1232.
[429] Transparency International 'Global Corruption Report 2007' (n405) 109.
[430] Dakolias and Thachuk (n116) 359.
[431] Ibid.
[432] Ibid.
[433] Ibid.
[434] Karklins (n391) 30.
[435] Transparency International 'Global Corruption Report 2007' (n405) 109.

Additionally, institutional independence and individual independence are contingent on a myriad of preconditions being effectively secured in practice. This makes monitoring the standards of judicial independence achieved in a state a complex and arduous task and means that international organisations must effectively audit a multiplicity of preconditions to ensure that judicial independence as a whole is achieved. The complexity and volume of the necessary information means that that traditional monitoring efforts have been criticised for a failure to assess the most appropriate information to reach reasoned conclusions.[436] This is further complicated by the fact that different preconditions hold different levels of relevance in different socio-political, economic, legal, and historic contexts.[437] Therefore each precondition assumes differing levels of importance in determining the *de facto* level of judicial independence in a particular country. As the American Bar Association has concluded:

> Assessing a country's progress towards judicial reform is fraught with challenges. No single criterion may serve as a talisman, and many commonly considered factors are difficult to quantify.[438]

The problem of effectively identifying the necessary preconditions and assigning those preconditions the correct weighting[439] has led to broader criticisms that the conclusions reached during these monitoring activities have limited utility, as they struggle to interpret the significance of judicial outcomes.[440]

Any understanding and monitoring of judicial independence is made additionally complex by the fact that it is a concept that is necessarily evolving and developing to reflect changing relationships and divergences from traditional power dynamics. Therefore, in recent decades the international understanding of decisional independence has necessarily expanded to recognise that influential socio-economic, religious, or civil organisations, alongside the executive and legislative branches of government, that can exert undue influence over judicial decision-making. This expanding definition of decisional independence means that

[436] Larkins (n26) 615.
[437] ABA ROLI 'Judicial Reform Index for Armenia 2008' (n354) i.
[438] Ibid.
[439] Larkins (n26) 615.
[440] Ibid.

international observers seeking to monitor judicial independence standards in a state must also monitor the relationships between judges and members of society, alongside the relationships between judges and members of the executive and legislative branches.

Finally, it has proven difficult to expose incidents where judicial independence has been compromised. Incidents where judges are willing participants in corrupt activity, and incidents where judges are victims of the activity compromising their independence, are both shrouded in a culture of secrecy.[441] Where judges are compliant in dishonest activities, there is no impetus for them to expose that activity, and these incidents are often couched in a culture of corruption.[442] Similarly, factors including embarrassment and self-preservation, impede judges from exposing incidents where external factors have compromised their decisional independence.[443] All of these factors have represented significant barriers to efforts to monitor judicial independence standards, and have worked to frustrate the efforts of international organisations including the American Bar Association, OSCE, and the CoE.

2.4 The Difficulty Monitoring of Standards of Judicial Impartiality

Monitoring standards of judicial impartiality has also proven to be a difficult task. Like judicial independence, judicial impartiality is made up of component parts; subjective impartiality and objective impartiality. This means that any attempts to monitor standards of judicial impartiality must determine whether both objective and subjective standards have been achieved in practice.

Subjective impartiality is concerned with ascertaining that the personal convictions of a judge in a particular case do not affect the decision taken,[444] and is achieved by ensuring that judges are not assigned cases where they have a particular bias as to the outcome due to their personal feelings or beliefs. The automatic presumption in each case is that subjective impartiality has been adequately achieved.[445] This presumption can be rebutted however, if, for example a judge shows evidence of hostility or ill-will',[446] or evidence is presented that a

[441] Transparency International 'Global Corruption Report 2007' (n405) 109; *see generally* Melone (n408).
[442] Dakolias and Thachuk (n116) 359.
[443] Melone (n408).
[444] OSCE ODHIR 'Legal Digest of International Fair Trial Rights' (n73) 62; *Piersack v Belgium* App no 8692/79 (ECtHR, 1 October 1982) para 30.
[445] *Le Compte, Van Leuven and De Meyere v Belgium* App no 6878/75 (ECtHR, 23 June 1981) para 58; *Campbell and Fell v United Kingdom* App no 7819/77 (ECtHR, 28 June 1984) para 84; *Hauschildt v Denmark* App no 10486/83 (ECtHR, 24 May1989) para 47.
[446] *Kyprianou v Cyprus* App no 73797/01 (ECtHR, 15 December 2005) para 119.

judge has arranged a particular case to be assigned to them for personal reasons.[447] The Human Rights Committee has further identified violations of the standard of subjective impartiality where judges have demonstrated clear bias through unbalanced directions to a jury in the summary.[448]

The second component of judicial impartiality is objective impartiality. Objective impartiality demands that there is the appearance of impartiality.[449] This means that any proceedings must appear to the reasonable observer to be impartially conducted and concluded.[450] In this respect the state has two duties. Firstly, the state must ensure that members of the judiciary are not faced with conflicts of interests arising from the performance of different functions in the same judicial process.[451] This means that during legal proceedings the judge should hold a singular role as an independent and unbiased arbitrator, and should not act, for example, as legal counsel or investigator.[452] Secondly there is a corresponding duty on individual judges to excuse themselves from cases where there is an 'objectively justifiable'[453] appearance of a conflict of interest.[454]

Measuring standards of judicial impartiality, and identifying incidents where it is violated, is made more complicated because, like institutional independence, it is impossible to achieve absolute judicial impartiality.[455] This is because judges and 'courts do not exist or operate in a vacuum'.[456] Absolute judicial impartiality cannot be achieved because judges cannot disregard their social, religious, political, and economic experiences during their decision making process.[457] Any attempt by judges to adopt a point of view that it is naturally not their own and observe a situations with complete, objective clarity would be 'superhuman'.[458]

[447] Ibid.
[448] *Wright v Jamaica* (18 August 1992) Communication no 349/1998 CCPR/C/45/D/349/1989.
[449] *Ferrantelli and Santangelo v Italy* App no 1987/92 (ECtHR, 7 August 1996) para 58; *Hauschildt v Denmark* (n445) para 48; *Wettstein v Switzerland* App no 33958/96 (ECtHR, 21 December 2000) para 44; *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000) para 32.
[450] OSCE ODIHR 'Legal Digest of International Fair Trial Rights' (n73) 63.
[451] Ibid 63-64; *see also* discussion on the use of judges in the USSR pp xx.
[452] Peter Costea 'The Legal System and the Judiciary in the Marxist-Leninist Regimes of the Third World' (1990) 16(3) Review of Socialist Law 225, 243.
[453] *Castdeo v Spain* (20 October 2008) Communication no 1122/2002 CCPR/C/94/D/1122/2002 para 48.
[454] *Piersack v Belgium* (n418) para 30(a).
[455] Becker (n140) 699.
[456] Larkins (n26) 613.
[457] Ibid.
[458] Becker (n140) 699.

Absolute judicial impartiality is also impossible because of the fundamental conflicts between judicial independence and judicial impartiality. To ensure that judicial impartiality is achieved in practice, there needs to be adequate judicial accountability in the relevant state. Judicial accountability, also necessary to protect against incidents of judicial corruption,[459] is a system by which judges can be held account for incidents where they disgrace their judicial office. There is, however, an inherent tension between securing judicial accountability on the one hand, and judicial independence on the other.[460] Should absolute judicial independence be achieved, it would preclude judicial accountability, because absolute judicial independence excludes any oversight by the executive and legislative branches of government over judicial decision-making.[461] Any attempts to tackle incidents of judicial corruption and non-impartiality, through judicial oversight and monitoring, have the potential to threaten judicial independence. The Special Rapporteur on the Independence of Judges and Lawyers has noted the danger that judicial accountability efforts might be abused by the executive and legislative branches of government to undermine judicial independence,[462] and to unduly discipline independent judges.[463] Conversely, however, institutional protocols to ensure judicial independence can afford judges too much latitude 'to impose their own views on society'.[464] As early as 1787, during the debates regarding the ratification of the American constitution in New York, Brutus warned that judges who are too well insulated from scrutiny may use that protection to abuse the trust placed in them, and the power awarded to them.[465] Under those circumstances it is imperative that judicial independence is not used as a barrier by which judges are protected from credible inquiry into allegations of judicial corruption and non-impartiality.[466] In this respect, the United Nations has noted that there needs to be greater attention to the promotion of judicial integrity and judicial

[459] See pp
[460] UNGA 'Independence of Judges and Lawyers: Note by the Secretary-General' (13 August 2012) UN Doc A/67/305 paras 3 and 37; UNGA 'Report of the Special rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul' (28 April 2014) UN Doc A/HRC/26/32 paras 3 and 22.
[461] Ferejohn (n172) 343.
[462] UNHRC 'Report of the Special Rapporteur on the independence of judges and lawyers: Note by the Secretariat' (9 June 2017) UN Doc A/HRC/35/31 para 42.
[463] Ibid para 93; *see also* UNHRC 'Report of the Special rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul: Addendum, Mission to the Maldives' (21 May 2013) UN Doc A/HRC/23/43/Add.3, para 87.
[464] Ralph Louis Ketcham The Anti Federalist Papers and the Constitutional Convention Debates (Signet Classic 2003) 293.
[465] Ferejohn (n172) 365.
[466] Ibid 344.

accountability,[467] and the World Bank has highlighted the continued importance of both a 'fair'[468] and 'predictable'[469] judicial system.

Thus, monitoring judicial impartiality also presents a difficult exercise for international organisations. This is because any monitoring efforts must take account of both the subjective and objective elements of judicial impartiality. More importantly, however, is the fact that judicial impartiality and aspects of judicial independence are in conflict with one another. Because absolute judicial impartiality is impossible, there is no benchmark to measure the standards achieved against. Furthermore, any attempts to measure both judicial impartiality and judicial independence must take into account the conflict between the two principles, and instead seek to ascertain whether an appropriate balance has been struck between the two standards, both complicating and burdening that monitoring process.

2.5 Conclusion

The problems associated with enforcing judicial independence and judicial impartiality are not as a result of a lack of formal provisions that support those standards.[470] There are numerous international and regional provisions which seek to protect judicial independence and judicial impartiality standards.[471] However, the effect of ratification of international human rights treaties on the standards of human rights achieved in practice is 'rather thin and inconsistent'.[472] Accession to the Convention Against Torture and the Optional Protocol to the ICCPR has no statistically significant effect on a state's adherence to standards of judicial independence.[473] Ratification of international human rights instruments does not seem to indicate true governmental intent to adhere to adequate standards of judicial independence

[467] UNCHR 'Civil and Political Rights, Including The Questions Of Independence Of The Judiciary, Administration Of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers Dato: Mission to Belarus' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42' (1 February 2001) UN Doc E/CN.4/2001/65 para 28.
[468] US Embassy in Israel 'World Bank Press Release on World Development Report' (*World Bank,* 25 June 1997) <http://www.usembassy-israel.org.il/publish/press/worldbnk/archive/1997/june/wb10626.htm> accessed 28 March 2015.
[469] Ibid.
[470] E.A. Howard 'The Essence of Constitutionalism' in Kenneth W Thompson and Rett T Ludwikowski (eds) *Constitutionalism and Human Rights: America, Poland, and France* (University Press of America 1991) 3.
[471] Charter of the United Nations (n67) Article 10; American Convention on Human Rights (n71) Article 8(1); African Charter on Human and Peoples' Rights (n69) Articles 7(1) and 26; UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Articles 1.1-1.4; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (n226) Article 75(4); International Covenant on Civil and Political Rights 1966 (n64) Article 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (n70) Article 6(1).
[472] Camp Keith *Political Repression* (n30) 180.
[473] Ibid.

and impartiality, rather ratification of seems to amount to a symbolic means by which a government can 'signal (it) is not a deviant actor'.[474]

The problem for international organisations that seek to enforce judicial independence and impartiality standards is twofold. Firstly, there continue to be significant problems ensuring that judicial independence and impartiality standards are respected in practice. Secondly, efforts to monitor the standards that are actually achieved in practice similarly face critical hurdles.

A significant part of the problem associated with ensuring judicial independence and impartiality standards are protected in practice is that, in reality, the violation of those standards may help a government illegitimately maintain power. An independent and impartial judiciary provides a forum for dissatisfied citizens to air their grievances against a repressive government.[475] It can further work to socialise citizens to become more rights aware, and less tolerant of other forms of government repression.[476] The perceived benefits of undermining judicial independence and impartiality standards therefore work to outweigh the associated 'material and reputational costs'[477] of violating those rights. In CIS member states the willingness of the government to engage in repression of judicial independence standards may be compounded by the regime types present in the state.

In addition, efforts to monitor *de facto* standards of judicial independence and impartiality across the globe have experienced limited success.[478] This is in part due to the definitional complexities of both judicial independence and impartiality. Both of these standards are made up of various foundations, which all need to be achieved for there to be judicial independence and impartiality in practice. Furthermore, aspects of judicial independence and judicial impartiality have seemingly mutually exclusive; judicial accountability and judicial independence acting in conflict with one another. Alongside this, numerous pre-conditions are required for judicial independence and judicial impartiality to be effectively protected in practice. Finally, violations of judicial impartiality and judicial independence both engender a

[474] Ibid; *see also* Howard (n470) 3.
[475] UNGA 'Human Rights in the Administration of Justice: UN Res 50/181' (28 February 1996) UN Doc A/Res/50/181.
[476] Camp Keith *Political Repression* (n30) 27.
[477] Ibid 291.
[478] Larkins (n26) 615.

culture of secrecy and silence. All of these factors work to frustrate and hinder efforts to monitor *de facto* standards of judicial independence and impartiality around the World.

This combination produces a very unwelcome result. Despite significant international pressure, in practice the executive and legislative branches in many states do not want to achieve true judicial independence and true judicial impartiality, and in turn the international community struggles to adequately determine when those standards are being violated. Given the crucial role that judicial independence and judicial impartiality plays in democratic governance and in the protection of human rights[479] the failures to adequately protect those standards is deeply problematic, particularly in the context of democratising ex-Soviet CIS member states.

[479] Cox (n1) 571; World Conference on Human Rights (n237); UNGA Res 'High Commissioner for the Promotion and Protection of all Human Rights' (n237).

3 The Far-Reaching Impact of Judicial Independence and Judicial Impartiality in CIS member states: The Exhaustion of Domestic Remedies Rule and Incidents of Torture

3.1 The Far-Reaching Consequences of Judicial Independence and Judicial Impartiality

The *de facto* level of judicial independence and judicial impartiality achieved in a state has far reaching consequences and its ripple effects are felt far from the judiciary. This is unsurprising given the integral nature of judicial independence and judicial impartiality in the functioning of the separation of powers[480] and the rule of law,[481] and in turn its fundamental role in the operation of democratic governance in practice.[482]

The impact of standards of judicial independence and impartiality is apparent with respect to the exhaustion of domestic remedies rule. The relationship between standards of judicial independence and judicial impartiality on the one hand, and the exhaustion of domestic remedies rule on the other, is a direct one; a failure to secure adequate standards of judicial independence is a direct cause of applications to circumvent the exhaustion of domestic remedies rule. It is not the only factor behind application to circumvent domestic remedies, but one of those factors. As a result, in instances where an individual alleging a human rights violation against a CIS member state makes an individual communication to a regional or international human rights body, and the individual perceives that they are unable to utilise the domestic court system because of inadequate judicial independence standards in the country, they will make a request to circumvent those domestic remedies. In turn, in instances where the international or regional human rights body is also of the opinion that there are inadequate standards of judicial independence in the domestic courts of the respondent state they will permit those individual applicants to abstain from engaging and exhausting those ineffective domestic remedies.

[480] Dakolias and Thachuk (n118) 360; Plato *The Laws* (n119) 716a-d.
[481] Steiner and Alston (n216) 711.
[482] Russell (n191) 2.

Applications and decisions with respect to the exhaustion of domestic remedies rule therefore provides a useful lens with which to understand judicial independence. Primarily, it demonstrates the wide-reaching ripple effects and consequences that standards of judicial independence and impartiality can have. Secondly, the content of applications and decisions provide useful details about alleged standards of judicial independence and impartiality present in a country.

The breadth of the consequences of standards of independence and impartiality in a domestic judiciary is also apparent with respect to the incidence of torture in the country. The relationship between standards of judicial independence and the protection of human rights is a well-established one;[483] an independent judiciary acts as a guardian of human rights standards against infractions from the executive and legislative branches of government.[484] Without a domestic forum to hold a rights-abusing executive or legislative branch to account, human rights standards may be abused with impunity without intervention. The ripple effects of judicial independence and the impact those standards have on incidents of torture in a country is indirect; there is not a cause and effect relationship akin to that of the exhaustion of domestic remedies rule and judicial independence and impartiality. Instead, the relationship is more oblique and ancillary; many other factors also contribute to a culture of torture in a country. Nonetheless, the ripple effects of judicial independence and impartiality are seen in the incidence of torture, where impunity and prosecutorial bias allow the use of torture to go unchallenged.

Torture therefore provides another useful lens with which to understand the far reaching consequences of standards of judicial independence and impartiality in a country.

3.2 Examining the Relationship between the Exhaustion of Domestic Remedies Rule and Standards of Judicial Independence and Judicial Impartiality

a) Introduction to, and History of, the Exhaustion of Domestic Remedies Rule

[483] *See* pp22-26
[484] World Conference on Human Rights 'Vienna Declaration' (n237); UNGA Res 'High Commissioner for the Promotion and Protection of all Human Rights' (n237).

The exhaustion of domestic remedies rule provides an informative and revealing lens with which to examine the wide-ranging ramifications of judicial independence and impartiality standards. Circumvention of the exhaustion of domestic remedies rule is in a large part contingent on the demonstration that adequate standards of judicial independence have not been achieved in the respondent state.[485] In this respect, the institutionalisation of the exhaustion of domestic remedies rule can be used to monitor the 'voluntary compliance of states'[486] with universally acknowledged standards of judicial independence.[487] The frequency and contents of successful applications to circumvent the exhaustion rule therefore provide valuable lens with which to examine the *de facto* standards of judicial independence achieved in the respondent state.

The exhaustion rule demands that an international tribunal must reject any complaint from an individual who has not exhausted all domestic remedies available in the respondent state.[488] Therefore any application to an international tribunal should either demonstrate that domestic remedies available in the respondent state have been exhausted, or alternatively the claim should demonstrate the futility of any attempt to engage those domestic remedies. The standard demanded by the rule is high, and the International Court of Justice has confirmed that it requires that all available remedies, whether judicial or administrative, be pursued.[489]

The rule can be framed in a number of ways. Primarily, the rule has been interpreted as a procedural mechanism, dealing with issues of admissibility rather than substance.[490] Fawcett[491] and Schochet[492] have framed this procedure as being that of a conflict rule,[493] where the exhaustion of domestic remedies rule resolves which tribunal has jurisdiction of an issue,[494] and determines the circumstances in which an international tribunal may assume

[485] *T.K. v France* (8 November 1989) Communication No 220/1987 CCPR/C/37/D/220/1987.
[486] Paula Rivka Schochet 'A New Role for an Old Rule: Local Remedies: Local Remedies and Expanding Human Rights Jurisdiction under the Torture Victim Protection Act' (1987) 19(1) Colombia Human Rights Law Review 223, 240.
[487] Ibid.
[488] AO Adede 'A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies' (1977) 18(1) Harvard International Law Journal 1, 9.
[489] *Ambatelios (Greece v United Kingdom)* (Preliminary Objection) [1952] ICJ Rep 28.
[490] Adede (n488) 15.
[491] JES Fawcett 'The Exhaustion of Local Remedies: Substance or Procedure' (1954) 31 British Yearbook of International Law 452, 454.
[492] Schochet (n486) 235.
[493] Fawcett (n491) 454.
[494] Ibid.

jurisdiction.[495] The Law Commission has interpreted the rule as substantive as well as procedural.[496] In his report to the Law Commission, Ago concluded that the existence of any international responsibility on the part of the state was contingent on the individual exhausting any and all remedies available in that state.[497] Until there is effective exhaustion of domestic remedies the actions of the state cannot amount to an 'internationally wrongful act'.[498] This interpretation of the rule bestows it with a substantive quality, as the recognition of an internationally wrongful act is contingent on any claim either exhausting domestic remedies, or successfully claiming the right to circumvent those remedies.[499]

Despite differing views on the substantive and procedural qualities of the exhaustion of domestic remedies rule, the rule itself is well established. The rule has been described as both 'ancient and commonplace',[500] with 'particularly deep roots'[501] in international law. The exhaustion of domestic remedies rule has become so widely accepted that it was recognised as a 'well established rule of customary international law'[502] by the International Court of Justice. The International Court of Justice has also noted the significance of the exhaustion rule,[503] emphasising its importance and its status as an elementary principle of international law.[504]

b) Rationalising the Exhaustion Rule

The utilisation of the exhaustion of domestic remedies rule has been rationalised in a number of ways. The exhaustion rule originated in the sphere of international diplomatic protection of citizens abroad,[505] and has more recently been transposed into a number of other international

[495] Ibid.
[496] Robert Ago 'Sixth Report on State Responsibility' (1977) 2 Year of International Law Commission Part II 3, 20.
[497] Silvia D'Ascoli and Kathrin Maria Scherr 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection' (2007) 2007/02 European University Institute Working Papers s1, 3.
[498] Ibid.
[499] Ibid.
[500] Lord McNair *International Law Opinions* (Volume 2, Cambridge University Press, 1956) 312.
[501] Matthew S Duchesne 'The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes' (2004) 36 George Washington International Law Review 783, 788.
[502] *Ambatielos (Greece v UK)* (Merits) [1952] ICJ Rep 10.
[503] *The Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* P.C.I.J. (ser. A/B) No. 76, para 181.
[504] *Mavrommatis Palestine Concessions (Greece v UK)* P.C.I.J. (ser. B) No. 3, para 21.
[505] D'Ascoli and Scherr (n498) 1.

law spheres,[506] including that of international human rights protection.[507] In the human rights context the exhaustion rule has been framed in terms of the rights of the relevant parties, and conversely in terms of their responsibilities in the litigation process, to explain and justify its presence in this sphere. Judicial independence and the various rationalisations of the exhaustion rule are intrinsically linked. Judicial independence runs like a thread through each rationalisation, and each rationalisation, at least in some way, is contingent on judicial independence.

The International Court of Justice noted that the exhaustion of domestic remedies rule ensures that 'the state where the violation occurred should have an opportunity to redress it by its own means'.[508] By preserving the dignity of the state[509] and protecting state sovereignty,[510] the exhaustion rule primarily benefits the respondent state.[511] In the context of diplomatic protection the protection of state sovereignty was particularly critical, given the assumption that a citizen travelling abroad would accept to be bound by the domestic law of that state.[512]

The exhaustion rule is therefore primarily framed with respect to the respondent state and provides that state with a number of assurances. Firstly, it reassures the state that the assumption is that the domestic courts are capable of ensuring justice,[513] without any need for international interference.[514] The assumption in this instance is that there is an independent judiciary in the respondent state capable, and willing to, objectively adjudicate the human rights complaint. It further allows the state to first establish that the wrong committed against the claimant was committed by a state actor,[515] rather than by a private citizen.[516] Additionally, even if state actors committed the wrong, the exhaustion rule ensures that the

[506] Schochet (n486) 235.
[507] Adede (n488) 4.
[508] *Interhandel (Switzerland v United States of America),* (Preliminary Objections) [1959] I.C.J. Rep 6, para 27.
[509] David R Mummery 'The Content of the Duty to Exhaust Local Judicial Remedies' (1964) 58(2) American Journal of International Law 389, 391.
[510] Algot Bagge 'Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders' (1958) 34 British Yearbook of International Law 162, 166; Alwyn F Freeman *The International Responsibility of States for Denial of Justice* (Longman, Green and Co 1938) 417.
[511] Schochet (n486) 235.
[512] Edward Montefiore Borchard *The Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Company 1915) 817-818.
[513] Ibid.
[514] Ibid.
[515] Ibid.
[516] Ibid.

state is able to regulate its own affairs,[517] to do justice in its own way,[518] and redress the wrong by its own means within its own domestic legal system.[519] This again assumes that the respondent state has a domestic legal system willing and able to provide justice to the victim of a human rights violation. The primary purpose of the exhaustion rule is, therefore, to ensure that the state has the opportunity to redress any wrongs prior to 'its international responsibility [being] called into question',[520] and before it is forced to answer to another state in an international proceeding.[521] The right of the state to have this opportunity, and to avoid diplomatic embarrassment, is therefore contingent on its ability and willingness to provide an independent and impartial tribunal to hear the alleged wrong.

Antithetically, the exhaustion rule has also been framed in the terms of the responsibility of the state to resolve any dispute in the domestic courts.[522] This rationalisation envisages the exhaustion of domestic remedies rule as a duty that the state must account for, rather than as right bestowed on the state. This interpretation of the exhaustion rule demands that the state provides a viable remedy for the complainant within the domestic jurisdiction. Furthermore, it demands that any resolution is adequate,[523] and provides a minimum standard of justice necessary to redress the wrong.[524] In 1955 during the drafting of the International Covenant on Civil and Political Rights, the UN Secretary General at the time, Dag Hammarskjöld, supported this rationalisation of the exhaustion rule. He framed the state's responsibility in three parts, stating that it was made up of 'the individual's possession of a legal remedy, the granting of this remedy by national authorities, and the enforcement of the remedy by the competent authorities'.[525] Under this rationalisation, the justification of the exhaustion of domestic remedies is similarly contingent on the realisation of true judicial independence and judicial impartiality.

[517] Adede (n488) 15.
[518] Borchard (n512) 817-818.
[519] Interhandel (n508) 27.
[520] AA Cançado Trindade *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its rationale in the international protection of individual rights* (Cambridge University Press 1983) 1.
[521] Ivan L Head 'A Fresh Look at the Local Remedies Rule' (1967) 5 Canadian Yearbook of International Law 142, 151; Adede (n488) 15.
[522] CF Amerasinghe 'The Exhaustion of Procedural Remedies in the Same Court' (1963) 12(4) International and Comparative Law Quarterly 1285, 1290.
[523] Ibid 1292.
[524] Ibid 1296.
[525] UNGA 'Draft International Covenant on Human Rights' (1955) UN Doc A/2929 para 14.

Secondly, the exhaustion of domestic remedies rule has been framed with respect to the international community, and other nation states within that community. This rationalisation of the exhaustion rule is based on the principle of reciprocity;[526] the rule applying consistently to any application against any state. Therefore, even in instances where the state of an 'injured alien'[527] wishes to espouse the rights of its citizen in an international forum,[528] it is bound to respect the right of the respondent state's domestic courts' to do justice,[529] knowing that, in turn, the rule would be applied *quid pro quo* should a challenge be brought against it.

As a result, the successful application of this rule helps to minimise diplomatic tensions and avoid diplomatic incidents by ensuring that the legal issues between the respondent state and the individual are not aired in the international arena.[530] This ensures that the state has a chance to deal with any complaint before it can cause diplomatic embarrassment or diplomatic tensions by being unduly publicised.[531]

The exhaustion of domestic remedies rule further ensures that international forums are not overwhelmed with complaints, by assuring that the domestic courts deal with the majority of claims. During the debates on the drafting of the International Covenant on Civil and Political Rights delegates noted that the Human Rights Committee could only operate effectively when it is not 'inundated'[532] with a 'flood of petitions'.[533] The rule further ensures that the international tribunal does not duplicate any domestic remedies offered to the claimant.[534] This rationalisation of the exhaustion rule also relies on domestic standards of judicial independence and judicial impartiality being effectively implemented, to ensure that the issue does not need to be heard before an international tribunal.

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[526] Emeka Duruigbo 'Exhaustion of Local Remedies in Alien Tort Litigation: Implication for International Human Rights Protection' (2006) 29 Fordham International Law Journal 1245, 1258; Mummery 'The Content of the Duty to Exhaust Local Judicial Remedies' (n509) 392.
[527] Borchard (n512) 817-818.
[528] Bagge (n510) 163; *Mavrommatis Palestinian Confessions* (n504) para 21.
[529] Borchard (n512) 817-818.
[530] David R Mummery 'Increasing the Use of Local Remedies' (1964) 58 Proceedings of the American Society of International Law at Its Annual Meetings (1921-1969) 107, 113.
[531] Amerasinghe 'The Exhaustion of Procedural Remedies in the Same Court' (n522) 1288; Mummery 'The Content of the Duty to Exhaust Local Judicial Remedies' (n509) 391.
[532] AA Cançado Trindade 'Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and its Optional Protocol' (1976) 28 International and Comparative Law Quarterly 734, 745.
[533] Ibid.
[534] BA Wortley 'The Protection of Property Situation Abroad' (1961) 35 Tulane Law Review 739, 744; Duruigbo (n526) 1257.

Finally, the exhaustion rule has been framed in terms of the individual making the complaint of a human rights violations. Primarily it has been understood in the context of the duties of the individual. The exhaustion rule obliges the individual to exhaust all domestic remedies,[535] the counterpart of the state's duty to provide an effective remedy.[536] The duty on the individual to exhaust domestic remedies assumes that there is an effective remedy available to exhaust, an assumption reliant on there being *de facto* judicial independence and impartiality in the domestic courts.

The exhaustion rule has also been framed in terms of the advantages bestowed on the complainant, by ensuring any claim is heard in the most efficient forum.[537] The underlying belief in these instances is that domestic remedies are 'speedier, less expensive, and more effective'[538] than international alternatives. There a number of rationales for this assumption, in particular the proximity of the courts to the incident,[539] and the avoidance of 'outsiders' interfering with, and slowing, the case.[540] In theory therefore, the rule protects the interests of the claimant by ensuring that justice is either secured in the most speedy and effective forum, or 'failing that, a remedy is provided [in an] international forum'.[541]

In practice, however, this rationalisation is unconvincing. The exhaustion rule is prefaced on the assumption that there are effective remedies available in the state for the individual to exhaust.[542] However, an application to international tribunal where domestic remedies have not been engaged indicates that the complainant believes that they will not receive an adequate or just hearing in the domestic tribunal, making a complaint to the less efficient and more expensive international tribunal necessary. In the human rights context this criticism has been particularly emphasised, given that domestic justice in rights-abusing states is 'notoriously corrupt'.[543] The UN Secretary General acknowledged this reality during the drafting of the International Covenant on Civil and Political Rights, accepting that it might be

[535] D'Ascoli and Scherr (n498) 18.
[536] Ibid.
[537] Schochet (n486) 227.
[538] Ibid.
[539] Mummery 'The Content of the Duty to Exhaust Local Judicial Remedies' (n509) 391.
[540] Ibid.
[541] Adede (n488) 15.
[542] *Wemhoff v Federal Republic of Germany* App no 2122/64 (ECtHR, 27 June 1968) para 23.
[543] Bagge (n510) 166-167.

> undesirable that a person whose freedoms had been violated, in all probability by the political authorities of the state, should have his right to a remedy determined by a political organ, since the very same organ that had violated his right might be the one that was adjudicating on his claim for a remedy.[544]

In those circumstances the exhaustion of domestic remedies rule obligates the individual to finance their attempts to exhaust all remedies in the domestic jurisdiction, before financing a further application before the international tribunal. In this respect the International Court of Justice noted

> it appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts, only exhaust what to him - at least, for the time being - must be a very unsatisfactory remedy.[545]

The exhaustion rule therefore obligates the injured individual to invest time and funds on a remedy that will likely prove fruitless.[546]

Judicial independence and the various rationalisations of exhaustion rule are all inextricably linked. All rationalisations of the exhaustion rule are contingent on *de facto* judicial independence and judicial impartiality being realised in the respondent state. Without judicial independence and judicial impartiality any benefits bestowed on the individual or the international community cannot be realised in practice, and those rationalisations for the rule fail to justify its use in the international human rights context. Similarly, the protection of state sovereignty and state responsibility also assumes that judicial independence is a right adequately implemented in the respondent state. If there is no judicial independence and impartiality in the respondent state, then the circumvention of the exhaustion of domestic remedies rule would not deprive the respondent state of their right to do justice by their own means, given that no adequate standard of justice would be achieved in the domestic forum.

[544] Draft International Covenant on Human Rights (n525) Chapter V, para 16.
[545] *Finnish Vessels Case (Finland v Great Britain)* [1934] Rep 12, para 149.
[546] Bagge (n510) 166-167.

c) Mitigation of the Exhaustion Rule in the International Human Rights Law Context

The transposition of the exhaustion of domestic remedies rule to the human rights sphere has been criticised.[547] Petitions in the international diplomatic context generally involve claims for monetary compensation, whereas claims in the international human rights context are more likely to involve claims for 'life or liberty'.[548] The application of the rule in both contexts, despite the fundamental differences between the commercial sphere and the human rights sphere, has received condemnation.[549] Additionally, it has been noted that the exhaustion of domestic remedies rule results in a very high percentage of human rights complaints to international tribunals being rejected.[550] The subsequent failure to provide international oversight of human rights abuses in the respondent state allows those violations to continue unchecked and unchallenged. In this respect it has been noted that the failure to exhaust local remedies is 'one of the favourite objections… to international claims',[551] seemingly allowing states to derive an advantage from their own wrongs.[552]

Nonetheless, regardless of the perceived wisdom of transposition, the rule has become commonplace in the human rights context. In United Nations' human rights instruments, the phrase 'all available domestic remedies [must] have been invoked and exhausted'[553] has become standard.[554] In other regional and international human rights conventions comparable provisions similarly demanding the exhaustion of local remedies are present.[555]

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[547] *See generally* Sophie Gallop 'The Exhaustion of Domestic Remedies Rule: A Realistic Demand for Individuals for have Suffered Torture at the Hands of State actors' (2013) (1) Bristol Law Review 75, 80-82; Gordon L Weil 'Decisions on Inadmissible Applications by the European Commission of Human Rights' (1960) 54(3) American Journal of International Law 874, 874; Theodor Meron 'The Incidence of the Rule of Exhaustion of Local Remedies' (1959) 35 British Yearbook of International Law 83, 100; Fawcett (n491) 452.
[548] Hugh I Manke 'The Exhaustion of Domestic Remedies in the United Nations Subcommission on Prevention of Discrimination and Protection of Minorities' (1975) 25 Buffalo Law Review 643, 644.
[549] Gallop (n547) 80-82.
[550] Weil has estimated that between 1955 and 1960 of the 713 applications to the European Court of Human Rights, 710 were declared inadmissible, 'a rather high proportion of [these] decisions…. Have been based partly or wholly on the ground that all domestic remedies have not been exhausted'. *See* Weil (n547) 874.
[551] Fawcett (n491) 452.
[552] Meron (n547) 100.
[553] International Covenant on Civil and Political Rights (n68) Article 41(1)(c).
[554] Adede (n488) 4; International Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Article 14(7)(a) (annex).
[555] The American Convention on Human Rights 1969 (n68) Article 46(1)(a.) demands 'that the remedies under domestic law have been pursued and exhausted in accordance with generally recognised principles of international law; African Charter on Human and Peoples' Rights (n68) Article 50 states that 'The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged'; European Convention on Human Rights (n70) Article 35(1) states that 'The Court may only

To mitigate the problems associated with a strict application of the exhaustion of domestic remedies rule in the human rights context, a number of exceptions have been recognised allowing individuals to circumvent the rule. The exhaustion rule has been applied with flexibility even in the context of international diplomatic protection. The International Court of Justice concluded that

> The principle of the exhaustion of local remedies is not absolute and rigid; it has to be applied flexibly according to the case. Some situation or facts may entitle the Court to accede to a request, even if the remedies have not been completely exhausted.[556]

It further noted

> [T]he requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity.[557]

In the human rights context the rule has been applied with greater flexibility,[558] and a number of exceptions have been recognised, allowing circumvention of the exhaustion rule. The European Court of Human Rights[559] and the Human Rights Committee[560] have both expanded on exceptions to the exhaustion of domestic remedies rule and applied it in a 'pragmatic'[561] case-by-case manner.[562]

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deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken'.

[556] *Interhandel* (n508) para 87.

[557] *Certain Norwegian Loans (France v Norway)* ICJ Rep 9 (1957) para 37.

[558] D'Ascoli and Scherr (n498) 12.

[559] Armenia and Azerbaijan are both signatories to the European Convention on Human Rights. *See* Council of Europe 'Chart of signatures and ratifications of Treaty 005' (*Council of Europe,* 25 January 2017) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=2AfZsoJr> accessed 25 January 2017.

[560] All CIS member states are signatories to the Optional Protocol to the International Covenant on Civil and Political Rights, which allows individual citizens to make a complaint to the Human Rights Committee. Armenia ratified the Optional Treaty in 1993, Azerbaijan in 2001, Belarus in 1992, Kazakhstan in 2009, Kyrgyzstan in 1994, Moldova in 2008, Tajikistan in 1999, and Uzbekistan in 1995. *See* OHCHR 'Ratification of International Human Rights Treaties' (*United Nations,* 2017) <http://indicators.ohchr.org/> accessed 25 January 2017.

[561] Schochet (n486) 229.

[562] Ibid.

i. Unavailable Remedies

Case law from both the Human Rights Committee and the European Court of Human Rights has established that when remedies are unavailable in the respondent state, the claimant cannot utilise them, and therefore does not need to attempt to exhaust those remedies.[563] This exception recognises that whilst an individual is obliged to make efforts to exhaust domestic remedies, they are not obliged to make unreasonable efforts.[564] It further recognises that a remedy must be sufficiently available in practice as well as in theory.[565] Remedies are therefore considered unavailable when the complainant has not got access to legal aid, and cannot afford legal representation to support their claim.[566]

In instances where the state denies the claimant access to courts, or to other administrative remedies, human rights tribunals have recognised that remedies are in practice not available.[567] European case law has recognised numerous instances where remedies have been made unavailable, and noted that in a number of cases the Turkish government could not provide a 'single example of compensation being awarded',[568] nor could they demonstrate any 'successful prosecutions'[569] of government officials alleged to have committed human rights abuses domestic remedies could not be considered available. As a consequence, victims of similar human rights abuses were allowed to circumvent the exhaustion rule, given that no remedies were available in practice.[570] The European Court of Human Rights has also recognised that remedies will unavailable when they are constructively denied to the claimant, for example when individuals are intimidated into withdrawing applications.[571]

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[563] D'Ascoli and Scherr (n498) 12.
[564] Mummery 'The Content of the Duty to Exhaust Local Judicial Remedies' (n509) 395.
[565] D'Ascoli and Scherr (n498) 12; *Ciulla v Italy* App no 11152/84 (ECtHR, 22 February 1989); *Vernillo v France* App No 1188/85 (ECtHR, 20 February 1991).
[566] *Reid v Jamaica* (14 July 1994) Communication No 355/1989 UN Doc CCPR/C/51/D/355/1989.
[567] Adede (n488) 9; Head (n521) 149; Duruigbo (n526) 1263; Chittharanjan Felix Amerasinghe *Local Remedies in International Law* (CUP 2004) 81.
[568] *Akdivar and Others v Turkey* App No 21893/93 (ECtHR, 1 April 1998).
[569] Ibid.
[570] Reidy, Hampson, and Boyle note that in over 60 cases the Human Rights Commission found that complainants did not have access to an adequate remedy at their disposal. *See* Aisling Reidy, Francoise Hampson, and Kevin Boyle 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey' (1997) 15 Netherlands Quarterly of Human Rights 161, 165.
[571] Ibid 167; *Akdivar and Others v Turkey* (n568).

ii. Insufficient Remedies

Additionally, an individual will be permitted to circumvent the exhaustion of domestic remedies rule when the remedy offered is not sufficient.[572] This exception recognises that any remedy offered must be capable of 'redressing the alleged harm'[573] suffered by the victim of the human rights violation. These remedies should include steps to conduct investigations into the alleged breach of human rights, bring the perpetrators of the violation to justice, and include efforts to ensure that such violations are not repeated.[574] The Human Rights Committee has noted that remedies that are solely 'disciplinary or administrative'[575] in nature will not be considered sufficient to redress 'violations of basic human rights'.[576] In *Lawless v Ireland*,[577] the European Court of Human Rights noted that the domestic remedies could not offer compensation, nor offer the alleged victim the prospect of release from the alleged unlawful imprisonment. In these circumstances the remedies were not deemed sufficient.[578]

iii. Ineffective Remedies

Human rights tribunals have also clarified that an individual complainant may circumvent domestic remedies when those remedies are ineffective. Remedies are considered ineffective in a number of instances, most importantly when there is not *de facto* judicial independence in domestic courts.

Remedies will not be considered effective when they do not offer the claimant a reasonable prospect of success.[579] In instances where there is not effective separation of powers, and the decisions of the judicial branch are in practice dictated by the executive branch, [580] the individual bringing a human rights complaint against the government will not have that reasonable prospect.[581] The CoE has clarified that for judicial remedies to be considered

[572] D'Ascoli and Scherr (n498) 13.
[573] Ibid.
[574] *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996); Dinah Shelton *Remedies in International Human Rights Law* (2nd edn, OUP, 2006) 15-16.
[575] *Arhuaco v Colombia* (29 July 1997) Communication No 612/1995 CCPR/C/60/D/612/1995 para 5.3.
[576] Ibid.
[577] App no 332/57 (ECtHR, 1 July 1961) para 318.
[578] D'Ascoli and Scherr (n498) 13.
[579] *T.K. v France* (n485).
[580] *Robert E. Brown (United States v Great Britain)* 6 R. International Arbitration Awards 120 (1923).
[581] Ibid.

effective, judges must be impartial and independent,[582] and free from any political bias.[583] Therefore, where judges are either threatened or intimidated during their judicial decision-making process, human rights tribunals have recognised that such judicial remedies cannot be effective.[584] Additionally, domestic judges hearing a human rights complaint must hear the application in full and examine its merits before passing any decision.[585] This principle has been recognised by other tribunals in the international context where it has been noted that remedies cannot be effective when they amount to a 'clear and discriminatory violation' of the domestic law of the respondent state.[586] Thus, when the risk or cost of engaging with domestic remedies outweighs the possibility of the potential remedy, the individual will likely be able to circumvent domestic remedies.[587]

Nonetheless, demonstrating that judicial remedies are ineffective in the respondent state can prove to be a particularly arduous task.[588] The threshold for demonstrating that domestic remedies are ineffective, due to inadequate standards of judicial independence in a state, is very high. The essential purpose of the rule is to give 'primacy'[589] to local courts, and international tribunals have proven reluctant to undermine this by recognising instances where it would be 'unreasonable to compel the injured individual to seek justice'[590] in domestic courts. The Human Rights Committee has reiterated the fact that 'mere doubts about the success of such remedies do not render them ineffective'.[591] Similarly, the Committee has noted that remedies will not reach the standard of being 'ineffective' when they are merely 'inconvenient'.[592] Even when an individual does attempt to utilise domestic remedies, 'it might be difficult, at times impossible, for applicants to obtain certified true

[582] Council of Europe 'Guide to Good Practice in Respect of Domestic Remedies' (*Council of Europe,* 2013) <http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/GuideBonnesPratiques-FINAL-EN.pdf> accessed 27 January 2017, 17.
[583] Schochet (n486) 230.
[584] *Velasquez Rodriguez v Honduras* (1988) Inter-Am.Ct.H.R. (Ser. C) No. 4, paras 34 and 194; Duruigbo (n526) 1273.
[585] Ibid; *Brincat v Italy* App No 13867/88 (ECtHR, 26 November 1992) para 21; *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979) para 31.
[586] *Great Britain v Colombia* (1875) 2 Moore Arbitrations 2050.
[587] Mummery 'The Content of the Duty to Exhaust Local Judicial Remedies' (n509) 401.
[588] Meron (n547) 83; Gallop (n547) 92-93.
[589] Schochet (n486) 228.
[590] Meron (n547) 83.
[591] *J.B. and H.K. v France* (25 October 1988) Communication No 325/1988 CCPR/C/34/D/325/1988 para 3.3.
[592] *T.K. v France* (n485).

copies of judgments'[593] that demonstrate that the domestic remedies did not offer a reasonable prospect of success in that case.

Domestic remedies will additionally be considered ineffective in two notable circumstances. Firstly, domestic remedies are considered ineffective when they are not realised in a reasonable time frame.[594] The Optional Protocol to the International Covenant on Civil and Political Rights specifically states that an individual will not need to exhaust domestic remedies when the remedies available are unduly prolonged.[595] Unlike the Optional Protocol,[596] the European Convention on Human Rights does not include a specific provision in the treaty text allowing the individual to circumvent the exhaustion rule when domestic remedies are not realised with a reasonable time. However, case law from the European Court of Human Rights has established that when remedies are unduly prolonged they are ineffective,[597] allowing the complainant to circumvent the rule.

Finally, evidence of an administrative practice of human rights abuses will also render any local remedies offered by the respondent state ineffective.[598] In such circumstances, human rights tribunals have recognised that an administrative practice would likely negate the efficacy of any local remedies due to the difficulties 'of securing probative evidence',[599] and due to the fact that 'administrative enquiries would either be not instituted, or, if they were, would likely to be half-hearted and incomplete'.[600] The European Commission of Human Rights concluded that an administrative practice was contingent on a 'substantial number'[601] of violations of the human rights standard, and an official tolerance of that practice.[602] This exception recognises therefore that a systematic violation of human rights 'requires the

[593] Nsongurua J. Udombana 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97(1) The American Journal of International Law 1, 18.
[594] Duruigbo (n526) 1265.
[595] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 5(2)(b) states 'the Committee shall consider communications received under the present Protocol [when]… the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged'.
[596] Ibid.
[597] *Tomasi v France* App No 12850/87 (ECtHR, 27 August 1992).
[598] *Norway, Sweden, Denmark, and the Netherlands v Greece* App Nos 3321/67, 3322/67, 3323/67 and 3344/67 (European Commission of Human Rights, 4 April 1968) para 194; *Donnelly v UK* App no 29374/95 (ECtHR, 16 April 1998); *Barbato and Barbato v Uruguay* (21 October 1982) Communication No 84/1981 CCPR/C/OP/2; Edmond McGovern 'The Local Remedies Rule and Administrative Practice in the European Convention on Human Rights' (1975) 24(1) International and Comparative Law Quarterly 119, 120.
[599] *Norway v Greece* (n598).
[600] Ibid.
[601] Ibid.
[602] McGovern (n598) 120.

sanction of the state at some level',[603] and 'constitute the policy and practice of the state concerned'.[604] In this instance it is concluded that in instances where the executive has undertaken an administrative practice to undermine human rights a likely by product of this will be to undermine judicial independence, negating any domestic threat to that practice.

3.3 Examining the Relationship between Incidents of Torture and Standards of Judicial Independence and Judicial Impartiality

The incidence of torture provides another informative lens with which to examine the far-reaching impact of standards of judicial independence achieved in a state. The relationship between torture and judicial independence is indirect; incidents of torture are not a direct result of incidents of non-judicial independence, and incidents of non-judicial independence are not as a direct result of incidents of torture. Instead the relationship is more ambiguous and multi-faceted, and the correlation between incidents of torture and problems with standards of judicial independence and impartiality can instead be explained by a number of external factors.

a) Introduction to, and History of, Torture

Torture has been practised by executive and legislative branches since 'ancient times',[605] and has been utilised by 'every nation'[606] at some point in history.[607] The use of torture as a method of governance to maintain power has been long established,[608] which has resulted in torture becoming a commercial and consumable commodity. This fact has resulted in a market for expertise on torture. This market includes the creation, and trading, of manuals demonstrating torture,[609] the creation of training schools for intelligence officers,[610] the

[603] Reidy, Hampson, and Boyle (n570) 162.
[604] Alexander Orakhelashvili 'The Position of the Individual in International Law' (2001) 31 California Western International Law Journal 241, 253.
[605] Amnesty International *Amnesty Report on Torture* (Gerald Duckworth & Co Ltd 1973) 18.
[606] Ibid 23.
[607] Ibid.
[608] Ibid 18.
[609] Ibid.
[610] Ibid.

development of more 'sophisticated methods of torture',[611] and the refinement of interrogation techniques,[612] all shared widely amongst various regimes.[613]

Whilst torture was forbidden in both ancient Greece and Rome,[614] the prohibition of torture has only recently received universal recognition.[615] Nonetheless, torture continues to be widely utilised,[616] and, in 2010, the Foreign and Commonwealth Office estimated that it was prevalent in over 40% of countries.[617] Governments have justified the use of torture in numerous ways since World War II.[618] Those justifications have traditionally been premised on claims of 'necessity',[619] which acknowledges that torture is 'barbaric',[620] but maintains that it is necessary to effectively protect a country from individuals with 'evil'[621] intentions.[622]

Despite these apparent justifications, there has been near universal assent that torture is one of the most egregious violations of an individual's human rights.[623] In respect of torture Amnesty International concluded that

> no act is more a contradiction of our humanity than the deliberate infliction of pain by one human being on another, the deliberate attempt over a period of time to kill a man without his dying.[624]

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[611] Ibid.
[612] Ibid.
[613] Experts and their training, as well as torture equipment, are repeatedly sold by one government for use in another. *See* Amnesty International *Amnesty Report on Torture* (n605) 17.
[614] Ibid 23.
[615] Ibid 20.
[616] Ibid 23.
[617] Human Rights and Democracy Department 'FCO Strategy for the Prevention of Torture, 2011-2015' (*Foreign and Commonwealth Office* October 2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35449/fcostrategy-tortureprevention.pdf> accessed 25 February 2017, 7.
[618] Ibid 19.
[619] Ibid.
[620] Ibid.
[621] Ibid.
[622] This justification has been used by various regimes; in particular by Stalin who argued that it was needed to counteract the use of torture by the bourgeoisie, similarly it was the only method that could defeat the Tupamaros in Uruguay etc. *See* Amnesty International (n605) 19.
[623] Amnesty International *Amnesty Report on Torture* (n605) 20.
[624] Ibid.

Whilst all violations of human rights are unlawful, torture is viewed as a particular horror.[625] This is in part due to the particular brutality of torture, which aims to 'dehumanize, humiliate, and degrade'[626] the victim, thereby undermining their sense of identity, agency, and control.[627] Almost all governments, therefore, state their opposition the use of torture.[628] The official position of the regimes is often, therefore, denial of the existence of torture, even when there is evidence to the contrary.[629] This is made possible because citizens are often unable to accept that 'their own countrymen would commit such practices'.[630]

The United Nations has defined torture as the intentional infliction of pain or suffering, whether mental or physical, for the purpose of obtaining a confession, punishment, or for reasons of discrimination with the consent or acquiescence of a public official.[631] The purpose of torture is to force the purpose of the torturer against the will of the victim.[632] This can be for numerous reasons, including

> to extract information, to punish, to exact retribution, to discredit or incapacitate political opposition, and as one element in a general strategy of ethical cleansing or genocide.[633]

Similarly, the act of torture can be achieved in innumerate ways, including 'beatings, electro-shock, near-drowning, sleep deprivation and drugs'[634] and various other methods aimed at breaking the spirit of the victim.[635]

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[625] Ibid 18.
[626] Derrick Silove 'The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework' (1999) 4 Journal of Nervous & Mental Disease 200, 205.
[627] Ibid.
[628] Human Rights and Democracy Department (n617) 8.
[629] See, for example, the military regime in Greece between 1967-1974, where despite evidence of a policy of torture in the country, Greek officials repeatedly denied the existence of torture at both the domestic and international level. Amnesty International *Amnesty Report on Torture* (n605) 79; Human Rights and Democracy Department (n617) 9-10.
[630] *See for example*, the 'Germans in the last war [World War II], the French in Algeria, the Americans in Vietnam [as] contemporary Western examples' Amnesty International *Amnesty Report on Torture* (n605) 97-99.
[631] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, opened for signature 10 December 1984) 1465 UNTS 85 Article 1(1).
[632] Amnesty International *Amnesty Report on Torture* (n605) 30.
[633] Stuart Turner and Caroline Gorst-Unsworth 'Psychological Sequelae of Torture: A Descriptive Model' (1990) 157(4) The British Journal of Psychiatry 475, 475.
[634] Amnesty International *Amnesty Report on Torture* (n605) 30-33.
[635] Ibid.

Determining whether various acts amount to torture is, however, problematic, and some acts will only amount to cruel, inhuman, or degrading treatment.[636] Where that line should be drawn, however, is unclear,[637] and an inherent 'grey area'[638] exists between acts that will amount to torture compared to acts that will only amount cruel, inhuman, or degrading treatment. Whilst the distinction between torture and cruel, inhuman or degrading treatment is at times unclear, the prohibition of torture has been acknowledged in every relevant international legal document.[639]

This prohibition of torture is absolute; it carries a special status in international law and there can be no derogation from this standard even in times of public emergency.[640] The absolute prohibition of torture is in large part due to the catastrophic personal effects of torture. It can 'pose a major threat to the psychological well-being of individuals'.[641] Whilst it seems that there is no one universal 'torture syndrome',[642] there are many symptoms common to victims of torture. Those can include anxiety, depression, irritability, aggressiveness, social withdrawal, and suicide.[643] In particular, exposure to torture has been associated with particularly high levels of posttraumatic stress disorder.[644] Physical disability and injuries are also common amongst victims of torture, and include loss of limbs, loss of normal body functions and general health.[645] Additionally, the sufferer of torture is not the sole sufferer, and family and community members experience psychological effects including anxiety and depression alongside the immediate victim.[646] It is for these reasons that torture has been

[636] Convention Against Torture (n631) Article 16.
[637] J Welsh and M Rayner *The 'acceptable enemy': torture in non-political cases. AI index: ACT 40/01/*96 (Amnesty International 1996) 2; Amnesty International *Amnesty Report on Torture* (n605) 30-33.
[638] Amnesty International *Amnesty Report on Torture* (n605) 30-33.
[639] Universal Declaration of Human Rights 1948 (n65) Article 5; American Declaration on the Rights and Duties of Man (1948) Article 26; International Covenant on Civil and Political Rights (n68) Article 7; European Convention for the Protection of Human Rights and Fundamental Freedoms (n70) Article 6(1); American Convention on Human Rights (n71) Article 5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (Adopted 21 April to 12 August 1949) 75 UNTS 287, Common Article 3; Protocol Additional to the Geneva Conventions (n68); Amnesty International *Amnesty Report on Torture* (n605) 34.
[640] Human Rights and Democracy Department (n617) 5.
[641] Silove (n626),
[642] Turner and Gorst-Unsworth (n633) 475.
[643] Amnesty International *Amnesty Report on Torture* (n605) 35-58.
[644] M Basoglu and others 'Psychological effects of torture: A comparison of tortured with non-tortured political activists in Turkey' (1994) 151(1) The American Journal of Psychiatry 76-81.
[645] Turner and Gorst-Unsworth (n633) 475.
[646] Ibid.

recognised as a 'catastrophic existential event' for survivors,[647] demanding absolute prohibition.

For victims of torture the immediate concern is the cessation of that torture.[648] The most direct recourse of action for a victim hoping to achieve this and to bring a deviant state to account would be through domestic channels. However, domestic remedies will often prove fruitless, given that 'the state that tortures is normally not one that respects the rule of law'.[649] In these cases, where domestic remedies are not available or have been effectively exhausted,[650] the survivor may utilise international remedies.

A number of international mechanisms monitor incidence of torture and provide remedies for those violations.[651] It should be acknowledged that in this respect the term 'remedies' is used relatively loosely. Remedies provided by the Human Rights Committee and the Committee Against Torture are limited. When the Human Rights Committee or the Committee Against Torture finds a violation of a right contained in the International Covenant on Civil and Political Rights or Convention Against Torture there is not a binding judgment. Instead, any declaration is limited to formal recognition of that violation, recommendations for remedies for that violation, and an invitation to the state party to supply information 'within a set time frame'[652] on the steps undertaken to remedy the violation.[653] The 'remedies' offered to the torture survivor are predicated on recognition and public record of that violation,[654] which should 'induce the state concerned to remedy the violation'.[655] In comparison, where the European Court of Human Rights finds that there has been a violation of the right to freedom from torture under the European Convention on Human Rights, it will issue a binding

[647] F Benfeldt-Zachrisson 'State (political) torture: some general, psychological, and particular aspects' (1985) 15 International Journal of Health Services 339, 342.
[648] Amnesty International *Amnesty Report on Torture* (n605) 66-78.
[649] Ibid.
[650] *See* Convention Against Torture (n639) Article 21(c); International Covenant on Civil and Political Right (n639) Article 41(c); European Convention on Human Rights (n639) Article 35(1).
[651] Amnesty International *Amnesty Report on Torture* (n605) 66-78.
[652] OHCHR 'Human Rights Treaty Bodies – Individual Communications: 23 FAQ Treaty Body complaints procedures' (*United Nations,* 2017) <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> accessed 26 February 2017.
[653] Ibid.
[654] Committee Against Torture 'Fact Sheet No. 17, The Committee Against Torture' (*United Nations,* 2017) <http://www.ohchr.org/Documents/Publications/FactSheet17en.pdf> accessed 26 February 2017, 6.
[655] Ibid 6; Amnesty International *Amnesty Report on Torture* (n605) 66-78.

judgment.[656] In this instance, the remedies offered to the victim are more tangible to the traditional concept of 'remedy'.

b) Understanding the Relationship between Torture and Judicial Independence: Torture as an Indicator of Levels of Judicial Independence in a State

The relationship between incidents of torture and judicial independence and judicial impartiality is a complex one. There is not a direct relationship of cause and effect, akin to the relationship between judicial independence and impartiality and the exhaustion of domestic remedies rule, rather a relationship based on a number of diverse factors. As a result, issues with *de facto* judicial independence standards do not cause incidents of torture, and incidents of torture do not cause directly result in standards of judicial independence being compromised. Instead, a number of different issues seem to affect the incidence of torture in a state, including the number of NGOs in the state.[657] Despite the complexity of factors involved in the incidence of the torture, it is clear that there is a strong correlation between issues with judicial independence standards in a state and increased incidence of torture in a country. The United Nations has repeatedly noted the link between attacks on the independence of the judiciary, and the 'gravity and frequency of violations of human rights'.[658] This conclusion is reflected in empirical evidence; which strongly suggests that an effective judiciary has a significant impact on reducing the instances of torture in a country.[659]

The impact of an independent and impartial judiciary on torture is in part because an independent and impartial judiciary can constrain the actions of the state,[660] and ensure that international obligations, including the prohibition of torture, are enforced domestically.[661]

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[656] European Court of Human Rights 'The ECHR in 50 Questions' (*Council of Europe,* 2017) <http://www.echr.coe.int/Documents/50Questions_ENG.pdf> accessed 26 February 2017.
[657] Emilie Hafner-Burton and Kiyoteru Tsutsui 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) The American Journal of Sociology 1373-1411.
[658] OHCHR Resolution 1994/41 (n238).
[659] Emilia Justyna Powell 'Domestic Judicial Institutions and Human Rights Treaty Violation' (2007) 53 International Studies Quarterly 149, 166; *see generally* Linda Camp Keith 'Constitutional Provisions for Individual Human Rights (1977-1996): Are They More Than Mere 'Window Dressing?' (2002) 55(1) Political Research Quarterly 111-143; Frank B Cross 'The Relevance of Law in Human Rights Protection' (1999) 19(1) International Review of Law and Economics 87-98.
[660] Powell (n659) 172-174 'The reason is that many features of the domestic judiciary can influence its ability to constrain the state; The results strongly suggest an impact of effective judicial systems [as] the legal constraint element of democracy seems to reduce instances of torture'.
[661] Powell (n659) 151.

There is significant empirical evidence to support the conclusion that an independent judiciary can protect individuals from torture,[662] and that states feel bound to their obligations under the Convention Against Torture when there is domestic legal enforcement.[663]

The standards of judicial independence and impartiality can reach far beyond the court room, and the wide-reaching effects can be seen in the incidence of torture in a country. The role that an independent judiciary plays in preventing incidents of torture is crucial. As part of the structure of democratic governance, it ensures that a government is held culpable for its actions.[664] Where a body holds a government accountable for their decision to violate international human rights standards,[665] and imposes penalties when those standards are violated,[666] that body will a significant problem for a rights-abusing government.

As a result, where standards of judicial independence and impartiality are not adequately secured, the executive is far less likely to suffer consequences for rights violations; creating opportunity for incidents of torture. Instead, without an independent and impartial judiciary to hold the executive and legislative branches to account, it may be unrealistic to expect a domestic or internal inquiry into allegations of torture to be 'honest'[667] and 'thorough'.[668] Judicial independence and impartiality can help to ensure that any investigations of allegations of torture are run smoothly and efficiently. Where there is not an independent and impartial tribunal acting to oversee the inquiry, there may problems ensuring that there is cooperation with the investigation,[669] and problems associated with collecting evidence.[670] In addition, without the supervisory function of an independent and impartial body there may be a tendency for those investigating to 'protect their own'.[671] This is particularly true given that incidents of torture, and other violations of physical integrity rights, do not take place in

[662] Ibid 166.
[663] Ibid 167.
[664] Ibid 151-152; *see generally* Oona Hathaway 'Why Do Countries Commit to Human Rights Treaties' (2007) 51(4) Journal of Conflict Resolution 588-621; Oona Hathaway 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72(2) University of Chicago Law Review 469-536; Eric Neumayer 'Do International Human Rights Treaties Improve Respect for Human Rights' (2005) 49(6) Journal of Conflict Resolution 926-953; Camp Keith 'Constitutional Provisions for Individual Human Rights (1977-1996): Are They More than Window Dressing?' (n659) 111-143.
[665] Camp Keith 'Constitutional Provisions for Individual Human Rights (1977-1996): Are They More than Window Dressing?' (n659) 112.
[666] Powell (n659) 154.
[667] Ibid 101.
[668] Ibid.
[669] Ibid.
[670] Ibid 110.
[671] Ibid 101.

vacuum, and often involve the knowledge of the military, police, and medical personnel in the state.[672] Where there is no independent body to hold actors within the executive and legislative branches to account, those individuals can act with impunity.[673] It is important to note that that it is by no means suggested that the standards of judicial independence and judicial impartiality are the sole factor contributing to incidents of torture. Far from it. There are a litany of other factors that contribute to the prevalence of torture. Nonetheless, it is apparent that this impunity allows torture to become commonplace.[674]

As a result the *de facto* levels of judicial independence and judicial impartiality achieved in a State can have wide reaching consequences, and contribute to the incidence of torture in a country. Where there is not an independent and impartial judiciary to ensure consequences for incidents of torture, the incentives of utilising torture outweigh the deterrents.[675] Torture is utilised in CIS member states, at least in part, to punish and prevent dissidence and threats to executive and legislative rule.[676] Where perpetrators of torture are able to act with impunity, and without fear of legal consequences, it allows the practice of torture as punishment to continue unabated and to act as a warning against future dissension. Similarly, where courts routinely accept evidence obtained through torture, successful prosecutions can be achieved with minimal effort on the part of the police.[677] Therefore, where judicial impartiality and independence are not achieved to a sufficiently high standard it allows torture to be utilised with impunity and without consequence. The lack of an impartial and independent forum to hold rights-abusing regimes to account, drastically changes both the opportunity for and consequences of the utilisation of torture in the State. It is within the culture of impunity, with no body to challenge the practice that a culture of torture can survive.

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[672] Ibid 100.
[673] *See generally* Amnesty International 'Torture is 'routine', shows new Amnesty report' (*Amnesty International,* 2017) <https://www.amnesty.org.uk/press-releases/tajikistan-torture-routine-shows-new-amnesty-report> accessed 2 August 2018.
[674] Ibid.
[675] Camp Keith *Political Repression* (n30) 291.
[676] See Chapter VII 'The Impact of Judicial Independence and Judicial Impartiality on Incidents of Torture in CIS Member States'
[677] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Tajikistan: December 2008' (*American Bar Association,* December 2008) <https://www.americanbar.org/content/dam/aba/directories/roli/tajikistan/tajikistan_jri_12_2008_en.authcheckdam.pdf> accessed 19 June 2017, 30.

3.4 The Impact of Judicial Independence Standards: Exhaustion of Domestic Remedies Rule and Incidence of Torture in CIS Member States

It is therefore through the lenses of the exhaustion of domestic remedies rule and incidents of torture that this thesis will examine the far-reaching impact of the standards of judicial independence achieved in a CIS member states.

Primarily, the thesis will examine the content of submission to international human rights bodies to circumvent domestic remedies to understand the impact that standards of judicial independence and judicial impartiality have within this context. The exhaustion of domestic remedies rule is dependent on sufficiently high standards of judicial independence being present in the domestic state, both when it is rationalised and when it is implemented in practice. Any rationalisation of the rule assumes that there are adequate standards of judicial independence in the respondent state, either to protect the interests of the individual and the international community, or that must be respected by allowing the respondent state to respond to the complaint through its domestic courts. In turn, a decision by an international human rights body to disallow an individual complaint for a failure to exhaust domestic remedies assumes that there are sufficient standards of judicial independence and impartiality to be exhausted. If the international body determines that adequate standards of judicial independence and impartiality were not achieved, then the international body will permit the exhaustion of domestic remedies rule to be circumvented.

The exhaustion of domestic remedies rule is a useful tool to understand the far-reaching impact of judicial independence and impartiality in CIS member states in two respects. Firstly, the number of claims made to an international tribunal requesting to circumvent domestic remedies, and the content of those claims, can indicate perceived problems with judicial independence by individuals alleging human rights abuses at the hands of the state. Secondly, the number of successful claims to circumvent domestic remedies can indicate the perceived standards of judicial independence by the international community and the relevant international human rights tribunal.

With respect to CIS member states, guidance on the perceived standards of judicial independence can be found in the number and nature of attempts to circumvent domestic

remedies in complaints to two relevant human rights bodies. The most instructive human right tribunal in this instance is the monitoring body of the International Covenant on Civil and Political Rights, the Human Rights Committee, given that all CIS member states have ratified the Optional Protocol to the International Covenant on Civil and Political Rights.[678] Additionally, two CIS states in this study have ratified the European Convention on Human Rights allowing the European Court to hear individual complaints alleging human rights abuses.[679] Therefore applications to both the Human Rights Committee and the European Court can be utilised to demonstrate the fundamental nature of judicial independence and the far reaching consequences of the standards achieved in practice, and further, can act as a useful research tool to understand and analyse problems, and perceived problems, with judicial independence and impartiality standards in a country.

The incidence of torture also provides a useful lens with which to examine the extent of the consequence of judicial independence and impartiality standards in CIS member states. Whilst the international legal community acknowledges that freedom from torture is a right from which there cannot be lawful derogation,[680] incidents of torture remain relatively common.[681] Where incidents of torture can (at least in part) be linked back to issues such as impunity and accusatory bias, there ripple effectscan help demonstrate the far-reaching effects of judicial independence and impartiality standards achieved in practice. To understand the impact of judicial independence and impartiality on incidents of torture a number of international and regional human rights bodies and conventions will be of particular use. In addition, the various reporting mechanisms under those conventions allow for greater analysis. CIS member states have ratified a number of international treaties that allow individual complaints to be made to international human rights tribunals. All CIS member states are signatories to the Optional Protocol to the International Covenant on Civil and Political Rights, allowing individuals to make complaints of torture to the Human Rights

[678] All CIS member states are signatories to the Optional Protocol to the International Covenant on Civil and Political Rights (n595) which allows individual citizens to make a complaint to the Human Rights Committee. Armenia ratified the Optional Treaty in 1993, Azerbaijan in 2001, Belarus in 1992, Kazakhstan in 2009, Kyrgyzstan in 1994, Moldova in 2008, Tajikistan in 1999, and Uzbekistan in 1995. *See* OHCHR Rights 'Ratification of 18 International Human Rights Treaties' (*United Nations,* 2017) <http://indicators.ohchr.org/> accessed 2 August 2018.
[679] Armenia and Azerbaijan are both signatories to the European Convention on Human Rights. *See* Council of Europe 'Chart of signatures and ratifications of Treaty 005' (n559).
[680] Convention Against Torture (n639) Article 2(2).
[681] Human Rights and Democracy Department (n617) 7; Amnesty International *Amnesty Report on Torture* (n605) 18.

Committee.[682] Similarly, all CIS member states are signatories to the Convention Against Torture,[683] however only three have made a declaration under Article 19 allowing individual complaints to the Committee Against Torture.[684] Finally, two CIS member states have ratified the European Convention on Human Rights, allowing individuals to make complaints to the European Court of Human Rights alleging torture.[685] This means that individuals alleging torture perpetrated by a CIS government have up to three possible international forums to make complaints to; the Human Rights Committee, the European Court of Human Rights, or the Committee Against Torture.

In addition, incidents of state sponsored torture may be identified through the state reporting mechanism. All CIS member states are signatories to the Convention Against Torture, and are obliged to provide a report to the Committee Against Torture every four years demonstrating the ways in which they are protecting the rights guaranteed by the convention.[686] Similarly, signatories of the ICCPR are obliged to report to the Human Rights Committee every four years demonstrating the methods undertaken to ensure the rights included in the covenant, including, *inter alia,* the right to freedom from torture.[687] Both of these human rights tribunals also allow shadow reporting from civil society and relevant NGOs,[688] which may provide further context on standards of judicial independence in the relevant.

Under Article 20 of the Convention Against Torture[689] the Committee Against Torture has an inquiry procedure. All CIS member states have ratified the Convention Against Torture, including Article 20,[690] allowing the Committee to undertake inquiries when there are 'well-founded indications that torture is being systematically practised in a state party'.[691] Whilst those inquiries allow the United Nations to investigate allegations of egregious violations of

[682] Office for the High Commissioner for Human Rights 'Status of Ratification: Interactive Dashboard' (*United Nations,* 2017) <http://indicators.ohchr.org/> accessed 26 February 2017.
[683] Ibid.
[684] Ibid.
[685] Council of Europe 'Chart of signatures and ratifications of Treaty 005' (n559).
[686] Convention Against Torture (n639) Article 19.
[687] International Covenant on Civil and Political Rights (n639) Article 40.
[688] ACLU 'FAQ: The Covenant on Civil and Political Rights (ICCPR)' (*American Civil Liberties Union,* 2017) <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> accessed 26 February 2017.
[689] Convention Against Torture (n639) Article 20.
[690] OHCHR 'Status of Ratification: Interactive Dashboard' (n682).
[691] Committee Against Torture 'Confidential Inquiries under Article 20 of the Convention Against Torture' (*United Nations,* 2017) <http://www.ohchr.org/EN/HRBodies/CAT/Pages/InquiryProcedure.aspx> accessed 23 February 2017.

the rights contained in the Convention Against Torture, any inquiries are conducted in a confidential manner, and are not available for external analysis.[692]

Finally, under Article 21 of the Convention Against Torture[693] and Article 33 of the European Convention on Human Rights,[694] one state party may make a complaint to the relevant human rights body alleging that another state party is 'not discharging its obligations under the Convention'.[695] Given that all CIS member states have ratified the Convention Against Torture, and two CIS member states have ratified the ECHR, these mechanisms made provide a further method for monitoring violations of torture in a state. However, in practice, there have been no interstate complaints made against CIS member states under the ECtHR,[696] and no interstate complaints made at all under the Convention Against Torture.[697]

Alongside data from international and regional human rights bodies, information can be obtained from various non-governmental organisations and international organisations reporting in the region. In particular, reports from the European Bank of Reconstruction and Development, the Organisation for Security and Cooperation in Europe, the American Bar Association, Amnesty International, Freedom From Torture, and the Open Society Foundation amongst others, provide invaluable insights into the realised situation experienced by citizens. Nonetheless, is is important to note the limits of those sources; in particular with respect to issues of objectivity and impartiality.[698]

It is therefore through the lenses of torture and the exhaustion of domestic remedies rule that the extent of the impact of the standards of judicial independence and judicial impartiality in CIS member states will be examined.

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[692] Ibid.
[693] Convention Against Torture (n639) Article 21.
[694] European Convention on Human Rights (n639) Article 33.
[695] Committee Against Torture 'Fact Sheet No. 17, The Committee Against Torture' (n654).
[696] European Court of Human Rights 'Inter-State applications' (*Council of Europe,* 2015) <http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf> accessed 26 February 2017.
[697] Equality and Human Rights Commission 'The UN Convention Against Torture: How Civil Society Organisations Can Help Hold the Government to Account' (*Equality and Human Rights Commission,* March 2018) <https://www.equalityhumanrights.com/sites/default/files/un-convention-against-torture-guidance.pdf> accessed 2 August 2018.
[698]

Part II: Case Studies

4 Foundations of Judicial Independence and Impartiality in CIS Member States: Judicial Independence and Impartiality in the Soviet Union

4.1 Marxist-Leninist Theory and the Law: Rhetoric and Practice

Before the Communist Party rose to power in 1917, rule of law and separation of powers doctrines were not enforced or respected under the Tsarist system.[699] Instead, the Romanov family were above the law and were able to alter and disregard the law on a whim to 'meet their own immediate political or ideological needs'.[700] The law under the Tsarist government was a tool with which the Tsar could dominate the population of the country.[701]

When the Communist Party came to power in 1922, after the Russian revolution which dispossessed the Tsarist government and slaughtered the Romanov family,[702] the government made efforts to demonstrate that there had been a shift from the previous *status quo*.[703] As part of efforts to demonstrate a change in governance, the Communist government utilised extensive propaganda and rhetoric that claimed that there had been drastic reforms from standards under the previous Tsarist regime.[704] Communist propaganda included specific assurances that the Soviet government was stringently adhering to international human rights standards,[705] in particular ensuring that adequate standards of judicial independence were being achieved in the new Soviet state.[706]

As part of efforts to demonstrate a departure from Tsarist totalitarian governance the Communist government introduced significant legislative reforms; these included provisions in the Constitution of the Union of Soviet Socialist Republics that paid lip service to the protection of human rights.[707] Alongside these legislative reforms the government sought to

[699] Scott P Boylan 'The Status of Judicial Reform in Russia' (1998) 13(5) American University International Law Review 1327, 1330.
[700] Richard Thornburgh 'The Soviet Rule and the Rule of Law' (1990) 69(2) Foreign Affairs 13, 14.
[701] Ibid.
[702] *See generally* Leon Trotsky (translated by Max Eastman) *History of the Russian Revolution* (Haymarket Books 2008).
[703] Boylan (n699) 1330.
[704] Ibid.
[705] Ibid.
[706] Ibid.
[707] Constitution of the Union of Soviet Socialist Republics 1977, Article 6.

tie public perceptions of the Communist agenda with the rule of law,[708] declaring that it was Communist policy that all laws should be followed to the 'smallest detail'.[709] Legislative provisions in the USSR also paid lip service to both separation of powers and judicial independence.[710] Accordingly, under the Constitution of the Union of Socialist Soviet Republics, the Supreme Court of the USSR was the highest judicial organ of the USSR,[711] and the ultimate arbiter of the law,[712] ensuring that the legal issues were the concern of the Soviet judiciary alone.

In spite of these legislative reforms, little changed in practice. There was inherent tension between the purposes of Marxist-Leninist ideology and true reform. The ideology of the Communist party was to establish a one-party state under the Soviet government,[713] which should operate as a vanguard party representing the will of the proletariat, or working-class members of Soviet society.[714] As the apparent representatives of the proletariat the Communist party was endowed with control over all aspects of society, including over all of the various features of the legal sphere.[715] The judicial function was therefore subsumed into the Communist Party jurisdiction, so that the judiciary became a part of the omnipotent regime.[716] The function of the judiciary was perceived by the executive branch to be the protection of the Communist totalitarian government[717] and of individuals within the Communist government.[718]

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[708] Mariusz Mark Dobek and Ray D Laird 'Perestroika and a "law-governed" Soviet State: Criminal Law' (1990) 16(2) Review of Socialist Law 135, 136.
[709] Ibid.
[710] Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (as amended 1991) Article 153.
[711] Ibid; *see also* Fundamental Principles on Court Organization of the USSR and the Union Republics (1924) Article 10; Fundamental Principles on Court Organization additionally included articles protecting judges from "interference in concrete cases" (Article 4) which would entail criminal responsibility (Article 5). These provisions were reiterated in Law of the USSR: On the Status of Judges (1989) (No. 9 item 223) Article 5(2) which prohibited 'influencing of any kind of judges…'.
[712] Constitution of the USSR (as amended 1991) (n710) Article 160.
[713] Alexander Shtromas, Robert K Faulkner, and Daniel J Mahoney *Totalitarianism and the Prospects for World Order: Closing the Door on the Twentieth Century* (Lexington books 2013) 18.
[714] Michael Albert and Robin Hahnel *Socialism Today and Tomorrow* (South End Press 1981) 24-25.
[715] Ledeneva 'Telephone Justice in Russia' (n991) 328.
[716] Ibid.
[717] Costea (n452) 253.
[718] Gordon B Smith 'Guidance by the Communist Part of State Administrative Agencies in the USSR' in Dietrich Andre Loeber (ed) *Ruling Communist Parties and Their Status Under Law* (Martinus Nijhoff 1986) 179, 180.

Judicial independence and judicial impartiality continued to be undermined by the Communist government, and the Soviet system remained marred by executive control. Thus,

> whether under the Bolivars or Bolsheviks, the Russian courts have always been part of a repressive system.[719]

Legislative amendments under the Soviet government amounted to window dressing, rather than substantive reforms. Dolapchiev described the law under the Communist party as being like the mythical Janus,[720] one head with two faces:

> one which is comparatively decent and destined to be shown to the outside world, and the other, the real one, which may be seen only be a close examination of the actual facts.[721]

a) The *Perestroika* Reforms

In 1985 there was a significant shift in the Communist narrative on judicial independence. Previously, there had been emphasis on the merits of Communist rule and the rule of law; the Soviet government had lauded the advantages of 'socialist legality'[722] and claimed its superiority over the Western 'bourgeois' model.[723] However, in 1985 a series of embarrassing newspapers exposés forced official acknowledgment of significant problems in Soviet governance,[724] including in the Soviet judiciary.[725] Those stories revealed serious problems with standards of judicial independence and impartiality,[726] including examples of forced confessions;[727] convictions of innocent persons;[728] interference in trials by Communist party officials;[729] and persecution of judges and lawyers who failed to adhere to the party

[719] Boylan (n699) 1330.
[720] N Dolapchiev 'Law and Human Rights in Bulgaria' (1953) 29(1) International Affairs 59, 59.
[721] Ibid.
[722] Peter H Solomon Jr 'The Role of the Defense in the USSR: The Politics of Judicial Reform under Gorbachev' (1988-1989) 31 Criminal Law Review Quarterly 76, 81.
[723] *See generally* Dobek and Laird (n708) 135-161.
[724] Solomon (n722) 83.
[725] Ibid; Mikhail Gorbachev 'Theses of the CPSU Central Committee for the 19th All-Union Party Conference' *Pravda* (Moscow 27 May 1988) 45.
[726] Solomon (n722) 83.
[727] Ibid.
[728] Ibid.
[729] Ibid.

line.[730] Journalists also ran a series of interviews with members of the Soviet judiciary. Those interviews particularly illuminated two serious problems: the widespread practice of 'telephone justice'[731] and the astonishingly low acquittal rate in the Soviet Union.[732]

As a result of those revelations, the Soviet government introduced a series of wide-ranging reforms known as *perestroika*,[733] ('restructuring'[734]). This included the policy of *glasnost*[735] ('openness'[736]) which permitted an 'unprecedented'[737] dialogue regarding the state of the judiciary.[738] The Communist Party proclaimed that the purpose of the *perestroika* reforms was to

> … strengthen the legal foundation of the life of the State and society, ensure strict observance of socialist law and order, and improve the work of judicial bodies.[739]

Through the policy of *perestroika* constitutional reforms were proposed with the goal of restructuring the court system.[740] The proposed amendments acknowledged that any reforms would have to strive to protect a number of fundamental standards that had previously been seen as part of the bourgeois Western governance.[741] Legislative reforms provided for radical improvement in the protection of democratic principles of court procedure;[742] of contestation of the judicial process;[743] the principle of equality;[744] publicity of trials;[745] and of the

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[730] Ibid.
[731] Ibid; 'telephone justice' being the practice where judges would telephone a judge and dictate what the outcome of the case should be.
[732] Ibid.
[733] *See generally* Michael I Kaplan 'Solving the Pitfalls of Impartiality when Arbitrating in China: How the Lessons of the Soviet Union and Iran can Provide Solutions to Western Parties Arbitrating in China' (2005-2006) 110 Penn State Law Review 769, 792.
[734] Dobek and Laird (n708) 135.
[735] Jane Henderson 'Law of the USSR: On the Status of Judges in the USSR' (1990) 16(3) Review of Socialist Law 305, 314.
[736] Ibid.
[737] Dobek and Laird (n708) 135.
[738] Ibid.
[739] CPSU *The Programme of the Communist Party of the Soviet Union: A New Edition* (CPSU 1986) 52.
[740] *See generally* FJM Feldbrugge 'The Constitution of the USSR' (1990) 16(2) Review of Socialist Law 163-166.
[741] *See generally* Dobek and Laird (n708) 135-161.
[742] Gorbachev 'Theses No. 8' (n725) 45.
[743] Ibid.
[744] Ibid.
[745] Ibid.

presumption of innocence.[746] To accomplish these far-reaching proposals the Communist Party acknowledged that it was imperative to secure unconditional judicial independence.[747] In order to secure this independence, proposals demanded sanctions for interference in judicial activity,[748] the establishment of longer terms of office,[749] and judicial subordination to the law alone.[750]

Throughout the introduction of the *perestroika* reforms the Communist Party expressed its apparent unequivocal support for these changes.[751] However, in practice, the proposed reforms had limited effect and no true attainment of separation of powers was ever achieved in the Soviet Union.[752] Instead the Communist Party continued to exist as a monopoly over all government powers.[753] In this respect, Dobek and Laird concluded

> (i)n spite of the Gorbachev rhetoric about "democratization" and the "rule-of-law", the USSR remains in practice an authoritarian State (sic).[754]

Repression of the judiciary in the Soviet Union was achieved in a multiplicity of ways, and various aspects of both institutional and individual independence were routinely undermined. However, the number of ways in which judicial independence and judicial impartiality was undermined in the Soviet Union meant that it was difficult to understand the true extent to which judicial independence and judicial impartiality was impaired in the Soviet Union.[755] This was made more difficult due to the smoke and mirrors attitude of the Communist government, which paid lip service to judicial independence and impartiality protections, whilst continuing to undermine them in practice.[756]

4.2 The Repression of Institutional Independence in the Soviet Union

Institutional independence was routinely undermined in the Soviet Union, and the

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[746] Ibid.
[747] The Communist Party of the Soviet Union 'Resolution 4 of the 19th All-Union CPSU Conference: On Legal Reform' *Pravda* (Moscow 1988) 45.
[748] Ibid.
[749] Ibid.
[750] Ibid.
[751] *See generally* Henderson (n735) 305-338.
[752] *See* pp 112-117.
[753] Dobek and Laird (n708) 159-160.
[754] Ibid 160.
[755] See generally on this pp39-51
[756] See generally pp112-117

Communist Party repeatedly intervened in the affairs of the judicial branch.[757] The process of weakening institutional independence standards allowed the Communist Party to dominate the process of judicial-decision making.[758] This interference was justified on the basis that the Communist Party had the 'leading role' in society,[759] and was therefore not subject to the rule of law.[760]

One of the ways in which the Communist government repressed the institutional independence of the Soviet judiciary was through the deprivation of financial autonomy.[761] This made the judicial branch dependent on the executive,[762] by ensuring that the judiciary was reliant on the executive and legislative branches for sufficient financing to allow the judiciary to function.[763]

Between 1922 to 1991 the Ministry of Justice managed all aspects of the judicial budget.[764] This meant that the judicial branch was subordinate to the executive branch for salaries, general court expenditure, and other expenses such as security.[765] The reliance of the judicial branch on the executive branch made the judiciary vulnerable. The judiciary were at the whim of the executive and legislative branches when its budgets were being calculated, and thus operated in the knowledge that should the judicial branch in any way displease the other branches of government its budget may be negatively affected.

Another factor integral to ensuring institutional independence in the Soviet Union was the assurance that it would be the judicial branch alone that had exclusive authority over legal matters. Such exclusive authority was provided for in the Soviet Constitution, which demanded that no person be convicted of a crime other than by judgment of a court, in accordance with the law.[766] These sentiments were reiterated in other Soviet legal instruments, which stressed that all State organs should 'be obliged to fulfil the demand and

[757] Alena Ledeneva 'Telephone Justice in Russia' (2008) 24(4) Post-Soviet Affairs 324, 328.
[758] Ibid.
[759] Ibid.
[760] Ibid.
[761] Boylan (n699) 1334.
[762] Ibid.
[763] Ibid.
[764] Ibid.
[765] Ibid.
[766] Constitution of the USSR (as amended 1991) (n710) Article 160.

ordinances of judges'[767] including the 'promptly answering… inquiries'.[768] This, however, was not realised in practise.

Contrary to the law established in the Constitution, the Communist Party exercised power over all aspects of Soviet life, including the courts.[769] This meant that the Communist Party exerted authority over the judicial branch ensuring that judges adhered to Communist values when passing judgments.[770] Frequently aspects of cases or entire trials, including questions of guilt or innocence, were decided prior to trial, and appearances in court were simply to determine appropriate sentences.[771] This resulted in a situation where it was not judges passing judgment but instead local Communist leaders; with the result that exclusive authority was effectively removed from the judicial branch.

This was exacerbated by the fact that if members of the executive branch did not approve of, or like, a court judgment, then they would simply not abide by it.[772] This had the effect of demoralising the judicial branch, which was made acutely aware of the fact that in practise it possessed no real authority.[773]

4.3 The Repression of Individual Independence in the Soviet Union

Individual independence was also compromised under the Communist government. This independence was undermined both with, and without, the consent of members of the judicial branch.

a) Decisional Independence in the Soviet Union

Incidents where judicial independence and judicial impartiality were coercively deprived from individual judges were common in the Soviet Union, and political pressure was routinely utilised to compel judges to conform to the wishes of the Communist Party and local Communist officials.[774] Where judges ignored the wishes of members of the executive

[767] On the Status of Judges in the USSR (n711) Article 12(3).
[768] Ibid.
[769] Costea (n452) 253.
[770] Ibid.
[771] Solomon (n722) 79; *see generally* Dolapchiev (n720) 59-68.
[772] Boylan (n699) 1334.
[773] *See generally* Boylan (n699).
[774] WF Rylaarsdam 'Judicial Independence – a Value Worth Protecting' (1992-1993) 66 Southern Californian Law Review 1653, 1655.

and legislative branches, and they reached 'unwelcome' decisions, judges were faced with attacks on their profession.[775]

Soviet legislation provided for a somewhat objective process of selection and appointment. In practice, however, the process of selection and appointment under Soviet rule was neither independent nor impartial, and lacked a formal procedure. The Law on the Selection of Judges did not require judicial candidates to have a legal education[776] and the judiciary was dressed with unqualified and inexperienced persons of uncertain quality and pre-eminence.[777] Instead, local Communist leaders, or '*apparatchik'*, often selected candidates in a process colloquially referred to as '*podbor kadrov*' (selection of cadres).[778] *Podbor kadrov* allowed Communist officials to appoint individuals who adhered to, and were willing to promote, the Communist agenda and Communist interests.[779]

The *Perestroika* reforms introduced under the Gorbachev administration acknowledged the problems with selection and appointment procedures under previous governments. Under the *Perestroika* reforms, amendments were made to the Constitution of USSR, and Article 152 dramatically transformed the judicial selection and appointment process.[780] Under Article 152 reforms applied to all Soviet courts, including the district, territory, province, and city courts.[781] Those reforms demanded that judicial selection was conducted by 'the corresponding higher Soviets of People's Deputies',[782] and judicial appointment conducted by the Supreme Soviet of the USSR.[783] Article 152 also demanded that judges appointed to the District Court were elected by citizens in an open ballot.[784] Reforms also required that any prospective judges should have gained a higher legal education,[785] worked in juridical speciality for two years or more,[786] and completed a qualifying examination.[787] This ensured that for the first time in the history of the Soviet Union, judges being elected to office were

[775] Ibid.
[776] Henderson (n735) 320.
[777] Ibid.
[778] Ledeneva 'Telephone Justice in Russia' (n757) 328.
[779] Ibid.
[780] Dobek and Laird (n708) 158.
[781] Constitution of the USSR (as amended in 1991) (n710) Article 152.
[782] Ibid.
[783] Ibid.
[784] Ibid.
[785] On the Status of Judges in the USSR (n711) Article 8(1).
[786] Ibid.
[787] Ibid.

held to an objective qualifying standard.[788] These reforms were aimed at eradicating any concerns regarding the quality of members of the judiciary.[789]

However, in practice, legislative reforms had a limited impact. Even after the *Perestroika* reforms the reality remained that judges were selected and appointed because of their relationship to the Communist Party,[790] thereby compromising the independence of the selection and appointment procedure.[791]

Adequate judicial tenure is considered pivotal to properly secure standards of judicial independence in a state.[792] Without adequately lengthy tenure, the vulnerability of judges at the renewal of their term of office threatens the independence of judges and their decision-making process.

Legislation in the Soviet Union provided for somewhat adequate judicial tenure. Whilst other officials elected to public office were given a maximum tenure of two consecutive terms,[793] judges were exempted from this restriction.[794] The length of judicial tenure varied between 1922 and 1991 in the Soviet Union. Prior to the *Perestroika* reforms of 1989 the term of judicial tenure was five years,[795] but this was modified in December 1988 when the Constitution was amended; doubling the period of tenure to ten years.[796] The express intention of this extension was to secure greater independence for judges.[797] Alongside this extension, as part of efforts to protect judicial independence and judicial impartiality, legislation was rectified to limit instances where judges could be dismissed by the

[788] Dobek and Laird (n708) 158.
[789] Ibid.
[790] Dolapchiev (n720) 64.
[791] Ibid.
[792] The Commonwealth *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (The British Institute of International and Comparative Law 2015) 59; International Bar Association 'IBA Minimum Standards of Judicial Independence, adopted 1982' (*International Bar Association,* 1982) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29> accessed 22 September 2018, 22; UNGA 'Basic Principles on the Independence of the Judiciary' (n68) Conditions of Service and Tenure, Article 12; United Nations Development Programme 'Judicial independence in transitional countries' (*United Nations,* 2003) <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018253.pdf> accessed 22 September 2018, 18.
[793] Constitution of the USSR (as amended in 1991) (n710) Article 91.
[794] Ibid.
[795] Ibid Article 152.
[796] Ibid.
[797] Dobek and Laird (n708) 150.

executive.[798]

Whilst the extension of tenure under *Perestroika* reforms was widely welcomed,[799] the effect in practice was limited, as reforms were not extensive enough to appropriately protect judicial independence.[800] Despite international calls for judicial tenure to be lifelong or to a specific age of retirement,[801] the tenure awarded to judges after the *Perestroika* reforms was merely temporal. Judicial tenure contingent on a temporal term meant that judges had to seek reappointment at either five or ten year intervals, leaving them susceptible to pressure from the re-appointing authorities.[802] In particular, Soviet judges felt 'indebted'[803] to re-appointing authorities, resulting in efforts to appease them to ensure re-election.[804] Judges in the USSR were particularly susceptible to external pressures relating to reappointment, as judges were dependent on the local *apparatchik* and the Ministry of Justice for nomination for re-election.[805] Despite the *Perestroika* reforms, even temporal tenure was not respected in practice.[806] Instead it was commonly acknowledged amongst the Soviet public that regardless of legislative provisions a judge could be 'dismissed, disregarded, or transferred at will'[807] by the local *apparatchik.* Judges were effectively reliant on the local *apparatchik* for reappointment, knowing that in instances where they displeased members of the executive branch they might lose their job, significantly impairing the independence of their decision-making.[808]

In 1989 the Soviet newspaper *Izvestiia* ran a story highlighting this issue.[809] In this case Judge Kudrin lost his job after he failed to adhere to the instructions of the Communist Party and dismissed a politically sensitive case from court.[810] Kudrin was called to a meeting with

[798] On the Status of Judges in the USSR (n711) Article 17(1).
[799] *See generally* Dobek and Laird (n708).
[800] UNGA 'Basic Principles on the Independence of the Judiciary' (n226) Articles 1.1-1.4.
[801] Ibid.
[802] Institute for Democracy and Electoral Assistance (n397) 2.
[803] Ibid.
[804] Ibid.
[805] Solomon (n722) 80.
[806] Dolapchiev (n720) 64.
[807] Ibid.
[808] Henderson (n735) 315.
[809] Arnold Beichman *The Long Pretence: Soviet Diplomacy from Lenin to Gorbachev* (Transaction Publishers 1991) 114.
[810] Ibid.

the head of the local Department of Justice,[811] and the next day Kudrin resigned.[812] This all took place after the judicial reforms of *perestroika* under Gorbachev.[813]

In the Soviet Union the wage awarded to members of the judicial branch also negatively impacted their decisional independence. Judges in the Soviet Union were paid very inadequately compared to their Western counterparts.[814] Soviet judges repeatedly complained of their 'material distress'[815] and many experienced homelessness and destitution.[816] The average wage of those working in the Soviet court system averaged a mere sixty-three per cent of the national average.[817] Unsurprisingly, many Soviet judges abandoned the judiciary in favour of higher paid employment.[818] Despite publicity about the issue in the USSR,[819] repeated calls from within the legal sphere for a judicial wage increase,[820] and an official acknowledgment by the Communist Party of the problem,[821] there was no change in judicial wages under the *Perestroika* reforms.[822]

The problems funding the judicial branch were not limited to judicial wages alone. In fact, the entire judicial budget was underfunded and investment in the judicial branch fell year on year.[823] The effects of this was that court buildings were constantly in a 'state of dilapidation'[824] and it was estimated that around one third of all judicial buildings were so derelict that they were 'absolutely unsuitable for the administration of justice'.[825]

The lack of investment in the judicial branch and judicial wages was detrimental to standards of judicial independence in the Soviet Union. Primarily, low judicial wages meant that judges often had to find other sources of employment, making them more vulnerable to external

[811] Henderson (n735) 314-315.
[812] Ibid.
[813] Ibid; *See generally* Eugene Huskey 'Soviet Justice in the Age of Perestroika' (*The Christian Science Monitor* 22 August 1989) <http://www.csmonitor.com/1989/0822/ehusk.html> accessed 26 August 2015.
[814] Henderson (n735) 311.
[815] Ibid.
[816] Ibid 311-312.
[817] The average pay for employees of the Ministry of Justice was 137 roubles per calendar month, whilst the national average was 217 roubles per calendar month; *see* Henderson (n735) 312.
[818] Izvestiia 'The Judiciary' *Izvestiia* (Moscow 11 April 1989) 3.
[819] Henderson (n735) 311-314.
[820] Ibid.
[821] Ibid.
[822] Ibid.
[823] Izvestiia (n818) 3.
[824] Henderson (n735) 312.
[825] Ibid 313.

influences. In addition, the low judicial wages meant that judges were more susceptible to corruption.[826]

Furthermore, the lack of investment in the judicial branch and judicial wages was a clear indication of the esteem held in the judiciary by the Communist Party. The failure by the Soviet government to invest in judicial infrastructure or in judges themselves, communicated that the Communist Party did not value the legal or judicial profession. It was unsurprising that the judicial branch commanded the least respect of any of the branches of Soviet government,[827] and was seen by the Soviet public as a tool of the Communist regime.[828] The lack of respect from both the Communist government and the Soviet public also left the judiciary demoralised,[829] and more susceptible to judicial corruption.[830]

Soviet legislation purported to insulate judges from external influences over their judicial decision-making. According to that legislation Soviet judges were only subordinate to the law,[831] and any interference in the activity of judges during the performance of their duties was expressly forbidden.[832] Similar provisions were reiterated in the Constitution of the USSR, and Article 96 stated that judges should not be deputized to the Soviet that appointed them.[833] However, problems associated with judicial selection and appointment,[834] tenure and judicial dismissal,[835] and inadequate judicial wages,[836] made Soviet judges particularly susceptible to political pressure from both local and national Communist Party members.

In practice, the Communist Party exerted significant direct and indirect influence over the decision-making powers of judges. Primarily, the Communist Party issued 'guiding explanations'[837] which dictated how the law should be interpreted and implemented by the

[826] Marina Kurkchiyan 'Judicial Corruption in the Context of Legal Culture' in Transparency International (ed) in *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007) 100 & 113.
[827] *See* p117-118; Boylan (n699) 1327.
[828] Boylan (n699) 1330.
[829] Kurkchiyan (n826) 100.
[830] Ibid.
[831] On the Status of Judges in the USSR (n711) Part ii Fundamental Guarantees of the Independence of Judges and People's Assessors, Article 3(1).
[832] Ibid Article 5(1).
[833] Constitution of the USSR (as amended in 1991) (n710) Article 96.
[834] *See pages* 95-98.
[835] *See pages* 96-98.
[836] *See pages* 98-99.
[837] Henderson (n735) 320.

judicial branch.[838] There was also significant indirect pressure on judges to ensure that defendants in criminal trials faced the death penalty,[839] which impinged on their ability to make independent decisions.[840] The dominance of the Communist Party over the judiciary was achieved through the doctrine of *pravo kontrolia* (the right of supervision),[841] which effectively granted the Communist Party the right to intervene in any matter. The result was that 'Party functionaries dictate[d] to the justices the desired verdict'.[842] Judges who did not adhere to Communist 'guidance' were forced to retire.[843] Even when this practice became public knowledge through various media articles, which highlighted corruption in the USSR, the precedent continued.[844] The practice endured in part because of the Communist belief in the party's righteous supremacy over all organs over government, which prohibited any true realisation of the separation of powers.[845]

The Communist doctrine of *pravo kontrolia* included the practice of '*telefonnoe pravo*' (telephone justice),[846] which became pervasive in the Soviet Union. *Telefonnoe Pravo* was a colloquial phrase that referred to instances where, under the instructions of a Communist Party member, a judge made a decision on 'grounds external to the judge's own assessment of the law and the facts of case' after receving an 'instructive' telephone call.[847] The phrase was used ironically, and referred to the non-transparency in the legal system[848] where only 'Soviet' justice prevailed.[849] Telephone justice was achieved through both formal and informal pressure,[850] and ensured that judges passed decisions that adhered to the wishes of the local *apparatchik* and the Communist government.

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[838] Ibid.
[839] Dolapchiev (n720) 62.
[840] Ibid.
[841] Dobek and Laird (n708) 150.
[842] Ibid.
[843] For example, the case of Judge Kudrin who was forced to retire after failing to adhere to the Communist *apparatchik* instructions in Henderson (n735) 314-315; *see also* pp98-98.
[844] Henderson (n735) 314-315.
[845] *See generally* Costea (n452).
[846] Alena Ledeneva 'Behind the Façade: Telephone Justice in Putin's Russia' in Mary McAulley, Alena Ledeneva, and Hugh Barnes (eds) *Dictatorship or Reform? The Rule of Law in Russia* (Foreign policy Centre 2006) 24, 30.
[847] Ibid.
[848] Ibid 26.
[849] Ibid 25.
[850] *See generally* Randall T Shepard 'Telephone Justice, Pandering, and Judges Who Speak Out of School' (2001) 29(3) Fordham Urban Law Journal 811-825.

The practice of *Telefonnoe Pravo* granted members of the Communist Party members 'exceptional powers'[851] and gave them a position above the law.[852] The practice allowed Communist members to pick up the phone and dictate to the judge how a particular case should be concluded,[853] including instances where judges were told to pursue cases with vigour, or alternatively to drop them altogether.[854] These decisions were often motivated for reasons entirely personal to the dictating *apparatchik* to the judge, rather than based on any external social, political, or moral reasoning.[855] In some areas of the Soviet Union the problems were reportedly so extreme that judges would not render a decision without consulting the local *apparatchik*.[856]

The expectation in the Soviet government was that any oral or written command from a member of the Communist Party would take precedence over legislation and decrees.[857] In instances where there was a deviation between the written law and the oral instructions of the local *apparatchik*, it was widely acknowledged that the verbal instructions would take precedence.[858] The result was that unwritten rules governed legal society, and members of the Communist government could bend the law to suit their wishes and benefit some or punish others.[859]

There was also significant informal pressure exerted on Soviet judges to pressure them to rule in a particular way. During the Communist rule this informal pressure became widespread in the legal sphere.[860] The pressure constantly reiterated to judges that their decisions should serve the needs of the ruling Communist leaders.[861] Judges were therefore subject to 'incessant… moral duress',[862] communicated through various state run and state controlled media outlets. Informal pressure was achieved in a variety of ways including

> frenzied radio, press, and other propaganda but also by specially staged open

[851] Ledeneva 'Behind the Façade' (n101) 25.
[852] Ibid.
[853] Ibid.
[854] Solomon (n722) 84.
[855] Ibid.
[856] Boylan (n699) 1327.
[857] Ledeneva 'Telephone Justice in Russia' (n757) 328.
[858] Timothy J Colton *Yeltsin: A Political Life* (Basic Books 2007) 325.
[859] Ledeneva 'Telephone Justice in Russia' (n991) 330.
[860] Ibid.
[861] Ibid.
[862] Dolapchiev (n720) 61.

> 'people's meetings' which in fact passed the actual verdicts before the judicial decisions were determined.[863]

People's meetings were often attended by the Communist Minister of Justice,[864] who would also regularly address these meetings.[865] The presence of Communist Minister of Justice at these People's Meetings flew in the face of the fact that it was his job to secure judicial independence.[866] The direct and indirect pressure faced by judges had a significant impact on judicial decision-making in the Soviet Union, and judgments were consistently 'biased in favour of the Communist Party'.[867] There was additional indirect and informal pressure on judges to avoid acquittals at all costs.[868] Significant pressure was exerted by members of the Procuracy, the governmental body charged with investigating and prosecuting crimes.[869] Acquittals were deemed to be a failure on the part of the investigating and prosecuting officials, who therefore wished to avoid a 'not guilty' verdict by any means possible.[870] The pressure exerted on judges to pass guilty verdicts, meant that defendants were found guilty on weak evidence, or that weak cases were sent back to the procuracy for further investigation.[871]

The continued and ever-present direct and indirect pressure on judicial decision-making crippled the decisional independence of Soviet judges. In reality the practice of *Telefonnoe Pravo*, the constant media pressure to avoid acquittals, and use of 'People's Meetings' completely undermined the ability of judges to assess a case on its merits. Instead, vulnerable due to the lack of objective selection and appointment processes, temporal tenure, arbitrary dismissal and low wages, judges were compelled to make decisions in line with local and national Communist wishes.

b) Judicial Corruption in the Soviet Union

[863] Ibid.
[864] Ibid.
[865] Ibid.
[866] Ibid.
[867] Ibid 68.
[868] Solomon (n722) 84.
[869] Ibid.
[870] Ibid.
[871] Ibid.

Judicial corruption also undermined judicial independence standards in the Soviet Union. Judges were routinely involved in activity that compromised their independence,[872] in spite of Soviet law which expressly prohibited corruption in all spheres of government. With respect to the Soviet judiciary, legislation demanded that judges should act in a way that was just and humane,[873] and that honoured and dignified their profession.[874] Nonetheless corruption was widespread in the Soviet Union, both within the judicial branch and in other sectors of government and society, and other sectors of the justice systems including the police and the procuracy were repeatedly criticised for endemic corruption.[875]

The legal culture of the Soviet Union was one factor that caused judicial corruption to become so prevalent in the country. The legal community of the Soviet Union tolerated the existence of corruption and did little to extinguish bribery and extortion within the judiciary. This was in part because of the public and Communist Party disregard for the judicial branch,[876] which commanded very little respect during the execution of its duties.[877] There was little prestige attached to holding the position of a judge in Soviet society,[878] and therefore no legal culture that frowned upon and prohibited judicial corruption.[879] Without a strong sense of self-identity and honour in the judicial community,[880] there was no sense of pride to be protected from digressing members of the group.[881] The legal community also contributed to the longevity and prevalence of judicial corruption, because of the closed nature of the judicial branch itself. When faced with incidents of corruption the Soviet judiciary was prone to 'close ranks'[882] and protect any guilty parties from legal consequence.[883] Alongside this, where judges feared exposure of their corrupt activity they could 'misinterpret these laws or twist the

[872] James Heinzen 'The Art of the Bribe: Corruption and Everyday Practice in the Late Stalinist USSR' (2007) 66(3) Slavic Review 389, 407.
[873] On the Status of Judges in the USSR (n711) Article 13(1).
[874] Ibid.
[875] Dobek and Laird (n708) 146-147.
[876] Boylan (n699) 1327.
[877] Ibid.
[878] Kurkchiyan (n826) 100.
[879] Boylan (n699) 1327.
[880] Ibid.
[881] Ibid.
[882] Geoffrey Robertson QC 'The Media and Judicial Corruption' in Transparency International (ed) in *Global Corruption Report 2007* (Cambridge University Press 2007) 108, 109.
[883] Ibid.

facts to support unjust rulings'[884] to silence[885] or intimidate[886] any persons who threatened to come forward and expose corrupt activity. Dissidents were vulnerable to arbitrary or vengeful prosecution[887] because all members of Soviet society were 'bound to break the law somehow to survive'.[888] Judges and other corrupt government officials were therefore able to routinely abuse their powers to avoid exposure of their corrupt activities.[889]

Corruption was also able to flourish in the Soviet Union because there was no free press in the country. Traditionally, judicial corruption is exposed by journalists operating against executive interests,[890] working in cooperation with resolute members of the legal profession.[891] In the Soviet Union there was significant censure of press freedom,[892] in part because nearly all the media was under the strict control of the Communist Party.[893] The Communist Party utilised the media to portray a nation untouched by the bourgeois issues that affected Western states, such as corruption.[894]

Judicial corruption also endured throughout the Soviet era because of the prevalence of corruption in other areas of Soviet society and government. This resulted in a spiral of corruption where enough individuals were involved in the culture of corruption that those involved were able to avoid public exposure through political blackmail.[895] The pervasiveness of corruption in Soviet society meant that any individual who wished to expose corruption would risk exposure of their own misconduct.[896]

Therefore, despite the prevalence of corruption in the Soviet Union, there was little done to combat it. Trials and prosecutions for corruption were few and far between.[897] The scarcity of trials for corruption reflected not the infrequency of judicial corruption,

[884] Robertson (n882) 111.
[885] Ibid 109.
[886] Karklins (n416) 30.
[887] Ibid.
[888] Ibid.
[889] Ibid.
[890] Robertson (n882) 109.
[891] Ibid.
[892] Stjepan Malović and Gary W. Selnow *The People, Press, and Politics of Croatia* (Praeger 2001) 145.
[893] Ibid.
[894] Dobek and Laird (n708) 143.
[895] Karklins (n416) 30.
[896] Ibid.
[897] Ibid; Heinzen (n872) 407.

but instead reflected the problems associated with exposing corruption and the pervasiveness of corruption within Soviet society.[898]

One of the most common expressions of corruption in the Soviet Union was bribery. Bribery was so rife in the USSR that it was a 'phenomenon of everyday life'.[899] Judicial bribery was the culmination of an informational relationship between the judge and one or more parties to a case,[900] and occurred where a party to a case paid for, and received, 'for better than fair treatment'.[901] Bribery occurred when that the transaction was initiated by the parties rather than the judges.[902] On the other hand, extortion was a relationship initiated by the judge.[903] Extortion occurred when the judge demanded a payment threatening that without payment the success of the party concerned would be detrimentally affected.[904] In practice however, there was not a clear delineation between judicial bribery and judicial extortion in the Soviet Union.[905] Instead, in reality parties to a case were often faced with a blend of bribery and extortion, whereby when a party did not pay anything to the judges their chances would fall, and when a party did pay their chances of success would rise.[906] In reality therefore parties to a case were faced with a threat/offer dichotomy at trial to ensure the success of their case.[907]

Bribery of a government official, including Soviet judges, was unlawful under Soviet law, as was judicial extortion. The RSFSR Criminal Code prohibited any 'inducements that improperly influenced the performance of an official's public function'.[908] Additionally the Criminal Code made both the offering[909] and acceptance[910] of a bribe unlawful, and punishable by up to fifteen years for repeated offenders.[911] Despite legislative provisions prohibiting bribery and extortion, both activities were very commonplace in the Soviet Union.

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[898] Karklins (n416) 30.
[899] Heinzen (n872) 393.
[900] Ibid.
[901] Ian Ayres 'The Twin Faces of Judicial Corruption: Extortion and Bribery' (1996-1997) 74 Denver University Law Review 1231, 1234.
[902] Heinzen (n872) 393.
[903] *See generally* Ayres (n901) 1234.
[904] Ibid.
[905] Ibid.
[906] Ibid 1232.
[907] Ibid 1235.
[908] The Criminal Code of the Russian Soviet Federative Socialist Republic 27 October 1960 (as amended), Chapter VII Official Crimes, Article 174.
[909] Ibid.
[910] Ibid Article 173.
[911] Ibid.

Judicial bribery and judicial extortion were prevalent in the Soviet Union for a number of reasons. Judges were susceptible to bribery and extortion in part because of the inadequacy of judicial wages.[912] Judges in the Soviet Union lived in 'material deprivation',[913] making it tempting for judges to sell access to 'justice' to help escape poverty.[914] The temptation for judges to 'sell justice'[915] was particularly acute during the Stalinist post-war era.[916] A shortage of rations[917] and a dramatic increase in the prevalence and severity of poverty[918] in the post-war era saw an upsurge in incidents of bribery and extortion.[919] During this time, bribery and extortion became a means by which judges could dramatically increase their quality of life, and ensure their survival through the post-conflict recession.[920]

The culture of extortion and bribery across Soviet society also encouraged judicial bribe-taking and extortion. In post-World War II Soviet society, the acts of bribery and extortion were not considered immoral given the poverty felt by the majority of Soviet citizens.[921] In turn, judicial bribery and extortion thrived in a situation where neither party paying for nor the party receiving payment felt guilt or a need to admit to the activity.[922]

The preponderance of convictions at criminal trials also contribute to the prevalence of bribery and extortion in the Soviet Union. There was significant pressure on Soviet courts to ensure all criminal trials ended in convictions.[923] The predominance of convictions in the Soviet justice system opened up a market for the accused to 'purchase mercy'[924] by buying a reduction in their inevitable sentence.[925]

[912] Transparency International (n405) 49.
[913] Heinzen (n872) 409.
[914] Ibid 400-401.
[915] Ibid.
[916] Ibid 401.
[917] Ibid 400.
[918] Ibid.
[919] Ibid 401.
[920] Ibid 400-401.
[921] Ibid 404.
[922] Ibid 395.
[923] *See* p 103; Dobek and Laird (n708) 144.
[924] Heinzen (n872) 402.
[925] Ibid 416.

Lenin acknowledged the problem of corruption in the Soviet Union in 1921 and stated that bribery was one of the 'three main enemies' of Communism.[926] However, the recognition of corruption was not with genuine acknowledgment of the factors that fed into the culture of corruption. Instead, the Communist Party blamed corruption in the Soviet Union on the vestiges of Capitalist ideals in the country.[927] This sentiment was reiterated by the Soviet Supreme Court in a decree in 1949, stating that bribery was 'the most shameful relics of the capitalist past'.[928] The attribution of incidents of corruption and bribery to capitalism meant that after reforms in the Soviet Union corruption was deemed to be impossible, as the Communist Party claimed to have eradicated capitalism from Soviet society.[929] Instead it was believed that corruption could only exist in bourgeois capitalist countries.[930] This meant that incidents of corruption could not be acknowledged by the Soviet judiciary or government, and forced corrupt activity further from public exposure.[931]

As a result, bribery and extortion became endemic in the Soviet Union, both in the Soviet judiciary and throughout the Communist government. This situation became so extreme that it was an 'open secret'[932] in Soviet society, and in some instances unofficial 'price lists' for justice became available.[933]

4.4 The Repression of Judicial Impartiality in the Soviet Union

Similarly, judicial impartiality was never truly realised in the Soviet Union.[934] Problems with Soviet judicial impartiality were in part due to problems with judicial selection and appointment procedures.[935] Via the non-independent selection and appointment procedures the Communist Party staffed the judiciary with individuals who had strong political ties to the

[926] Alongside Communist arrogance and illiteracy; *see* Vladimir Lenin (translated by Kharms D) *Polnoe sobranie sochinenii* [Full Composition of Writing] (5th edn, Gumanitarnoe Agentstvo, 1964), 173-74; Christopher Read *Lenin: A Revolutionary Life* (Routledge 2009) 271; Sheila Fitzpatrick *The Commissariat of Enlightenment: Soviet Organization of Education and the Arts under Lunacharsky* (Cambridge University Press 2002) 252.
[927] Lenin (n926) 173-74; Read (n926) 271; Fitzpatrick (n926) 252.
[928] Supreme Court of the USSR *Postanovlenie* [meaning decree of the Supreme Court] (1949); F Chernov 'Bourgeois Cosmopolitanism and its Reactionary Role' in Bolshevik (ed) *Bolshevik: Theoretical and Political Magazine of the Central Committee of the All-Union Communist Party* (Communist Party of the Soviet Union 1949) 30-41.
[929] *See generally* Heinzen (n872).
[930] Ibid.
[931] Ibid.
[932] Karklins (n416) 24.
[933] Ibid 23.
[934] Eugene Huskey 'The Administration of Justice: Court, Procuracy and Ministry of Justice' in Eugene Huskey (ed) *Executive Power and Soviet Politics: The Rise and the Decline of the Soviet States* (M.E. Sharpe 1992) 223.
[935] *See* pp95-96

Communist Party,[936] and who often lacked a legal education.[937] The Soviet judiciary was therefore a highly politicised body, rather than an impartial one.[938] The judiciary was not solely utilised to adjudicate issues of law and order,[939] and many trials were conducted to eliminate political opponents of the Communist government.[940] The Soviet judiciary was seen by the Communist government as a method by which the Communist agenda could be promoted via legal means.[941] This was exemplified by the Communist policy of '*Grundnorm'* which demanded that the law always be interpreted by the judiciary in a way that furthered Communist policies.[942] This drastically undermined judicial impartiality, and judges were expected to adjudicate cases on the basis of Communist political theory,[943] rather than on the basis of legal theory.[944]

Problems with impartiality were in part due to the structure of the Soviet legal system. Judicial impartiality was also severely compromised because judges did not act in a singular role, and the role of the defence counsel was not solely limited to representing defendants. Defence counsels were given a dual role in the justice system. Not only did defence lawyers owe a duty to their clients, they simultaneously owed a duty as 'helpers of the court'. [945] The primary task for defence counsel during a trial was, alongside the judge and the procurator, to find 'the truth'.[946]

Judges faced a similar blurring of lines in the Soviet legal system, and judges did not act in a singular role. Instead, judges often straddled the role of the judge and the prosecutor.[947] In practice, often prosecutors did not attend trials, and Soviet judges would step in to assume that role,[948] and an acquittals were a 'mark against [the judge's] record'.[949] In addition, judges

[936] Solomon (n722) 78.
[937] Ibid.
[938] Dolapchiev (n720) 60.
[939] Ibid.
[940] Ibid.
[941] *See generally* Costea (n452).
[942] *See generally* George Ginsburgs *The Soviet Union and International Cooperation in Legal Matters: Civil Law* (Springer 1991) 69; Aleksander Pecsenik and Jaap Hage *On Law and Reason* (2nd edn, Springer, 2008) 226; Robert Sharlat 'The Prospects for Federalism in Russian Constitutional Politics' (1994) 24(2) Publius 115, 117.
[943] Costea (n452) 243.
[944] Ibid.
[945] Ibid.
[946] Ibid.
[947] Ibid.
[948] Ibid.
[949] Ibid.

were also forced to act as both judge and prosecutor because the courts were held to be equally as accountable as the police and procuracy in the apprehension and prosecution of criminals.[950] This meant that judges had a vested interest in ensuring that those who appeared before them were convicted.[951]

Judicial impartiality was also undermined by the operation of the doctrine of the 'presumption of innocence'. The doctrine of the presumption of innocence has long been accepted as a cornerstone of democratic criminal procedure.[952] However, in the Soviet Union, the presumption of innocence was seen as a bourgeois Western fallacy.[953] This attitude allowed 'major abuses of law'[954] by law enforcement officials, including the use of torture by the police to obtain confessions,[955] the use of forged evidence,[956] and the obscuring and covering up of facts by investigating officers and procuracy to ensure convictions.[957]

In the Soviet Union not only was there no presumption of innocence, the inverse was true.[958] The presumption in the Soviet justice system was that any individual who had been investigated or arrested was guilty.[959] As a result, it was expected that any defendant appearing before a judge would be convicted.[960] This attitude survived even after 1978 when the Supreme Court of the USSR introduced the doctrine of the presumption of innocence in the Soviet legal society.[961] Despite these procedural changes, the attitude that the accused was guilty was so ingrained in Soviet society that these reforms made little difference.[962] As a result, the doctrine of the presumption of innocence never permeated the Soviet legal consciousness.[963] This meant that judges throughout Soviet era operated from the prejudiced position that any person appearing before them was guilty.

Impartiality was also undermined in the Soviet Union by the network of connections and

[950] Dobek and Laird (n708) 144.
[951] Ibid.
[952] Ibid 143.
[953] Ibid.
[954] Ibid 147.
[955] Ibid.
[956] Ibid.
[957] Ibid.
[958] Solomon (n722) 89.
[959] Ibid.
[960] Ibid.
[961] Law on the Supreme Court of the Union of Socialist Soviet Republics (1979) Article 3.
[962] Solomon (n722) 89.
[963] Ibid.

rivalries that existed in the Soviet Union. This was particularly apparent in the 1940s during the economic fall out after World War II,[964] where Soviet citizens were forced to establish '*svyazi*'[965] (connections) and '*protektsiyi*'[966] (patronage) in order to survive during the period of scarce resources and minimal opportunities.[967] Judges were not immune from this, and also established 'connections' throughout the Soviet society and the Communist government to secure rations,[968] favours,[969] and day to day necessities.[970] These connections undermined standards of judicial impartiality, especially when judges were faced with their 'connections' in the courtroom.[971]

Impartiality in the Soviet judiciary was also undermined by connections established by the non-independent judicial selection and appointment process, who were selected on a subjective basis.[972] The judicial branch was staffed with individuals appointed on the basis of familial affiliations or political loyalties, rather than on the basis of their qualifications.[973] These political and family loyalties created connections which further undermined judicial impartiality standards in the Soviet Union. Alongside, political and family connections, personal connections also affected judicial impartiality in the Soviet Union. Biased judges were elected to the judiciary to maintain those connections,[974] by preventing the election of new and unknown persons to those positions[975] and protecting the 'turf' of those connections.[976]

Judicial impartiality was also undermined by the existence of rivalries. Judges adjudicating on politically sensitive trials were often selected because they were 'known to be hostile to the defendants, openly seeking vengeance and not justice'.[977] This meant that judges

[964] Heinzen (n872) 489.
[965] TH Rigby 'Early Provincial Cliques and the Rise of Stalin' (1981) 33(1) Soviet Studies 1, 4-5.
[966] Ibid.
[967] Heinzen (n872) 489.
[968] Ledeneva 'Telephone Justice in Russia' (n991) 330.
[969] Ibid.
[970] Ibid.
[971] Ibid.
[972] Dakolias and Thachuk (n116) 356.
[973] Ibid.
[974] Karklins (n416) 28.
[975] Ibid.
[976] Ibid 25.
[977] Dolapchiev (n720) 61.

adjudicating those trials were far from impartial and instead had a vested interested in ensuring a conviction.[978]

4.5 Conclusions: Judicial Independence and Judicial Impartiality in the Soviet Union

Despite Communist rhetoric to the contrary, in practise there was a singular failure to secure either effectual judicial independence or judicial impartiality in the Soviet Union. Legislation in the Soviet Union provided for standards of judicial independence and judicial impartiality, but these legal provisions were not translated into reality. Instead under the Marxist-Leninist rule of the Communist government there was total 'dictatorship of the proletariat',[979] and the Soviet Union operated as a totalitarian state,[980] including a total domination of the judicial branch.

Even after the *Perestroika* reforms were introduced in 1985, little changed in practice. This was in part due to the fact that the *Perestroika* reforms failed to acknowledge many of the real reasons that judicial independence and judicial impartiality had not been realised in the Soviet Union.[981] The Communist government failed to acknowledge that shortcoming in judicial practice were, at least in part, the fault of the overarching Communist policies, rather than the fault of individual members of the Communist party.[982] Instead of acknowledging that problems with separation of power standards in the country lay at the door of Communist policies, problems with judicial independence and judicial impartiality standards were blamed on the influence of Western bourgeois culture.[983]

The *Perestroika* reforms also failed because many power-monopolising Communist policies survived the reforms,[984] including the doctrine of *pravo kontrolia*.[985] *Pravo kontrolia* (the

[978] Ibid.
[979] Poe and Tate (n322) 858.
[980] *See generally* Daniel Yergin *Shattered Peace* (Penguin Books 1990); AM Khazanov *After the USSR: Ethnicity, Nationalism, and Politics in the Commonwealth of Independent States* (CUP 1995); A McClintok 'The Angel of Progress: Pitfalls of the Term "Post-Colonialism"' (1992) 31/32 Social Text 84-98; Zbigniew Brzezinski 'Totalitarianism and Rationality' (1956) 50(3) American Political Science Review 751-763; F Fukuyama 'The Modernising Imperative: The USSR as an Ordinary Country' (1993) 31 The National Interest 10-18.
[981] Dobek and Laird (n708) 137.
[982] Ibid.
[983] Lenin (n926) 173-74; Read (n926) 271; Fitzpatrick (n926) 252.
[984] Dobek and Laird (n708) 150.
[985] Ibid.

right of control) granted the Communist Party ultimate control over all Soviet matters, including the law, as the 'guardian of ideological truth'.[986] The Communist Party justified this interference on the basis that it had the 'leading role'[987] in Soviet society, and therefore placed itself above the law.[988] The Communist party did little to hide this reality from Soviet society, and even during the *Perestroika* reform efforts the government continued to reiterate the claim that reforms should only bolster the Communist Party and Communist policies.[989] As late as 1988 Gorbachev proclaimed that:

> the ultimate goal of *perestroika* is to strengthen socialism and the enhancement of the role of the Party is the key to achieving that goal.[990]

Whilst the *Perestroika* reforms ostensibly sought to introduce judicial independence and judicial impartiality reforms, in practice there was a significant chasm between legislation and practice. This disparity between the written and the actual was a reality that permeated all aspects of the USSR, including the political, economic, and social spheres of Soviet society.[991] Despite legislative provisions that provided for judicial autonomy, all aspects of the Soviet Union were controlled by the Communist Party.[992]

Judicial independence and judicial impartiality were undermined in the Soviet Union for a number of reasons. One of the reasons that the executive branch elected to repress standards of judicial independence was due to the suspicion felt about the judicial branch by the Communist party.[993] The entire legal profession was widely distrusted by the Soviet government,[994] who believed its members to be bourgeois, manipulative, and a threat to Communist power and ideologies.[995] The distrust felt about the legal profession meant that the Communist party sought to control the entire legal sphere. This resulted in various attempts by the Soviet government to exert control over members of the legal community,

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[986] Ibid.
[987] Ibid 160.
[988] Ibid.
[989] Ibid.
[990] Ibid.
[991] Ledeneva 'Telephone Justice in Russia' (n757) 327-328.
[992] Dolapchiev (n720) 64.
[993] Solomon (n722) 78.
[994] Ibid.
[995] Ibid.

including assuming authority over the Soviet bar organisation,[996] and limiting and curbing the movements of lawyers during politically sensitive trials.[997] The Soviet government also recognised that the judiciary was a means by which they could advance the Communist agenda through legal avenues.[998] Not only did this help to disseminate Communist policies throughout the Soviet Union, but it clothed those policies with seemingly greater legitimacy.[999] In addition, it granted Communist party members practical immunity from the law,[1000] including for flagrant and repeated breaches of human rights standards in the Soviet Union.[1001]

The Soviet judiciary was also utilised as a repressive weapon itself.[1002] Aspects of criminal law were repeatedly violated,[1003] and the rights of defendants were ignored to ensure prosecution.[1004] Judges frequently prosecuted a number of crimes, including offences such as 'infringing on the activities of the State'.[1005] Those crimes were widely acknowledged by Soviet society as a means by which the Communist Party could prosecute dissidents for actions that were deemed to be a threat to the Communist agenda.[1006] The Soviet government took active steps to increase the opportunities with which they could utilise the judiciary for repression,[1007] and withheld fundamental aspects of criminal law from public circulation.[1008] Citizens were not aware of, and could not make themselves aware of, various crimes. This increased the opportunities for the Communist government to prosecute individuals for those crimes.[1009] The Communist party also took advantage of the ambiguity of the criminal law and pressed the judiciary to prosecute acts that were not technically illegal.[1010] Nonetheless, these charges were very difficult to challenge, and dissidents found themselves being imprisoned for acts that did not in fact amount to a breach of the criminal law.[1011] Because of

[996] Ibid.
[997] Ibid.
[998] Costea (n452) 253.
[999] Ibid.
[1000] Ibid.
[1001] Ledeneva 'Telephone Justice in Russia' (n991) 324-350.
[1002] Shepard (n850) 811.
[1003] Dolapchiev (n720) 61.
[1004] Ibid.
[1005] Shepard (n850) 811.
[1006] Stephen G Breyer 'Comment: Liberty, Prosperity, and a Strong Judicial Institution' (1998) 61(3) Law & Contemporary Problems 3, 3.
[1007] *See generally* p35
[1008] Dobek and Laird (n708) 139.
[1009] Ibid.
[1010] Ibid.
[1011] Ibid.

this abuse of the criminal law, the result was that in the USSR all actions were considered to be unlawful, unless the law expressly provided that they were legal.[1012] As Solzhenitsyn noted, Communist Party members:

> could twist the law anyway they liked. When your ten years were up they could say good, have another ten. Or pack you off to some godforsaken place of exile.[1013]

This abuse of criminal law was reinforced by the extreme punishment of criminal activity in the Soviet Union. The Communist government established prison camps throughout the Soviet Union.[1014] Prison camps were 'particularly brutal',[1015] and citizens seen as enemies of the Communist regime could have their sentences there extended indefinitely.[1016]

The abuse of standards of judicial independence and judicial impartiality in the Soviet Union had far-reaching consequences. Communist intervention in judicial decision-making was commonplace.[1017] Human rights violations in the Soviet Union went unchallenged and were routinely utilised by the Communist government as a means of repression.[1018] The Soviet Constitution was not a 'living document',[1019] and was rarely used as a means by which to challenge unconstitutional executive action or to protect human rights standards.[1020] The fidelity of judges in the Soviet Union was not to legality, but rather to Communist party loyalty, or *Partyinost*.[1021] As a result, justice in the Soviet Union was executed under the command of 'the Communist Party, the Procuracy, the Ministry of Justice, and even local soviets'.[1022] In practice, the legal fate of individuals appearing before a court was often decided by a member of the Soviet regime, rather than by a judge.

Where the Communist Party did not have an interest in the outcome of a case those trials

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[1012] Ibid.
[1013] Alexander Solzhenitsyn *One Day in the life of Ivan Denisovich* (Penguin Modern Classics 2000) 60-61.
[1014] Decree on the Labour Reformatory Institutions for Politically Dangerous Persons (1945) *cf* Dolapchiev (n720) 62.
[1015] Dolapchiev (n720) 62.
[1016] Ibid.
[1017] Ibid.
[1018] *See* Chapter VI 'Incidents of Torture in Member States of the Commonwealth of Independent States as a Result of Problems with Standards of Judicial Independence and Impartiality' pp
[1019] Boylan (n699) 1339.
[1020] Ibid.
[1021] Ledeneva 'Telephone Justice in Russia' (n757) 329.
[1022] Ledeneva 'Behind the Façade: Telephone Justice in Putin's Russia' (n846) 26.

were often decided by an informal system of justice in the country.[1023] In those instances, judges would reach decisions through an unofficial arrangement of 'leverage and loyalties',[1024] rather than through the process of law and order. These informal arrangements became so commonplace in Soviet society that they were viewed with a degree of legitimacy by the Soviet public,[1025] who accepted those systems as a necessary step in the justice system.[1026]

Consequences of this domination were also felt within the judicial branch. Of all the government branches, the judiciary commanded the least respect.[1027] The courts were seen as a cog in the repressive machine,[1028] and the public was very suspicious of the judiciary and the motives behind their judgments.[1029] This pressure led to serious mental health problems in the judicial branch, where up to one in every five judges was dismissed from his position due to 'nervous disorders'.[1030] There was little pride in being a member of the judiciary, which also permitted incidents of judicial corruption to undermine judicial independence in the country.[1031]

In short, judicial independence and judicial impartiality in the Soviet Union was never truly realised. Instead aspects of both judicial independence and judicial impartiality were undermined in a litany of ways, despite legislative provisions which ostensibly prohibited any interference with judicial activities. Despite purported reform efforts under Gorbachev, in reality those reforms had limited impact, and throughout these reform efforts emphasis was placed on the importance of protecting the Communist Party, rather than on securing practical change. The lack of autonomy in the judicial branch, alongside the poverty felt by judges and members of Soviet society, also contributed to the lack of judicial independence in the country. Disenfranchisement and extreme financial hardship opened the door for judicial corruption in the Soviet Union, which created an informal and unpredictable system of justice in the country.

[1023] *See generally* Ledeneva 'Telephone Justice in Russia' (n757) 328.
[1024] Ibid 330.
[1025] Ibid.
[1026] Ibid.
[1027] Boylan (n699) 1327.
[1028] Ibid 1330.
[1029] Ibid 1343.
[1030] Henderson (n735) 313.
[1031] Boylan (n699) 1343.

Despite the fall of the Soviet Union in 1991 being nearly three decades ago, the 'afterlife' of this legacy of non-respect for judicial independence and judicial impartiality still permeates modern Russia and former Soviet Union states to this day.[1032] As Boylan concluded, the reality in many former Soviet states remains that the 'legislature is controlled by Communists, former Communists, and re-labelled Communists'.[1033]

[1032] Ibid.
[1033] Ibid.

5 Transitioning to Democracy

Judicial Independence and Judicial Impartiality in members of the Commonwealth of Independent States

5.1 Introduction

The foundations on which members of the CIS organisation built their judiciaries was not a solid one.[1034] The Soviet experience was that of vocal support for judicial independence and judicial impartiality standards, but these sentiments were not matched with practical implementation and support.[1035] In fact, Communist lip service to judicial independence ran in direct contradiction to direct and deliberate efforts to undermine those standards in order to benefit the Communist Party members and individual Party members.[1036] After the fall of the Soviet Union between the years of 1989 and 1991,[1037] the newly-formed ex-Soviet states sought to establish themselves as democracies rising out of the ashes of the authoritarian Soviet Union.

Like the Soviet government before them, the executive branches of CIS member states have made efforts to establish that they are functioning democracies and have sought to demonstrate a significant shift away from the previous *status quo* under the Soviet government. In the Convention creating the Commonwealth of Independent States all member states made a declaration to strive towards various elements of democratic governance, including the rule of law, human rights protections, and the protection of fundamental freedoms.[1038] These sentiments were reiterated throughout the Convention, which provided for various democratic standards, including various rule of law

[1034] USAID 'Kazakhstan Judicial Assistance Project: Annual Report 2006' (*USAID* 2006) <http://pdf.usaid.gov/pdf_docs/Pdacj359.pdf> accessed 19 June 2017, 29.
[1035] *See* Chapter IV 'Foundations of Judicial Independence and Impartiality in CIS Member States: Judicial Independence and Impartiality in the Soviet Union', pp89-90.
[1036] *See* Chapter IV 'Foundations of Judicial Independence and Impartiality in CIS Member States: Judicial Independence and Impartiality in the Soviet Union', pp90-118.
[1037] See generally Richard Sawka *The Rise and Fall of the Soviet Union 1917-1991* (Routledge 1991); Serhil Plokhy *The Last Empire: The Final Days of the Soviet Union* (Oneworld Publications 2015); Victor Sebestyen *Revolution 1989: The Fall of the Soviet Empire* (W&N 2010).
[1038] Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995), preamble.

provisions,[1039] the right to engage in the democratic voting process,[1040] and adequate standards of judicial independence and judicial impartiality.[1041]

Government efforts to demonstrate democratic credentials were not limited to member states of the Commonwealth of Independent States. Over the last few decades the vast majority of states have made claims to be democratic,[1042] a claim that necessitates adequate standards of judicial independence and impartiality to be present in the state.[1043] Around the fall of the Soviet Union in the early 1990s there was increased pressure on states to join of the 'club' of democratic states. This pressure existed for a number of reasons. In part the interweaving of national and international politics in the late 20th century led to increased globalisation and put pressure on states to be seen to be adhering to the global *status quo*.[1044] CIS member states, as part of the group of newly independent countries, were under particular pressure to be seen as credible members of the democratic community,[1045] where democracy was deemed to bestow 'an aura of legitimacy on modern political life'.[1046] CIS member states also felt pressure to be seen as democratising because of their economic vulnerability. Emphasis on democratic governance from international organisations bestowing development funds, such as the World Trade Organisation[1047] and the World Bank,[1048] also encouraged states to claim that those standards are being achieved regardless of the reality.

[1039] Ibid Article 2(1) states that 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally'; Article 6(1) states that 'All persons shall be equal before the judicial system'; Article 7(1) provides that 'No one shall be liable for an act which did not constitute an offence under national legislation or international law at the time'; Article 20(1) states that 'All shall be equal before the law and shall be entitled, without any discrimination, to be equal protection of the law'.
[1040] Ibid Article 29 states that 'in accordance with national legislation, everyone shall have the right and opportunity to… vote and be elected at elections'.
[1041] Ibid Article 6(1) states that 'All persons shall be equal before the judicial system. In the determination of any charge against him, everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial court'.
[1042] Peter Calvert and Susan Calvert *Politics and Society in the Developing World* (3rd edn, Routledge, 2007) 357; *see also* David Held 'Democracy: From City-States to a Cosmopolitan Order' (1992) Special Issue, Political Studies 10, 22.
[1043] Russell (n191) 2.
[1044] Held (n1042) 22.
[1045] Ibid 10.
[1046] Ibid.
[1047] World Trade Organisation 'General Agreement on Tariffs and Trade' (1986) 55 UNTS 194, Article X(3).
[1048] See Linn Hammergren 'Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs' (*World Bank,* 1999) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf> accessed 13 December 2016.

As part of attempts to demonstrate their democratic credentials CIS member states engaged in various reform efforts. Some of these reforms efforts were part and parcel of membership of the Commonwealth of Independent States.[1049] In particular, membership of the Commonwealth of Independent States included various democratic promises, including that every citizen in those member state should be 'entitled to a fair hearing within a reasonable time by an independent and impartial court'.[1050] CIS member states also engaged in reform efforts in partnership with various international and regional organisations. The European Bank for Reconstruction and Development,[1051] the International Development Law Organisation, [1052] the American Bar Association Rule of Law Initiative, [1053] OSCE,[1054] the United Nations Special Rapporteur on Judicial Independence,[1055] and USAID[1056] have all been involved in judicial independence monitoring and implementation programmes in CIS states.

As in the Soviet Union however, assertions of increased democratisation were not necessarily met with change in reality. In fact, claims of democratisation and improved standards of judicial independence coincided with a 'growing gap between promise and practice'[1057] in those standards worldwide.[1058] In practice many states still fail to uphold standards of judicial independence,[1059] correspondingly the mandate of the Special Rapporteur has been extended on a number of occasions.[1060] The disparity between government claims of judicial independence and the standards achieved in reality led to the creation of a UN Special

[1049] CIS Convention on Human Rights and Fundamental Freedoms (n1038) preamble.
[1050] Ibid Article 6(1).
[1051] European Bank for Reconstruction and Development 'Commercial Laws of Tajikistan: April 2012. An Assessment by the EBRD' (*EBRD,* 2012) <http://www.ebrd.com/documents/legal-reform/tajikistan-country-law-assessment.pdf> accessed 22 September 2018.
[1052] International Development Law Organization 'Expanding Access to Judicial Decisions in Tajikistan' (*IDLO,* 26 March 2016) <http://www.idlo.int/what-we-do/initiatives/expanding-access-judicial-decisions-tajikistan> accessed 19 June 2017.
[1053] ABA ROLI 'Judicial Reform Index for Armenia' (n354).
[1054] Organisation for Security and Cooperation in Europe (OSCE) 'Statement by the Delegation of Azerbaijan, Human Dimension Implementation Meeting, Working Session 8: Rule of Law I' (*OSCE,* 23 September 2016) <http://www.osce.org/odihr/273371?download=true> accessed 19 June 2017.
[1055] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467).
[1056] USAID 'Kazakhstan Judicial Assistance Project: Annual Report 2006' (n1034).
[1057] Camp Keith *Political Repression* (n30) 155.
[1058] Ibid.
[1059] Howard and Carey (n72) 286.
[1060] UNHRC 'Mandate of the Special Rapporteur on the Independence of Judges and Lawyers' (18 June 2008) UN Doc A/HRC/8/52 para 29; UNGA Resolution 17/2 (n97) para 2; UNHRC 'Mandate of the Special Rapporteur on the Independence of Judges and Lawyers' (10 July 2014) UN Doc A/HRC/Res/26/7 para 2.

Rapporteur on the Independence of Judges and Lawyers[1061] only two years after the dissolution of the Soviet Union.[1062] The mandate creating the position of the UN Special Rapporteur on the Independence of Judges and Lawyers emphasised that judicial independence is an 'essential prerequisite for the protection of human rights and ensuring… justice'.[1063] With respect to CIS member states, judicial reform has proven 'severely problematic in almost all post-Soviet countries'.[1064]

5.2 Legislative Reform and Judicial Reform Programmes in CIS member states

Alongside the International Commission of Jurists, the Commonwealth of Independent States created a programme that aims to 'strengthen the protection of human rights and rule of law throughout the region'.[1065] The programme acknowledges that problems with judicial independence persist in the CIS member states and continues to undermine the rule of law and protection of human rights in the region.[1066] Despite this programme, and the efforts of other international organisations, reform efforts in CIS states have progressed slowly, and the 'Soviet format' of separation of powers and judicial independence persists in many countries.[1067]

Legislative reforms have however been introduced, to greater and lesser extents, across all CIS member states. In addition, various CIS member states have implemented judicial reform programmes to support legislative reform efforts. In the Republic of Armenia, legislation introduced when Armenia gained independence, after the fall of the Soviet Union in 1991, provides for various human rights and rule of law standards, including that of judicial

[1061] OHCHR, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers (n93) 1; UNCHR 'Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers' (11 April 1997) UN Doc E/CN.4/1997/23, preamble.
[1062] *Декларация Совета Республик ВС СССР от 26.12.1991 № 142-Н* [Declaration no 142-N of the Soviet of the Republics of the Supreme Soviet of the USSR No 142-N] 26 December 1991.
[1063] OHCHR 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers' (n93).
[1064] International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform. Asia Report No 150' (*International Crisis Group,* 2008) <https://d2071andvip0wj.cloudfront.net/150-kyrgyzstan-the-challenge-of-judicial-reform.pdf> accessed 19 June 2017, 1.
[1065] International Commission of Jurists 'Europe and the Commonwealth of Independent States (CIS)' (*International Commission of Jurists*, 2017) <https://www.icj.org/regions/europe-and-the-commonwealth-of-independent-states-cis/> accessed 19 June 2017.
[1066] Ibid.
[1067] USAID 'Kazakhstan Judicial Assistance Project' (n1034) 17.

independence.[1068] The Armenian government has also extensively ratified a number of European Human Rights instruments.[1069] After problems in the early 1990s, a number of legislative reforms were introduced in the mid 1990s. These included significant commitments to judicial reform, including Constitutional reforms in 1995 and a Concept Paper called the 'Legal and Judicial Reform Program' two years later in 1997.[1070] The Constitutional reforms established a three-tier court system,[1071] which was further reformed in 2005 to strengthen the independence of the courts.[1072] The Concept Paper proposed reform of the Armenian judiciary to transform it from its Soviet legacy to a modern functioning institution,[1073] with the overarching goal[1074] that the judiciary would be elevated to 'equal to the executive and legislative branches'.[1075] To achieve these goals, the World Bank identified three policy objectives:[1076] the establishment of an independent judiciary;[1077] the establishment of a smoothly functioning and effective judiciary; [1078] and the creation of a

[1068] *See generally* Constitution for the Republic of Armenia (1995, with the amendments of 27 November 2005 and 6 December 2015) Article 5 reads 'The state power shall be exercised in conformity with the Constitution and the laws based on the principle of the separation and balance of the legislative, executive and judicial powers'; *See also* Republic of Armenia Judicial Code (adopted 12 February 2007), Part I: Judicial Power, Section I: The Judicial System, Chapter 1: General Provisions, Article 7 reads 'everyone has right to judicial protection of his rights and freedoms'; Part I: Judicial Power, Section I: The Judicial System, Chapter 2: Principles of the Functioning of the Judiciary, Article 8 reads 'courts shall administer justice in accordance with the Constitution, international treaties, ratified by the Republic of Armenia, and the laws of the Republic of Armenia'; Article 9 reads 'self-governance of the judiciary shall be performed through self-governing bodies defined by this Code'; Article 11 reads 'in the administration of justice and the performance of other powers stipulated by law, and the judge is independent'; Part I: Judicial Power, Section 2: Status of a Judge, Chapter 12: Rules of Judicial Conduct, Article 88(1) reads 'With his activities and conduct, a judge must aspire to ensure the impartiality and independence of the court, and to contribute to building respect for and confidence in the court. The interpretation and application of the rules of conduct shall facilitate the achievement of this goal'; Article 88(2) reads 'A judge must contribute to instilling high standards of conduct both by personally following such rules and by pursuing compliance by his colleagues'.

[1069] International Federation for Human Rights (FIDH) 'Overview of Major Human Rights Issues in the Republic of Armenia' (*International Federation for Human Rights,* 2006) <https://www.fidh.org/IMG/pdf/armenierapport1311a.pdf> accessed 19 June 2017, 1.

[1070] Legal Department of the World Bank 'Armenia: Challenges for Judicial Reform, Judicial Assessment Report' (*World Bank,* April 1998) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ArmeniaJudAssessment.pdf> accessed 19 June 2017.

[1071] The Constitution of the Republic of Armenia (n1068) Chapter 6: Judicial Powers, Article 92.

[1072] Grigor Mouradian 'Independence of the Judiciary in Armenia' in Anja Seibert-Fohr (ed) *Judicial independence in Transition* (springer-Verlag Berlin and Heidelberg GmbH & Co. K 2012) 1197; Constitution of Armenia, Chapter 6: Judicial Power, Article 92 reads 'The courts operating in the Republic of Armenia are the first instance court of general jurisdiction, the courts of appeal, the Court of Cassation, as well as specialized courts in cases prescribed by the law. The highest court instance in the Republic of Armenia, except for matters of constitutional justice, is the Court of Cassation, which shall ensure uniformity in the implementation of the law. The powers of the Court of Cassation shall be defined by the Constitution and the law'.

[1073] Mouradian (n1072) 1197.

[1074] Ibid.

[1075] Ibid.

[1076] Ibid.

[1077] Ibid.

[1078] Ibid.

judiciary respected by the legislative, executive, and public.[1079] More recent reform efforts have involved the Parliamentary Assembly of the Council of Europe, and led to the creation of a 'roadmap of reforms' in 2008.[1080]

In the Republic of Azerbaijan similar legislative provisions were created to ensure judicial independence standards.[1081] In practice however these provisions have proved insufficient, and there was international criticism of the lack of *de facto* independence in the country.[1082] As a result of these criticisms and as a requirement for accession to the CoE, the Azerbaijani government undertook a series of reforms in the early 2000's.[1083] The Azerbaijani government reiterated its commitment to reformation of the judiciary as recently as 2016,[1084] and noted steps such as the establishment of the Judicial Legal Council, an independent body to govern judicial affairs, have been taken to strengthen judicial independence in the state.[1085] The CoE has commended these efforts.[1086] However in practice, there remain serious shortcomings in standards of judicial independence in the country, and the judiciary remains 'beholden'[1087] to the executive.

Whilst judicial reforms have been introduced have been introduced in Belarus, those reforms have had limited effect in practice. Extensive judicial reforms took place in Belarus between 1992 and 1995 under the Belarusian Supreme Soviet, the first Parliament to be created in

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[1079] Ibid.
[1080] Human Rights Watch 'Armenia: Country Summary 2011' (*Human Rights Watch,* January 2011) <https://www.hrw.org/sites/default/files/related_material/Armenia.pdf> accessed 19 June 2017.
[1081] The Constitution of the Republic of Azerbaijan (1995, as amended 24 August 2005 and 18 March 2009), Chapter II: Basis of the State, Article 7(2) reads 'In terms of internal problems state power in the Republic of Azerbaijan is limited only by law, in terms of foreign policy-by provisions resulting from international agreements, wherein the Republic of Azerbaijan is one of the parties'; Chapter VII: Judicial Power, Article 127(1) reads 'Judges are independent, they are subordinate only to Constitution and laws of the Republic of Azerbaijan, they cannot be replaced during the term of their authority'. *See also* Code of Criminal Procedure of the Azerbaijan Republic (1999), Article 25.1 which reads 'Judges and jurors shall be independent and shall obey only the legislation of the Azerbaijan Republic'.
[1082] International Bar Association's Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (*International Bar Association,* 2014) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=D168B0B4-C377-4EC7-A0B9-D029EF09A39C> accessed 22 September 2018, 42.
[1083] Ibid; Eastern Partnership Civil Society Forum 'Judicial Independence in the Eastern Partnership Countries: Armenia, Azerbaijan, Belarus, and Georgia' (*European Union,* 2011) <http://archive.eap-csf.eu/assets/files/publications/Judicial_Independence_in_the_EaPCountries.pdf> accessed 22 September 2018, 4.
[1084] OSCE 'Statement by the delegation of Azerbaijan' (n1054).
[1085] Ibid.
[1086] IBAHRI 'Freedom of Expression on Trial' (n1082) 42.
[1087] Amnesty International 'The spring that never blossomed: Freedoms suppressed in Azerbaijan' (*Amnesty International,* 2011) <http://www.amnesty.eu/content/assets/Doc2011/azerbaijan_report.pdf> accessed 19 June 2017, 8.

Belarus after the fall of the Soviet Union.[1088] During that time 'The Concept of Judicial and Legal Reform' programme was introduced by the Supreme Soviet.[1089] These efforts were later supplanted by Constitutional 'reform' in 1996, when a number of new constitutional amendments were introduced. These legislative provisions provide for judicial independence in Belarus under various guises,[1090] including constitutional articles which afforded the Belarusian government separation of powers standards.[1091] However, in practice legislative provisions have had a limited effect. The United Nations Office for the High Commissioner for Human Rights has concluded that in Belarus the rule of law has been thwarted[1092] and the courts have been used to repress political dissidents in the country.[1093] The Special Rapporteur on the Independence of Judges and Lawyers has also addressed problems with separation of powers and judicial independence and impartiality in Belarus, and has emphasised the transitional nature of the country, its economic deprivation, and the effects the Chernobyl disaster have had on democratisation efforts in Belarus.[1094]

Judicial reform in Kazakhstan began in 1993 when Kazakhstan's first post-Soviet constitution was ratified, but this constitution was shortly replaced by a new one in 1995.[1095] The 1993 Constitution had included significant legislative reforms which provided for various aspects of democratic governance.[1096] The Constitution introduced in 1995 undermined many of the judicial reform efforts apparent in the earlier constitution. In particular, the Constitutional Court was replaced with the Constitutional Council to determine

[1088] Timm Beichelt 'Autocracy and Democracy in Belarus, Russia and Ukraine' (2007) 11(5) Democratization 113, 113-117.
[1089] Angelika Neuberger 'Judicial Reforms in Post-Soviet Countries: Good Intentions with Flawed Results?' in Anja Seibert-Fohr (ed) *Judicial independence in Transition* (springer-Verlag Berlin and Heidelberg GmbH & Co. K 2012) 885, 887.
[1090] The Constitution of the Republic of Belarus (1994, as amended 1996 and 2004), Section 1: Fundamentals of the Constitutional System, Article 2 reads 'The individual, his rights, freedoms and guarantees for their attainment manifest the supreme goal and value of society and the State'; Article 8 reads 'The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles'.
[1091] Ibid Article 6 reads 'State power in the Republic of Belarus is exercised on the principle of division of powers between the legislature, executive and judiciary. State bodies within the confines of their powers, shall be independent: they shall co-operate among themselves acting on the principle of checks and balances'.
[1092] UNHCR 'Independence and impartiality of the judiciary' (n93).
[1093] Ibid.
[1094] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 100.
[1095] Parliament of the Republic of Kazakhstan 'The Constitution of the Republic of Kazakhstan' (*Republic of Kazakhstan,* 2017) <http://www.parlam.kz/en/constitution> accessed 19 June 2017.
[1096] European Commission for Democracy Through Law 'The Constitutional Court and the Constitutional Council of the Republic of Kazakhstan: A Comparative Analysis' (*Council of Europe,* 9 November 2012) <http://ksrk.gov.kz/uploads/file/vene_com.pdf> accessed 19 June 2017.

issues of constitutionality.[1097] The limited authority of the new Constitutional Council allowed any decision to be vetoed by the President of Kazakhstan.[1098] In addition under the new 1995 Constitution, the President was awarded the power to issue legally binding decrees[1099] and limited rights to dissolve Parliament,[1100] eroding other aspects of the rule of law and separation of powers. Despite setbacks with legislative reforms, the Kazakh government has taken some positive steps to practically reform the judiciary and has invested significant sums of money into judicial reform efforts in the country, especially in comparison to neighbouring CIS member states.[1101] Nonetheless, those reform efforts have experienced limited success, and the Special Rapporteur on the Independence of Judges and Lawyers has called for significant reforms to *de facto* judicial independence standards in the country, in particular by limiting and counterbalancing the influence of the President in Kazakhstan.[1102]

Significant efforts to reform judicial independence and judicial impartiality standards in the Republic of Kyrgyzstan have been relatively recent. Between 2007 and 2011 reform efforts were undertaken by the Joint Country Support Strategy for the Kyrgyz Republic made up of the Asian Development Bank, the Swiss Cooperation, the UK Department for International Development, the World Bank group, and the United Nations.[1103] More recent reforms began in 2011 under the interim President,[1104] and involved the replacement of the corrupt Supreme Court with the Constitutional Chamber and the introduction of a more objective judicial

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[1097] The Constitution of the Republic of Kazakhstan (1995) Section I: General Provisions, Article 4 (1) 'The provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaty and other commitments of the Republic as well as regulatory resolutions of Constitutional Council and the Supreme Court of the Republic shall be the functioning law in the Republic of Kazakhstan'.
[1098] European Commission for Democracy Through Law 'The Constitutional Court and the Constitutional Council of the Republic of Kazakhstan: A Comparative Analysis' (*Council of Europe,* 9 November 2012) <http://ksrk.gov.kz/uploads/file/vene_com.pdf> accessed 19 June 2017.
[1099] Ibid.
[1100] Ibid.
[1101] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (*American Bar Association,* December 2008) <https://www.americanbar.org/content/dam/aba/directories/roli/kazakhstan/kazahstan-jri-2004.authcheckdam.pdf> accessed 19 June 2017, 2.
[1102] UNCHR 'Civil and Political Rights, including the questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Addendum: Mission to Kazakhstan' (11 January 2005) UN Doc E/CN.4/2005/60/Add.2, para 48.
[1103] *See generally* World Bank and Swiss Cooperation Office in the Kyrgyz Republic 'Kyrgyz Republic Judicial System Diagnostics: Measuring Progress and Identifying Needs: Report No. 61906-KG' (*World Bank,* 2011) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Kyrgyzstan_Judicial_System_Diagnostic_Report.pdf> accessed 19 June 2018.
[1104] Freedom House 'Kyrgyzstan: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/kyrgyzstan> accessed 19 June 2017.

selection process.[1105] Whilst there have been important legislative reforms and significant donor investment in judicial reform in the country, problems with domestic implementation have continued to plague the realisation of meaningful change in the country.[1106] Freedom House has highlighted legislative gaps in the current reform efforts, and noted the need for Parliament to vote to introduce new legislation to reinforce judicial independence standards in the state.[1107] In addition, Freedom House noted that current legislative provisions need to be respected in reality to end the practice of prosecution of the political opposition and members of religious minorities.[1108]

Judicial reform efforts in Tajikistan have confronted problems similar to those faced in Belarus. Tajikistan is a relatively impoverished country,[1109] a fact that was exacerbated by a five-year civil war in the country between 1992 and 1997 that resulted in deaths of an estimated 100,000 people.[1110] Unsurprisingly, reform efforts in Tajikistan have been both relatively recent and relatively limited. In 2011 the President of Tajikistan issued a decree on the 'Programme for Judicial/Legal Reform for 2011-13' which identified judicial reform as one of the key priorities for the country.[1111] Despite the introduction of reform programmes, reform efforts have experienced very limited success and in 2016 Freedom House awarded Tajikistan 6.75 (out of a possible worst case 7) for levels of freedom in the Tajik judiciary.[1112] More recently the European Bank for Reconstruction and Development and the International Development Law Organization began an 'Access to Justice' project in Tajikistan as part of broader efforts to reform judicial standards in the country.[1113]

Finally, reform efforts in Uzbekistan have experienced greater success. Legislative provisions adopted after Uzbek independence provide for an independent judiciary.[1114] To encourage the

[1105] Ibid.
[1106] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 50.
[1107] Freedom House 'Kyrgyzstan (2016)' (n1104).
[1108] Ibid.
[1109] United States Commission on International Religious Freedom 'Tajikistan' (*United States Government,* 2016) <http://www.uscirf.gov/sites/default/files/USCIRF_AR_2016_Tier1_2_Tajik.pdf> accessed 19 June 2017, 2.
[1110] Ibid.
[1111] Ibid.
[1112] Freedom House 'Tajikistan: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/tajikistan> accessed 19 June 2017.
[1113] IDLO 'Expanding Access to Judicial Decisions in Tajikistan' (n1052).
[1114] Constitution of the Republic of Uzbekistan (1992, as amended in 2003) Chapter XXII: Judiciary Authority in the Republic of Uzbekistan, Article 106 reads 'The judicial authority in the Republic of Uzbekistan shall function independently from the legislative and executive authorities, political parties, other public

practical implementation and realisation of judicial independence and impartiality standards a Presidential decree in 2000 launched the Uzbek judicial reform programme.[1115] As part of those reform efforts the powers of the Constitutional Court were expanded to allow constitutional review of the decisions of the Prosecutor General. In addition, the judicial reform programme curtailed the power of Uzbek Prosecutors to interfere with judicial decision-making.[1116] Furthermore, the Uzbek government established the Research Center for Democratization and Liberalization (sic) to help ensure the independence of the judiciary by developing measures to strengthen the rule of law.[1117] However, in practice however these reforms have had limited impact. The European Bank of Reconstruction and Development has criticised the limited impact of legislative reforms in Uzbekistan and noted that the 'monopolisation of power (remains) within the executive branch'.[1118] Freedom House has levelled similar concerns noting that the judiciary continues to 'function as a tool of the executive, serving the interests of the President'.[1119]

5.3 Judicial Independence in Practice in CIS member states

Despite legal reforms across all CIS member states, those legislative reforms have not necessarily been met with change in practice. This is in part because of the complexities of judicial independence and judicial impartiality standards, which have allowed states to adhere to certain aspects of those standards whilst subverting other standards and concealing this reality from other members of the international community.[1120]

a) Institutional Independence in CIS member states

Aspects of institutional independence were routinely undermined in the Soviet Union. In particular, the Soviet judiciary was financially dependent on the executive branch

associations'; Article 108 reads 'The Constitutional Court of the Republic of Uzbekistan shall hear cases relating to the constitutionality of acts of the legislative and executive authorities'.

[1115] Marina Shin and others 'Implementation of judicial in Uzbekistan and Kazakhstan in the rule of law context' (2004) 46(6) Managerial Law 86, 88.

[1116] Ibid 89.

[1117] The Permanent Mission of the Republic of Uzbekistan to the United Nations 'On the way to improve the judicial system' (*United Nations,* 8 September 2015) <https://www.un.int/uzbekistan/news/way-improve-judicial-system> accessed 19 June 2017.

[1118] International Crisis Group 'Uzbekistan: In Transition. Briefing No. 82' (*International Crisis Group*, 29 September 2016) <https://www.crisisgroup.org/europe-central-asia/central-asia/uzbekistan/uzbekistan-transition> accessed 19 June 2017.

[1119] Freedom House 'Uzbekistan: Nations in Transit 2017' (*Freedom House,* 2017) <https://freedomhouse.org/report/nations-transit/2017/uzbekistan> accessed 19 June 2017.

[1120] *See* Chapter II 'Violations and Monitoring Judicial Independence and Judicial Impartiality in Practice', pp40-55

compromising the financial autonomy of the judicial branch.[1121] In addition, the executive branch consistently undermined the exclusive authority of the Soviet judiciary; aspects of a case were determined before the trial took place, and judgments were routinely ignored when they proved inconvenient or undesirable for the Communist government.[1122]

In general, the financial autonomy of judicial branches in CIS states has seen a significant improvement since the Soviet era. A number of judicial branches in CIS states have seen a drastic improvement in the budget awarded to the judicial branch and have received an amount adequate enough to permit the completion of the day-to-day activities of the judiciary.[1123] However, a number of problems that plagued the Soviet judiciary continue to blight modern CIS judiciaries. Both the Tajik and Uzbek judiciaries continue to suffer relative financial deprivation,[1124] a problem manifesting in 'low judicial salaries, poor infrastructure, limited technological support and virtually no system of access to judicial decisions'.[1125]

In addition, like the Soviet judiciary before them, a number of CIS judiciaries remain reliant on the executive branch to provide an adequate judicial budget. In Azerbaijan the judiciary has not been granted adequate financial security, and the budget awarded to the judicial branch varies year on year.[1126] The situation has continued in spite of calls for reform, and the judiciary still has no guaranteed percentage of the government budget.[1127] In Tajikistan and Uzbekistan both judiciaries have little or no control over the judicial budget awarded to

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[1121] *See* Chapter IV 'Foundations of Judicial Independence and Impartiality in CIS member states: Judicial Independence and Impartiality in the Soviet Union' pp94-94; Boylan (n699) 1334.
[1122] *See* Chapter IV 'Foundations of Judicial Independence and Impartiality in CIS member states: Judicial Independence and Impartiality in the Soviet Union', p95
[1123] The Armenian judicial budget has been described as 'minimal but adequate' *see* ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 1, 39. The Azerbaijani judicial budget has been similarly described as generally adequate, *see* Transparency Azerbaijan Advocacy and Legal Advice Center 'The Azerbaijani Judiciary' (*Transparency International,* 2014) <http://transparency.az/alac/files/JUDICIARY.pdf> accessed 31 December 2016. In Belarus the judicial budget provides 'adequate finance', *see* Statement of Petr. P. Miklashevich, Chairman of the Constitutional Court of the Republic of Belarus 'Separation of powers and independence of Constitutional Court of Republic of Belarus' (*Council of Europe,* 2011) <http://www.venice.coe.int/WCCJ/Rio/Papers/BLR_Miklashevich_E.pdf> accessed 19 June 2017.
[1124] According to the European Bank for Reconstruction and Development the Tajik judiciary is 'not well resourced', *see* EBRD 'Commercial Laws of Tajikistan' (n1051). Similarly, The American Bar Association noted that 'insufficient resources' are allocated to the Uzbek judiciary, *see* American Bar Association Rule of Law Initiative 'Judicial Reform Index for Uzbekistan: 2002' (*American Bar Association* 2002) <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan017570.pdf> accessed 19 June 2019, 17-19.
[1125] EBRD 'Commercial Laws of Tajikistan' (n1051) 12.
[1126] Transparency Azerbaijan 'The Azerbaijani Judiciary' (n1123).
[1127] Ibid.

them.[1128] Similarly, in Kyrgyzstan the Kyrgyz judiciary has been granted no financial autonomy.[1129] Between the financial years of 2006 and 2007 the Kyrgyz judiciary received less than fifty per cent of the allocated judicial budget with no means of recourse to challenge the situation.[1130]

The experiences of CIS judiciaries with respect to *de facto* exclusive authority over legal matters has varied immensely. In Armenia, relatively great strides have been made towards securing the exclusive authority of the Armenian judiciary. In particular the Constitutional Court has exclusive jurisdiction over the constitutionality of Armenian legislation and over civil liberties and human rights.[1131]

However, for other CIS member states many aspects of the Soviet experience of exclusive authority continues. The Belarusian and Kazakh judiciaries have faced particularly significant challenges with respect to securing effective exclusive authority over legal issues in their respective states. In Kazakhstan legislative reforms introduced after the fall of the Soviet Union have been very limited. As a result, the Kazakh judiciary has not been awarded effective exclusive authority, and instead the line between executive and judicial jurisdiction remains blurred.[1132] The Kazakh executive retains the power to grant search and arrest warrants, and to approve the extension of detention in custody.[1133] Whilst the Kazakh Constitution provides that the Constitutional Council of Kazakhstan has the power to review the constitutionality of any legislation,[1134] this authority has been limited, and the President retains the right to veto those decisions.[1135] The power awarded to the executive has been limited to some extent, and a Presidential veto can be overturned by a 'supermajority' vote of the Constitutional Council.[1136] This safety net has, however, not been effective in practice, as

[1128] The Tajik judiciary has 'no influence over funding levels' *see* ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan (n677) 39. Similarly the Uzbek judiciary has 'little opportunity to influence the amount of money allocated to it', *see* ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 17.
[1129] International Crisis Group 'Kyrgyzstan' (n1064) 9-10.
[1130] Ibid.
[1131] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 29-35.
[1132] Criminal Procedure Code of the Republic of Kazakhstan No 231 (2014) Article 150(4).
[1133] Ibid.
[1134] Constitution of Kazakhstan (n1097) Section VI: The Constitutional Council, Article 72(2) states that the Constitutional Council shall 'consider the laws adopted by Parliament with respect to their compliance with the Constitution of the Republic before they are signed by the President'.
[1135] Ibid Section VI: The Constitutional Council, Article 73(4) reads 'The President of the Republic may object, as whole or in part to the resolutions of the Constitutional Council. These objections shall be overruled by two-thirds of the votes of the total number of the members of the Constitutional Council. If the objections of the President are not overruled, the resolution of the Constitutional Council shall be considered not adopted'.
[1136] Ibid.

three of the seven members of the Constitutional Council are appointed by the Kazakh President,[1137] limiting the independence of the Constitutional Council from the President.[1138]

In Belarus a slightly different situation has arisen, which has similarly undermined the exclusive authority of the Belarusian judicial branch. Despite effective legislative reforms which provide for the exclusive authority of the Belarusian judiciary those reforms have not been implemented and respected in practice. Instead, the Belarusian executive branch has routinely ignored the authority of the judicial branch to make legal determinations with respect to Belarusian law and the Belarusian Constitution.[1139]

The lack of respect for the exclusive authority of the Belarusian judiciary was particularly apparent in the 1996 during a significant constitutional referendum. The referendum addressed a number of constitutional issues, including a vote which permitted amendments to the constitution. The amendments under the referendum granted President Lukashenko significantly greater powers, including the ability to replace an apparently uncooperative Parliament, to increase the Presidential term, and limit the power of the Constitutional Court.[1140] After the referendum the Constitutional Court determined the referendum was merely advisory and consultative,[1141] and determined that the amendments granted under the referendum amounted to a new constitution, and would be in violation of Article 149 of the Belarusian Constitution.[1142]

Despite this judgment the Belarusian government nonetheless treated the result of the referendum as binding.[1143] In response to the ruling, President Lukashenko issued a decree which annulled the decision of the Constitutional Court and personally declared the referendum to be binding on the Belarusian government.[1144] In response a number of judges of the Constitutional Court resigned and another judge was forced from office by a Presidential edict.[1145]

[1137] American Bar Association 'Judicial Reform Index for Kazakhstan' (n1101) 12.
[1138] Ibid.
[1139] UNHCR 'Civil and Political rights, Report on the Mission to Belarus' (n467) paras 13-14.
[1140] Human Rights Watch 'Belarus: Background' (*Human Rights Watch,* 2000) <https://www.hrw.org/reports/1999/belarus/Belrus99-04.htm> accessed 19 June 2017.
[1141] UNHCR 'Civil and Political rights, Report on the Mission to Belarus' (n467) paras 21-24.
[1142] Ibid para 21.
[1143] Ibid.
[1144] Ibid.
[1145] Ibid para 24.

The Belarusian government continues to disregard the exclusive authority. Recently President Lukashenko was reported to have claimed that when he

> takes a criminal case under his control, he bears responsibility for it, for the investigation and, it would be wrong to deny it, for the outcome of the judicial proceedings.[1146]

In addition, new problems that were not apparent under the Soviet Union have arisen in CIS member states. Despite being awarded exclusive authority both the Tajik and Uzbek judiciaries have been reluctant to exercise their powers. In Tajikistan, despite the establishment of a Constitutional Court with the power to make determinations of the constitutionality of Tajik law, the court has been relatively inactive.[1147] Similarly in Uzbekistan, Uzbek legislation provides that the Constitutional Court is the ultimate arbiter of issues of the constitutionality of all aspects of Uzbek law.[1148] However, like the Tajik Constitutional Court, the Uzbek Constitutional Court has declined to rule on a number of issues.[1149] In particular, in 2016, after the death of the Uzbek President the Prime Minister took the office of interim President, despite the fact that the Constitution provides that the Chair of the Senate should have been the one to take office. Despite the ensuing confusion, the Constitutional Court made no ruling or comment on the issues.[1150] The unwillingness to engage with critical constitutional issues has plagued the Uzbek Constitutional Court, and it has ruled in fewer than fifty cases, none of which have been constitutionally or politically significant.[1151]

b) Measures of Individual Independence in CIS members states

i. Decisional Independence in CIS member states

Like measures of institutional independence, CIS judiciaries have had a vastly divergent experience with respect to the practical implementation of standards of individual independence. In the Soviet Union, aspects of individual independence were routinely

[1146] Ibid para 39.
[1147] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 39.
[1148] Shin and others (n1115) 91.
[1149] Freedom House 'Uzbekistan' (n1119).
[1150] Ibid.
[1151] Ibid.

undermined. Subjective selection and appointment procedures,[1152] temporal tenure,[1153] continued political interference through the doctrine of *pravo kontrolia*[1154] and the practice of 'telephone justice',[1155] and inadequate judicial wages[1156] were all utilised by the Communist government to undermine the individual independence of judges. However, despite purported reforms, many of these practices are, to lesser and greater extents, still present in modern day CIS judiciaries.

There have been drastic improvements in the process of selection and appointment of judges in CIS judiciaries. The Soviet judiciary was notoriously staffed with 'cadres';[1157] individuals loyal to the Communist regime that did not need to have a legal education or experience as a lawyer to become judges.[1158]

In response to the Soviet experience reforms in CIS states have brought in significant legislative changes. In Azerbaijan,[1159] and Armenia[1160] those applying for a position in the judiciary need to have a university degree. Similarly, all those sitting in the Constitutional Court of Belarus need to have a law degree.[1161] In Kazakhstan,[1162] Uzbekistan,[1163] and Kyrgyzstan,[1164] judges need to have a law degree, and two years,[1165] three years,[1166] and five

[1152] Ledeneva 'Telephone Justice in Russia' (n757) 328.
[1153] Henderson (n735) 315.
[1154] Dobek and Laird (n708) 150.
[1155] Ledeneva 'Telephone Justice in Russia' (n757) 328.
[1156] Henderson (n735) 311.
[1157] Ledeneva 'Telephone Justice in Russia' (n757) 328.
[1158] *See* Chapter IV 'Foundations of Judicial Independence and Impartiality: Judicial Independence and Impartiality in the Soviet Union' p96; Henderson (n757) 320.
[1159] Constitution of Azerbaijan (n1081) Article 126(1) 'Judges shall be citizens of the Republic of Azerbaijan, having voting rights, higher juridical education and at least 5-year working experience in the sphere of law'.
[1160] Judicial Code of Armenia (n1068) Chapter 15: Compilation and Approval of the List of Judicial Candidates. Procedure of Appointing Judges and Chairmen of First Instance Courts, Article 115(4) 'Participation in the qualification exam is open to citizens of the Republic of Armenia, who are 22-60 years old and have obtained in the Republic of Armenia a Bachelor's degree or a "specialist with diploma" degree in higher legal education, or have obtained a similar degree in a foreign state, which has been recognized and confirmed in terms of adequacy in the Republic of Armenia in accordance with the procedure stipulated by law, provided that they have a command of the Armenian language, have not been deprived of the right to apply to the Judicial School based on Article 185 hereof, and comply with the requirements of Article 119(1)'.
[1161] Republic of Belarus 'The Court System of Belarus' (*Republic of Belarus,* 2017) <http://www.belarus.by/en/government/courts> accessed 19 June 2017.
[1162] Presidential Decree on the Constitutional Council (Belarus), Article 4.
[1163] ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 5.
[1164] Constitution of the Kyrgyz Republic (2010, as amended in 2016), Article 94(5) 'Any citizen of the Kyrgyz Republic who is not younger than 40 years of age and not older than 70 years of age and has a higher legal education and not less than 10 years of experience in the legal profession may be a judge in the Supreme Court'; *see also* Law on the Constitutional Court of the Kyrgyz Republic, Article 5.
[1165] Constitution of the Republic of Kazakhstan (n1097) Article 79(3).
[1166] ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 5.

years[1167] experience within the legal profession respectively. However, despite welcome legislative reforms, significant problems exist with the practical implementation of selection and appointment systems in these CIS states.

Akin to the Soviet process, a number of the selection and appointment procedures in CIS member states have been criticised for their lack of transparency. In fact, problems with transparency have been identified in all CIS member states. In Armenia the process of secret balloting has been criticised by the American Bar Association Rule of Law Initiative for being opaque,[1168] permitting a subjective decision-making process with respect to the selection and appointment of judges.[1169] The American Bar Association expressed similar concerns about the selection processes in Tajikistan and Uzbekistan noting that they similarly lacked transparency.[1170]

Correspondingly, despite legislative reforms in Azerbaijan, the selection and appointment processes similarly continue to lack transparency. In 2001 the United Nations Human Rights Committee criticised the selection and appointment process in Azerbaijan noting that there had been a number irregularities in practice.[1171] There have been improvements over recent years and the CoE Human Rights Directorate complimented the increasingly transparent manner of the judicial selection processes in Azerbaijan.[1172] Despite this optimism of the Human Rights Directorate, they nonetheless expressed concern about the 'subjective nature'[1173] of the selection process, and recommended that to increase the transparency of the process the decisions of the judicial body determining the selection and appointment process, the General Assembly of Judges, should be made binding rather than advisory.[1174] Similarly, whilst there have been significant improvements in the transparency of selection and

[1167] Constitution of the Kyrgyz Republic (n1164) Article 80(5); Law of the Kyrgyz on the Constitutional Court of the Kyrgyz Republic No 1335-XII (1993) Article 5; Law on the Supreme Court of the Kyrgyz Republic and Local Courts of General Jurisdiction (1999) Article 8.
[1168] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 17.
[1169] Ibid 20.
[1170] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 17, 44; ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 7.
[1171] IBAHRI 'Freedom of Expression on Trial' (n1082) 44.
[1172] Ibid.
[1173] Ibid 45.
[1174] Eastern Partnership 'Enhancing Judicial Reform in the Eastern Partnership Countries, Working Group on Independent Judicial Systems: Project Report, Judicial Self-Governing Bodies, Judges' Career' (*European Union* March 2013) <http://vkksu.gov.ua/userfiles/doc/cepej/Report_Working_Group_on_Independent_Judicial_Systems.pdf> accessed on 19 June 2017.

appointment procedures in Kazakhstan,[1175] the European Instrument for Democracy and Human Rights has suggested that the current legislative provisions should be strengthened and developed to make them more transparent.[1176]

Similarly, problems in the make-up of judicial bodies involved in the process of election and appointment remain from the Soviet era in all CIS member states. The make-up of these judicial appointing bodies allows the executive branch and respective Presidents to continue to exert influence over judicial selection and appointment procedures and undermine individual independence standards in CIS member states.

In Azerbaijan the Judicial Council, the body responsible for appointing judges to all courts in the Azerbaijani judicial system, is made up of members appointed by the President, Parliament, and the Constitutional Court.[1177] However, the chair of the Judicial Council is selected by members to be the Minister of Justice, thereby granting '*de facto* control… to the executive branch'.[1178] In Kyrgyzstan the National Council for Judicial Affairs, responsible for nominating and dismissing judges of local courts, is also composed of a mix of members from different branches of government bringing varying vested interests into the selection and appointment of judges. The National Council for Judicial Affairs is staffed with members of the judicial branch, the Presidential administration, and Parliamentary Deputies.[1179] To combat the influence of the executive branch in the judicial selection and appointment process in Azerbaijan, International Crisis Group has recommended that the membership of the National Council by members of the judicial branch be increased, and the membership of the executive and legislative branch be simultaneously decreased.[1180] The executive influence granted by the composition of the National Council was compounded by external executive control over judicial selection and appointment. In Azerbaijan, the Minister of Justice presides over the selection and appointment process, allowing the executive branch

[1175] Shin and others (n1115) 91.
[1176] European Instrument for Democracy and Human Rights 'European Union – Kazakhstan, Civil Society Seminar on Human Rights: Judicial System and Places of Detention Towards the European Standards. Almaty, 29-30 June 2009. Final Report 2009. Contract no 2009/208316' (*European Union* September 2009) <http://www.eucentralasia.eu/fileadmin/user_upload/CS_seminars__final_reports/eu_kazakhstan_seminar_final_report_sept_2009_en.pdf> 42.
[1177] Rena Safaralieva 'Azerbaijan's yawning gap between reforms on paper and in practice' in Transparency International (ed) *Global Corruption Report 2007: Corruption in Judicial Systems* (CUP 2007) 175, 175.
[1178] Ibid.
[1179] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 42.
[1180] Ibid.

'significant influence' over which individuals become members of the judicial branch.[1181] This has led to concerns that this process allows for high scoring candidates to be rejected due to 'political factors'.[1182]

As in Azerbaijan, in Armenia there are similar echoes of the Soviet experience with respect to executive interference with judicial selection and appointment. Amongst the Armenian public there is a perception that the Council of Justice, the body tasked with recommending judges for appointment to the Court of Cassation,[1183] appeals courts,[1184] and first instance courts,[1185] faces significant pressure exerted on it by members of the executive branch.[1186] The right of the President of Armenia to reject any judicial candidate after a recommendation from the Council of Justice have also raised concerns about the interference of the Armenian executive on judicial selection and appointment procedures.[1187]

A similar Soviet hangover exists in Uzbekistan, Kyrgyzstan, and Kazakhstan. Under Uzbek law, the President nominates candidates for the Constitutional Council, Supreme Court, and the Higher Economic Court,[1188] and are then selected and approved by the *Oily Majlis* (the Uzbek Parliament).[1189] The process of approval before the *Oily Majliss* is considered to be, however, largely *'pro forma*', and the *Oily Majliss* has never rejected any candidate nominated by the Uzbek President.[1190] The process of selection and appointment in Kyrgyzstan is structured in a similar way, giving the President the ultimate decision with respect to judicial appointments. In Kyrgyzstan, Kyrgyz legislation grants the President the 'final say'[1191] with respect to the nomination of candidates to the Constitutional Court and the Supreme Court for approval before the Kyrgyz Parliament.[1192] This system of judicial

[1181] Helsinki Foundation for Human Rights *The Functioning of the Judicial System in Azerbaijan and its Impact on the Right to a Fair Trial of Human Rights Defenders* (Helsinki Foundation for Human Rights 2016) 6.
[1182] IBAHRI 'Freedom of Expression on Trial' (n1082) 42.
[1183] *See* The Constitution of the Republic of Armenia (n1068) Chapter 6: The Judicial Power, Article 92 reads 'The highest court instance in the Republic of Armenia, except for matters of constitutional justice, is the Court of Cassation, which shall ensure uniformity in the implementation of the law. The powers of the Court of Cassation shall be defined by the Constitution and the law'.
[1184] Ibid Article 55(11)(a) reads 'The President of the Republic… shall appoint the presidents and the judges of the Court of Cassation and its chambers, the appeal, first instance and specialized courts'.
[1185] Ibid.
[1186] Mouradian (n1072) 1185.
[1187] Ibid.
[1188] ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 6; Shin and others (n1115) 90-1.
[1189] Ibid.
[1190] Ibid.
[1191] International Crisis Group 'Kyrgyzstan' (n1064) 7.
[1192] Ibid; World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 42.

selection and appointments in Kyrgyzstan has bestowed the President with a 'significant degree… of control'[1193] over judicial selection. In Kazakhstan the President similarly wields 'enormous power'[1194] over judicial selection and appointment procedures and nominates candidates for the Supreme Court to the Kazakh Senate for approval. [1195]

New problems with respect to the selection and appointment procedures in Kyrgyzstan, Kazakhstan, Uzbekistan, and Armenia have also arisen. In Kyrgyzstan, not only is there executive influence over the judicial selection and appointment process in the country, Crisis Group has noted that the process of selection is 'accompanied by informal lobbying'[1196] for individual candidates. In addition, problems with corruption exist in Kazakhstan and Uzbekistan. In Kazakhstan a judgeship in rural regions of the country can reportedly be purchased for $100,000,[1197] whilst in Uzbekistan, the process of selection and appointment in the country is similarly alleged to be fraught with bribery.[1198]

Finally, the Soviet tradition of staffing the judiciary with 'cadres', or individuals aligned with the executive government, continues unabated in a number of CIS countries. The Human Rights Committee has expressed concern that positions in the Uzbek judiciary have been '"stuffed" by acquaintances of high government officials' rather than with objectively strong candidates.[1199] Similarly in Armenia, there are allegations that appointments to the Armenian judiciary are often based on 'patronage, kinship, and personal contacts'[1200] rather than on the objective selection and appointment procedures provided for by legislative reforms in the country.

Generally, there has been significant improvement in standards of judicial tenure after the fall of Soviet Union, however the tenure awarded across CIS member states are very variable. In

[1193] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 42.
[1194] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 7.
[1195] Ibid.
[1196] International Crisis Group 'Kyrgyzstan' (n1064) 7.
[1197] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 9.
[1198] Shin and others (n1115) 91.
[1199] UNHRC 'UN Human Rights Committee Concludes Consideration of Uzbekistan's Third Report, Poses Wuestions on Child Labour, Use of Torture, Judicial Independence' (*United Nations* 12 March 2010) <https://www.un.org/press/en/2010/hrct719.doc.htm> accessed 22 September 2018.
[1200] Transparency International Anti-Corruption Center 'Monitoring Armenia's Anti-Corruption Commitments' (*Transparency International,* 2010) <https://transparency.am/files/publications/enpti_armenia3.pdf> accessed 28 June 2017, 11.

Armenia,[1201] Azerbaijan,[1202] Belarus,[1203] Kazakhstan,[1204] and Kyrgyzstan[1205] tenure for judges until a specific retirement age has been introduced,[1206] demonstrating significant improvement in judicial independence standards in those states. However, aspects of judicial independence in Belarus have come under continued criticism. OSCE has noted that the probationary system in Belarus has created a loophole in the career of probationary judges leaving their continued employment 'effectively at the discretion of the executive'.[1207]

However, the Soviet shadow of temporal tenure remains in a number of CIS member states. In Tajikistan, judges have fixed-term tenure, and their term in office is limited to ten years.[1208] The continued use of temporal tenure in Tajikistan has left members of the judicial branch reliant on the executive branch for successful re-election. This has proven to be particularly problematic given the 'reappointment procedure is not regulated by law and lacks transparency'.[1209]

In Uzbekistan judicial tenure is even shorter and is limited to a mere five years.[1210] The particularly limited term of five-years in Uzbekistan is particularly concerning, as it is shorter

[1201] Constitution of the Republic of Armenia (n1068) Article 96 reads 'The Judge and the members of the Constitutional Court shall be irremovable. The Judge and the member of the Constitutional Court shall hold their offices until the age of 65. They may be removed from office only in the cases and in the manner prescribed by the Constitution and the law'.
[1202] Courts and Judges Act (1997, as amended 14 June 2005) (AZ), Chapter XVII: Authorities of Judges, Article 96 reads 'New judges shall be appointed for the term of five years. During this term judges shall take training course at least once a year. At the end of this period their activity shall be evaluated. If the evaluation does not reveal any professional shortcoming, the mandate of the judge is extended until the age of retirement of 65, by proposal of the Judicial-Legal Council. If there is necessity to benefit from the professionalism of the judge to have reached his/her age limit, his/her term of office may be extended till 70, subject to the proposal of the Judicial-Legal Council'.
[1203] Code of the Republic of Belarus on Judicial Systems and the Status of Judges No. 139-Z (2006) Article 99.
[1204] On the Judicial System and Status of Judges in the Republic of Kazakhstan N132-II (2000) Section 3: The Status of Judges, Chapter 1: The Legal Status of Judges, Article 24(1).
[1205] Constitution of the Kyrgyz Republic (n1164) Section VI: Judicial Power in the Kyrgyz Republic, Articles 94(6) 'Judges of the Supreme Court shall be elected until they reach the age limit'; 94(8) 'Judges of local courts shall be appointed by the President upon submission of the Judicial Appointments Committee for an initial term of 5 years and, for subsequent terms, until they reach the age limit. The procedure of nomination and appointment of judges shall be defined in the constitutional law'.
[1206] The law on judicial tenure is currently in a state of flux in Uzbekistan and lifetime tenure is being introduced as part of a number of judicial reform initiatives. *See generally* International Crisis Group 'Uzbekistan: In Transition' (n1118).
[1207] Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus (March-July 2011)' (*Organisation for Security and Cooperation in Europe,* 2011) <http://www.osce.org/odihr/84873?download=true> accessed 28 June 2017, para 86.
[1208] Constitution of Tajikistan (1994, as amended in 1999 and 2003), Chapter Eight: Courts, Article 84, '(t)he term of authority of the judges is 10 years'.
[1209] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 44.
[1210] UNHRC 'Human Rights Committee Concludes Consideration of Uzbekistan's Third Report' (n1199); UNHRC 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding

than the tenure awarded to Soviet judges just before the fall of the USSR.[1211] The short length of tenure in Uzbekistan has attracted criticism from the United Nations Committee for Human Rights. The Committee expressed particularly concern about the impact that the short-term tenure had on judicial independence in the country, stating that it 'gravely concerned about the lack of independence of judges'[1212] in Uzbekistan. The American Bar Association has also raised concerns about the re-appointment process in Uzbekistan and concluded that judges who reached decisions that frustrated or undermined the interests of the Uzbek government were unlikely to be reappointed after their short tenure had come to an end.[1213]

Whilst legislative provisions have been introduced in many CIS states that provide for discipline and dismissal proceedings, in practice many of the provisions have been criticised for being overly vague and open to executive abuse.[1214]

In Belarus the already precarious position of probationary judges has been further undermined by the very expansive discretion granted to the executive with respect to bringing disciplinary proceedings against judges.[1215] Under the Belarusian Judicial Code the Belarusian President has the right to open disciplinary proceedings against any judge,[1216] and to impose 'any disciplinary measure on any judge without instituting disciplinary proceedings'.[1217] The right to initiate disciplinary proceedings includes a broad range of powers, and OSCE has concluded that in practice the President has been awarded '*carte*

Observations of the Human Rights Committee, Uzbekistan' (16 April 2001) UN Doc CCPR/CO/71/UZB, para 14.

[1211] Tenure was raised to ten years just prior to the fall of the Soviet Union. *See* Constitution of the USSR (as amended 1991) (n710) Article 152.

[1212] UNHRC 'Consideration of Reports: Concluding Observations of the Human Rights Committee, Uzbekistan' (n1210) para 14.

[1213] ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 13.

[1214] The Netherlands Helsinki Committee and Helsinki Foundation for Human Rights noted that current laws 'concerning disciplinary proceedings against judges [in Azerbaijan] are vague', *see* Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 28. The American Bar Association noted that the grounds in Kazakhstan are 'ill-defined', *see* ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 28. In Kyrgyzstan Crisis Group International noted that disciplinary measures against judges are 'frequently arbitrary, or at least imprecise', *see* International Crisis Group 'Kyrgyzstan' (n1064) 4; OSCE have noted that in Belarus the Judicial Code is 'silent on specific criteria…. [which] leaves a judge's career effectively at the discretion of the executive', *see* OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) para 86.

[1215] Code of Belarus on Judicial Systems and the Status of Judges (n1203) Chapter 12: Suspension, Renewal, and Termination of Powers of Judges, Article 115.

[1216] Ibid.

[1217] Ibid Article 112.

blanche'[1218] powers to remove judges from their position in office. The extent of disciplinary and dismissal powers awarded to the President became particularly apparent during the unilateral removal of Justice Mikhail Pastuhov from the Constitutional Court of Belarus in 1997.[1219]

As in the Soviet Union, the abuse of disciplinary proceedings and dismissal continues to be utilised in many CIS member states. In Kazakhstan disciplinary proceedings have been utilised against judges who have had a proportionately high number of cases overturned at appeal.[1220] In both Armenia and Uzbekistan there continue to be numerous reports of politically motivated dismissals.[1221] In Uzbekistan judges have faced unwarranted discipline in instances where they have made decisions at trial without seeking the opinion of a member of the Uzbek procuracy.[1222] In certain instances judges have even faced legal consequences for making decisions without the input of the procurator, including examples of arrest and dismissal for 'incompetent rulings'.[1223] In 2002 the culture culminated in discipline and dismissal proceedings being abused such that eleven sitting judges of the Uzbek Supreme Court were involuntarily 'retired'[1224] or reassigned.[1225]

One area that has seen radical improvement is the reimbursement of judges. Generally, the salaries of judges in CIS member states have drastically improved since the Soviet era.[1226] Whilst there are still complaints that salaries are low, especially in comparison to their Western counterparts,[1227] generally judges are now paid comparably to, or higher than, other public sector employees.

[1218] OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) para 88.
[1219] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 24, 41, and 106.
[1220] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 28.
[1221] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 45-46; Transparency International Anti-Corruption Center 'Monitoring Armenia's Anti-Corruption Commitments' (n1200) 9; *see also generally* Mouradian (n1072). See also, for example, the instance of Judge Murtazo Aliev who was arrested after releasing a prisoner without involving the local prosecutor or people's assessor in the hearing in ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 47-48.
[1222] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 47-48.
[1223] Ibid; UNHRC 'Consideration of Reports: Concluding Observations of the Human Rights Committee, Uzbekistan' (n1210) para 14.
[1224] ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 24.
[1225] Ibid.
[1226] *See generally* ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 25; ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 41-42; Courts and Judges Act (AZ) (n1202) Chapter XVII Authorities of Judges, Articles 106-107; OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) paras 91-92; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 40-41; International Crisis Group 'Kyrgyzstan' (n1064) 10.
[1227] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 24.

In 2008-09 the Armenian judiciary was granted a significant increase in wages,[1228] as part of efforts to strengthen judicial independence and discourage corruption.[1229] Wages are generally considered to be adequate, and amongst the highest of all high-level government officials,[1230] and legislative provisions have been introduced to prevent the reduction of a judge's salary during their time in office.[1231] Similar wage increases have been implemented in Kazakhstan,[1232] and legislative provisions have been introduced to ensure that the President cannot reduce judicial salaries.[1233] However, the fact that the President determines judicial salaries[1234] has attracted criticism from the Special Rapporteur on the Independence of Judges and Lawyers[1235] who noted that the salaries of Kazakh judges remain a 'quasi exclusive domain of the President of the Republic'.[1236] Correspondingly, in Belarus the Presidential administration determines the salaries, bonuses, and benefits of members of the judicial branch, attracting criticism from both OSCE[1237] and Freedom House.[1238]

Other problems with judicial wages have also persisted. In Kyrgyzstan, Tajikistan, and Uzbekistan judicial salaries remain low. In Kyrgyzstan, the relative economic deprivation of the country has had significant impact on judicial wages.[1239] Whilst salaries have been increased in recent years,[1240] Crisis Group concluded that these wages are 'hardly commensurate with the status of judges'.[1241] Similarly, the European Bank for Reconstruction and Development has concluded that judicial wages in Tajikistan are low, and that the

[1228] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 41.
[1229] Mouradian (n1072) 1221.
[1230] Transparency International Anti-Corruption Center 'Monitoring Armenia's Anti-Corruption Commitments' (n1200) 13; Mouradian (n1072) 1178, 1249, 1261.
[1231] Republic of Armenia Judicial Code (n1068) Articles 75(1)-(3); American Bar Association 'Judicial Reform Index for Armenia' (n354) 41.
[1232] USAID 'Strengthening the Rule of Law in Kazakhstan' (n1034) 3; ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 2.
[1233] On the Judicial System and Status of Judges (n1204) Section 3: The Status of Judges, Chapter 3: Financial Support and Social Security of Judges, Article 47(2).
[1234] Ibid.
[1235] UNCHR 'Civil and Political Rights: Mission to Kazakhstan' (n1102) para 72(i).
[1236] Ibid.
[1237] OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) paras 91-94.
[1238] Freedom House 'Belarus 2016' (n1294).
[1239] International Crisis Group 'Kyrgyzstan' (n1064) 10.
[1240] Ibid 10-11.
[1241] Ibid 10.

judiciary has been deprived of a suitable infrastructure.[1242] In Uzbekistan, judicial salaries are so low that the American Bar Association described them as being 'woefully inadequate'.[1243]

Alongside inadequate judicial wages, another problem that has persisted in some CIS states is the continued reliance of judges on local government for professional benefits. In Belarus judges are reliant on the local executive to provide improved housing conditions and subsidised housing loans,[1244] something that OSCE identified as a 'prime opportunity for undue influence'.[1245] In Kazakhstan, judges are also reliant on the local government to provide housing,[1246] making them similarly vulnerable to external interference.

Despite some significant improvements with respect to judicial selection and appointment procedures, judicial tenure, and judicial wages in CIS member states, there has been far less progress made with respect to precluding external interference in judicial decision-making.

In some CIS states specific legislation was introduced, as part of efforts to move away from the Soviet legacy, that expressly prohibited external interference in judicial decision-making.[1247] Nonetheless, in practice executive influence over CIS judiciaries remains commonplace. In Belarus interference by the government takes place both directly and indirectly. The Belarusian government has achieved indirect influence in part via the Belarusian interdepartmental commission. The Commission was set up so that the government could monitor on-going cases before the judiciary, a move that the UN Special

[1242] EBRD 'Commercial Laws of Tajikistan' (n1051) 5-6, 12.
[1243] ABA Rule of Law Initiative 'Uzbekistan' (n1124) 18.
[1244] OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) para 92.
[1245] Ibid.
[1246] On the Judicial System and Status of Judges (n1204) Section 3: The Status of Judges, Chapter 3: Financial Support and Social Security for Judges, Article 51.
[1247] Republic of Armenia Judicial Code (n1068) Article 11 states that 'it shall be prohibited to interfere with the activities of a judge in any way that is not foreseen by law'; Republic of Armenia Constitution (n1068) Article 97 states that when 'administering justice, judges and members of the Constitutional Court shall be independent and shall only be subject to the Constitution and the law'; Criminal Code of the Kyrgyz Republic no 68 (1977) (as amended by Rule No 56; 13 February 2006 No 57), Article 319 reads 'Encroachment on the life of a judge, juror, or any other person participating in the administration of justice, of a procurator, investigator, a person conducting inquest, a defense lawyer, an expert, an officer of justice, and also of their relatives, in connection with the examination of cases or materials in court, with the preliminary investigation or the execution of a court's judgment or decision, or any other judicial act, accomplished for the purpose of obstructing the lawful activity of said persons or out of revenge for such activity, Shall be punishable by deprivation of liberty for a term of twelve to twenty years'; Code of Judicial Ethics of the Republic of Tajikistan (2013) Article 8(1); Courts and Judges Act (AZ) (n1202) Part I Courts, Chapter II Basic Provisions on Administration of Justice, Article 9 states 'direct or indirect restricting, undue influencing, threatening or interfering with court proceedings or acting in disrespect of the court and explicit disobedience by any person for any reason is inadmissible and shall entails liability provided by the legislation of the Republic of Azerbaijan'.

Rapporteur on the Independence of Judges and Lawyers characterised as 'unwarranted interference in the judicial process'.[1248] OSCE reported that judicial behaviour may have been further indirectly influenced by the presence of representatives of the Ministry of Interior, the Belarusian Special Forces (the SpetsNaz), and, reportedly, members of the KGB at trials.[1249] OSCE noted that in a number of instances SpetsNaz officials seemed to be taping trials and filming members of the public entering the public gallery. [1250] It concluded that the consistent 'overt presence'[1251] of members of the executive branch in courtrooms should be understood as at least intimidation, 'if not outright interference'[1252] by the executive in the judicial process. Freedom House has also noted that indirect influence is also apparent from members of local government, who have significant influence over important aspects of the livelihood of judges, acting as gatekeepers to housing, and other employment benefits including preferable housing loans.[1253] Direct influence has also been prevalent in the country. In one incident the Belarusian President purportedly sought to influence a decision before the Constitutional Court, by alleging to have compromising information regarding the Chair of the Constitutional Court and other judges.[1254] In fact executive interference in judicial decision-making is so endemic in the country that the President is alleged to have said

> Under the Constitution, the judiciary is in essence part of the Presidency. Yes, the courts are declared to be independent, but it is the President who appoints and dismisses judges. Thanks to that, it is easier for the President to pursue his policies through the judiciary.[1255]

The Tajik judiciary have faced comparable incidents of intimidation, and to ensure that judges are carrying out the will of the government, members of the executive,

[1248] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 109.
[1249] OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) para 14.
[1250] Ibid para 99.
[1251] Ibid.
[1252] Ibid.
[1253] *See* Freedom House 'Belarus 2016' (n1294); OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) para 92.
[1254] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 41.
[1255] Luu Tien Dung 'Judicial Independence in Transitional Countries' (*United Nations Development Programme,* January 2003) <http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30543/0291Judicial%20Independence%20in%20Transitional%20Countries.pdf?sequence=1> accessed 28 June 2017, 14.

including individuals from the Office of the Prosecutor General, are believed to monitor trials.[1256]

Similar issues of executive influence are apparent in Uzbekistan, where the executive continues to exert significant influence over judicial decision-making.[1257] Uzbek legislation established after independence permitted executive interference in judicial decision-making by granting the Uzbek procuracy significant powers. Those powers included the right to unilaterally suspend any judgment that it disagreed with.[1258] The executive also wielded significant power over judicial decisions due to legislative provisions which permitted the executive to discipline judges in instances where a judgment was later altered or reversed.[1259] Subsequent reforms repealed those laws thereby encouraging greater standards of judicial independence. However, in spite of those new legislative provisions which specifically prohibit interference in the work of judges,[1260] the procuracy still wields illegitimate control over members of the judicial branch.[1261] In criminal cases prosecutors hand out 'opinion-recommendations'[1262] which seem to form the basis of many judicial decisions. In addition members of the judicial branch still seemed to be disciplined and dismissed by an 'unwritten rule'[1263] which provides that judges can face discipline or dismissal in instances where their decisions are overturned on appeal by the procuracy in three instances or more.[1264]

Other legislative reforms meant to protect judicial independence have also been undermined in practice. Whilst the standard of 'habeas corpus' has been introduced into Uzbek law,[1265] in reality the courts do not apply this standard.[1266] Instead judges remain 'beholden'[1267] to the procuracy, and habeas corpus hearings before Uzbek judges take place quickly, with little

[1256] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 56.
[1257] Shin and others (n1115) 88.
[1258] Ibid 89.
[1259] Law of the Republic of Uzbekistan 'On Courts' No 942-XII (1993) Article 64; Shin and others (n1115) 88.
[1260] The Constitution of Uzbekistan (n1114) Article 112, 'Judges shall be independent and subject solely to law. Any interference in the work of judges in administering law shall be inadmissible and punishable by law. The immunity of judges shall be guaranteed by law'.
[1261] Shin and others (n1115) 88, 91.
[1262] Ibid.
[1263] ABA Rule of Law Initiative 'Judicial Reform Index for Uzbekistan' (n1124) 14.
[1264] Ibid; Shin and others (n1115) 91.
[1265] Human Rights Watch 'No One Left to Witness: Torture, the Failure of Habeas Corpus, and the Silencing of Lawyers in Uzbekistan' (*Human Rights Watch,* 13 December 2011) <https://www.hrw.org/report/2011/12/13/no-one-left-witness/torture-failure-habeas-corpus-and-silencing-lawyers-uzbekistan> accessed 28 June 2017.
[1266] Ibid.
[1267] Ibid.

analysis of arguments presented to the court.[1268] In some extreme instances, Human Rights Watch alleged that the judge will retreat to make a decision only to emerge five minutes later with a decision, which exactly replicates the prosecutor's petition including the same grammar errors and typos.[1269] As a result, the approval of detention at a habeas hearing is routine and judges are under no obligation to make a determination of the reasonableness of any application for detention or to probe the evidence presented by the Prosecutor.[1270] The problem of executive interference in judicial decision-making is so extreme in Uzbekistan that Freedom House concluded that, despite the fact that it has been over a decade since Uzbekistan gained independence, the 'judiciary continues to function as a tool of the executive branch'.[1271] The United States Department of State reached a similar conclusion, noting that 'the judicial branch takes its direction from the executive branch'.[1272] The result of this interference is that in Uzbekistan there is little separation in practice between the procuracy and the judiciary.[1273] In Azerbaijan analogous problems exist. Azerbaijani legislation has introduced reforms specifically aimed at preventing external influence over judicial decision-making.[1274] Despite this, the Azerbaijani judiciary suffers from a high level of politicisation,[1275] undermining the judiciary's ability to self-govern.[1276] This is reflected in public opinion in the judiciary, where the Azerbaijani public believe that criminal trials are 'foregone'[1277] conclusions and that judges simply 'reproduce the submission of the prosecution'[1278] and approve 'trial transcripts that bear no resemblance to the actual course of proceedings'.[1279]

[1268] Ibid.
[1269] Ibid.
[1270] Uzbek Bureau for Human Rights and Rule of Law 'Uzbekistan's Implementation of the CAT: Responses to the List of Issues CAT/C/UZB/4 and Concluding Observations CAT C/UZB/CO/3' (*Committee Against Torture,* September 2013) <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/UZB/INT_CAT_NGO_UZB_15489_E.pdf> accessed 28 June 2017, 7.
[1271] Freedom House 'Uzbekistan: Nations in Transit 2016' (*Freedom House* 2016) <https://freedomhouse.org/report/nations-transit/2016/uzbekistan> accessed 28 June 2017.
[1272] Diplomacy in Action 'Country Reports on Human Rights Practices: Uzbekistan (2001)' (*U.S. Department of State* 4 March 2002) <https://www.state.gov/j/drl/rls/hrrpt/2001/eur/8366.htm> accessed 28 June 2017.
[1273] IBAHRI 'Freedom of Expression on Trial' (n1082) 47.
[1274] Constitution of Azerbaijan (n1081) Article 127, Part III; OSCE 'Statement by the delegation of Azerbaijan' (n1054).
[1275] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 7, 13, 14, 29.
[1276] IBAHRI 'Freedom of Expression on Trial' (n1082) 50.
[1277] Ibid.
[1278] Ibid.
[1279] Ibid.

The continued political pressure on CIS judiciaries has meant that judges have found themselves unable and unwilling to challenge the executive branches of CIS states. In Armenia, Freedom House noted that the judiciary remains 'strongly tied to the executive authorities'[1280] and this executive interference and influence over the Armenian judiciary has resulted in the judiciary being the 'weak link in Armenia's democratic reform'.[1281] The Armenian judiciary rarely makes decisions that would frustrate government interests.[1282] In instances where judges have gone against government interests they have been disciplined or dismissed. In one instance, the Armenian President dismissed a judge who had allowed the release of two individuals who were involved in a legal dispute with the government.[1283] Similarly, in Kyrgyzstan the Constitutional Court has been 'weakened by accusation of pro-presidential activities'.[1284] In another example, the Constitutional Court ruled that regardless of the constitutional restraints, President Akayev was eligible to stand for another term despite having already stood for the maximum two terms.[1285] In fact, executive interference and judicial deference to the executive has been so extreme that, in 2005, it prompted public protests against a number of pro-government decisions.[1286]

In Belarus, the considerable influence that the executive continues to wield over the judicial branch means that the judiciary has failed as a tool to protect citizens against unlawful executive or legislative actions.[1287] The failure of the judiciary to monitor the unlawful actions of the executive has had significant political consequences in Belarus. In particular, the judiciary has failed to provide judicial supervision of the Presidential Guard, who have repeatedly used forced against political opponents of the President.[1288] In Uzbekistan the judiciary has similarly failed to act as a gatekeeper against unlawful action of the executive and legislative branches, including a failure to investigate allegations of torture.[1289] Despite

[1280] Freedom House 'Armenia: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/armenia> accessed 28 June 2017.
[1281] Ibid.
[1282] Emil Danielyan 'Armenia: Presidential Dismissal of Judge Sparks Outcry over Judicial Independence Issue' (*Eurasianet.org*, 17 October 2007) <http://www.eurasianet.org/departments/insight/articles/eav101807.shtml> accessed 20 June 2017.
[1283] Ibid.
[1284] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 42-43.
[1285] International Crisis Group 'Kyrgyzstan' (n1064) 3.
[1286] Ibid.
[1287] Mikhail Pastukhov 'An Ideal Model for Belarus' Judiciary and Law Enforcement Agencies' in Ruta Vainiene and others (eds) *Belarus: Reform Scenarios* (Stefan Batory Foundation 2003) 77.
[1288] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 16.
[1289] Freedom House 'Uzbekistan: Nations in Transit 2016' (n1271); Uzbek Bureau for Human Rights and Rule of Law 'Uzbekistan's Implementation of the CAT' (n1270) 3.

numerous allegations of confessions made under torture in Belarus, in reality the number of individual appearing before the courts accused of torture remains low.[1290] Correspondingly, in Azerbaijan the Azerbaijani courts have failed to investigate allegations of torture, beatings, and threats against defendants appearing before them,[1291] and members of the opposition and human rights defenders are regularly barred from court proceedings.[1292] The chairman of the opposition party in Azerbaijan concluded that Azerbaijani judges conclude cases for one of two reasons; either to satisfy the executive, or they 'rule in favour of the highest bidder'.[1293]

Alongside a failure to challenge unlawful government actions, CIS judiciaries have become political weapons to support executive policy. In Kazakhstan, Kyrgyzstan, Azerbaijan, Tajikistan, and Belarus the courts have repeatedly been used as a tool to suppress political opposition figures.[1294] In Kazakhstan, the Kazakh judiciary has been routinely used to prosecute political opponents and journalists who have criticised the government.[1295] Those cases have involved 'serious procedural irregularities',[1296] where judges have repeatedly denied motions filed by the defence team.[1297] Freedom House noted that in 2012 all cases involving politically motivated charges resulted in a conviction by the Kazakh courts.[1298] In this respect, US AID concluded 'unfortunately, throughout its young history, the Kazakhstani judiciary has remained largely within the control of the executive'.[1299]

In Kyrgyzstan, despite attempts at reforms,[1300] the judiciary has routinely been used as a 'weapon to silence government critics'[1301] since the fall of the Soviet Union, and 'continues to serve the interests of political elites'.[1302] In one instance an outspoken Imam who had

[1290] Uzbek Bureau for Human Rights and Rule of Law 'Uzbekistan's Implementation of the CAT' (n1270) 11.
[1291] Freedom House 'Azerbaijan: Nations in Transit 2014' (*Freedom House,* 2014) <https://freedomhouse.org/report/nations-transit/2014/azerbaijan> accessed 29 June 2017.
[1292] Ibid.
[1293] Transparency International 'Azerbaijan's yawning gap' (n1177) 175.
[1294] Freedom House 'Kazakhstan: Nations in Transit 2012' (*Freedom House,* 2012) <https://freedomhouse.org/report/nations-transit/2012/kazakhstan> accessed 28 June 2017; Diplomacy in Action 'Armenia 2013 Human Rights Report' (*United States Department of State,* 2014) <http://www.state.gov/documents/organization/220461.pdf> accessed 28 June 2017, 16; Freedom House 'Belarus: Nations in Transit 2016' (n2120); International Crisis Group 'Kyrgyzstan' (n1064) I.
[1295] Diplomacy in Action 'Kazakhstan 2005 Human Rights Report' (*U.S. Department of State,* 28 February 2005) <https://www.state.gov/j/drl/rls/hrrpt/2004/41689.htm> accessed 28 June 2017.
[1296] Ibid.
[1297] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 34.
[1298] Freedom House 'Kazakhstan: Nations in Transit 2012' (n1294).
[1299] USAID 'Kazakhstan Judicial Assistance Project' (n1034) 10.
[1300] *See* pp
[1301] Freedom House 'Kyrgyzstan (2016)' (n1104).
[1302] Ibid.

regularly criticised governmental policy was prosecuted for charges related to extremism.[1303] In another, the courts were utilised to disqualify opposition candidates before an election.[1304] In Belarus, the judiciary is similarly regularly used as a weapon by the government to target political opponents and members of human rights organisations.[1305] In those instances the Belarusian courts have prosecuted dissidents and members of the opposition for a variety of administrative crimes, ranging from 'swearing in public'[1306] to 'disorderly conduct'. [1307] In all of these cases Freedom House concluded that a conviction is 'all but guaranteed'.[1308]

In Tajikistan the courts have been extensively utilised by the government to repress dissident voices,[1309] political opposition and religious minorities in Tajikistan.[1310] In particular, members of the Islamic Renaissance Party and Group 24, the two 'leading opposition movements'[1311] in Tajikistan, have been repeatedly prosecuted for a variety of crimes including 'extremism',[1312] 'terrorism',[1313] and 'insulting the President'.[1314] The courts have also been used to repress human rights lawyers, and have prosecuted those individuals for charges related to corruption, bribery, and fraud.[1315]

The Azerbaijani judiciary has faced a similar fate, and prosecutions are routinely utilised to discredit members of the political opposition, [1316] human rights defenders,[1317] civil

[1303] Ibid.
[1304] International Crisis Group 'Kyrgyzstan' (n1064) 2.
[1305] Freedom House 'Belarus: Nations in Transit 2014' (*Freedom House,* 2014) <https://freedomhouse.org/report/nations-transit/2014/belarus> accessed 28 June 2017.
[1306] Ibid.
[1307] Ibid.
[1308] Ibid.
[1309] Freedom House 'Tajikistan: Nations in Transit 2016' (n1112).
[1310] Ibid.
[1311] Ibid.
[1312] Ibid.
[1313] Ibid.
[1314] Fabio Belafatti 'The judicial system of Tajikistan and the situation of the opposition movement "Group 24": an assessment' (*Vilnius University,* 14 October 2015) <https://www.fairtrials.org/wp-content/uploads/TJK-judicial-Group-24-Final.pdf> accessed 28 June 2017, 8.
[1315] Ibid.
[1316] Ibid 50.
[1316] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 33.
[1317] IBAHRI 'Freedom of Expression on Trial' (n1082) 50; UNHRC 'Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21: Azerbaijan' (11 February 2013) UN Doc A/HRC/WG.6/16/AZE/2, para 47; Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 33.

society,[1318] and bloggers.[1319] Prosecutions have also provided a mechanism by which the executive can remove perceived threats to their governance, and, as a result, disproportionate sentences'[1320] are regularly handed down to dissidents.

The Soviet tradition of telephone justice[1321] has also survived reform efforts in some CIS member states and continues to act as a means by which the respective executive branches and members of local government can dictate the outcome of legal cases. Kyrgyz judges reportedly receive calls dictating how to rule from local government official on an almost daily basis.[1322] In Belarus, the practice remains so rife that the where the UN Special Rapporteur on the Independence of Judges and Lawyers concluded that the practice of telephone justice amounts to 'pervasive interference' in the Belarusian judicial process.[1323]

Finally, a new problem has raised its head in Armenia, where illegitimate pressure on judicial decision making is reported to come not only from externally to the judicial branch, but additionally from within the judicial branch itself.[1324] The American Bar Association has noted that the Court of Cassation (the highest court in the Armenian judiciary), exercises 'considerable control'[1325] over judge's decision-making process. This has led to a culture of consultancy, where it is common practice for judges to 'consult'[1326] members of the higher courts and court chairs to avoid having a decision reversed[1327] or being disciplined for passing an 'illegal' ruling.[1328]

Despite reform efforts throughout these countries, the Soviet reality of executive interference in judicial decision making remains prevalent in all CIS member states. Many practices which should have been left in the Soviet era continue to undermine judicial independence and rule of law standards to this day in each of these countries. In particular, executive

[1318] IBAHRI 'Freedom of Expression on Trial' (n1082) 50; UNHRC 'Compilation prepared by the OHCHR: Azerbaijan' (n1317) para 51.
[1318] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 36.
[1319] Freedom House 'Azerbaijan: Nations in Transit 2010' (*Freedom House,* 2010) <https://freedomhouse.org/report/nations-transit/2010/azerbaijan> accessed 29 June 2017.
[1320] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 7.
[1321] See Chapter IV 'Foundations of Judicial Independence and Impartiality in CIS member states: Judicial independence and Impartiality in the Soviet Union' pp102-103.
[1322] International Crisis Group 'Kyrgyzstan' (n1064) 4.
[1323] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 40.
[1324] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 59-60.
[1325] Ibid.
[1326] Ibid.
[1327] Ibid.
[1328] Ibid.

interference, both direct and indirect, in day to day judicial activities ensures that CIS judiciaries remain obligated and submissive to the executive branches of those governments. The result is that CIS judiciaries have become compliant to the wishes of government, and rarely challenge unlawful government actions.[1329] Instead, judicial decisions in favour of government policies bestow those arrangements with an air of legal legitimacy.

However, an even more troubling result of the continued executive interference in CIS judiciaries is the continued use of CIS courts as political weapons.[1330] The utilisation of the courts in this manner has resulted in the courts prosecuting journalists,[1331] human rights activists,[1332] members of the political opposition,[1333] and other individuals who the government deems pose a threat to the *status quo* of governance in the country.[1334] As a result, like the Soviet judiciary before, CIS judiciaries allow procuracies to dictate the outcome of cases prior to trial,[1335] and the courts continue to be used to prosecute 'administrative' crimes,[1336] whilst imposing unduly harsh sentences[1337] against 'problematic' individuals.

ii. Corruption in CIS Member States

Another problem that continues to drastically undermine judicial independence in CIS member states is the survival of judicial corruption which, like executive interference, continues to pose a significant hurdle to reform efforts.[1338] Corruption has continued to survive and prosper in CIS countries despite reforms in many of those states which have introduced significantly improved judicial salaries. Legislative reforms have been introduced in a number of CIS member states, and all CIS member states have acceded to the United

[1329] Helsinki Foundation for Human Rights (n1181) 6.
[1330] Freedom House 'Kazakhstan (2012)' (n1294); Diplomacy in Action 'Armenia' (n1294) 16; Freedom House 'Belarus 2016' (n1294); International Crisis Group 'Kyrgyzstan' (n1064) I.
[1330] Kyrgyzstan scored 6.25, *see* Freedom House 'Kyrgyzstan (2016)' (n1104); Kazakhstan scored 6.50 *see* Freedom House 'Kazakhstan (2016)' (n1426).
[1331] See pp149.
[1332] See p150.
[1333] See pp127.
[1334] See pp148-150.
[1335] Ibid; See Shin and others (n1115) 88; ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 59; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 47-48.
[1336] See pp149
[1337] See pp151
[1338] FIDH 'Overview Armenia' (n1069) 1.

Nations Convention Against Corruption[1339] which calls on states to adopt anti-corruption legislation into their domestic law.[1340] In Kazakhstan legislation has been introduced which criminalises the payment or acceptance of bribes.[1341] Similarly, in Kyrgyzstan a number of reforms have been introduced to try to eradicate corruption in the legal sphere.[1342] Armenia, as part of consultations with the Organisation for Economic Co-operation and Development, has re-drafted its Criminal Code to incorporate the crime on 'illicit enrichment' into crimes recognised in the country.[1343] In Azerbaijan, legislation has been specifically introduced which seeks to combat corruption in the country, and provides comprehensive definitions for corruption and various liabilities, including civil and criminal, for acts of corruption.[1344]

However, reforms in these CIS states have very limited effect, and the judiciaries in Kazakhstan,[1345] Azerbaijan,[1346] Tajikistan[1347] and Kyrgyzstan[1348] have each been described as pervasively corrupt. With respect to corruption in the legal sphere in Kazakhstan the US Department of State has noted that 'corruption is evident at every stage of the judicial

[1339] United Nations Office on Drugs and Crime 'UN Convention against Corruption: Signature and Ratification Status' (*United Nations,* 26 June 2018) <https://www.unodc.org/unodc/en/corruption/ratification-status.html> accessed 5 September 2018.
[1340] United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December October 2005) 999 UNTS 171, Article 7(2).
[1341] Criminal Code of the Republic of Kazakhstan No 167 (1997) Chapter 13: Corruption and Other Crimes Against Interests of State Service and State Administration, Article 311(1) states 'Acceptance of a bribe by a person, who is empowered to fulfil state functions, or equated to his person, personally or through an intermediary in the form of money, securities, other property, property rights or benefits of the property kind for himself or other persons for the act (or omission) in favor (*sic*) of a bribe giver or represented by him persons, if such acts (omissions) are the part of the official powers of a person, who is empowered to fulfil state functions, or equated to him person or by the virtue of the official position may assist such acts (omissions) and equally for the general patronage or connivance in the service, - shall be punished by a fine ranging from seven hundred to two thousand monthly calculation indices, or with the restraint of liberty for a period up to five years, or with the deprivation of liberty for the same period with the deprivation of the right to hold specific posts or to practice a specific activity for a period up to five years with confiscation of property or without it'.
[1342] Freedom House 'Kyrgyzstan (2016)' (n1104).
[1343] OECD 'Istanbul Anti-Corruption Action Plan, Third Round of Monitoring: Armenia Progress Update' (*Organisation for Economic Co-operation and Development,* 13 September 2017) <https://www.oecd.org/corruption/acn/OECD-ACN-Armenia-Progress-Update-2017-ENG.pdf> accessed 9 September 2018.
[1344] Law of the Republic of Azerbaijan on Combating Corruption (2004).
[1345] Diplomacy in Action 'Kazakhstan 2015 Human Rights Report' (*United States Department of State,* 18 May 2016) <http://www.state.gov/documents/organization/253177.pdf> accessed 29 June 2017, 1; ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 35; Richard A. Remias 'Judicial Reform Activities Evaluation for Kazakhstan' (*USAID,* April 2005) <http://pdf.usaid.gov/pdf_docs/Pdacf229.pdf> accessed 29 June 2017, 2.
[1346] IBAHRI 'Freedom of Expression on Trial' (n1082) 47.
[1347] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 54-56; Freedom House 'Tajikistan: Nations in Transit 2016' (n1112); Belafatti 'The Judicial System of Tajikistan' (n1314) 1.
[1348] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 35; International Crisis Group 'Kyrgyzstan' (n1064) 9.

process'.[1349] In Kyrgyzstan, reforms seeking to extinguish corruption in the Kyrgyz judiciary have similarly progressed slowly,[1350] and there is a belief amongst the Kyrgyz public that and the belief is that the best way to avoid a criminal conviction is to 'buy a judge'.[1351]

In Azerbaijan corruption is extremely pervasive in the judicial branch.[1352] In fact the judges in Azerbaijan have been described as the most corrupt judges in Eastern Europe,[1353] passing judgment either for political reasons, or in 'favour of the highest bidder'. [1354] In Uzbekistan, corruption has been described as widespread, which has been attributed to, at least in part, the failure to create a formal procedure for judicial disclosure of income and assets.[1355] In addition, the American Bar Association has identified the meagre wages awarded to members of the judicial branch as contributing to corruption in the sector. Nonetheless, they went on to note that, despite those inadequate wages, many judges own expensive and luxurious houses.[1356] The judiciary in Tajikistan has not fared much better, and is 'subject widespread corruption'.[1357] Because of the pervasiveness of corruption in Tajikistan, there is a belief that within the judicial system 'everything can be bought and sold'.[1358] In addition, many of the Tajik population feel priced out of the courts because the 'informal costs are too high'.[1359]

[1349] Diplomacy in Action 'Kazakhstan 2015' (n1345) 6; USAID 'Strengthening the Rule of Law in Kazakhstan' (n1232) 3; *see also* GAN Business Anti-Corruption Portal 'Kazakhstan Corruption Report' (*GAN* 2017) <http://www.business-anti-corruption.com/country-profiles/kazakhstan> accessed 29 June 2017; UNCHR 'Civil and Political Rights: Mission to Kazakhstan' (n1102) paras 2, 12, 66.
[1350] Freedom House 'Kyrgyzstan (2016)' (n1104).
[1351] Ibid.
[1352] Freedom House 'Azerbaijan: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/azerbaijan> accessed 28 June 2017
[1353] Deborah Hardoon and Finn Heinrich, 'Global Corruption Barometer 2013: Report' (*Transparency International,* 2013) <https://www.transparency.org/gcb2013/report> accessed 12 August 2016; Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 7; *see also* Parliamentary Assembly of the Council of Europe (PACE) 'Report of the Committee on Legal Affairs and Human Rights, Judicial corruption: urgent need to implement the Assembly's proposals, adopted by the Assembly on 29 January 2016 (9th sitting)' (*Council of Europe,* 19 June 2015) <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMTc5OCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIxNzk4> accessed 29 June 2017, 1.
[1354] Freedom House 'Azerbaijan: Nations in Transit 2010' (n1319).
[1355] Uzbek Bureau for Human Rights and Rule of Law 'Uzbekistan's Implementation of CAT (n1270) 12.
[1356] ABA Rule of Law Initiative 'Uzbekistan' (n1124) 27.
[1357] U4 Anti-Corruption Resources Centre, Transparency International, and CHR Michelsen Institute 'U4 Expert Answer: Overview of corruption and anti-corruption in Tajikistan' (*U4,* 24 January 2013) <http://www.transparency.org/files/content/corruptionqas/356_Overview_of_Corruption_in_Tajikistan.pdf> accessed 29 June 2017, 5.
[1358] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 41.
[1359] U4 Anti-Corruption Resources Centre and others 'U4 Expert Answer' (n1357) 5.

Like corruption in the Soviet Union before them, corruption in both Kazakhstan and Kyrgyzstan has leaked into other spheres of government. In Kazakhstan corruption is not limited to the judiciary and is prevalent in the procuracy and in other areas of the legal system.[1360] Similarly, corruption in the Kyrgyz legal system is apparent throughout the entire legal sphere. The World Bank concluded that corruption in the Kyrgyzstan legal system starts in Kyrgyz Law Schools, where bribes are allegedly exchanged in return for diplomas.[1361]

Other consequences of corruption in the Soviet Union have also endured into some modern CIS member states. In Kazakhstan the preponderance of corruption in the Kazakh judiciary and law enforcement system is so great that, as in the Soviet Union,[1362] there exists an unofficial price list for justice.[1363] The Rule of Law Initiative Project has also noted that, like the Soviet experience before it,[1364] the culture of corruption has become self-perpetuating, where enough individuals are involved in corrupt activities that whistleblowing would necessarily involve self-incrimination.[1365]

New problems have also arisen. In Kyrgyzstan and Azerbaijan, the problem is so endemic that the role of lawyers has been fundamentally altered. Instead, in Kyrgyzstan, lawyers operate as 'fixers';[1366] individuals who fix meetings and bribes between clients and judges,[1367] facilitating the endemic corruption in the country.[1368] Similarly, in Azerbaijan lawyers do not act as legal representatives in court;[1369] and instead act as 'brokers' to connect clients with judges willing to receive bribes.[1370]

Another new problem is a knee jerk reaction amongst judges to the endemic corruption in those CIS states. In Armenia and Kyrgyzstan, judges who wish to demonstrate that they have not accepted bribes have started to avoid passing any 'not guilty' verdicts.[1371] In addition, in

[1360] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 2.
[1361] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 49.
[1362] *See* p109
[1363] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 35.
[1364] *See p106*
[1365] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 35.
[1366] International Crisis Group 'Kyrgyzstan' (n1064) 9.
[1367] Ibid.
[1368] Ibid 1.
[1369] Transparency International 'Azerbaijan's Yawning Gap' (n1177) 175.
[1370] Ibid.
[1371] International Crisis Group 'Kyrgyzstan' (n1064) 8; Diplomacy in Action 'Armenia' (n1294) 13; UNHRC 'Reporting of the Working Group on Arbitrary Detention, Addendum: Mission to Armenia' UN Doc A/HRC/16/47/Add.3 (17 February 2011) para 93.

Armenia judges are prone to also passing harsher sentences than necessary to further demonstrate that they have not succumbed to bribery,[1372] which has further distorted the Armenian justice system.[1373]

Despite the pervasive nature of judicial corruption in many CIS states, in practice little seems to be changing. In Azerbaijan, there have been no prosecutions of judges for corrupt behaviour between 2000 and 2014.[1374] This in part due to the lack of formal procedures for the asset disclosure of judges which has led GRECO (Group of States Against Corruption) to recommend that reforms, including a format for asset disclosure, be introduced in the country.[1375]

5.4 Judicial Impartiality in CIS member states

An area that has seen significant improvement since the fall of the Soviet Union is that of judicial impartiality. With respect to securing the impartial role of the judiciary in the Commonwealth of States, there seem to be far fewer problems than existed in the Soviet Union. In particular, the blurring of the role between judges and prosecutors has been more clearly delineated,[1376] and, whilst issues with patronage still exist,[1377] in practice judgments seem to, generally, be based on issues of law, rather than connections.

Nonetheless significant problems remain. There particularly seems to be problems with the failure to challenge 'accusatory bias' in CIS member states. The result is that individuals appearing before CIS criminal courts are presumed to be guilty rather than innocent from the moment of arrest. Legislative reforms have been implemented across CIS states, which

[1372] International Crisis Group 'Kyrgyzstan' (n1064) 8; Diplomacy in Action 'Armenia' (n1294) 13; UNHRC 'Reporting of the Working Group: Mission to Armenia' (n1371) para 78.
[1373] International Crisis Group 'Kyrgyzstan' (n1064) 8; Diplomacy in Action 'Armenia' (n1294) 13; UNHRC 'Reporting of the Working Group on Arbitrary Detention, Addendum: Mission to Armenia' UN Doc A/HRC/16/47/Add.3 (17 February 2011) para 78.
[1374] Transparency Azerbaijan 'The Azerbaijani Judiciary' (n1123) 58.
[1375] Group of States against Corruption (GRECO) 'Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors. Compliance report: Azerbaijan' (*Council of Europe* 17 March 2017) <https://rm.coe.int/16806fe9f2> accessed 29 June 2017, paras 27, 29, 48, 53, 95.
[1376] For example, there are a number of specific legislative prohibitions of judges acting in the role of prosecutor in Azerbaijan. *See* The Constitution of the Republic of Azerbaijan (n1081) Article 126, para 2; Law on Courts and Judges (AZ) (n1202) Chapter XIII: Independence of Judges, Article 104. This has not, however, prevented judges being 'beholden' to the procuracy; see IBAHRI 'Freedom of Expression on Trial' (n1082) 42.
[1377] In Kyrgyzstan International Crisis Group noted that many are still tempted to 'call a friend', *see* International Crisis Group 'Kyrgyzstan' (n1064) 4; similarly, in Tajikistan there remains a significant role of 'patronage' within the judicial system, *see* Freedom House 'Tajikistan' (n1112).

presume innocence before the court.[1378] Nonetheless, reforms have had little effect in practice, and the remarkably low acquittal rates amongst CIS judiciaries are indicative of the failure to challenge the Soviet legacy. In Kazakhstan, Belarus, Tajikistan, and Kyrgyzstan the acquittal rates of those accused of a criminal offence fall below 1%.[1379] In Belarus the acquittal rates in fell to as low as 0.26% in 2015.[1380]

Low acquittal rates are as a result of a number of factors. In most instances the reluctance to acquit is due to the fact that judges are unwilling to oppose pressure from the prosecutor,[1381] or fear retaliation for unfavourable verdicts.[1382] Judges in CIS member states particularly fear summary dismissals, discipline, and the removal of opportunities for promotion. In instances where judges have failed to convict individuals they have faced unfavourable consequences. In Kazakhstan the International Commission of Jurists has particularly criticised the use of disciplinary sanctions against a judge who, in defiance of instructions from the procuracy and senior judges, refused to issue convictions in two cases.[1383] Those disciplinary sanctions were later escalated and the judge was later issued with threats of criminal prosecution.[1384] The Tajik judiciary has experienced similar problems, where judges who fear they cannot return a guilty verdict have resorted to sending back cases for additional investigation to avoid acquittal.[1385]

The low acquittal rates in CIS member states and the continued failure to respect the presumption of innocence has had knock on effects. One of these consequences is that judges

[1378] Constitution of the Republic of Armenia (n1068) Article 21 and Article 41; Constitution of the Republic Azerbaijan (n1081) Article 63; Criminal Code of Procedure of the Republic of Azerbaijan (adopted on 14 July 2000) Article 21; Constitution of the Republic of Belarus (n1090) Article 26; Constitution of the Republic of Kazakhstan (n1097) Article 77(3)(1) and Article 77(3)(6); Criminal Code of the Kyrgyz Republic (n1247) Section I. Criminal Law, Chapter 1. Objective and Principles of the Kyrgyz Republic Criminal Code, Article3(2); The Criminal Procedure Code of the Kyrgyz Republic No. 62 (1999, as amended up to Law No. 162 of 28 July 2017) Article 15.
[1379] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 16; Supreme Court of the Republic of Belarus '*Статистические данные о деятельности судов за 1-е полугодие 2015 года* [Statistical data about activities of courts in the 1st half of 2015]' (*The Supreme Court of Belarus* 2016) <http://court.by/justice/press_office/d89fcdae29ca3d1c.html> accessed 29 June 2017; International Crisis Group 'Kyrgyzstan' (n1064) 8; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 30.
[1380] Supreme Court of the Republic of Belarus 'Statistical Data from Belarus' (n1379).
[1381] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 16.
[1382] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 59.
[1383] International Commission of Jurists 'Disciplinary Action against Judge Zhumasheva is an attack on Judicial Independence' (*ICJ,* 2012) <https://www.icj.org/kazakhstan-disciplinary-action-against-judge-zhumasheva-is-an-attack-on-judicial-independence/> accessed 29 June 2017.
[1384] Ibid.
[1385] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 30.

have failed to probe or investigate allegations of torture or other illegal means of achieving a prosecution in CIS states.[1386] Incidents where Tajik judges accept illegally obtained evidence from the prosecutor to support a conviction are not uncommon.[1387] Similarly, in Uzbekistan and Armenia judges have done little to investigate allegations of the use of torture to obtain confessions.[1388]

5.5 Conclusion: The Degree of Reform in CIS Member States

In some respects, CIS member states have made great steps in securing judicial independence. In broad terms institutional independence is more respected in CIS states than it was in the Soviet Union. Generally, the exclusive authority of the judicial branch seems to be upheld to a far greater extent than under the Communist regime of the USSR. Nonetheless problems still remain, and legislative reforms are still necessary in some states to effectively secure the exclusive authority of the judicial branch.[1389] Even where legislative reforms have been successfully implemented in practice executive branches have ignored the exclusive authority of the judicial branch,[1390] or judicial branches have been unwilling to exercise that authority.[1391] Similarly, whilst there have generally been drastic reforms to secure the financial security of the judicial branches in CIS states, improvements with respect to a guaranteed percentage of the government budget and an input in the amount awarded are still needed.[1392]

Aspects of individual independence have also generally improved. The selection and appointment processes in CIS member states have generally been reformed to ensure a much more objective standard. Nonetheless issues of transparency and executive influence over judicial selection and appointment continue to undermine judicial independence in many CIS member states. Similarly, whilst judicial tenure until a specific retirement age has been introduced in a number of CIS member states, in others the continued use temporal tenure undermines judicial independence. In addition, executive abuse of judicial disciplinary and

[1386] See Chapter VII 'Torture in CIS Member States: Understanding the reach of judicial independence and judicial impartiality standards' pp
[1387] Ibid.
[1388] See Chapter VII 'Torture in CIS Member States: Understanding the reach of judicial independence and judicial impartiality standards' pp ; Freedom House 'Uzbekistan: Nations in Transit 2016' (n1271); ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 59.
[1389] See p126
[1390] See pp131-132
[1391] See pp132-133
[1392] See pp130-130

dismissal processes further undermines judicial independence in CIS states.[1393] Finally, judicial wages have also generally seen great improvement, despite unwarranted executive interference in the judicial budget in some CIS states.[1394]

Despite some significant improvements coupled with claims from CIS governments that judicial independence standards are being respected and enforced, in practice executive interference in judicial decision-making continues to undermine judicial independence in all CIS states. In this respect, executive interference in judicial decision-making has seemingly made little progress from the legacy of the Soviet era. The interference of executive branches in the judiciary has taken on many forms, some of which may be repaired through legislative change[1395] and others that require that existing legislation is respected in practice.[1396] The effect of this interference is two-fold. Primarily the judicial branches in CIS member states have shown to be unwilling to challenge the unlawful and ultra vires actions of their respective governments.[1397] Secondly, in some instances, the judicial branch has been utilised as a weapon in the arsenal of CIS governments, allowing those governments to abuse the law to repress their citizens.[1398]

Similarly, significant problems arise with respect to both judicial corruption and judicial impartiality. Furthermore, incidents of corruption remain rife and Freedom House has noted an increase in the incidence of corruption in many CIS judiciaries in the last five years.[1399] Corruption in these states has also caused problems not previously observed in the Soviet Union, including warping the role of lawyers[1400] and resulting in some judges exuberantly demonstrating their honourable credentials by imposing unreasonable criminal sentences.[1401] Similarly, whilst aspects of judicial impartiality have seen improvement in CIS member

[1393] See pp23-25
[1394] See pp142-143
[1395] See p126
[1396] See pp131; 135; 144-145
[1397] See pp31-32
[1398] See pp32-36
[1399] Between 2011 and 2016 the score for Judicial Framework and Independence in Kazakhstan fell from 6.25 to 6.50, *see* Freedom House 'Kazakhstan: Nations in Transition 2016' (n1426); Between 2011 and 2016 the score for Judicial Framework and Independence in Belarus fell from 6.75 to 7.00, *see* Freedom House 'Belarus 2016' (n1294); Between 2011 and 2016 the score for Judicial Framework and Independence in Azerbaijan fell from 6.25 to 7.00, *see* Freedom House 'Azerbaijan (2016)' (n1427); Between 2011 and 2016 the score for Judicial Framework and Independence in Tajikistan fell from 6.25 to 6.75, *see* Freedom House 'Tajikistan' (n1112).
[1400] See pp155
[1401] See pp151

states, accusatory bias continues to undermine efforts to achieve greater impartiality in practice.[1402]

There are a number of factors that have contributed to the failure to secure *de facto* judicial independence in CIS member states. The traditions of democracy, separation of powers, and judicial independence in these states are comparatively young.[1403] There is no strong foundation on which to build these principles, and they are not ingrained in judicial or executive behaviour. Instead these judiciaries are built on, and have inherited, the legacy of the USSR.[1404] Indeed, many aspects of the Soviet mentality are still visible as undercurrents in modern CIS judicial thinking. In particular vestiges of deference to the procuracy[1405] and executive,[1406] and the idea that judges are 'public officials' of the government[1407] remain apparent.

In addition, whilst governments continue to utilise judiciaries for their own benefits, whether to protect themselves from litigation or to repress CIS citizens, there is little incentive for change. Where judicial independence is respected in practice, CIS executive branches lose a weapon in their arsenal and may face legal challenges to other repressive actions, human abuses, and other ultra vires actions.

The culture of secrecy that surrounded Soviet incidents of non-independence and non-impartiality, remains apparent in CIS states to this day. The executive branch of the USSR went to great pains to illustrate judicial independence, making statements regarding its implementation,[1408] and enacting legislation that should have effectively protected that standard.[1409] Similarly in CIS states there has been comprehensive enactment of legislation purportedly protecting judicial independence.[1410] Members of various CIS governments have

[1402] See pp157-158
[1403] Adam Bodnar and Eva Katinka Schmidt 'Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia' in Institute for Peace Research and Security (ed) *Yearbook of the Organization for Security and Co-Operation in Europe 2011* (Baden-Baden 2012) 291.
[1404] USAID 'Kazakhstan Judicial Assistance Project' (n1034) 29.
[1405] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 59.
[1406] USAID 'Kazakhstan Judicial Assistance Project' (n1034) 29.
[1407] Shin and others (n1115) 95.
[1408] Boylan (n699) 1330.
[1409] Constitution of the Union of Soviet Socialist Republics (n1211) Article 153; *also* Fundamental Principles on Court Organization of the USSR (n710) Articles 4, 5, 10; Law of the USSR: On the Status of Judges (n711) Article 5(2).
[1410] *See* pp122-128

also made various statements emphasising their respect for judicial independence,[1411] and members of affected judiciaries deny the existence of problems undermining judicial independence.[1412] With these legacies still haunting CIS judiciaries, it is unsurprising that many of the problems that afflicted the Soviet judiciary continue to impact judiciaries built upon that foundation.

Alongside these issues, efforts to undermine judicial independence and judicial impartiality in CIS states have benefitted from the ambiguities of those standards. For external organisations like the UN, the American Bar Association, and OSCE which seek to quantify and measure the progress of standards of judicial independence and impartiality in CIS member states the task is a difficult one. Measures of *de facto* progress a state makes towards judicial reform is an inherently imperfect science.[1413] Difficulties arise from the fact that in 'different legal cultures certain issues are more or less relevant',[1414] current measures inevitably rely on formal indicators that do not match reality,[1415] and the relative scarcity of information available in developing countries.[1416] All of these factors allow governments to disguise and conceal inadequacies in, and deliberate attempts to thwart, judicial independence and impartiality standards.

The requirements for change are similarly multifaceted. For judicial independence measures to be truly respected and implemented in CIS countries there must first be recognition from both the executive and the judiciary of the indispensable role the judicial branch plays as the gatekeeper to ultra vires executive or legislative action.[1417] This shift in attitude, both amongst members of the government and amongst members of the judiciary, will inevitably take some time. As Bodnar and Schmidt concluded, 'rule of law and judicial independence are features of a democratic state that cannot be achieved all at once'.[1418]

Long-term shifts in attitude will need to occur 'from the ground up'. This demands investment in the judicial branch. In several CIS member states some judges still live in

[1411] Bodnar and Schmidt (n699) 292-293; see also the statements of Mr Rakhmonov in UN Human Rights Committee 'Human Rights Committee Concludes Consideration of Uzbekistan's Third Report' (n1199).
[1412] *See* ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 55.
[1413] Larkins (n26) 605, 611.
[1414] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) i.
[1415] Ibid.
[1416] Ibid ii.
[1417] Forsyth (n235) 122-140.
[1418] Bodnar and Schmidt (n699) 291.

relative poverty,[1419] and others are paid less than members of the procuracy and police.[1420] Until judicial salaries and judicial buildings reflect the prestige of the judicial position, there will not be a culture that condemns behaviour that brings the judiciary into disrepute.[1421] Additional investment in judicial education,[1422] in particular ensuring that judges are effectively educated as to their role in the separation of powers and their responsibility to operate as an objective forum, will help to erode ingrained attitudes.

There is room for the amendment and improvement of legislation providing for judicial independence and impartiality in a number of CIS states,[1423] including the provision of blanket lifetime tenure, adequate protection from executive dismissal or discipline, and true transparency in selection and appointment of judges.[1424] However, the experience of the Soviet judiciary and CIS judiciaries today clearly demonstrates that *de jure* provisions are insufficient on their own to secure *de facto* judicial independence. To this end, delegates at the Human Rights Committee have noted that that priority should be given to enforcing laws, not just writing them.[1425]

Despite the various challenges faced by CIS countries, there have been some improvements with respect to both judicial independence and impartiality standards. However, there are significant chasms in practice that need addressing. This is reflected in the Freedom House scores assigned to these states for judicial independence, which range from between 6.25[1426] and 7.00[1427] (7.00 representing the lowest level of judicial independence possible). It is also apparent in the public levels of trust felt in the judiciary in those countries, which tends to be very low.[1428] Importantly however, the effects of problems securing judicial independence and impartiality standards are not left at the door of judiciary. Instead the ramifications are

[1419] Shin and others (n1115) 94.
[1420] Ibid.
[1421] Robertson (n882) 107-110.
[1422] Bodnar and Schmidt (n699) 293.
[1423] Ibid 289.
[1424] Shin and others (n1115) 95.
[1425] UN Human Rights Committee 'Human Rights Committee Concludes Consideration of Uzbekistan's Third Report' (n1199).
[1426] Kyrgyzstan scored 6.25, see Freedom House 'Kyrgyzstan: Nations in Transit 2016' (n1104); Kazakhstan scored 6.50, *see* Freedom House 'Kazakhstan: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/kazakhstan> accessed 28 June 2017.
[1427] See Freedom House 'Belarus (2016)' (n1294); Freedom House 'Azerbaijan: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/azerbaijan> accessed 28 June 2017; Tajikistan scores 6.75 *see* Freedom House 'Tajikistan: Nations in Transit 2016' (n1112).
[1428] Freedom House 'Azerbaijan: Nations in Transit 2014' (n1291).

felt by citizens of CIS member states in a variety of ways; including in their complaints to international human rights bodies and in the incidence of torture in those countries.

6 The Far-Reaching Impact of Standards of Judicial Independence and Judicial Impartiality Reforms in Practice: The Content of Applications to Circumvent Domestic Remedies in CIS Member States

6.1 Introduction

The exhaustion of domestic remedies rule demands that individuals making a complaint to the Human Rights Committee,[1429] the Committee Against Torture,[1430] or the European Court of Human Rights,[1431] alleging a violation of their human rights by the government of a CIS member state must exhaust all domestic remedies available in the respondent CIS state before the application will be considered by the international human rights body. If the individual complainant fails to exhaust those remedies, whether judicial or administrative,[1432] this rule demands that the relevant human rights committee should reject the claim.[1433] However, as discussed in detail in Chapter III,[1434] individual complainants are under no obligation to exhaust domestic remedies where those remedies are unduly prolonged;[1435] are unavailable to the claimant;[1436] are insufficient to address or remedy their complaint;[1437] or are ineffective given that they offer the claimant no reasonable prospect of success.[1438]

The application of the exhaustion of domestic remedies rule allows for a three-way dialogue to take place between the complainant, the respondent state, and the human rights body. Primarily, the individual alleging a violation of their human rights before a human rights commission must either demonstrate that they have effectively exhausted all domestic remedies or alternatively that the domestic remedies within the respondent CIS State are

[1429] Optional Protocol to the ICCPR (n595) Article 5(2)(b) states 'the Committee shall consider communications received under the present Protocol [when]… the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged'.
[1430] Convention Against Torture (n631) Article 21(1)(c) states '(t)he Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention'.
[1431] European Convention on Human Rights (n70) Article 35(1) reads 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken'.
[1432] *Ambatelios (Greece v United Kingdom)* (n489).
[1433] Ibid.
[1434] See Chapter III 'The Far-Reaching Impact of Judicial Independence and Judicial Impartiality in Practice in CIS Member States: The Exhaustion of Domestic Remedies Rule and Torture', pp70-74.
[1435] Optional Protocol to the ICCPR (n595) Article 5(2)(b).
[1436] D'Ascoli and Scherr (n497) 12.
[1437] Ibid 13.
[1438] *T.K. v France* (n485)

either unduly prolonged,[1439] unavailable,[1440] insufficient,[1441] or ineffective.[1442] The state is then given the opportunity to respond to either of these claims.

If the individual has claimed to have exhausted all domestic remedies the state may elect to challenge this assertion, by disputing the complainant's claim of exhaustion and alleging instead that they failed to exhaust domestic remedies. Should the state challenge the individual's claim of exhaustion, the human rights body will have to take steps to determine whether all domestic remedies have been effectively exhausted by the complainant. Alternatively, in instances where the state does not challenge the admissibility of the communication on the basis of non-exhaustion, the human rights body will simply move on to examine the merits of the claim.

However, instead of claiming to have exhausted domestic remedies the claimant may acknowledge that they have failed to do so but allege that they were unable to utilise domestic remedies in the respondent state. In those instances, the claimant will allege that they could not exhaust domestic remedies because those remedies were unavailable, insufficient, or ineffective.[1443] In turn, the respondent state will likely challenge this assertion. In those circumstances, the state will have to demonstrate that the remedies that the individual has failed to engage were accessible to the complainant within a reasonable time, available to the complainant, sufficient to remedy their claim, and effective in practice. Finally, the relevant human rights committee must weigh up the arguments of the complainant and the respondent state and determine whether the disputed remedies are indeed available, sufficient, and effective.

Should the state demonstrate available, sufficient, and effective domestic remedies, the individual's claim is held to be inadmissible and is rejected by the respective human rights committee.[1444] However, if the human rights body determines that the remedies cited by the state are unreasonably prolonged, unavailable, ineffective, or insufficient, the claimant will be excused from engaging with those remedies, and will be permitted to circumvent the

[1439] Optional Protocol to the ICCPR (n595) Article 5(2)(b).
[1440] Ibid; D'Ascoli and Scherr (n497) 12-13.
[1441] Ibid.
[1442] Ibid.
[1443] Ibid.
[1444] See *X and Y v Canada* (1 December 2016) Communication No 2771/2016 CCPR/C/118/D/2771/2016.

domestic forum, allowing the substance of the complaint to be heard by the human rights body.[1445]

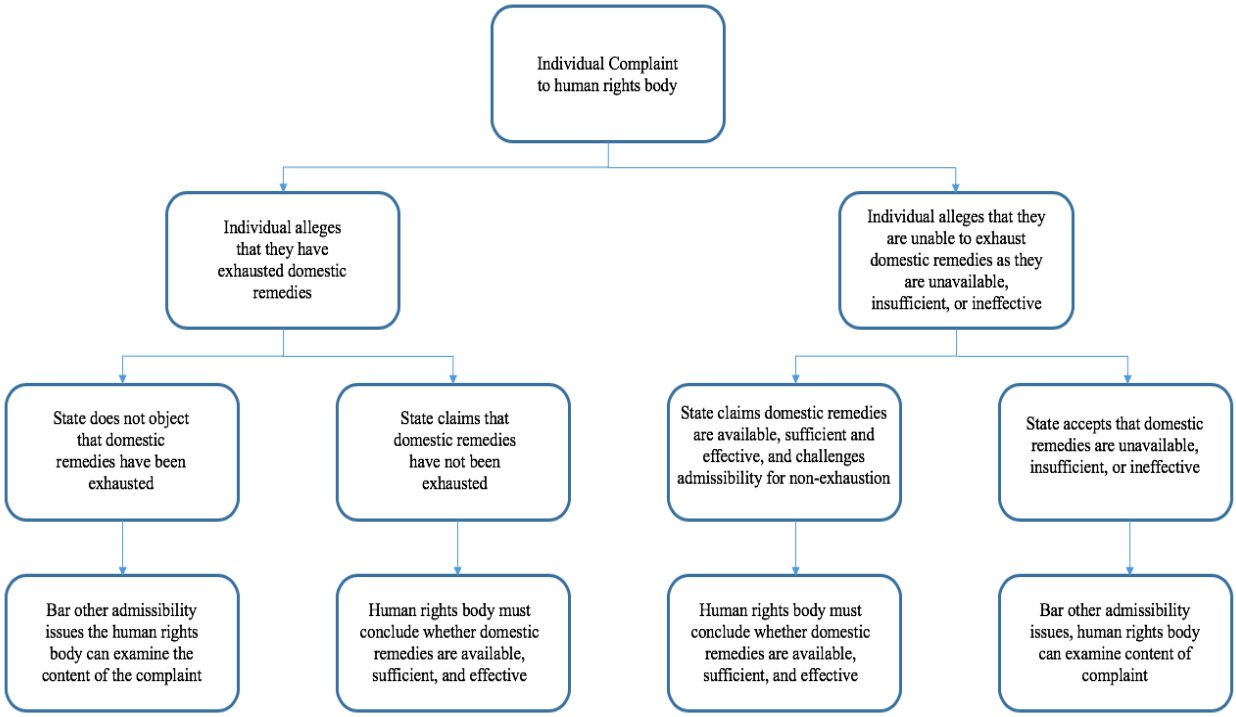

Fig 2: The Operation of the Exhaustion of Domestic Remedies Rule

Where there is an application to circumvent domestic remedies, the dialogue allows for three different perspectives on the speed, efficacy, availability, and sufficiency of the domestic remedies available within the country. Firstly, where individuals claim that they are unable to engage domestic remedies, the justifications that they proffer as to why remedies within the CIS member states are unavailable, insufficient, or ineffective, demonstrates their perception of the judicial independence standards, and other issues of justice, within that state. Secondly, where the state challenges the individual's claims that domestic remedies are unavailable, insufficient, or ineffective it demonstrates a division in the beliefs of the complainant and the respondent state with respect to the complainant's experience and the state's obligation. Finally, the ruling on admissibility by a human rights body provides an objective decision, on the available facts, as to the acceptability of the domestic remedies offered within the state, including whether the standards of judicial independence are adequate enough to provide an effective, sufficient, and available domestic remedy.

[1445] *See* Figure 2 'The functioning of the exhaustion of domestic remedies rule'.

6.2 Submissions by Individuals: The Content of Claims to Circumvent the Exhaustion of Domestic Remedies Rule

The content of applications to circumvent the exhaustion of domestic remedies rule provides insight into perceived issues with domestic remedies, and judicial independence standards, in the respondent states. The content of those applications highlights the various reasons why human rights victims believe that they are unable engage domestic remedies to address their complaint. With respect to allegations against CIS member states, the reasons victims of alleged human rights abuses have requested to circumvent domestic remedies are varied, and include issues ranging from concerns regarding the perceived futility of domestic remedies, to the danger of reprisals, to problems with separation of powers under domestic legislation.

a) Unreasonably prolonged domestic remedies in respondent CIS states

Many applications to circumvent domestic remedies in CIS member states are on the basis that remedies offered by the respondent state are unduly prolonged. Both Article 5(b) of the Optional Protocol to the International Covenant on Civil and Political Rights[1446] and Article 21(c) of the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment[1447] makes it clear respective human rights body may examine a complaint from an individual who has not exhausted all domestic remedies where those remedies are unreasonably prolonged. Similarly, whilst not contained within the treaty text of the European Convention on Human Rights, the jurisprudence of the European Court of Human Rights has established that where domestic remedies are unduly prolonged the complainant will not have to exhaust them before bringing their complaint before the European court.[1448]

Concerns about the length of executive examinations of a human rights allegation have been raised in a number of CIS member states, including Kyrgyzstan, Kazakhstan, and Belarus. In *Ernazarov v Kyrgyzsta*n[1449] the complainant's brother died in police custody. However, the investigation into his death was only reopened six years after he passed away. At the time the Human Rights Committee examined the complaint the investigation was still on-going, and the Kyrgyz judiciary had not examined the allegations of torture. The Human Rights Committee therefore concluded that proceedings had been unduly prolonged, which

[1446] Optional Protocol to the ICCPR (n595) Article 5(2)(b).
[1447] Convention Against Torture (n631) Article 21(c).
[1448] *See V.N.I.M. v Canada* (12 November 2002) Communication No 119/1998 CAT/C/29/D/119/1998, para 6.2.
[1449] *Ernazarov v Kyrgyzstan* (25 March 2015) Communication No 2054/2011 CCPR/C/113/DR/2054/2011.

permitted the complainant to circumvent those domestic remedies.[1450] Similarly, in *Gerasimov v Kazakhstan,*[1451] the investigation into the allegations of torture in police custody was only reopened four years after the initial incident and proceedings remained open by the time the complaint reached the Human Rights Committee. The prolonged and incomplete nature of the investigation prevented the complaint from being examined by the domestic courts. Accordingly, the Human Rights Committee concluded that proceedings had been unduly prolonged.[1452] Similarly in *Krasovskaya and Krasovskaya v Belarus*,[1453] the Human Rights Committee concluded that an investigation into the politically motivated disappearance of Anatoly Krasovsky that been on-going for 13 years was unduly prolonged and the complainants were consequently excused from exhausting domestic remedies, including judicial remedies, that were available in Belarus.

In instances where domestic investigations into the human rights allegation have been unjustifiably protracted, the domestic judicial branch will not assess the merits of an application before the complaint reaches the international human rights body. This is because in instances where domestic investigations are unduly prolonged and still incomplete, the respective CIS judiciary is never given the opportunity to exercise its authority to assess the merits of the claim, and to fulfil part of its role by protecting human rights victims. In those instances, the independence and impartiality of the courts in the respondent state becomes almost irrelevant, because that independence or impartiality can never be exercised, as any role the judicial branch should have in acting to prevent unlawful human rights violations is excluded; thereby undermining the judicial role in democratic governance and separation of powers.

b) Ineffective domestic remedies in respondent CIS member states

According to established jurisprudence of the various international and regional human rights bodies that have the jurisdiction to hear individual complaints against CIS member states, in instances where a domestic remedy is not effective, and does not offer the author a realistic

[1450] Ibid.
[1451] *Gerasimov v Kazakhstan* (24 May 2012) Communication No 433/2010 CAT/C/53/D/495/2012.
[1452] Ibid.
[1453] *Krasovskaya and Krasovskaya v Belarus* (26 March 2012) Communication No 1820/2008 CCPR/C/104/D/1820/2008.

and adequate method of addressing their complaint, they will be excused from engaging and exhausting that 'remedy'.[1454]

One area in which the far-reaching consequences of judicial independence and impartiality is apparent is in the content of submissions to circumvent the exhaustion of domestic remedies rule is with respect to reprisals. In particular, the inability of the court to protect the human rights complainant from executive reprisals and act as a bulwark in the separation of powers model is apparent in those applications.

These concerns have been raised in a number of cases alleging human rights violations perpetrated by the Azerbaijani government. In *Avadanov v Azerbaijan*[1455] the claimant alleged that members of the Azerbaijani police tortured him, raped his wife in front him, and then threatened to rape the complainant's daughter.[1456] However, the complainant claimed that he felt unable to seek justice or help in Azerbaijan because to do so would put him at further risk. He stated that any attempt to receive a medical examination necessary to confirm his allegations of torture would have to be conducted in the presence of a police officer, putting Avadanov at risk of reprisals given that the police 'would collectively defend itself since its reputation as a whole was at stake'.[1457] He further alleged that he was unable to bring his allegations before the judicial branch, or exhaust any other domestic remedies in Azerbaijan, due to his 'fear of reprisals'[1458] from the police and other members of the Azerbaijani government. On this basis, the Human Rights Committee allowed the complainant to circumvent domestic remedies, including judicial remedies, in Azerbaijan. In particular, the Committee concluded that the author could not bring a domestic complaint of

[1454] *J.B. and H.K. v France* (n591); *R.A.V.N. and others v Argentina* (26 March 1990) Communication Nos 343, 344, and 345/1988 CCPR/C/38/D/344/1988; *Josu Arkauz Arana v France* (9 November 1999) Communication No 63/1997 CAT/C/23/D/63/1997. This is also established in the Convention Against Torture (n631) Article 21(1)(c) which states '(t)he Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention'; *Icyer v Turkey* App no 18888/02 (ECtHR, 12 January 2006) para 72; *Fakhretdinov v Russia* App Nos. 26716/09, 67576/09, 7698/10, 26716/09 67576/09 and 7698/10 (ECtHR, 23 September 2010) para 30; *Latak v Poland* App no 52070/08 (ECtHR 12 October 2010). This is also established in Article 13 of the European Convention on Human Rights (n70) which states 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.
[1455] *Avadanov v Azerbaijan* (25 October 2010) Communication No 1633/2007 CCPR/C/100/D/1633/2007.
[1456] Ibid para 2.11.
[1457] Ibid.
[1458] Ibid.

torture without reference to the threats made and violence perpetrated against him and his family, thereby exposing him and his family to further reprisals and re-victimisation.[1459] The author in *A.A. v Azerbaijan*[1460] raised similar concerns. The complainant, an inmate who had been sentenced to death by the Supreme Court of Azerbaijan, claimed that, during his time on death row, he had been severely beaten and unjustifiably held in isolation.[1461] He further alleged that he had been made aware of a number of other inmates who had died as a result of beatings at the hands of guards during their time on death row.[1462] This resulted in a climate where, due to a fear of retaliation, prisoners felt unable to challenge the illegal behaviour of the prison guards, and few prisoners registered any complaints with respect to those incidents.[1463] Due to this fear of reprisals, in particular that a complaint would be met with torture or even death,[1464] the complainant requested to circumvent domestic judicial and administrative remedies.[1465]

Individuals alleging that the Kazakh government has violated their human rights have raised similar concerns with respect to the ability of the courts to protect them from the reprisals of state agents. In *Valetov v Kazakhstan*[1466] the complainant alleged that he was subject to torture during his time in police custody. He further claimed that any attempt to utilise the domestic courts would likely lead to further torture as an act of reprisal.[1467] Valetov also alleged that any attempts to engage the Kazakh judiciary would be futile as he would not receive a fair trial before the domestic courts, who would side with his abusers.[1468] Valetov concluded that the domestic remedies in Kazakhstan were therefore unavailable and ineffective.[1469] The complainant in *Gerasimov v Kazakhstan* raised analogous fears.[1470] In his complaint, the author concluded that any effort to engage domestic remedies would involve a real risk of threats and violence against the author and members of his family.[1471] These fears were not unfounded, and after the complaint was registered with the Committee Against

[1459] Ibid para 6.4.
[1460] *A.A. v Azerbaijan* (25 November 2005) Communication No 247/2004 CAT/C/35/D/247/2004.
[1461] Ibid para 2.1.
[1462] Ibid para 2.1.
[1463] Ibid para 2.10.
[1464] Ibid.
[1465] Ibid.
[1466] *Valetov v Kazakhstan* (17 March 2014) Communication No 2104/2011 CCPR/C/110/D/2104/2011.
[1467] Ibid para 5.1.
[1468] Ibid.
[1469] Ibid.
[1470] *Gerasimov v Kazakhstan* (n1451).
[1471] Ibid.

Torture, the Kazakh government ordered that the complainant undergo a psychiatric evaluation.[1472] In addition, the complainant and his family allegedly received numerous anonymous phone calls warning them to withdraw the complaint.[1473] The experience of Gerasimov was supported by testimony of other human rights complainants to the Special Rapporteur on Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment.[1474] In his report, the Special Rapporteur noted that many interviewees claimed to have experienced the threat or use of reprisals to intimidate them into withdrawing complaints, including threats to 'further charges, longer imprisonment, and… [threats of] sexual violence'.[1475] In Gerasimov's complaint, after being forced to undergo a compulsory psychiatric evaluation, the author withdrew his submission before the Committee Against Torture,[1476] a decision that the Committee concluded could not be considered to be 'voluntary'.[1477]

Requests to circumvent the exhaustion of domestic remedies rule on the basis of concerns of reprisals for registering a complaint before the domestic courts have also been made against Tajikistan. In *M.N. and others v Tajikistan*[1478] the complainants, members of the political opposition in Tajikistan, expressed fears of executive reprisals after alleging a number of rights violations under the ICCPR.[1479] In their communication the complainants referred to a number of threats by armed groups made against them and other members of parliament.[1480] They concluded that these threats demonstrated that they were at risk from reprisals and revenge attacks had they registered their case before the domestic Tajik courts.[1481]

[1472] Ibid para 2.15.
[1473] Ibid.
[1474] UN Human Rights Council 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to Kazakhstan' (16 December 2009) UN Doc A/HRC/13/39/Add.3.
[1475] Ibid. The pattern and practice of intimidation of those who make complaints of torture represent a particular problem in Kazakhstan: "Many of the detainees interviewed by the Special Rapporteur indicated that they had been threatened with further charges, longer imprisonment and, in some cases, sexual violence by fellow inmates in order to make them withdraw complaints or sign declarations that they did not have any complaints or statements that they had sustained injuries while resisting arrest … Such behaviour, besides going counter to international standards, renders any complaints system meaningless and should be addressed in a determined manner." (para 59); 'it appears that most detainees refrain from filing complaints because they do not trust the system or are afraid of reprisals' (para 51), and that detainees had suffered intimidation in preparation for his visit (paras 22 and 73). As a result, he identified a need for the State to take measures to 'protect complainants against reprisals' (para 80 (c)).
[1476] Ibid.
[1477] Ibid.
[1478] *M.N. and others v Tajikistan* (29 October 2012) Communication No 1500/2006 CCPR/C/106/D/1500/2006.
[1479] Ibid.
[1480] Ibid para 2.6.
[1481] Ibid.

In Belarus, complainants have claimed they have been unable to access the judicial system and other domestic remedies, because the risk of reprisals was so great that the complainants were unable to return to the respondent state. In *K.A. v Belarus*[1482] the author, a Belarusian dissident, noted that he was unable to access the domestic courts in Belarus to challenge the violation of his human rights standards, as he could not return to Belarus for fear that he would be arrested and tortured for his involvement in an unregistered organisation (the basis of his human rights claim).[1483] In each of these instances the domestic judiciary failed to fulfil its role within the separation of powers model and was unwilling, or unable, to act as a gatekeeper to ultra vires government action.

Complainants have also claimed that they are unable to exhaust domestic remedies due to the ineffectiveness of the remedies in practice. In both *X v Kazakhstan*[1484] and *Abdussamatov v Kazakhstan*[1485] the authors of the complaints alleged that any efforts to make an appeal to the Immigration Police Service regarding the complainant's extradition would be ineffective. In their submission to circumvent the domestic remedies in the state, the complainants stated that they could not find a single example where an appeal had been successful in an extradition case with a political basis in Uzbekistan like theirs. The claimants also stated that the any appeal before the Immigration Police Service would also be ineffective, given that any appeal would not have the effect of suspending their extraditions.[1486] Abdussamatov raised further concerns about the efficacy and fairness of the appeals process, noting that the complainants were not allowed to be present at their trial,[1487] and cited the findings of OSCE, who had sent independent observers to monitor the trial, which concluded that trials were held in clear violation of fair trial standards.[1488] In addition, Abdussamatov alleged that his lawyer was not given time to present his arguments during their appeals, the complainant was not provided an interpreter to communicate with his lawyer, that time with his lawyer was restricted, and that his lawyer was refused access to significant documents needed to support their case.[1489]

[1482] *K.A. v Belarus* (n1542).
[1483] Ibid.
[1484] *X v Kazakhstan* (3 August 2015) Communication No 554/2013 CAT/C/55/D/554/2013.
[1485] *Abdussamatov v Kazakhstan* (18 January 2012) Communication No 444/2010 CAT/C/47/D/444/2010.
[1486] Indeed, during X's appeal to the Immigration Police Service, the Kazakh government extradited X, see *X v Kazakhstan* (n1484) para 11.3.
[1487] *Abdussamatov v Kazakhstan* (n1485) para 5.5.
[1488] Ibid.
[1489] Ibid para 3.5.

Complainants have raised similar concerns about the futility of engaging with domestic remedies in a number of other CIS member states. In *A.A. v Azerbaijan* the complainant alleged that any further efforts to engage with the judicial authorities would be futile,[1490] and noted that previous efforts to request the domestic courts to investigate complaints regarding prison conditions and the use of torture by prison guards had gone unanswered.[1491] The complainants in *Khachatryan and Others v Armenia* similarly alleged that any efforts to appeal against their detention would be futile as it would certainly be dismissed.[1492] In particular, the complainant noted that appeals and other motions against detention before the Armenian courts were 'systematically dismissed',[1493] and that the judiciary was 'not inclined to grant remedy against the illegal actions of the prosecutors'.[1494] The complainant concluded that regardless of how many appeals he filed, the Armenian courts would always remain unwilling to rule against the General Prosecutor's Office.[1495] The ECtHR agreed that the domestic remedies that the claimants were seeking to circumvent provided the author with no reasonable prospect of success,[1496] and were not effective or capable of providing the claimant with effective redress for the human rights abuses suffered. The ECtHR therefore concluded that the claimant did not have to exhaust domestic remedies in this instance, and the government's objection to non-exhaustion was dismissed.[1497] In this instance the failure to secure adequate stabdards of judicial independence, in particular to ensure against prosecutorial bias, has proven to be fundamental within the context of the exhaustion of domestic remedies rule.

In *Yunusov and Yunusova v Azerbaijan*[1498] the complainant again alleged that any appeal under the Code of Administrative Procedure to the Azerbaijani courts with respect to the inadequate medical treatment received whilst in custody would be futile, as the courts were unwilling to rule against the prison service.[1499] The ECtHR supported this assertion and noted that in instances where the respondent state has refuted the complainant's claim that domestic

[1490] *A.A. v Azerbaijan* (n1460) para 2.16.
[1491] Ibid para 2.15.
[1492] *Khachatryan and Others v Armenia* App no 23978/06 (ECtHR, 27 November 2012).
[1493] Ibid para 124.
[1494] Ibid.
[1495] Ibid.
[1496] Ibid para 130.
[1497] Ibid para 130.
[1498] Ibid.
[1499] Ibid para 124.

remedies are futile, the state must demonstrate that the remedies alleged to be futile are in fact capable of providing redress both in theory and in practice.[1500] In this instance, whilst both the complainants and the ECtHR acknowledged that the complainants had failed to exhaust domestic remedies given that they had not lodged a complaint against the Prison Service before the Azerbaijani courts, the Court nonetheless concluded that whilst this remedy was effective in theory, the government had failed to demonstrate using case law that the remedy was effective in practice.[1501] On this basis, the ECtHR deemed that the Azerbaijani courts would not grant the complainants an effective remedy, as they were unable to illustrate more than one example where someone had made a successful application until the Code of Administrative Procedure.[1502] In this instance, the executive bias demonstrated by the Azerbaijani courts, and the lack of adequate independence, resulted in a decision to allow the circumvention of domestic remedies in Azerbaijan.

c) Unavailable domestic remedies

Finally, the jurisprudence of the Human Rights Committee,[1503] the Committee Against Torture,[1504] and the European Court of Human Rights[1505] has established that domestic remedies only need to be exhausted when they are available. This excuse for failure to exhaust domestic remedies has been raised by a number of complainants alleging human rights by CIS member states. In many of these instances, the unavailability of domestic judicial remedies is indicative of poorly-functioning, young justice systems in the respondent state, and three themes of unavailability have emerged with respect to CIS domestic remedies.

Firstly, remedies have been found to be unavailable in both Kazakhstan and Armenia due to the timings of those remedies in practice. In *Gerasimov v Kazakhstan* the complainant was unable to appeal the court's decision because his lawyer had only received the court's decision after the deadline for appeal had passed.[1506] Similarly, in *Helsinki Committee of*

[1500] *Yunusova and Yunusov v Azerbaijan* App no 59620/14 (ECtHR 17 December 2016).
[1501] Ibid para 129.
[1502] Ibid.
[1503] *Patiño v Panama* (20 December 1990) Communication No 437/1990 CCPR/C/52/D/437/1990, para 5.2. *See also* Optional Protocol to the ICCPR (n595) Article 5(2)(b) which states: 'the Committee shall not consider any communication from an individual unless it has ascertained that…the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged'.
[1504] *R.R.L. v Canada* (2 February 2015) Communication No 659/2015 CAT/C/61/D/659/2015.
[1505] *Akdivar and Other v Turkey* (n568).
[1506] *Gerasimov v Kazakhstan* (n1451).

Armenia v Armenia in practice the applicant organisation was deprived timely access to relevant domestic remedies.[1507] In this instance the Mayoral decision not to allow the claimant organisation to march was communicated to the organisation only after the march had taken place. As a consequence, the European Court of Human Rights held that the appeals process on that decision had been made unavailable to the complainants.[1508]

Alongside remedies being unavailable for temporal reasons, domestic remedies in Armenia and Azerbaijan have been deemed to be unavailable to the claimants as a result of financial factors. In *Ghuyumchyan v Armenia* the complainant could not appeal the earlier court decision because an appeal could only be lodged by a licensed advocate; something that was unaffordable to the author and his family.[1509] As a result, the ECtHR determined that under the circumstances domestic Armenian remedies were unavailable to the complainant and his family.[1510] In *Avadanov v Azerbaijan* the author claimed that he and his family had been forced to flee Azerbaijan after he was warned that his continued presence in the country would likely lead to him being physically 'exterminated'.[1511] However, the complainant could not afford to instruct a lawyer in Greece who could continue to present his case before the Azerbaijani courts. The Human Rights Committee therefore determined that the domestic remedies in Azerbaijan were unavailable to the claimant and his family.[1512] Analogous reasons were presented in *Chiragov and others v Armenia,*[1513] where applicants had been displaced from their homes in the respondent state of Armenia and prevented from returning. The ECtHR held that in these circumstances, given the Armenian government had not demonstrated any remedy capable of redressing their complaints, remedies were unavailable to the authors.

Finally, in a number of cases remedies have been considered to be unavailable where the claimant has been unable to communicate with domestic courts. In *M.N. and others v Tajikistan*[1514] the complainants entered a number of appeals to the Central Executive Committee of the Socialist Party of Tajikistan, various executive authorities, and law

[1507] *Helsinki Committee of Armenia v Armenia* App no 59109/08 (ECtHR, 31 March 2015).
[1508] Ibid para 33.
[1509] *Ghuyumchyan v Armenia* app no 53862/07 (ECtHR, 21 January 2016).
[1510] Ibid.
[1511] *Avadanov v Azerbaijan* (n1455) para 2.12.
[1512] Ibid.
[1513] *Chiragov and others v Armenia* App no 13216/05 (ECtHR, 16 June 2015).
[1514] *M.N. and others v Tajikistan* (n1478).

enforcement bodies with requests to investigate, prosecute, and punish individuals associated with the murder of Mr. Sa.K. However, all of those appeals went unanswered, as a result the complainant requested to circumvent domestic remedies. Comparatively in *A.A. v Azerbaijan*[1515] the complainant was unable to send any petitions of appeal, after allegedly being held in isolation for six months.

The content of applications of claims to circumvent the domestic remedies rule in complaints against CIS member states sheds some light not only on perceptions of judicial independence standards in those states, but also on various problems associated with young judiciaries in newly democratising states. Applications to circumvent domestic remedies on the basis that executive investigations have been unduly prolonged do not directly demonstrate a lack of judicial independence. Nonetheless, in each instance the judicial branch failed to challenge the fact that each of these investigations was unduly prolonged or that in each case the proceedings remained open by the time the complaint reached the international human rights body.

Applications to circumvent domestic remedies on the basis that those remedies were not available also provide insights into judicial realities in respondent CIS states. The temporal and logistical issues that claimants faced when trying to access justice in the respondent CIS states indicate two possibilities. On the one hand it might demonstrate that justice systems in CIS states are young and there are still problems with ensuring that justice systems operate properly and effectively in practice. On the other hand in instances where applicants are unable to access justice as a result of temporal or logistical factors, it might be the result of deliberate attempts by the executive branches of government to prevent victims of human rights abuses accessing domestic justice systems. However, regardless of the reason that the complainants have not been able to access justice, the important judicial function of holding the executive to account and protecting victims of human rights violations is not achieved in those instances.

Applications to circumvent domestic remedies because the victim alleges that the domestic remedies in the respondent CIS state are ineffective demonstrate the far-reaching effects of problems with judicial independence and impartiality can have in those countries. Those

[1515] *A.A. v Azerbaijan* (n1460).

applications further shed light on the perceived problems with judicial independence in respondent CIS member states and demonstrate two overriding themes. Primarily, these applications convey a belief amongst victims of human rights violations in a number of CIS member states that any attempts to engage the domestic courts in the respondent state would put them at risk of reprisals from the executive branch. In particular, applications included allegations that in those cases the executive, in an effort to deter the complainant from pursuing their complaint, have utilised threats of violence[1516] and actual violence.[1517] These efforts demonstrate that executive branches of government in Azerbaijan, Kazakhstan, Tajikistan, and Belarus have respected neither the separation of powers in the respective state, nor the right of the judiciary to hold other branches of government to account for ultra vires actions. It also demonstrates that victims of human rights violations in those states still do not trust that the domestic courts are willing or capable of protecting them from reprisals. As a result, it remains apparent that complainants still have an underlying belief that, as in the Soviet Union,[1518] the domestic judicial branches in a number of CIS states are unwilling or unable to act as a bulwark against the unlawful exercise of power by the executive branch.

In addition, requests to circumvent domestic remedies on the basis that those remedies are ineffective also demonstrates an underlying belief that judicial remedies in CIS member states are in fact futile in practice. In the complaints against Kazakhstan, Armenia, and Azerbaijan the complainants all noted that the domestic courts were unwilling to challenge the executive branches of government and the prosecutors in the case. This reality is reflected in acquittal rates in CIS member states, where judicial branches still demonstrate significant prosecutorial bias in practice,[1519] which has rendered judicial remedies for human rights victims ineffective.

6.3 CIS Member State challenges to the admissibility of a complaint alleging that domestic remedies have not been exhausted

As discussed in detail in Chapter III, one of the primary purposes of the exhaustion of domestic remedies rule is to protect the sovereignty of domestic states,[1520] and to ensure that

[1516] *Avadanov v Azerbaijan* (n1455).
[1517] *A.A. v Azerbaijan* (n1460); *Avadanov v Azerbaijan* (n1455); *Valetov v Kazakhstan* (1466); *Gerasimov v Kazakhstan* (n1451).
[1518] *See* pp117-117
[1519] *See* pp157-158
[1520] *See generally* Edward Montefiore Borchard 'Theoretical Aspects of the International Responsibility of States' (1929) 1 ZaöRV 224-250; Bagge (n510) 166; Freeman (n510) 417.

a dispute does not receive unnecessary and embarrassing international attention.[1521] These rationales originated in the sphere of international diplomatic protection,[1522] but the desire to avoid diplomatic embarrassment is particularly acute in the international human rights context.[1523] It is therefore unsurprising that

> [i]n almost all cases of human rights violations lodged before human rights tribunals... the respondent state, usually with barely any time for reflection, challenges their admissibility on grounds of non-exhaustion of local remedies.[1524]

This is a trend that the majority of CIS governments have adhered to, regularly challenging individual communications to international human rights committees claiming that those individuals have failed to exhaust domestic remedies within the respondent state.[1525] Despite this apparent global tendency, both Tajikistan[1526] and Kyrgyzstan[1527] have both regularly

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[1521] Ibid.
[1522] D'Ascoli and Scherr (n498) 1; *see also* pp62-63
[1523] *See generally* Mummery 'The Content of the Duty to Exhaust Local Judicial Remedies' (n509) 391.
[1524] Udombana (n593) 20.
[1525] *Misnikov v Belarus* (14 July 2016) Communication No 2093/2011 CCPR/C/117/D/2093/2011; *Gerasimov v Kazakhstan* (n1451); *Avadanov v Azerbaijan* (n1455); *Basarevsky and Rybchenko v Belarus* (14 July 2016) Communication No 2108/2011 and 2109/2011 CCPR/C/117/D/2108/2011-CCPR/C/117/D/2109/2011; *Levinov v Belarus* (14 July 2016) Communication No 2082/2011 CCPR/C/102/D/1812/2008; *Evzrezov v Belarus* (14 July 2016) Communication No 2101/2011 CCPR/C/117/D/2101/2011; *Bakur v Belarus* (15 July 2015) Communication No 1902/2009 CCPR/C/114/D/1902/2009; *Korol v Belarus* (14 July 2016) Communication No 2089/2011 CCPR/C/117/D/2089/2011; *S.V. v Belarus* (30 March 2016) Communication No 2047/2011 CCPR/C/WG/116/DR/2047/2011; *V.L. v Belarus* (30 March 2016) Communication No 1984/2010 Communication No 2084/2011 CCPR/C/WG/116/DR/2084/2011; *Pugach v Belarus* (15 July 2015) Communication No 1984/2010 CCPR/C/114/D/1984/2010; *E.V. v Belarus* (30 October 2014) Communication No 1989/2010 CCPR/C/112/D/1989/2010; *Asatryan v Armenia* App no 3571/09 (ECtHR, 27 April 2017); *Ara Harutyunyan v Armenia* App no 629/11 (ECtHR, 20 December 2017); *Minasyan v Armenia* App no 44837/08 (ECtHR, 8 July 2014); *Martirosyan v Armenia* App no 23341/06 (ECtHR, 5 May 2013); *Sefilyan v Armenia* App no 22491/08 (ECtHR, 2 January 2013); *Antonyan v Armenia* App no 3946/05 (ECtHR 2 January 2013); *Yunusova and Yunusov v Azerbaijan* (n1500); *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 4 July 2016); *Khalikova v Azerbaijan* App No 42883/11 (ECtHR, 22 October 2015); *Mustafayev v Azerbaijan* App no 47095/09 (ECtHR, 4 August 2017).
[1526] *Toshev v Tajikistan* (30 March 2011) Communication No 1499/2006 CCPR/C/101/D/1499/2006; *Kirpo v Tajikistan* (30 October 2009) Communication No 1401/2005 CCPR/C/97/D/1401/2005; *Khostikoev v Tajikistan* (22 October 2009) Communication No 1519/2006 CCPR/C/97/D/1519/2006; *Idieva v Tajikistan* (31 March 2009) Communication No 1276/2004 CCPR/C/95/D/1276/2004; *Dunaev v Tajikistan* (30 March 2009) Communication No 1195/2003 CCPR/C/95/D/1195/2003; *Sattorova v Tajikistan* (30 March 2009) Communication No 1200/2003 CCPR/C/95/D/1200/2003; *Khuseynova and Butaeva v* Tajikistan (20 October 2008) Communication Nos 1263/2004 and 1264/2004 CCPR/C/94/D/1263-1264/2004; *Ashurov v Tajikistan* (20 March 2007) Communication 1348/2005 CCPR/C/89/D/1348/2005.
[1527] *Bazarov v Kyrgyzstan* (21 October 2016) Communication No 2187/2012 CCPR/C/118/D/2187/2012; *Zhumbaeva v Kyrgyzstan* (29 July 2011) Communication No 1756/2008 CCPR/C/102/D/1756/2008; *Akhadov v Kyrgyzstan* (25 March 2011) Communication No 1503/2006 CCPR/C/101/D/1503/2006; *Tokatunov v Kyrgyzstan* (28 March 2011) Communication No 1470/2006 CCPR/C/101/D/1470/2006/Corr.1; *Kaldarov v*

declined to challenge the admissibility of communications on the basis of failure to exhaust domestic remedies.

Challenges by Armenia, Kazakhstan, and Azerbaijan with respect to failure to exhaust domestic remedies have on occasion been based on a somewhat disingenuous procedural reading of the law. These challenges often fail to acknowledge the factual matrix of the complaint, where accessing domestic remedies in practice have been impossible. In *Gerasimov v Kazakhstan*[1528] the Kazakh government challenged the admissibility of the complaint claiming that the complainant had failed to appeal the decision of the First City Court. Whilst this avenue of appeal was available in principle, in practice the complainant's lawyer had received the decision of the first court after the deadline for appeal had expired.[1529] Similarly, in *Ilyasov v Kazakhstan*,[1530] the state challenged the admissibility of the complaint before the Human Rights Committee, alleging that Ilyasov had failed to exhaust domestic remedies as he had not appealed the fact that the information regarding his conviction was classified. This challenge, however, failed to acknowledge that the claimant was refused access to that very information given his status as a foreign citizen.[1531]

In *Ayvazyan v Armenia*[1532] the Armenian government similarly challenged the admissibility of the complaint, alleging that the complainant had failed to appeal the court decision within the prescribed time limit.[1533] This challenge, however, failed to acknowledge that, despite the fact that the complainant had not submitted an appeal, the appeals court had nevertheless examined the content of the claim.[1534] Similarly, in *Tovmasyan v Armenia*[1535] and *Shomayan v Armenia*[1536] the Armenian state alleged that the claimants had failed to exhaust domestic remedies because they had neglected to appeal their claims to the Court of Appeal. This objection failed to acknowledge that the very basis of the complaints was that the claimants were unable to make such an appeal, as an appeal to the Court of Appeal had to be

Kyrgyzstan (18 March 2010) Communication No 1338/2005 CCPR/C/98/D/1338/2005; *Umetaliev and Tashtanbekova v Kyrgyzstan* (30 October 2008) Communication No 1275/2004 CCPR/C/94/D/1275/2004.
[1528] *Gerasimov v Kazakhstan* (n1451).
[1529] Ibid para 11.2.
[1530] *Ilyasov v Kazakhstan* (23 July 2014) Communication No 2009/2010 CCPR/C/111/D/2009/2010.
[1531] Ibid para 5.11.
[1532] *Ayvazyan v Armenia* App no 56717/08 (ECtHR, 1 June 2006).
[1533] Ibid.
[1534] Ibid.
[1535] App no 11578/08 (ECtHR, 21 April 2016).
[1536] App no 18499/08 (ECtHR, 7 December 2015).

undertaken by an advocate licensed to act before the Court of Appeal;[1537] something that was unaffordable to the complainants.[1538]

Comparatively, in *Avadanov v Azerbaijan*[1539] the state party alleged that the complainant had failed to exhaust domestic remedies as he neglected to bring allegations of torture before the domestic courts. This challenge failed to acknowledge or address the use of violence and threats made against the claimant and his family, which included rape, threats of rape, and beatings.[1540] It was for fear that these threats would come to fruition that the complainant failed to engage the domestic judicial system.[1541]

Most telling however, is the fact that within the jurisprudence of individual human rights complaints against CIS states, the challenge to admissibility most frequently utilised is that the complainant has failed to utilise the domestic supervisory review powers and thereby neglected to exhaust the domestic remedies available in the respondent state. In particular the governments of Belarus, Kazakhstan, Kyrgyzstan, and Uzbekistan have all alleged that domestic remedies have not been exhausted given the failure of the complainant to utilise the supervisory review proceedings.[1542] The Belarusian government, particularly, has utilised this

[1537] Ibid para 18.
[1538] Ibid para 23.
[1539] *Avadanov v Azerbaijan* (n1455).
[1540] Ibid para 2.10.
[1541] Ibid para 2.11.
[1542] *Akmatov v Kyrgyzstan* (29 October 2015) Communication No 2052/2011 CCPR/C/WG/115/DR/2052/2011; *Quliyev v Azerbaijan* (16 October 2014) Communication 1972/2010 CCPR/C/112/D/1972/2010; *K.A. v Belarus* (3 November 2016) Communication No 2112/2011 CCPR/C/118/D/2112/2011; *Poplavny and Sudalenko v Belarus* (3 November 2016) Communication No 2139/2012 CCPR/C/118/D/2139/2012; *Misnikov v Belarus* (n1525); *Basarevsky and Rybchenko v Belarus* (n1525); *Levinov v Belarus* (n1525); *Korol v Belarus* (n1525); *Evzrezov v Belarus* (n1525); V.*L. v Belarus* (n1525); *Bakur v Belarus* (n1525); *P.L. v Belarus* (n1525); *Krasovskaya and Krasovskaya v Belarus* (n1453); *Valentin Evrezov, Vladimir Nepomnyaschikh, Vasiliy Polyakov, Valery Rybchenko v Belarus* (10 October 2014) Communication No 1999/2010 CCPR/C/112/D/1999/2010; *Praded v Belarus* (10 October 2014) Communication No 2029/2011 CCPR/C/112/D/2029/2011; *Kalyakin and others v Belarus* (10 October 2014) Communication No 2153/2012 CCPR/C/112/D/2153/2012; *Stambrovsky v Belarus* (24 October 2010) Communication No 1987/2010 CCPR/C/112/D/1987/2010; *Nepomnyaschikh v Belarus* (10 October 2014) Communication No 2156/2012 CCPR/C/112/D/2156/2012; *Pinchuk v Belarus* (24 October 2014) Communication No 2165/2012 CCPR/C/112/D/2165/2012; *Mukhtar v Kazakhstan* (6 November 2015) Communication No 2304/2013 CCPR/C/115/D/2304/2013; *Abdussamatov v Kazakhstan* (n1485); *E.Z. v Kazakhstan* (1 April 2015) Communication 1855/2008 CCPR/C/113/D/1855/2008; *Leven v Kazakhstan* (21 October 2014) Communication No 2131/2012 CCPR/C/112/D/2131/2012; *Khuseynova and Butaeva v Tajikistan* (n1526); *Karimov and Nurastov v Tajikistan* (27 March 2007) Communication Nos 1108/2002 and 1121/2002 CCPR/C/89/D/1108&1121/2002; *Ashurov v Tajikistan* (n1526); *Yakupova v Uzbekistan* (3 April 2008) Communication No 1205/2003 CCPR/C/92/D/1205/2003; *Sharifova and Burkhonov v Tajikistan* (1 April 2008) Communication Nos 1209,1231/2003 and 1241/2004 CCPR/C/92/D/1209,1231/2003&1241/2004; *Sattorova v Tajikistan* (n1526); *Lyashkevich v Uzbekistan* (11 May 2010) Communication No 1552/2007 CCPR/C/98/D/1552/2007; *Umarova v Uzbekistan* (3 November 2010) Communication No 1449/2006

challenge consistently before UN human rights committees, regularly challenging the admissibility of individual complaints by noting that the complainants 'did not appeal under the supervisory review proceedings to the Prosecutor's Office'.[1543] The Kazakh government have similarly disputed claims by complainants to have exhausted domestic remedies, arguing that complainants have failed to exhaust domestic remedies as they have neglected to file 'a request for a supervisory review of [their] final conviction'.[1544] In comparison, the Kyrgyz government has utilised this challenge far more sparingly, only occasionally challenging cases for admissibility on the basis that the claimant has not sought supervisory review of the case before the regional courts.[1545]

The process of supervisory review originated in the Soviet Union as a discretionary power of the Supreme Court, which could elect to set aside a judicial decision if the court considered that there had a misinterpretation of the law.[1546] The supervisory review process remains a part of the judicial system in many ex-Soviet states including in Belarus,[1547] Kazakhstan,[1548] Kyrgyzstan,[1549] and Uzbekistan.[1550] In Belarus, the Prosecutor's Office of the Republic of Belarus is tasked with ensuring the rule of law,[1551] and ensuring the 'congruence of court rulings with the law'.[1552] These powers allow the Prosecutor's Office to receive and consider appeals against court judgments, and to determine whether those judgments comply with Belarusian law.[1553] Comparatively, in both Kazakhstan[1554] and Kyrgyzstan[1555] the supervisory

CCPR/C/100/D/1449/2006; *Iskiyaev v Uzbekistan* (20 March 2009) Communication No 1418/2005 CCPR/C/95/D/1418/2005; *Salikh v Uzbekistan* (30 March 2009) Communication No 1382/2005 CCPR/C/95/D/1382/2005.

[1543] *K.A. v Belarus* (n1542) para 4.1.

[1544] *Mukhtar v Kazakhstan* (n1542).

[1545] *Akmatov v Kyrgyzstan* (n1542).

[1546] Margaret Y.K. Woo 'Adjudication Supervision and Judicial Independence in the P.R.C.' (1991) 39(1) American Journal of Comparative Law 95, 106.

[1547] Prosecutor General's Office of the Republic of Belarus 'Tasks and Functions' (*Belarusian Government* 2018) <http://www.prokuratura.gov.by/en/about/zadachi-i-funktsii/> accessed 16 September 2018.

[1548] International Monetary Fund *The Republic of Kazakhstan: Financial System Stability Assessment – IMF Country Report No. 14/258* (International Monetary Fund 2014) 28.

[1549] International Federation for Human Rights (FIDH) 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deterioriating Situation' (*FIDH,* 23 May 2017) <https://www.fidh.org/IMG/pdf/20170523_eu-kyrgyzstan_note_final.pdf> accessed 22 September 2018, 6.

[1550] Freedom House 'Uzbekistan: Nations in Transit 2018' (*Freedom House,* 2018) <https://freedomhouse.org/report/nations-transit/2018/uzbekistan> accessed 16 September 2018.

[1551] Law of the Republic of Belarus On the Prosecution Service of the Republic of Belarus No 220-Z (2007) Article 4.

[1552] Prosecutor General's Office of the Republic of Belarus 'Tasks and Functions' (n1547).

[1553] Ibid.

[1554] International Federation for Human Rights 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deterioriating Situation' (n1549).

[1555] Scott Newton *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis (Constitutional System of the World)* (Bloomsbury 2017) 203.

review procedures lie with the Supreme Court, which has supervisory jurisdiction and review powers over judgments of the cassation and appellate courts.[1556] To make an appeal of a prior judicial decision before the Supreme Court of Kazakhstan, the appellant must obtain leave from the Supreme Court.[1557] In Kyrgyzstan the Supreme Court of Kyrgyz Republic has the power to review the verdicts of primary and appellate courts when there has been an application from a convicted defendant, or a petition from a prosecutor.[1558] The continued use of supervisory review in states, including former Soviet countries, has attracted significant criticism from various international human rights commissions. The European Court of Human Rights has noted that the use of the supervisory review undermines standards of the rule of law and legal certainty by frustrating the finality of the judicial judgments.[1559] The Court further condemned the continued use of supervisory review, noting that that it undermines the principle of *res judicata*[1560] by giving the parties a fresh determination of a case when a judgment has already come into force.[1561]

Similarly, throughout its jurisprudence, the Human Rights Committee has consistently resolved that supervisory review proceedings do not constitute an effective remedy that must be exhausted for the purpose of Article 5(2) of the Optional Protocol to the International Covenant on Civil and Political Rights.[1562] The Human Rights Committee has noted that the supervisory review mechanism does not constitute an effective domestic remedy for a number of reasons. Primarily, the Human Rights Committee has criticised the extraordinary nature of the remedy,[1563] noting that it is only available in exceptionally limited instances.[1564] The Committee has particularly condemned the discretionary nature of the remedy, concluding that the supervisory review mechanism cannot be seen to offer a reasonable

[1556] Ibid.
[1557] International Federation for Human Rights 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deterioriating Situation' (n1549).
[1558] The Criminal Procedure Code of the Kyrgyz Republic (n1377) Section XI: Review of Res Judicata Verdicts, Rulings and Resolutions of Courts, Chapter 42: Review of Res Judicata Verdicts, Rulings and Resolutions of Courts Pursuant to the Procedure for Review, Article 376.
[1559] *Ryabykh v Russia* App no 52854/99 (ECtHR, 24 July 2003).
[1560] *Res judicata* mearning that the matter having already been adjudicated by a competent court should not be available to be further pursued by the same parties, *see Vardanyan and Nanushyan v Armenia* App no 8001/07 (ECtHR, 27 October 2016).
[1561] Ibid.
[1562] *Alekseev v Russian Federation* (25 October 2013) Communication No 1873/2009 CCPR/C/109/D/1873/2009; *Koktish v Belarus* (26 August 2014) Communication No 1985/2010 CCPR/C/111/D/1985/2010 para 7.3.
[1563] *Basarevsky and Rybchenko v Belarus* (n1525).
[1564] Ibid

prospect of success for the complainant,[1565] given that the complainant has no automatic right to leave to appeal and that neither the courts nor the prosecutorial office are under an obligation to review the appeal.[1566] In addition, like the European Court of Human Rights, the Human Rights Committee has noted that such a remedy would have the force of *res judicata* against decisions that have already entered into force,[1567] further precluding it from being considered an effective remedy.[1568] Finally, the Human Rights Committee has noted that even in cases where the state has provided statistics regarding the success rate of appeals before the supervisory review procedure,[1569] generally information about the success rate of appeals with respect to specific human rights abuses has not been forthcoming.[1570]

Concerns raised by human rights bodies regarding the use of supervisory review have been echoed by concerns raised by complainants alleging human rights abuses. Complaints before the Human Rights Committee demonstrate little public confidence in the likelihood of a successful appeal under the supervisory review process. In Belarus, for example, a complainant noted that he was not aware of any cases within ten years where the General Prosecutor's Office had lodged an objection or requested a revocation of administrative proceedings in relation to the exercise of civil and political rights in the country.[1571] In the context of cases involving political rights in Belarus, complainants have expressed particular concern that attempts to utilise the supervisory review procedure would be especially futile, given that the procedure is at the discretion of a prosecutor, a high-level public official.[1572] In

[1565] *Gelazauskas v Lithuania* (17 March 2003) Communication No 836/1998 CCPR/C/77/D/836/1998 para 7.4; *Sekerko v Belarus* (28 October 2013) Communication No 1851/2008 CCPR/C/109/D/1851/2008 para 8.3; *Protsko and Tolchin v Belarus* (1 November 2013) Communication No 1920/2009 CCPR/C/109/D/1919-1920/2009 para 6.5; *Schumilin v Belarus* (23 July 2012) Communication No 1784/2008 CCPR/C/105/D/1784/2008 para 8.3; *P.L. v Belarus* (26 July 2011) Communication No 1814/2008 CCPR/C/102/D/1814/2008 para 6.2.
[1566] *Gelazauskas v Lithuania* (n1565) para 7.4; *Sekerko v Belarus* (n1565) para 8.3; *Protsko and Tolchin v Belarus* (n1565) para 6.5; *Schumilin v Belarus* (n1565) para 8.3; *P.L. v Belarus* (n1565) para 6.2.
[1567] The matter having already been adjudicated by a competent court should not be available to be further pursued by the same parties. The European Court of Human Rights have raised similar objections to the *res judicata* nature of of administrative and judicial supervisory review procedures to appeal decisions that should be 'irreversible'. See *Vardanyan and Nanushyan v Armenia* (n1560).
[1568] *Evzrezov v Belarus* (n1525).
[1569] Often States fail to provide the relevant statistical data. See *Sudalenko v Belarus* (3 May 2012) Communication No 1750/2008 CCPR/C/104/D/1750/2008. However, in *Evzrezov v Belarus* (n1525) the Belarusian government claimed that of the 4,565 appeals filed under the supervisory review procedure in 2011 239 were upheld (a successful appeal rate of around 5.24%).
[1570] *Evzrezov v Belarus* (n1525).
[1571] The complainant in *Sudalenko v Belarus* noted that he was 'unaware of any case over the last 10 years when the General Prosecutor's Office would lodge an objection, requesting revocation of administrative proceedings related to the exercise of citizens civil and political rights'. See *Sudalenko v Belarus* (n1569) para 7.1.
[1572] *Evzrezov v Belarus* (n1525); *V.L. v Belarus* (n1525).

addition, authors have expressed concerns that any supervisory review procedures are undertaken in the absence of the complainant,[1573] do not allow the complainant to present their appeal or ask questions regarding the motion,[1574] and do not have a suspensive effect on the prior court judgment.[1575]

However, despite established jurisprudence before various international and regional human rights bodies, both the Belarusian[1576] and Kazakh[1577] governments have failed to acknowledge this precedent and continue to challenge the admissibility of claims before the Human Rights Committee and other human rights bodies on the basis of a failure by the complainant to initiate supervisory review proceedings. Belarus has been particularly unequivocal in its stance, and the Belarusian government has regularly challenged the Human Rights Committee's jurisprudence on the issue. As part of those challenges the Belarusian government has claimed that any decisions undertaken by the Committee where the complainant has not utilised the supervisory review procedure will amount to 'illegally registered communications'[1578] and decisions will be considered invalid.[1579]

The content of allegations that domestic remedies have not been exhausted demonstrate a number of problems that continue to undermine rule of law standards in CIS member states. Importantly, the general challenge that the complainant has failed to exhaust domestic remedies is unsurprising. This tactic is used by nearly every state as a knee-jerk reaction to an individual communication to a human rights body;[1580] it is therefore unsurprising that CIS member states, for the most part, have not deviated from this trend. It is interesting to note

[1573] *V.L. v Belarus* (n1525) para 5.5.
[1574] Ibid.
[1575] *Abdussamatov v Kazakhstan* (n1485) para 5.5.
[1576] *K.A. v Belarus* (n1542); *Poplavny and Sudalenko v Belarus* (n1542); *Misnikov v Belarus* (n1525); *Levinov v Belarus* (n1525); *Korol v Belarus* (n1525); *V.L. v Belarus* (n1525); *P.L. v Belarus* (n1565); *Govsha, Syritsa and Mezyak v Belarus* (27 July 2012) Communication No 1790/2008 CCPR/C/105/D/1790/2008; *Bakur v Belarus* (n1525); *Evrezov v Belarus* (n1525); *Pugach v Belarus* (n1525); *Sudalenko v Belarus* (n1569); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus* (n1542); *Praded v Belarus* (n1542); *Kalyakin and others v Belarus* (n1542); *Stambrovsky v Belarus* (n1542); *Nepomnyaschikh v Belarus* (n1542); Communication No 2108/2011 and 2109/2011, *Basarevsky and Rybchenko v Belarus* (n1525); *S.V. v Belarus* (n1525); *E.V. v Belarus* (n1525); *E.Z. v Kazakhstan* (n1542).
[1577] *Mukhtar v Kazakhstan* (n1542); *E.Z. v Kazakhstan* (n1542); *Abdussamatov v Kazakhstan* (n1485) para 5.5.
[1578] *K.A. v Belarus* (n1542) para 4.1.
[1579] Ibid.
[1580] Udombana (n593) 20.

that both Tajikistan[1581] and Kyrgyzstan[1582] have on a number of occasions declined to challenge admissibility on the grounds of failure to exhaust domestic remedies; a move that would seem to buck the global trend.[1583]

The most apparent issue with judicial independence standards evident from the content of the challenges to admissibility for non-exhaustion of domestic remedies is the failure by a number of CIS states to ensure the exclusive authority of the judicial branch both in theory and in practice. In particular, the continued utilisation of the supervisory review process in Belarus, Kazakhstan, and Kyrgyzstan erodes the exclusive and final authority of the courts.[1584] Primarily, the use of the supervisory review in these countries undermines the principle of *res judicata*[1585] (i.e. that the parties should not pursue any dispute adjudicated by a competent court further). Secondly, in Belarus, the power of supervisory review lies with the Prosecutor General. This further undermines the exclusive authority of the judicial branch[1586] as it allows a non-judicial authority to modify a legal decision.[1587] The result in these states is that rule of law, separation of powers, and judicial independence standards are not effectively recognised or implemented in practice. Reforms to these standards would need to be two-fold, and would demand both legislative and practical changes. Primarily, legislative reforms would need to be introduced to abolish the practice of supervisory review in Belarus, Kazakhstan, and Kyrgyzstan, and new laws introduced to ensure that questions of legality and rule of law were solely within the exclusive jurisdiction of the judicial branch. In addition, longer term changes in practice would also be necessary, in order to properly embed a culture of exclusive authority and judicial independence within the legal community.

However, given the steadfast support shown by these governments to these practices, reforms in the near future seem unlikely. The Belarusian government has shown itself to be particularly unwilling to reform the system currently in place. When it became a part to the

[1581] *Toshev v Tajikistan* (n1526); *Kirpo v Tajikistan* (n1526); *Khostikoev v Tajikistan* (n1526); *Idieva v Tajikistan* (n1526); *Dunaev v Tajikistan* (n1526); *Sattorova v Tajikistan* ((n1526); *Khuseynova and Butaeva v Tajikistan* (n1526); *Ashurov v Tajikistan* (n1526).
[1582] *Bazarov v Kyrgyzstan* (n1527); *Zhumbaeva v Kyrgyzstan* (n1527); *Akhadov v Kyrgyzstan* (n1527); *Tokatunov v Kyrgyzstan* (n1527); *Kaldarov v Kyrgyzstan* (n1527); *Umetaliev and Tashtanbekova v Kyrgyzstan* (n1527).
[1583] Udombana (n593) 20.
[1584] International Commission of Jurists (n102) 18.
[1585] I.e. that a matter adjudicated by a competent domestic court may not be pursued further by the same parties. *Findlay v The United Kingdom* App no 22107/93 (ECtHR 25 February 1997) paras 74 to 77.
[1586] *Ryabykh v Russia* (n1559) paras 13-17.
[1587] Ibid.

Optional Protocol to the ICCPR, the Belarusian government acknowledged that it recognised the competence of the Human Rights Committee under Article 1 of the Optional Protocol to

> receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights set forth in the Covenant.[1588]

Nonetheless, the Belarusian government has repeatedly refused to recognise the competence of the Human Rights Committee to examine communications that the government believes should be held to be inadmissible for failure to exhaust domestic remedies where the complainant has failed to engage the supervisory review process.[1589] To support this assertion, Belarusian representatives have claimed that Belarus is under no obligation under the Optional Protocol to recognise the Human Rights Committee's rules of procedures nor its interpretation of the provisions contained within the Optional Protocol.[1590] In particular, Belarus has concluded that it is under no obligation to accept or recognise the practice of the Human Rights Committee, the Committee's methods of work, or the Committee's case law, given that these are not part of the Optional Protocol.[1591] As a consequence, the Belarusian government has concluded that if any communication is, in its' view, registered in violation of Article 2[1592] and Article 5(2)(b)[1593] of the Optional Protocol, then it would be viewed by Belarus as 'incompatible' with the Optional Protocol, and any decisions taken by the Human Rights Committee will considered by the Belarusian government as 'invalid'.[1594]

With respect to those decision, the Belarusian government has stated that any conclusion the Human Rights Committee may make on those unjustly registered communications[1595] will be 'rejected [by the Belarusian government] without observations on admissibility or the

[1588] *K.A. v Belarus* (n1542) para 4.2.
[1589] *K.A. v Belarus* (n1542); *Misnikov v Belarus* (n1525); *Grishkovtsov v Belarus* (1 April 2015) Communication No 2013/2010 CCPR/C/113/D/2013/2010; *Sudalenko v Belarus* (n1569); *E.V. v Belarus* (n1525); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus* (n1542); *Praded v Belarus* (n1542); *Lozenko v Belarus* (24 October 2010) Communication 1929/2010 CCPR/C/112/D/1929/2010; *Kalyakin and others v Belarus* (n1542); *Symonik v Belarus* (24 October 2014) Communication No 1952/2010 CCPR/C/112/D/1952/2010; *Stambrovsky v Belarus* (n1542); *Nepomnyaschikh v Belarus* (n1542); *Yuzepchuk v Belarus* (24 October 2014) Communication No 1906/2009 CCPR/C/112/D/1906/2009; *Pinchuk v Belarus* (n1542).
[1590] Ibid.
[1591] *Misnikov v Belarus* (n1525) para 6.
[1592] Optional Protocol to the ICCPR (n595) Article 2.
[1593] Ibid Article 5(2)(b).
[1594] *K.A. v Belarus* (n1542) para 4.2.
[1595] *E.V. v Belarus* (n1525).

merits'[1596] given that there are 'no legal grounds for the state party to consider those communications'.[1597] Therefore, in those instances, the Belarusian government has concluded that any such decision 'will be considered legally invalid'.[1598]

The declaration by the Belarusian government that it will refuse to recognise the competence of the Human Rights Committee in instances where the Belarusian government disagrees with the Committee's interpretation of the complainant's duty to exhaust domestic remedies under Articles 2 and 5(2)(b) has been met with criticism from the Human Rights Committee. The Human Rights Committee concluded that implicit in the state's adherence to the Optional Protocol is

> an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination thereof, to forward its Views to the state party and to the individual.[1599]

In particular, the Human Rights Committee has made it clear that the competence to determine whether a case is admissible before the Committee lies with the Committee, rather than the respondent state,[1600] and that any decision by the Belarusian government to refuse to accept the Human Rights Committee's determination would be in violation of the state party's obligations under Optional Protocol.[1601]

Nonetheless, in numerous communications between 2010 and 2016, the Belarusian government has continued to declare that it will decline to recognise the competence of communications that it deems should be held to be inadmissible due to the failure to exhaust domestic remedies. In particular, the Belarusian government has refused to recognise the Human Rights Committee's determination that the supervisory review procedure does not constitute an effective remedy that individuals are obliged to exhaust.[1602]

[1596] *Misnikov v Belarus* (n1525).
[1597] *E.V. v Belarus* (n1525).
[1598] Ibid.
[1599] Ibid para 5.2.
[1600] Ibid.
[1601] Ibid.
[1602] *Sudalenko v Belarus* (n1569); *E.V. v Belarus* (n1525).

Other CIS member states have also undermined the authority of the Human Rights Committee during its process of determining whether domestic remedies have been effectively exhausted. Kazakhstan,[1603] Kyrgyzstan,[1604] Tajikistan,[1605] and Belarus[1606] have all declined to cooperate with the Human Rights Committee during its examination of the admissibility of individual communications. In particular, the Belarusian, Kazakh, Kyrgyz, and Tajik governments have refused to respond to complaints under the Optional Protocol to the International Covenant on Civil and Political Rights and ignored requests to comply with interim measures during the Human Rights Committee's deliberations regarding admissibility. In a number of complaints before the Human Rights Committee the Kyrgyz[1607] and Tajik[1608] governments refused to cooperate with requests for their views on the admissibility and merits of the communications. In addition, a number of governments have also refused to comply with interim measures requested by the Human Rights Committee. Both the Kazakh[1609] and Kyrgyz[1610] governments have extradited complainants in spite of the Committee's request for interim measures of protection to suspend the extradition pending the consideration of the case. In addition, both Belarusian[1611] and Tajik[1612] governments have carried out death sentences despite the Human Rights Committee's request for interim measures of protection. In response to condemnation from the Human Rights Committee, the Belarusian government reiterated its conclusion that the long-standing practice, methods of work, and case law of the Committee do not bind Belarus,[1613] and it is therefore not encumbered to adhere to the requests for interim measures of the Human Rights Committee.[1614]

[1603] *Valetov v Kazakhstan* (n1466); *Israil v Kazakhstan* (31 October 2011) Communication No 2024/2011 CCPR/C/103/D/2024/2011.
[1604] *Torobekov v Kyrgyzstan* (21 November 2011) Communication No 1547/2007 CCPR/C/103/D/1547/2007; *Gunan v Kyrgyzstan* (25 July 2011) Communication No 1545/2007 CCPR/C/102/D/1545/2007; *Tursunov v Kazakhstan* (8 May 2015) Communication No 538/2013 CAT/C/54/D/538/2013; *Maksudov and Takhimov, Tashbaev and Pirmatov v Kyrgyzstan* (16 July 2008) Communications No 1461/2006, 1462/2006, and 1477/2006 CCPR/C/93/D/1461, 1462, 1476 & 1477/2006.
[1605] *Kirpo v Tajikistan* (n1526); *Idieva v Tajikistan* (n1526); *Sharifova and Burkhonov v Tajikistan* (n1542).
[1606] *Yuzepchuk v Belarus* (n1589); *Grishkovtsov v Belarus* (n1589).
[1607] *Gunan v Kyrgyzstan* (n1604); *N.T. v Kyrgyzstan* (26 March 2010) Communication No 1522/2006 CCPR/C/98/D/1522/2006; *Torobekov v Kyrgyzstan* (n1604).
[1608] *Sharifova and Burkhonov v Tajikistan* (n1542); *Kirpo v Tajikistan* (n1526).
[1609] *Valetov v Kazakhstan* (n1466); *Israil v Kazakhstan* (n1603); *Tursunov v Kazakhstan* (n1604).
[1610] *Maksudov and others v Kyrgyzstan* (n1604).
[1611] *Yuzepchuk v Belarus* (n1589); *Grishkovtsov v Belarus* (n1589).
[1612] *Idieva v Tajikistan* (n1526); *Yuzepchuk v Belarus* (n1589).
[1613] *Grishkovtsov v Belarus* (n1589).
[1614] Ibid.

The decision by members of the Belarusian government to challenge the competence of the Human Rights Committee to examine communications that have not engaged the supervisory review process in Belarus demonstrates a two-fold issue. Human rights bodies have challenged the continued use of the supervisory review process on numerous occasions.[1615] Those challenges have included criticisms of the *res judicata* effect of the supervisory review process, and of the negative impact that the supervisory review process has on the exclusive authority of the judicial branch. Nonetheless, Belarus continues to assert that it is a remedy that it considers should be exhausted; demonstrating a flagrant disregard for *de facto* separation of powers and the exclusive authority of the judiciary in the country. Secondly, the unilateral claim that the Human Rights Committee does not have the competence to examine communications where the author has not engaged the supervisory review process, demonstrates an unwillingness by the Belarusian government to engage with important international oversight over human rights and democratic standards in the country, and may have greater consequences for human rights standards within Belarus.

6.4 Conclusion

Many of the requests before international human rights bodies do not provide direct insight into judicial independence standards in the respondent CIS member state. Nonetheless, those problems provide insight into broader problems with justice in the respondent state, and other problems faced by those judicial branches. In particular, a number of the reasons given by human rights victims as part of applications to circumvent domestic remedies are demonstrative of young judicial systems in emerging democracies. Both unduly prolonged investigations and the lack of availability of domestic remedies, judicial or otherwise, are indicative of developing systems of justice, struggling to cope with increased logistical demand and complexity.[1616] Other applications to circumvent domestic remedies where judicial remedies are delayed,[1617] or justice is unaffordable to victims of human rights

[1615] *Ryabykh v Russia* (n1559); *Alekseev v Russian Federation* (n1562); *Koktish v Belarus* (n1562) para 7.3.
[1616] Julius Court, Goran Hyden and Ken Mease 'The Judiciary and Governance In 16 Developing Countries: World Governance Survey Discussion Paper' (*Overseas Development Instituite,* 9 May 2003) <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4088.pdf> accessed 14 September 2018; *see generally* Jessica Vapnek, Peter Boaz & Helga Turku 'Improving Access to Justice in Developing and Post-Conflict Countries: Practical Examples from the Field' (2016) 8 Duke Forum for Law & Social Change 27-44; OECD and Open Society Justice Initiative 'Understanding Effective Access to Justice' (OECD Conference, Paris, 3-4 November 2016) <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf> accessed 19 September 2018.
[1617] *See* pp

abuses,[1618] are similarly demonstrative of emerging democracies with young judicial systems.[1619] However, whilst these problems do not give a direct insight into judicial independence standards in the respondent state, those problems mean that the domestic judicial branches are not fulfilling their primary purpose; to act as a bulwark against the unlawful actions of the executive branches of government. Where a complaint of a human rights abuse is not heard, because justice is delayed or because that justice is unaffordable, this amounts to no domestic justice for the victim. This amounts to a *de facto* failure by the judiciary to carry out its functions.

In addition, whilst it does not give direct insight into judicial independence standards in those states, the decision by the Tajik and Kazakh governments not to challenge the admissibility of individual complaints before international human rights bodies for failure to exhaust domestic remedies is interesting. In particular, the decision by those governments seems to buck a seemingly global trend to routinely challenge human rights complaints on this ground.

However, a number of important trends regarding judicial independence are apparent in the content of claims to circumvent the exhaustion of domestic remedies rule and in the responses to those claims from the respondent state. Firstly, a concern that has been raised by complainants alleging human rights violations with respect to a number of CIS member states, is that efforts to engage domestic courts will put the complainant or their family members at the risk of reprisals. Concerns about the risks of reprisals were raised by complainants alleging violations by the governments of Azerbaijan, Kazakhstan, Tajikistan, and Belarus. Implicit in the requests to circumvent domestic remedies on this basis is the belief that the domestic courts would be either unwilling or unable to protect these complainants from executive reprisals.

The second theme with respect to judicial independence apparent from individual applications to circumvent the exhaustion of domestic remedies rule, is that legal reforms on paper are not necessarily being met with change in practice. This is evident in claims against Azerbaijan and Armenia, where the judicial branches have been unwilling to hear claims

[1618] *See* pp
[1619] Matthew C. Stephenson 'Judicial Reform in Developing Countries: Constraints and Opportunities' in François Bourguignon & Boris Pleskovic (eds) *Annual World Bank Conference on Development Economics: Beyond Transition* (World Bank 2007) 311, 317.

against executive branches of government, and have either regularly dismissed those claims, or routinely ruled against the complainants. The content of those applications demonstrates the continued perception by victims of significant prosecutorial bias in those countries and is demonstrative of a failure by the Azerbaijani and Armenian governments to ensure any significant reform from the previous Soviet model.

A number of other themes are also apparent from the content of challenges by states to requests to circumvent the exhaustion of domestic remedies rule. The steadfast support shown by Belarus and Kazakhstan for the Soviet-era practice of supervisory review demonstrates some fundamental shortcomings in the *de facto* realisation of separation of powers standards and exclusive judicial authority within those states. That Belarus, Kyrgyzstan, and Kazakhstan continue to cite the supervisory review as an effective domestic remedy that needs to be exhausted, in spite of widespread international acknowledgment that the process undermines the exclusive authority of the judicial branch, is problematic. It demonstrates that separation of power standards, rule of law, and exclusive authority standards are not adequately respected and implemented in those countries. In addition, the continued and unwavering support shown by the Belarusian and Kazkh governments for the continued use of the supervisory review process indicates that neither government is seemingly considering a reform of the model currently in place, signifying that respect for separation of powers in those countries unlikely to improve in the near future.

The stance of the Belarusian government with respect to the continued use of supervisory review has been particularly dogmatic. The on-going refusal by the Belarusian government to recognise the competence of the Human Rights Committee with regard to complaints where the author has not engaged the supervisory review process further compounds the assumption that there is little impetus for reform on this issue within Belarus. In addition, and even more worryingly, it demonstrates an unwillingness to have either domestic or international oversight over human rights standards in Belarus.

The limited progression of judicial reforms with respect to judicial independence and impartiality in the context of the exhaustion of domestic remedies rule has manifested itself in a number of ways. Primarily, prosecutorial and executive bias have meant that judicial remedies have been argued to be ineffective in a number of CIS states. Similarly, the inefficacy of those judicial remedies to protect claimants against executive reprisals has also been highlighted in applications to circumvent domestic remedies. In turn, lack of respect for

judicial independence standards and the exclusive authority of the judicial branch, has also been highlighted in various cases. In those instances, the far-reaching impact of judicial independence and impartiality is apparent.This impact in turn has its own knock-on effects. Without a domestic safeguard to hold governments to account, human rights abuses may be allowed to continue or worsen in those states. In addition, where complainants do not trust the domestic courts to adjudicate their claims and instead look to engage international human rights bodies, those international bodies are inundated with claims that should be ideally dealt with in domestic forums. Finally, the failure of some states to engage in wholesale reforms, and to repeal the respective supervisory review powers, is not something that is simply felt within those countries. Instead, issues surrounding separation of powers and rule of law standards have leaked into the international human rights sphere and caused on-going tensions between the Belarusian and Kazakh governments and UN human rights bodies.

7 The Far-Reaching Impact of Judicial Independence and Judicial Impartiality Reforms in Practice: Torture in CIS Member States

7.1 Introduction: Torture in the Soviet Union, the Foundations of Torture in the CIS Member States

Torture, and other cruel, inhuman, degrading treatment or punishment was, according to Soviet law, unlawful. The Constitution of the USSR guaranteed basic civil and political rights, including the 'inviolability of the person'.[1620] Nonetheless, torture was commonplace under the Communist government,[1621] despite denials of this reality by the Soviet government.[1622]

The use of torture by the Communist government varied throughout the Soviet era. Prior to the death of Stalin torture was widely practiced in the Soviet Union, however after Stalin's death in 1953, there was an open change in government stance, and the government vocally opposed the use of torture. Nonetheless, in reality, torture remained commonplace.[1623]

During the Stalinist era the Communist government openly condoned the practice of torture in the USSR, and under Stalin's rule the use of torture by local government agencies was encouraged. A directive written by Stalin stated that 'the application of methods of physical pressure in… practice is permissible from 1937 onwards on'.[1624] The Communist government justified the use of torture. Primarily, the Party Central Committee stated that torture was made necessary because members of the 'bourgeois intelligence services' regularly utilised 'physical influence against the representatives of the Socialist proletariat'.[1625]

Torture was routinely utilised by the Soviet regime to punish political opponents of the Communist government.[1626] Individuals deemed to be a threat to the Communist rule were

[1620] The Constitution (Fundamental Rules) of USSR 1977 (n707) Chapter VII 'Basic Rights, Freedoms, and Duties of Citizens of the USSR', Article 54 'Citizens of the U.S.S.R. are guaranteed inviolability of the person'.
[1621] Amnesty International *Amnesty Report on Torture* (n605) 171-177.
[1622] Richard J. Bonnie 'Political Abuse of Psychiatry in the Soviet Union and in China: Complexities and Controversies' (2002) 30(1) Journal of the American of Psychiatry and the Law 136, 136.
[1623] Ibid.
[1624] Amnesty International *Amnesty Report on Torture* (n605) 171.
[1625] Ibid.
[1626] Ibid 175.

routinely placed in Soviet labour camps and psychiatric hospitals.[1627] Political prisoners were frequently sent to 'strict' and 'special' labour camps.[1628] In those camps prisoners were kept on a 'starvation diet',[1629] whilst being required to carry out hard physical labour.[1630] These conditions resulted in the destruction of the 'physical and psychological morale' of the victims.[1631]

The Communist government also abused medicine and utilised it as a method of repression.[1632] Members of the political opposition in the Soviet Union were routinely sectioned in psychiatric confinement.[1633] Individuals detained by the KGB (the Soviet Committee for State Security) for 'anti-Soviet' activities who represented a particular threat to the Communist government,[1634] because their arrest or trial might attract particular attention or provoke demonstration, were sent for psychiatric evaluation.[1635] The findings of the evaluation were then presented to the court at a closed trial,[1636] which the defendant was not permitted to attend, and the court inevitably endorsed the evaluation's decisions.[1637] The psychiatric confinement of members of the political opposition was re-examined every six months, however, even in instances where external psychiatrists recommended the individual be released, these recommendations were routinely overruled by the courts.[1638]

The abuse of psychiatric medicine became so prevalent in the Soviet Union that during the 1970s that it became widely acknowledged by the international community. Concerns about the practice and abuse of psychiatric medicine meant that international medical association felt the need to comment on the situation.[1639] The World Psychiatric Association condemned the practice,[1640] and the Soviet psychiatric association, the AllUnion Society of Neuropathologists and Psychiatrists, resigned from the World Psychiatric Association to pre-

[1627] Ibid.
[1628] Ibid.
[1629] Ibid.
[1630] Ibid.
[1631] Ibid.
[1632] Bonnie (n1622) 137.
[1633] Ibid.
[1634] Ibid.
[1635] Amnesty International *Amnesty Report on Torture* (n605) 176-177.
[1636] Ibid.
[1637] Ibid 177.
[1638] Ibid.
[1639] Bonnie (n1622) 137.
[1640] Choudary Laxmi Narayan 'Political Abuse of Psychiatry' (2013) 55(1) Indian Journal of Psychiatry 96, 96.

empt their expulsion.[1641] The practice of repression utilising psychiatric medicine continued unabated until the 1980s. During this decade the Communist government utilised psychiatric confinement to punish those who 'were not mentally ill and whose only transgression had been the expression of political or religious dissent'.[1642]

The abuse of psychiatric evaluation and psychiatric medicine as a tool of repression in the Soviet Union endowed the Communist Party with advantages beyond the punishment of dissidents.[1643] It also ensured that trials could be held in secret,[1644] and denied members of the political opposition and a platform in court. The psychiatric confinement further ensured that individuals who represented threats to the Communist government were isolated from the general public, and the medical of nature of their confinement discredited those dissidents and their political beliefs. As part of its repressive qualities, it was made clear to individuals detained under a psychiatric hold that any diagnosis of a 'cure', allowing their release, was contingent upon the individual renouncing their problematic political or religious beliefs.[1645]

7.2 The Prohibition of Torture under International Law and CIS Legislation

Whilst torture was unlawful, according to the constitution of the Soviet Union,[1646] this prohibition was vague,[1647] and not respected in practice.[1648] This legacy, and international diplomatic pressure,[1649] encouraged CIS member states to introduce domestic legislation specifically outlawing the use of torture. The CIS Convention on Human Rights and Fundamental Freedoms also prohibited the use of torture, under Article 3 which declared that no one shall be subjected to torture or cruel, inhuman, or degrading treatment.[1650]

[1641] Ibid.
[1642] Bonnie (n1622) 137.
[1643] Amnesty International *Amnesty Report on Torture* (n605) 176-177.
[1644] Ibid 177.
[1645] Ibid.
[1646] The Constitution (Fundamental Rules) of USSR 1977 (n707) Chapter VII 'Basic Rights, Freedoms, and Duties of Citizens of the USSR' Articles 54 and 127.
[1647] Ibid. These provisions guaranteed the 'inviolability of the person' but did not specifically prohibit the use of torture.
[1648] See pp1-3
[1649] See generally,
[1650] CIS Convention on Human Rights (n1038) Article 3.

After declaring independence in 1990,[1651] Armenia ratified a number of international human rights treaties prohibiting the use of torture including the International Covenant on Civil and Political Rights and the Convention Against Torture in 1993.[1652] More recently, in 2002 Armenia ratified the European Convention on Human Rights.[1653] The ratification of the European Convention, alongside ratification Optional Protocol to the International Covenant on Civil and Political Rights in 1993,[1654] allows victims of torture at the hands of Armenian state actors to make an individual complaint of torture to international and regional human rights bodies.[1655] Finally, in 2006, Armenia ratified Optional Protocol to the Convention against Torture,[1656] which permits the Subcommittee on Prevention of Torture to undertake visits to Armenia and provide advisory assistance to Armenia on its obligations to prevent torture under international law.[1657]

Despite extensive ratification of international human rights treaties, until recently there were significant concerns about domestic legislation prohibiting the use of torture in Armenia. Despite the creation of a National Preventative Mechanism for Torture in 2008,[1658] important gaps remained within Armenia legislation. The Criminal Code of Armenia did not require the direct or indirect involvement of public officials in the act of torture,[1659] thereby relegating torture from a human rights violation to a common crime.[1660] This attracted criticism from the CoE, which noted that the Armenian definition of torture did not

[1651] Stephanie Platz 'The Shape of National Time: Daily Life, History, and Identity during Armenia's Transition to Independence, 1991-1994' in Daphne Berdahl (ed) *Altering States: Ethnographies of Transition in Eastern Europe and the Former Soviet Union* (University of Michigan Press 2000) 114, 114.
[1652] OHCHR 'View the ratification status by country or by treaty: Armenia' (*United Nations,* 2018) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=8&Lang=EN> accessed 21 September 2018.
[1653] European Court of Human Rights 'Armenia: Ratified the European Convention on Human Rights in 2002' (*European Court of Human Rights,* July 2018) <http://www.echr.coe.int/Documents/CP_Armenia_ENG.pdf> accessed 21 September 2018.
[1654] OHCHR' View the ratification status: Armenia' (n1652).
[1655] Optional Protocol to the ICCPR (n595).
[1656] OHCHR 'View the ratification status: Armenia' (n1652).
[1657] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237.
[1658] OHCHR 'Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on Torture: National Preventive Mechanisms' (*United Nations,* 2018) <https://www.ohchr.org/en/hrBodies/opcat/pages/nationalpreventivemechanisms.aspx> accessed 21 September 2018.
[1659] UNICEF *Torture and Ill-Treatment in the Context of Juvenile Justice: Findings from Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Republic of Moldova, Tajikistan, Ukraine* (The United Nations Children's Fund 2013) 4.
[1660] Ibid; similar concerns were noted by the Institute for War and Peace Reporting *see* Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (*IWPR,* 25 Mar 2015) <https://iwpr.net/global-voices/armenia-tackle-police-torture> accessed 21 September 2018.

'encompass crimes committed by public officials, but only those by individuals acting in a private capacity'.[1661] In response to these gaps the Armenian government has faced calls to its revise domestic legislation to bring it in line with international standards,[1662] in particular the standards included in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment.[1663] The Committee Against Torture made particular calls on Armenia to revise its domestic legislation to ensure that the definition of torture applied to all individuals, and to ensure that domestic legislation excluded the possibility of official pardons for torturers, and finally to ensure that domestic legislation abolished the statute of limitations on incidents of torture.[1664] To address some concerns regarding domestic legislation, the Armenian government introduced some reforms in the early 2010's. In particular, significant human rights education and training was undertaken within the military,[1665] and a number of international documents detailing standards that should be upheld to prevent incidents of torture were translated into Armenian in 2012.[1666]

To address the gaps in the Armenian legislation, in 2015 the Armenian government adopted new laws to bring domestic legislation in line with the Convention Against Torture.[1667] These laws ensured that all public officials engaged in the practice of torture should be charged accordingly.[1668] In addition, the penalty for torture was increased to reflect the gravity of the incident.[1669] However, the Committee noted that despite these efforts some significant problems in the Armenian legislation remain.[1670] In particular, the Committee Against

[1661] Institute for War and Peace Reporting (n1660).
[1662] Civil Society Institute and European Union *Torture in Armenia in 2013-2014: Situation Analysis* (European Union 2015) 78.
[1663] Ibid.
[1664] UNCAT 'Concluding Observation on the Fourth Periodic Report of Armenia' (26 January 2017) UN Doc CAT/C/ARM/CO/4 paras 8, 25, 38(d).
[1665] OHCHR 'Committee Against Torture considers report of Armenia' (*United Nations,* 24 November 2016) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20940&LangID=E> accessed 21 September 2018.
[1666] These include The Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, developed by the Organization for Security and Cooperation in Europe Guidelines and the Geneva Centre for Democratic Control of Armed Forces, *see* Ibid.
[1667] Criminal Procedure Code of the Republic of Armenia (1998, as amended in 2016) Chapter 2 'Principles of Criminal Proceedings', Article 11(7) states 'In the course of criminal proceedings, no one shall be subjected to torture, unlawful physical or mental violence, including the use of drugs, hunger, exhaustion, hypnosis, deprivation of medical aid, and any other cruel treatment. It shall be prohibited to use force, threats, fraud, violation of rights, and other unlawful methods while trying to obtain testimony from the suspect, the accused, the defendant, the injured party, the witness, and other persons participating in criminal proceedings'.
[1668] OHCHR 'CAT considers report of Armenia' (n1665).
[1669] Ibid.
[1670] Ibid.

Torture noted that a statute of limitations on torture remained in place,[1671] as did the possibility of an executive pardon for perpetrators of torture.[1672]

After declaring independence in 1991 Azerbaijan made similar efforts to ratify international conventions prohibiting torture. Azerbaijan ratified the International Covenant on Civil and Political Rights in 1992,[1673] the Convention Against Torture in 1996,[1674] and the European Convention on Human Rights in 2002.[1675] The ratification of the European Convention, the ratification of the Optional Protocol to the International Covenant on Civil and Political Rights in 2002,[1676] and the declaration under Article 22 of the Convention Against Torture in 2002[1677] further allowed individual complaints to international human rights bodies alleging torture.

Domestic legislation in Azerbaijan also prohibits torture. The definition of torture included in the Criminal Code of Azerbaijan until 2015, however, attracted criticism from international bodies.[1678] In particular, the interpretation of torture under the previous code was vague and did not require the direct or indirect involvement of a public official.[1679] The Committee Against Torture raised concerns about the definition of torture under the Azerbaijani Criminal Code, calling it ambiguous.[1680] In particular the Committee noted that the definition of torture did not include instances where torture is not systematic and does not result in severe harm,[1681] and it didn't include instances where an individual is tortured to illicit a confession or information from a third party.[1682] The Committee concluded that the Criminal

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[1671] Ibid.
[1672] Ibid.
[1673] OHCHR 'View the ratification status by country or by treaty: Azerbaijan' (*United Nations,* 2018) <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=11&Lang=EN> accessed 21 September 2018.
[1674] Ibid.
[1675] European Court of Human Rights 'Azerbaijan: Ratified the European Convention on Human Rights in 2002' (*European Court of Human Rights,* July 2018) <http://www.echr.coe.int/Documents/CP_Azerbaijan_ENG.pdf> accessed 21 September 2018.
[1676] OHCHR 'View the ratification status: Azerbaijan' (n1673).
[1677] Ibid.
[1678] Criminal Code of the Azerbaijan Republic (as amended in 2012) Section VIII Crime Against Individual, Chapter 18 Crime Against Life and Health, Article 133.
[1679] UNICEF (n1659) 4.
[1680] CAT 'Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observation of the Committee Against Torture: Azerbaijan' (8 December 2009) UN DOC CAT/C/AZE/CO/3, para 9.
[1681] Eldar Zeynalov 'Azerbaijan's 'Torture Chambers'' (*Institute for War and Peace Reporting,* 21 January 2000) <https://iwpr.net/global-voices/azerbaijans-torture-chambers> accessed 21 September 2018.
[1682] Ibid.

Code failed to criminalise actions that would constitute torture under the Convention Against Torture.[1683] Following these criticisms the Azerbaijani government reformed the Criminal Code in 2015. The definition of torture now specifically acknowledges the role members of the executive branch in the act torture, and defines torture as an act 'committed by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity'.[1684]

Belarus ratified the International Covenant on Civil and Political Rights in 1973, and the Convention Against Torture in 1987.[1685] Whilst Belarus ratified the Optional Protocol to the International Covenant on Civil and Political Rights in 1992, it failed to make a declaration under Article 22 allowing individual complaints to the Committee Against Torture,[1686] and also failed to ratify the Optional Protocol to the Convention Against Torture.[1687] As a result, individual complainants alleging torture can only be heard before the Human Rights Committee.

Nonetheless, torture is prohibited in domestic Belarusian law. According to the Belarusian constitution '(n)o-one shall be subjected to torture or cruel, inhuman or undignified treatment or punishment'.[1688] This article also seems to directly acknowledge the Soviet legacy of abusing psychiatric medicine as a form of repression, noting that '(n)o one shall be… subjected to medical or other experiments without his consent'.[1689] The Criminal Code of the Republic of Belarus also tangentially deals with torture in two articles. Article 394 of the Criminal Code establishes liability for 'coercing a suspect, an accused, a victim, or a witness to give testimony',[1690] for using violence or humiliation to coerce,[1691] and for using torture to

[1683] Ibid.
[1684] Human Rights Watch 'Azerbaijan: UN Criticizes Torture Record – Highlights Need to End Impunity, Free Rights Defenders' (*Human Rights Watch,* 11 December 2015) <https://www.hrw.org/news/2015/12/11/azerbaijan-un-criticizes-torture-record> accessed 21 September 2018.
[1685] OHCHR 'View the ratification status by country or by treaty: Belarus' (*United Nations,* 2018) <http://tbinternet.ohchr.org/layouts/TreatyBodyExternal/Treaty.aspx?CountryID=8&Lang=EN> accessed 21 September 2018.
[1686] Ibid.
[1687] Ibid.
[1688] The Constitution of Belarus (n1090) Section II 'Individual, Society, and the State', Article 25.
[1689] Ibid.
[1690] Criminal Code of the Republic of Belarus (1999 as amended in 2013) Article 394(1).
[1691] Ibid Article 394(2).

coerce.[1692] Article 426 of the Criminal Code also makes allusions to torture, prohibiting the abuse of power or official authority, although it does not specifically mention torture.[1693]

This definition has attracted criticism before the United Nations. In particular, in the NGO report on the implementation of Convention Against Torture, NGOS expressed concern that Article 392 of the Criminal Code separates torture from the use of violence or humiliation to coerce a suspect.[1694] In particular those NGOs expressed concern that this delineation would imply that incidents of violence or humiliation might not amount to torture.[1695] In addition, it was noted that Article 394 only applies to individuals held as a suspect, accused, victim, or witness, and therefore excludes criminal liability for torture against individuals not associated with an investigation.[1696] In particular, those NGOs noted that this definition means that criminal liability does not protect those who are tortured in prison, or those detained over administrative offences.[1697] The International Federation for Human Rights has concluded that the lack of a concrete definition in the Criminal Code of Belarus may result in a climate where the use of torture is not appropriately acknowledged or punished as required by Belarus' obligations under Article 4(2) of the Convention Against Torture.[1698]

Whilst Kazakhstan has ratified a number of international treaties prohibiting torture,[1699] and ratified and made declarations allowing individual communications to international human rights committees,[1700] the international human rights community expressed similar concerns

[1692] Ibid Article 394(3).
[1693] Ibid Article 426.
[1694] OHCHR 'NGO Report on the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in the Republic of Belarus' (*United Nations,* 2012) <http://www2.ohchr.org/english/bodies/cat/docs/ngos/belarusianNGOCoalition2_Belarus_CAT47.pdf> accessed 21 September 2018, 46.
[1695] Ibid.
[1696] Ibid 43.
[1697] Ibid 49.
[1698] International Federation for Human Rights (FIDH) 'International Fact-Finding Mission: Conditions of Detention in the Republic of Belarus' (*Council of Europe,* 1 October 2008) <https://www.osce.org/odihr/33759?download=true> accessed 21 September 2018, 10.
[1699] Kazakhstan accession to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment was in 1988, and its ratification of the International Covenant on Civil and Political Rights was in 2006, *see* OHCHR 'View the ratification status by country or by treaty: Kazakhstan' (*United Nations,* 2018) <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=89&Lang=EN> accessed 21 September 2018.
[1700] Kazakhstan made a declaration under Article 22 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 2008 allowing individual complaints to the Committee Against Torture, and additionally ratified the Optional Protocol to the International Covenant on Civil and Political Rights in 2009. *See* ibid.

about domestic legislation prohibiting torture to those expressed in Belarus and Azerbaijan. Whilst the Constitution of the Republic of Kazakhstan prohibits the use of torture,[1701] the previous definition of torture contained in the Criminal Code, received significant criticism from UNICEF.[1702] UNICEF criticised the previous definition noting that Article 141-1 did not require that the torture be committed by an individual acting in an official capacity[1703] Reforms began in 2013 with the establishment of a National Preventive Mechanisms under its obligations under the Optional Protocol to the Convention Against Torture.[1704] Those reforms were built on in 2015, and were welcomed by Amnesty International, and abolished the statute of limitations of the offence of torture, and increased the maximum punishment for torture to 12 years.[1705] These reforms built on Kazakhstan's establishment of a National Preventive Mechanism under its obligations under the Optional Protocol to the Convention Against Torture in 2013.[1706]

Alongside these legislative reforms, the Kazakh government has repeatedly asserted their commitment to upholding its international human rights obligations with respect to the prevention of torture, stating that it is committed to a zero-tolerance policy with respect to incidents of torture.[1707]

Like other CIS member states Kyrgyzstan also ratified various international human rights instruments that prohibit the use of torture, including the International Covenant on Civil and Political Rights,[1708] the Convention Against Torture,[1709] and the Optional Protocol to the International Covenant on Civil and Political Rights.[1710] Important reforms took place in 2012, when the definition of torture under domestic legislation was revised. Accordingly, under the Criminal Code of Kyrgyzstan torture was reclassified as a serious crime or a very

[1701] Constitution of Kazakhstan (n1097) Section I General Provisions, Article 17 'No one must be subject to torture, violence or other treatment and punishment that is cruel or humiliating to human dignity'.
[1702] UNICEF (n1659) 5.
[1703] Ibid.
[1704] Amnesty International *Dead End Justice: Impunity for Torture in Kazakhstan* (Amnesty International 2016) 55.
[1705] Ibid 22.
[1706] Ibid.
[1707] Ibid.
[1708] Kyrgyzstan's accession to the International Covenant on Civil and Political Rights was in 1994, *see* OHCHR 'View the ratification status by country or by treaty: Kazakhstan' (n1699).
[1709] Kyrgyzstan's accession to the Convention against Torture, and Other Cruel, Inhuman, or Degrading Treatment, or Punishment was in 1997, *see* ibid.
[1710] Kyrgyzstan's ratified the Optional Protocol to the International Covenant on Civil and Political Rights in 1994, *see* ibid.

serious crime,[1711] therefore negating the possibility of perpetrators avoiding prosecution should they 'reconcile' with the victim.[1712]

Around the same time as these reforms took place the Kyrgyzstan government produced the Manual on Effective Documentation of Violence, Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, a document established by the Kyrgyz government based on the equivalent UN manual.[1713] In conjunction with this manual the Ministry of Health has obligated its medical personnel to conduct investigations on suspected victims in conformity with international standards.[1714]

Tajikistan is also party to a number of international human rights convention that prohibit the use of torture, including the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights to which Tajikistan acceded in 1995 and 1999 respectively.[1715] Tajikistan's Constitution clearly establishes the prohibition on torture, noting that 'no one may be subjected to torture or cruel and inhuman treatment'.[1716] After previous criticism of Tajikistan's Criminal Code, the Tajik government undertook significant reform of its domestic legal provisions with respect to torture. In particular, a specific article criminalising torture was incorporated into the Tajik Criminal Code,[1717] and other aspects of the Tajik legal framework were adapted to better regulate arrest and detention.[1718] The UN Committee Against Torture concluded that the new definition within the Criminal Code was 'fully in line with Article 1 of the Convention'.[1719] Legislative reforms in Tajikistan have proven to be

[1711] The Criminal Code of the Kyrgyz Republic (n1247) Section VII Personal Crimes, Chapter 16 Crimes Against Life and Health, Article 305-1.
[1712] Open Society Foundations and the NGO Coalition against Torture in Kyrgyzstan 'Torture in Kyrgyzstan: Current concerns and recommendations' (*Open Society Foundations,* 18 May 2015) <http://iphronline.org/wp-content/uploads/2015/09/torture_in_kyrgyzstan_may_2015.pdf> accessed 21 September 2018.
[1713] OHCHR Professional Training Series No. 8/Rev.1: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) (United Nations 2004); *See* Ibid 4.
[1714] Ibid.
[1715] Human Rights Watch 'Kyrgyzstan: Ensure Accountability in Torture Case' (*Human Rights Watch,* 22 July 2016) <https://www.hrw.org/news/2016/01/24/kyrgyzstan-ensure-accountability-torture-case> accessed 21 September 2018.
[1716] The Constitution of the Republic of Tajikistan (1994, as amended in 2003), Article 18.
[1717] Institute for War and Peace Reporting 'Interview: Fighting Against Torture in Tajikistan' (*Institute for War and Peacekeeping,* 25 April 2016) <https://iwpr.net/global-voices/fighting-against-torture-tajikistan> accessed 21 September 2018.
[1718] Ibid.
[1719] UNCAT 'Concluding Observations on the Second Periodic Report of Tajikistan, Adopted by the Committee at its forty-ninth session 29 October-23 November 2012' (21 January 2013) UN Doc CAT/C/TJK/CO/2 para 6.

very successful on paper. Alongside these legal reforms, the Tajik government has adopted a number of other initiatives. In particular, the Tajik government passed a National Action Plan for the implementation of recommendations of the Committee Against Torture,[1720] and established a manual for judges and prosecution officials on how to investigate allegations of torture.[1721]

Nonetheless, international observers continue to express concerns about the drafting of current domestic legislation. The Committee Against Torture particularly noted that whilst revisions to the Tajik Criminal Code were welcome, the sanctions envisaged under the Code of five years or less for first time torturers, was not commensurate with the gravity of torture.[1722] The Committee therefore concluded that this would amount to a failure under Tajikistan's obligations under the Committee Against Torture under Articles 1 and 4,[1723] in particular its duty to ensure that the state make these offences punishable by appropriate penalties which take into account their grave nature.[1724] The Committee also expressed deep concern that the 2011 Law on Amnesty grants prosecutors the opportunity to 'commute, reduce, or suspend' the sentences of individuals convicted of torture.[1725] Furthermore, the Helsinki Foundation has criticised Tajikistan's failure to ratify the Optional Protocol to the Convention against Torture.[1726]

Finally, the Uzbek government have taken a number of positive steps to strengthen the prohibition of torture in domestic legislation;[1727] nevertheless some problems remain.[1728] In 1995 Uzbekistan ratified and acceded to both the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.[1729] In addition, Uzbekistan ratified the Optional Protocol to the

[1720] Parvina Narvuzova 'The Civil Society Coalition Against Torture in Tajikistan: Freedom from Torture in the Republic of Tajikistan' (*OSCE,* 3 October 2013) <https://www.osce.org/odihr/106546?download=true> accessed 21 September 2018, 1.
[1721] Ibid.
[1722] UNCAT 'Concluding Observations on the Second Periodic Report of Tajikistan' (n1719) para 6.
[1723] Ibid 9(d).
[1724] Ibid.
[1725] Ibid 7.
[1726] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan, May 2016' (*Helsinki Foundation for Human Rights,* May 2016) <http://www.hfhr.pl/wp-content/uploads/2017/08/Attachment-3_4_4-1-EN.pdf> accessed 21 September 2018.
[1727] Amnesty International *Secrets and Lies: Forced Confessions under Torture in Uzbekistan* (Amnesty International 2015) 35.
[1728] Ibid 7-8.
[1729] OHCHR 'View the ratification status by country or by treaty: Uzbekistan' (*United Nations,* 2018)

International Covenant on Civil and Political Rights in 1995, allowing individuals complaints alleging torture against Uzbekistan to be communicated to the Human Rights Committee.[1730] Uzbekistan has not, however, made the necessary declaration under Article 22 of the Convention Against Torture to permit individual communications to the Committee Against Torture,[1731] nor has it ratified the Optional Protocol to the Convention Against Torture.[1732]

The Uzbek Constitution strictly prohibits 'torture, violence, or any other cruel or humiliating treatment'.[1733] The Criminal Procedure Code of Uzbekistan reiterates this sentiment.[1734] Whilst the Uzbek Criminal Code does not specifically prohibit torture, it does prohibit the use of coercion to giving testimony, including mental or physical pressure.[1735] However problems with drafting remain and the Criminal Code is still overly narrow;[1736] and under Article 235 of the Uzbek Criminal Code only law enforcement individuals can be held to account for incidents of torture.[1737]

All CIS member states have introduced legislative reforms specifically prohibiting torture. Those provisions are an improvement on previous Soviet legislation, but these legislative reforms have experienced varying degrees of success. Whilst some states have demonstrated some success in incorporating international standards into domestic legislation, other states still have significant gaps in the legislation, whilst other do not have effective punishment for incidents of torture.

7.3 The Incidence of Torture in CIS Member States

Whilst the incidence and frequency of torture varies from state to state, in each CIS member state in this study, torture continues to present a serious problem..

<https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=189&Lang=EN> accessed 21 September 2018.
[1730] Ibid.
[1731] Ibid.
[1732] Ibid.
[1733] Ibid.
[1734] Criminal Procedure Code of the Republic of Uzbekistan (1994), Section One Basic Provisions, Chapter 2 Principles of Criminal Proceedings, Article 17.
[1735] Criminal Code of the Republic of Uzbekistan (1994) Chapter 16 Crimes Against Justice, Article 235.
[1736] Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 35-38.
[1737] Ibid 36.

In Armenia, incidences of torture are still apparent, but those incidents do not form part of a systemic practice within the state. The CoE noted that in 2015 whilst they continued to receive a small number of complaints about allegation of police ill-treatment, there has generally been significant improvement in the prevention of torture in the country since the Soviet era.[1738] These conclusions were reiterated by both the Civil Society Institute and the European Union in 2013 and 2014, where they concluded that whilst incidents of torture do occur in Armenia; generally they are unusual.[1739] Nonetheless, international bodies have emphasised that efforts to ensure torture entirely eradicated in the state need to continue.[1740] The International Rehabilitation Council for Torture reiterated these sentiments and expressed concern about reports on on-going police torture in the country.[1741]

However, in other CIS member states torture remains an endemic problem. In Azerbaijan, the UN Working Group on Arbitrary Detention described the incidents of torture in the country as being part of a litany of human rights abuses in the country.[1742] Similarly, in Belarus, for a long time after Belarusian independence, torture was described as being systemic in the country.[1743] However, in the last few years, the situation has seen some improvement and in 2016 there were no reports of deaths as a result of incidents of torture.[1744] As part of the recognition of the overall improvement in human rights situation, including the relative improvement regarding the incidence of torture in the state, in early 2016 the European Union lifted almost all of its sanctions against Belarus.[1745]

[1738] Council of Europe 'Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 15 October 2015' (*Council of Europe,* 22 November 2016) <https://rm.coe.int/16806bf46f> accessed 21 September 2018, 16.
[1739] Civil Society Institute and EU (n1662) 16.
[1740] Council of Europe 'Report to the Armenian Government' (n1738) 16.
[1741] International Rehabilitation Council for Torture Victims 'IRCT concerned about ongoing police violence in Armenia' (*IRCT,* 28 July 2016) <http://irct.org/media-and-resources/latest-news/article/650> accessed 21 September 2018.
[1742] Freedom House 'Azerbaijan: Nations in Transit 2017' (*Freedom House,* 2017) <https://freedomhouse.org/report/nations-transit/2017/azerbaijan> accessed 21 September 2018.
[1743] International Federation for Human Rights (FIDH) 'Death Penalty in Belarus: Murder on (Un)Lawful Grounds' (*FIDH,* 2016) <https://www.fidh.org/IMG/pdf/belarus683angbassdef.pdf> accessed 21 September 2018, 17.
[1744] Diplomacy in Action 'Belarus 2015 Human Rights Report' (*U.S. Department of State,* 2016) <https://www.justice.gov/sites/default/files/pages/attachments/2016/04/18/dos-hrr_2015_belarus.pdf> accessed 21 September 2018, 2.
[1745] Civil Rights Defenders 'Human Rights in Belarus' (*Civil Rights Defenders*, June 2016) <http://old.civilrightsdefenders.org/country-reports/human-rights-in-belarus/> accessed 21 September 2018.

In Kazakhstan, despite a 'strong legal and institutional framework' in the state,[1746] Amnesty International concluded that 'torture and ill-treatment by law enforcement bodies in Kazakhstan remains largely unchecked and unpunished'.[1747] As a result, the practice of torture and ill-treatment has remained prevalent throughout the country.[1748] In the first six months of 2016 the NGO Coalition Against Torture in Kazakhstan reported that it had received 80 complaints of torture, and the Kazakhstan International Bureau for Human Rights and Rule of Law (KIBHR) recorded 115 complaints of torture during the same period.[1749] In late 2016 the Kazakh Prosecutor General conceded that torture remained a problem in the country, despite continued executive efforts to tackle it.[1750] Echoing these sentiments, the National Preventative Mechanism in Kazakhstan concluded that the risk of human rights violations, including torture, was high at detention centres throughout the country.[1751]

Incidences of torture are similarly commonplace in Kyrgyzstan.[1752] In 2013 the United Nations Committee Against Torture noted in its concluding observations that it was 'deeply concerned about the ongoing and widespread practice of torture and ill-treatment of persons deprived of their liberty'.[1753] Incidences of torture are so prevalent in Kyrgyzstan that the Open Society Foundation and the NGO Coalition Against Torture in Kyrgyzstan have both concluded that torture is endemic in the country.[1754]

With respect to Tajikistan, Amnesty International has noted that torture, and other forms of ill-treatment, thrive in the climate of corruption and impunity in the country.[1755] These

[1746] Amnesty International *Dead End Justice* (n1704) 7.
[1747] Ibid.
[1748] Amnesty International 'Kazakhstan 2017/2018' (*Amnesty International,* 2018) <https://www.amnesty.org/en/countries/europe-and-central-asia/kazakhstan/report-kazakhstan/> accessed 21 September 2018.
[1749] Diplomacy in Action 'Kazakhstan 2017 Human Rights Report' (*U.S. Department of State,* 3 March 2017) <https://www.state.gov/j/drl/rls/hrrpt/2016/sca/265538.htm> accessed 21 September 2018.
[1750] Human Rights Watch 'Kazakhstan: Events of 2016' (*Human Rights Watch,* 2016) <https://www.hrw.org/world-report/2017/country-chapters/kazakhstan> accessed 21 September 2018.
[1751] Diplomacy in Action 'Kazakhstan 2016 Human Rights Report' (*U.S. Department of State,* 2016) <https://www.justice.gov/sites/default/files/pages/attachments/2017/03/06/dos-hrr2016kazakhstan.pdf> accessed 21 September 2018.
[1752] Amnesty International 'Kyrgyzstan 2017/2018' (*Amnesty International,* 2018) <https://www.amnesty.org/en/countries/europe-and-central-asia/kyrgyzstan/report-kyrgyzstan/> accessed 21 September 2018; Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 3.
[1753] Human Rights Watch 'Kyrgyzstan: Ensure Accountability' (n1715).
[1754] Open Society Foundation 'Case Watch: UN Rights Body Challenges Police Brutality in Kyrgyzstan' (*Open Society Foundations,* 8 February 2016) <https://www.opensocietyfoundations.org/voices/case-watch-un-rights-body-challenges-police-brutality-kyrgyzstan> accessed 21 September 2018.
[1755] Amnesty International 'Torture is 'routine'' (n673).

sentiments have been reiterated by the United Nations, and the Committee Against Torture has repeatedly criticised the Tajik government for its widespread use of torture against prisoners.[1756] Decisions by the Human Rights Committee reflect these concerns, where violations of the prohibition on torture have been found in numerous complaints.[1757] Whilst Tajikistan is not a party to the European Convention on Human Rights, a number of cases before the European Court have addressed the widespread practice of torture in the country.[1758] In particular, the principle of non-refoulement demands that refugees and asylum seekers should not be returned to a country where they would be at risk of persecution, including instances where their life or freedom would be threated.[1759] With respect to cases involving refugees challenging their extradition to Tajikistan the European Court of Human Rights has concluded that "the Court is ready to accept that illtreatment of detainees is an enduring problem in Tajikistan".[1760]

Finally, torture is similarly rife in Uzbekistan.[1761] Amnesty International has noted that torture is 'commonplace'[1762] in Uzbekistan, and plays a 'central role' in the Uzbek justice system.[1763] In fact Amnesty alleged that over a 15-year period hardly a day had passed without the NGO receiving a complaint of torture.[1764] In this vein, OSCE expressed deep concern that torture remains a persistent and endemic problem in Uzbekistan.[1765]

[1756] USCRIF 'Tajikistan Annual Report 2013' (*U.S. Commission on International Religious Freedom,* 2013) <https://www.uscirf.gov/sites/default/files/resources/Tajikistan%202013.pdf> accessed 21 September 2018.
[1757] Amnesty International *Shattered Lives: Torture and other Ill-Treatment in Tajikistan* (Amnesty International 2012) 19.
[1758] Ibid 6.
[1759] Convention Relating to the Status of Refugees (28 July 2951, entry into force 22 April 1954) 189 UNTS 137, Article 33(1).
[1760] *Khodzhayev v Russia* App no 52466/08 (ECtHR, 12 May 2010) para 98.
[1761] Amnesty International 'Uzbekistan: Fast Track to Torture' (*Amnesty International,* 2015) <https://www.amnesty.org/en/latest/campaigns/2016/04/uzbekistan-stop-torture/> accessed 21 September 2018; *see also* Diplomacy in Action 'Uzbekistan 2016 Human Rights Report' (*U.S. Department of State,* 3 March 2017) <https://www.state.gov/documents/organization/265766.pdf> accessed 21 September 2018; USCRIF 'USCRIF Recommended Countries of Particular Concern: Uzbekistan' (*U.S. Commission on International Religious Freedom* 2017) <http://www.uscirf.gov/sites/default/files/Uzbekistan.2017.pdf> accessed 21 September 2018.
[1762] Amnesty International 'Uzbekistan: Fast Track to Torture' (n1761).
[1763] Ibid.
[1764] Ibid.
[1765] International Partnership for Human Rights, Amnesty International, Association for Human Rights in Central Asia, Civic Solidarity Platform, Human Rights Watch '2015 OSCE Human Dimension Implementation Meeting, Warsaw, Statement for Working Session 4: Rule of Law I - A matter of international Concern: Endemic Torture in Uzbekistan' (*International Partnership for Human Rights,* 2015) <http://iphronline.org/wp-content/uploads/2015/09/OSCE-joint-written-statement-on-torture-in-Uzbekistan-September-2015.pdf> accessed 21 September 2018.

As a consequence, despite significant legislative reforms throughout CIS member states, torture remains a significant problem across those countries. Whilst the degree of problems with torture varies across all of those states it remains a problem in all member countries.

7.4 The Context of Torture in CIS Member States

As in the Soviet Union, methods of torture currently utilised in CIS member states include both physical and psychological torture.[1766] Physical methods of torture, commonplace in the Soviet Union,[1767] have been reported in all CIS member states. Methods have included extensive beatings,[1768] infliction of electric shocks,[1769] depriving chronically ill prisoners of medical treatment,[1770] burning victims with cigarettes,[1771] suffocation,[1772] deprivation of food and water,[1773] being stretched and hung in handcuffs,[1774] pouring boiling water over victims,[1775] sleep deprivation,[1776] and genital mutilation.[1777] One method of torture reportedly

[1766] Civil Society Institute and EU (n1662) 16.
[1767] *See* pp195-197
[1768] Council of Europe Human Rights Europe 'New anti-torture expert report on Armenia' (*Council of Europe,* 27 January 2015) <http://www.humanrightseurope.org/2015/01/new-anti-torture-experts-report-on-armenia/> accessed 21 September 2018; in Azerbaijan one such beating including the victim having his legs crushed in a vice *see* Zeynalov (n1681); International Federation for Human Rights 'International Fact-Finding Mission: Belarus' (n1698); Casey Michael 'Report: Torture in Kazakhstan Persists' (*The Diplomat,* 5 March 2016) <http://thediplomat.com/2016/03/report-torture-in-kazakhstan-persists/> accessed 21 September 2018; UN News Centre 'Kyrgyzstan must do more to prevent torture, end impunity for abuses – UN expert' (*United Nations,* 14 December 2011) <https://news.un.org/en/story/2011/12/398262-kyrgyzstan-must-do-more-prevent-torture-end-impunity-abuses-un-expert> accessed 21 September 2018; Amnesty International 'Torture is 'routine'' (n673); Amnesty International 'Torture in Uzbekistan: The Facts' (*Amnesty International,* 5 November 2015) <https://www.amnesty.org/en/press-releases/2015/11/torture-uzbekistan-facts/> accessed 21 September 2018; U.S. Department of State 'Uzbekistan: Diplomacy in Action 2016' (n1761); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 10.
[1769] Council of Europe 'New anti-torture expert report on Armenia' (n1768); Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; UN News Centre 'Kyrgyzstan must do more to prevent torture' (n1768); Amnesty International 'Torture is 'routine'' (n673); Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); CIVICUS 'On Torture and Arbitrary Detention in Uzbekistan and Turkmenistan, Report to UN Special Mechanisms' (*CIVICUS,* 3 March 2011) <http://www.civicus.org/images/stories/Eurasia/ReporttoUNSR-UzTk.pdf> accessed 21 September 2018, 13; Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 26.
[1770] Zeynalov (n1681).
[1771] Ibid; Amnesty International 'Torture is 'routine'' (n673).
[1772] *Jannatov v Azerbaijan* App no 32132/07 (ECtHR, 31 July 2014); Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; UN News Centre 'Kyrgyzstan must do more to prevent torture' (n1768).
[1773] *Jannatov v Azerbaijan* (n1772)*;* Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 9.
[1774] Jarl Hjalmarson Foundation 'Torture Used Against the Belarus Opposition' (*Jarl Hjalmarson Foundation* 1 March 2011) <http://www.hjalmarsonfoundation.se/2011/03/torture-used-aginst-the-belarus-opposition/> accessed 21 September 2018.
[1775] Amnesty International *Shattered Lives* (n1757) 18; CIVICUS (n1769) 24.
[1776] Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 9.
[1777] CIVICUS (n1769) 24, 39.

used in Armenia,[1778] Azerbaijan,[1779] Kyrgyzstan,[1780] and Uzbekistan[1781] involves a technique referred to as the 'elephant', where individuals are forced to wear a gas mark with a blocked air supply,[1782] or one that is pumped with noxious gas to simulate asphyxiation.[1783]

The use of rape as a torture technique is similarly not uncommon in some CIS member states.[1784] In Uzbekistan, the use of sexual humiliation is utilised particularly against secular detainees,[1785] in particular those of the persecuted Muslim minority.[1786] In Kazakhstan the use of rape to 'discipline' unruly female prisoners only came to light when a female who was repeatedly gang raped and beaten by four members of the prison staff gave birth to the biological child of one of the rapists.[1787]

In some instances the methods of torture have been so severe that some victims of torture died as a result of their physical mistreatment,[1788] or attempted suicide as a result of their experience.[1789] In one instance, the Armenian police arrested a victim on suspicion of distributing pornography.[1790] During her arrest, Boshyan was subjected to a number of threats, psychological pressure including the arbitrary imprisonment of her father, and forced to strip naked so police officers could take intrusive and non-consensual photographs of her.[1791] As a result of her experience Boshyan later attempted suicide.[1792] Similar incidents have been reported in Uzbekistan, where Muslim women, particularly those who wear the hijab and the jilbab, have been subjected to sexual humiliation in police custody.[1793] Many of

[1778] Council of Europe 'New anti-torture expert report on Armenia' (n1768).
[1779] Zeynalov (n1681).
[1780] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5.
[1781] CIVICUS (n1769) 13.
[1782] Zeynalov (n1681).
[1783] Council of Europe 'New anti-torture expert report on Armenia' (n1768).
[1784] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; Amnesty International 'Torture is 'routine'' (n673); Amnesty International *Shattered Lives* (n1757) 19; Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); CIVICUS (n1769) 21, 23; Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 9.
[1785] Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 9.
[1786] Ibid.
[1787] Amnesty International 'Kazakhstan 2017/2018' (n1748).
[1788] Diplomacy in Action 'Azerbaijan 2017 Human Rights Report' (*U.S. Department of State* 3 March 2017) <https://www.state.gov/documents/organization/277385.pdf> accessed 21 September 2018.
[1789] Diplomacy in Action 'Armenia 2015 Human Rights Report' (*U.S. Department of State* 13 April 2016) <https://www.state.gov/j/drl/rls/hrrpt/2015/eur/252819.htm> accessed 21 September 2018.
[1790] Ibid.
[1791] Ibid.
[1792] Ibid.
[1793] Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 9.

those women often report significant psychological and physical trauma as a result of the torture they endured at the hands of the Uzbek government.[1794]

Psychological torture is also common in CIS member states. The most common method of psychological torture in Armenia is threats made against the victim's family members.[1795] In Azerbaijan and Tajikistan those instances of intimidation have included threats to rape the victim's wife, daughters, and other family members;[1796] and the torture of various family members in the victim's presence.[1797] Threats of rape by police officers, prison guards, and other prisoners are also commonplace in Belarus.[1798] Others instances of psychological torture in CIS member states have included blackmail,[1799] humiliation,[1800] and insults.[1801] In Uzbekistan, security forces have reportedly utilised dogs in pre-charge detention centres to intimidate suspects.[1802]

Torture in CIS member states primarily occurs within closed and semi-closed institutions, where oversight over perpetrators is limited.[1803] The primary perpetrators of torture in CIS member states are members of the police force.[1804]

In Armenia, the Netherlands Helsinki Committee noted that they had received a number of allegations of police ill-treatment during arrest.[1805] Amnesty International and the US Department of State reiterated this, noting that the abuse of suspects by police during their arrest, detention, and interrogation remained a significant problem in the country.[1806] Similarly in Azerbaijan and Kazakhstan reports indicate that the use of torture in police

[1794] Ibid 27.
[1795] Council of Europe 'New anti-torture expert report on Armenia' (n1768).
[1796] Zeynalov (n1681); Amnesty International *Shattered Lives* (n1757) 26.
[1797] Zeynalov (n1681); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 26-27.
[1798] Zeynalov (n1681).
[1799] Amnesty International *Shattered Lives* (n1757) 19.
[1800] Ibid.
[1801] Ibid.
[1802] Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 27-28.
[1803] Civil Society Institute and EU (n1662) 19.
[1804] Ibid 19-24.
[1805] Netherlands Helsinki Committee 'Concerns over ongoing police brutality in Armenia' (*Netherland Helsinki Committee,* 2 August 2016) <https://www.nhc.nl/concerns-ongoing-police-brutality-armenia/> accessed 21 September 2018.
[1806] Diplomacy in Action 'Armenia 2016' (n1789); Amnesty International 'Azerbaijan 2017/2018' (*Amnesty International,* 2018) <https://www.amnesty.org/en/countries/europe-and-central-asia/azerbaijan/report-azerbaijan/> accessed 21 September 2018.

custody remains commonplace,[1807] including against peaceful citizens.[1808] The use of torture in Azerbaijan during arrest has reportedly resulted in a number of deaths,[1809] and a number of complaints to the European Court of Human Rights.[1810] Similarly, in Belarus the International Federation for Human Rights has noted that the risk of torture and ill treatment is particularly high during arrest, and the period shortly thereafter.[1811]

The pervasive and widespread use of torture by members of the police force in Tajikistan and Uzbekistan[1812] has had a number of wide reaching consequences. The extensive use of torture by police in Tajikistan has drastically undermined confidence and belief in the police force.[1813] Amnesty International reported that the mother of one victim of torture in the country concluded that '(t)he Police have become a source of threat, not of protection'.[1814] Human rights activists in the country have reiterated this noting that 'people are more frightened of the police than of crime'.[1815] In Uzbekistan the use of torture by the Uzbekistani National Security Service is so central to the Uzbek justice system, that there are reports that sound proof torture cells with padded walls have been installed in a number of police stations.[1816]

Other locations where the lack of oversight has resulted in torture becoming commonplace is behind the walls of penitentiary institutions.[1817] Torture has reportedly become widespread throughout prisons in Armenia,[1818] Belarus,[1819] Tajikistan,[1820] and Uzbekistan.[1821] The UN

[1807] Amnesty International 'Azerbaijan 2018/2018' (n1806); Zeynalov (n1681); Diplomacy in Action 'Kazakhstan 2016' (n1751).
[1808] Diplomacy in Action 'Azerbaijan 2017' (n1788).
[1809] Ibid.
[1810] *Mammadov v Azerbaijan* App no 81553/12 (ECtHR, 19 February 2015); *Hajili v Azerbaijan* App no 42119/12 (ECtHR, 24 November 2016).
[1811] International Federation for Human Rights 'Death Penalty in Belarus' (n1743) 35-36.
[1812] Diplomacy in Action 'Uzbekistan 2016' (n1761).
[1813] Amnesty International *Shattered Lives* (n1757) 16.
[1814] Ibid 5.
[1815] Ibid 12.
[1816] Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); Amnesty International 'Uzbekistan: Torture Plays 'Central Role' in Justice System – New Report' (*Amnesty International,* 15 April 2015) <https://www.amnesty.org.uk/press-releases/uzbekistan-torture-plays-central-role-justice-system-new-report> accessed 21 September 2018.
[1817] Civil Society Institute and EU (n1662) 67-71.
[1818] Amnesty International 'Armenia 2017/2018' (*Amnesty International,* 2018) <https://www.amnesty.org/en/countries/europe-and-central-asia/armenia/report-armenia/> accessed 21 September 2018.
[1819] Civil Rights Defenders (n1745).
[1820] Institute for War and Peace Reporting 'Fighting Against Torture in Tajikistan' (n1717).
[1821] International Partnership for Human Rights '2015 OSCE Human Dimension: Endemic Torture in Uzbekistan' (n1765) 1; Diplomacy in Action 'Uzbekistan 2016' (n1761).

Subcommittee on the Prevention of Torture particularly criticised the Kazakhstani prison system for overemphasising restrictions and punishment over reintegration and rehabilitation which they believed contributed to a climate which permitted torture and other forms of violence against detainees.[1822] These conclusions have been supported by reports from relatives, lawyers, monitors, human rights defenders, and journalists indicated that torture of prisoners was rife.[1823] In Azerbaijan the abuse of prisoners, including male, female, and juvenile detainees remains a similarly significant problem.[1824] Prisoners have alleged that members of the Ministry of Interior and other prison officials have engaged in incidents of torture, including incidents where they have burst into cells whilst wearing masks, accompanied by dogs, and beaten inmates with truncheons.[1825]

Another area where the lack of oversight has permitted a culture where torture has gone unchallenged is in the armed forces. In both the Armenian and Tajik armed forces torture is reported to be prevalent. According to various human rights organisations, within the Armenian armed forces there is a subculture based on a concept of 'manly behaviour', which leads to the acceptance of abuse within the military.[1826] This has led to significant mistreatment of conscripts and fellow officers with no accountability or punishment of offenders.[1827] Similar allegations have also been made against the military police, which has reportedly subjected soldiers and recruits to physical abuse whilst in custody.[1828] The Kazakh army faced analogous accusations, where torture is apparently widespread.[1829] This culture culminated in a situation where a conscript died in 2016 as a result of beatings by older recruits.[1830]

[1822] Human Rights Watch 'Kazakhstan: Events of 2016' (n1750).
[1823] Amnesty International 'Old Habits: The Routine Use of Torture and Other Ill-Treatment in Kazakhstan' (*Amnesty International,* July 2013) <https://www.amnesty.org/download/Documents/16000/eur570012013en.pdf> accessed 21 September 2018.
[1824] Diplomacy in Action 'Azerbaijan 2017' (n1788).
[1825] Council of Europe 'Report to the Azerbaijani Government on the visit to Azerbaijan carried out by European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), from 16 to 20 May 2005' (*Council of Europe,* 25 April 2017) <https://rm.coe.int/168070c2ea> accessed 21 September 2018, 6.
[1826] Diplomacy in Action 'Armenia 2015' (n1789) 6.
[1827] Ibid; Diplomacy in Action 'Armenia 2012 Human Rights Report' (*U.S. Department of State,* 19 April 2013) <https://www.state.gov/documents/organization/204468.pdf> accessed 21 September 2018, 3.
[1828] Diplomacy in Action 'Armenia 2015' (n1789).
[1829] Institute for War and Peace Reporting 'Fighting Against Torture in Tajikistan' (n1717).
[1830] Diplomacy in Action 'Tajikistan 2016 Human Rights Report' (*U.S. Department of State,* 3 March 2017) <https://www.state.gov/documents/organization/265762.pdf> accessed 21 September 2018.

One area that has generally seen significant improvement since the Soviet era as the abuse of psychiatric medicine, which has largely been eradicated in CIS member states. In 2016 the Netherlands Helsinki Committee noted that it had no allegation of torture or ill-treatment by members of staff in Armenian psychiatric facilities.[1831] However, in Uzbekistan the forcible psychiatric confinement of government dissidents remains problematic. In 2016 the chairperson of the Human Rights Alliance of Uzbekistan was forcibly placed under psychiatric hold, where she was beaten and forcibly given psychotropic substances.[1832]

7.5 Victims of Torture and Why Torture is utilised in CIS Member States

The use of torture remains prevalent in CIS member states for many of the same reasons that torture was commonplace in the Soviet Union. Primarily it allows the government to clampdown on any individual or group that is perceived as a threat to national security[1833] or to the government's hold on power.[1834] In addition, torture represents a method by which the executive can punish anyone who 'falls out of favour with the authorities'.[1835] Finally, torture remains a significant problem because continues to represent an easy and attractive option to members of the police in completion of their job.[1836]

a) Forced Confessions

The primary purpose of torture by police in CIS member states is to extract confessions from suspects.[1837] The use of torture to obtain confessions has been recorded in Armenia,[1838]

[1831] Netherlands Helsinki Committee (n1805).
[1832] Diplomacy in Action 'Uzbekistan 2016' (n1761).
[1833] Amnesty International 'Torture in Uzbekistan: The Facts' (n1768).
[1834] Amnesty International 'Uzbekistan: Torture plays 'Central Role'' (n1816).
[1835] Ibid.
[1836] Amnesty International *Shattered Lives* (n1757) 41-42.
[1837] Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (n1660); International Federation for Human Rights 'UN Committee against Torture to examine Armenia's record on torture' (*FIDH,* 9 May 2012) <https://www.fidh.org/en/region/europe-central-asia/armenia/UN-Committee-against-Torture-to> accessed 21 September 2018.
[1838] Diplomacy in Action 'Armenia 2012' (n1827) 1; UNCAT 'Concluding Observation on the Fourth Periodic Report of Armenia' (n1664) paras 13-14; Civil Society Institute and EU (n1662) 12.

Azerbaijan,[1839] Belarus,[1840] Kazakhstan,[1841] Kyrgyzstan,[1842] Tajikistan,[1843] and Uzbekistan.[1844] In these CIS member states police forces are extremely reliant on confessions to close criminal investigations. Torture remains a popular option for members of law enforcement because the use of torture circumvents the need for police officers to investigate the crime.[1845] It also ensures that the suspect becomes the primary source of information about the broader circumstances of the crime, and any accomplices involved in the crime.[1846] This salvages time from the investigation, alongside saving the human and material costs of an investigation.[1847] These factors have particular sway in CIS member states, where budgetary restrictions mean that police are 'overwhelmed by cases'.[1848]

The likelihood of an arrested individual being tortured depends on a number of factors. These factors include the type of crime the individual is accused of,[1849] the personal characteristics of the individual,[1850] and the previous criminal record of the individual.[1851] In addition, in circumstances where other evidence against the suspect is lacking the arrested individual is far more likely to be subjected to torture.[1852] In those instances, the Soviet legacy of police

[1839] Diplomacy in Action 'Azerbaijan 2016 Human Rights Report' (*U.S. Department of State,* 3 March 2017) <https://www.state.gov/documents/organization/265608.pdf> accessed 21 September 2018, 4; Penal Reform International *National Mechanisms for the prevention of Torture in the South Caucasus: Armenia, Azerbaijan, and Georgia* (Penal Reform International 2013) 12; Zeynalov (n1681).
[1840] Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (Amnesty International 2009) 6; Human Rights Watch 'In the Name of Security: Counterterrorism Laws Worldwide since September' (*Human Rights Watch,* 29 June 2012) <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11> accessed 21 September 2018; UN Watch 'It is time for Belarus to demonstrate that it respects minimal international standards' (*UN Watch,* 24 September 2015) <https://www.unwatch.org/it-is-time-for-belarus-to-demonstrate-that-it-respects-minimal-international-standards/> accessed 21 September 2018.
[1841] Amnesty International 'Old Habits: Kazakhstan' (n1823) 4; Casey Michael (n1768); Diplomacy in Action 'Kazakhstan 2016' (n1751).
[1842] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; Diplomacy in Action 'Kyrgyz Republic 2014 Human Rights Report' (*U.S. State Department,* 2015) <https://www.state.gov/documents/organization/236854.pdf> accessed 21 September 2018, 3.
[1843] Human Rights Watch 'Tajikistan: Events of 2015' (*Human Rights Watch,* January 2016) <https://www.hrw.org/world-report/2016/country-chapters/tajikistan> accessed 21 September 2018; Institute for War and Peace Reporting 'Fighting Against Torture in Tajikistan' (n1717).
[1844] Amnesty International *Amnesty International Report 2016/17: The State of the World's Human Rights* (Amnesty International 2017) 392; *see generally* Amnesty International *Secrets and Lies: Uzbekistan* (n1727); Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); International Partnership for Human Rights '2015 OSCE Human Dimension: Endemic Torture in Uzbekistan' (n1765) 2-4.
[1845] Amnesty International *Shattered Lives* (n1757) 41-42.
[1846] Ibid 15.
[1847] Ibid.
[1848] Ibid.
[1849] Civil Society Institute and EU (n1662) 16.
[1850] Ibid.
[1851] Ibid.
[1852] Ibid; Zeynalov (n1681).

belief in the need to obtain a confession to secure a conviction survives in modern day CIS member states.[1853]

Legislation in Azerbaijan specifically prohibits the use of threats or other unlawful actions to extract confessions.[1854] Nonetheless, the use of torture to obtain confessions remains commonplace.[1855] A number of allegations regarding the use of torture for prosecutorial purposes came to light in 2016. In one instance, a prominent activist, Elgiz Gahraman, was arrested for drug possession after he criticised a proposed constitutional change that would abolish the age limit for prospective presidential candidates.[1856] As a result of the arrest Gahraman was held incommunicado and reportedly tortured to obtain a confession for the allegations of drug possession.[1857] In a similar incident a number of members of the Muslim Unity Movement alleged that the police had tortured them into confessing to plotting to overthrow the government.[1858] In Armenia, the problem has been so great within the criminal justice system in the country that the Civil Society Institute has alleged that currently police lacked the technical capacity and professional skills to solve crimes without the use of torture.[1859] Instead, the Institute concluded that if torture were to be eliminated in Armenia, the police would not be able to solve a single crime in the country.[1860]

In Uzbekistan the use of torture is similarly unlawful, and a number of directives by the Plenum of the Supreme Court have explicitly prohibited its use in investigative proceedings.[1861] Nonetheless, Amnesty International has alleged that, in Uzbekistan, torture is pervasive and plays a 'central role' in the criminal justice system in the country.[1862] As a result, the courts in Uzbekistan rely heavily on confessions extracted under torture.[1863] Such is the scale of the problem that the UN Human Rights Committee has pressed the Uzbekistani

[1853] Ibid; Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (n1660).
[1854] Criminal Code of the Azerbaijan Republic (n1678) Article 177.
[1855] *See* Diplomacy in Action 'Azerbaijan 2016' (n1838).
[1856] Ibid 4.
[1857] Ibid.
[1858] Freedom House 'Azerbaijan: Nations in Transit 2017' (n1742).
[1859] Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (n1660).
[1860] Ibid.
[1861] International Partnership for Human Rights '2015 OSCE Human Dimension: Endemic Torture in Uzbekistan' (n1765) 2-4; CIVICUS (n1769) 19.
[1862] Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); International Partnership for Human Rights '2015 OSCE Human Dimension: Endemic Torture in Uzbekistan' (n1765) 2-4; Amnesty International 'Uzbekistan: Torture plays 'Central Role'' (n1816).
[1863] Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); International Partnership for Human Rights '2015 OSCE Human Dimension: Endemic Torture in Uzbekistan' (n1765) 2-4.

authorities to ensure that 'that the prohibition of forced confessions and the inadmissibility of torture-tainted evidence are effectively enforced in practice by law enforcement officers and judges'.[1864]

As in Armenia, Azerbaijan, and Uzbekistan, in both Belarus and Tajikistan criminal systems are built on the admission of guilt;[1865] a situation that encourages police officers to obtain a confession at any cost. As a result, the use of torture by members of the police officers and prison services to obtain confessions is unsurprisingly widespread in these countries.[1866] In Tajikistan, the motivations of using torture techniques are 'often stronger than the deterrents'[1867] given that police officials are 'unofficially assessed according to the number of crimes they solve'.[1868] By using torture police officers can avoid low crime statistics, retain their jobs, and increase the likelihood of promotion.[1869]

It is the prolificity of the use of torture to extract confession in Belarus, however that has garnered particular criticism from NGOs and the international community.[1870] Belarus has attracted such criticism as it is the only country in Europe that continues to use the death penalty.[1871] The international community has concurred that given the finality, inhumanity, cruelty, and severity of the death penalty,[1872] it should only ever be imposed after a fair trial, which has strictly adhered to rule of law and appeals standards.[1873] Amnesty International in particular has concluded that the use of confessions obtained under torture amount to a clear

[1864] UNHRC 'Concluding observations on the fourth periodic report of Uzbekistan' (17 August 2015) UN Doc CCPR/C/UZB/CO/4, para 14.
[1865] International Federation for Human Rights 'Death Penalty in Belarus' (n1743) 36; Freedom House 'Tajikistan: Nations in Transit 2016' (n1112).
[1866] Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (n1840) 6; Human Rights Watch 'In the Name of Security' (n1840); UN Watch (n1840); Human Rights Watch 'Tajikistan: Events of 2015' (n1843); Institute for War and Peace Reporting 'Fighting Against Torture in Tajikistan' (n1717).
[1867] Amnesty International *Shattered Lives* (n1757) 14.
[1868] Ibid.
[1869] Ibid.
[1870] Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (n1840) 6; Parliamentary Assembly of the Council of Europe 'The situation in Belarus: Doc. 12820' (*Council of Europe,* 9 January 2012) <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12917&lang=EN> accessed 29 September 2018.
[1871] Human Rights Watch 'World Report 2013: Belarus' (*Human Rights Watch,* 2013) <https://www.hrw.org/world-report/2013/country-chapters/belarus> accessed 21 September 2018.
[1872] Parliamentary Assembly 'The situation in Belarus Doc. 12820' (n1870).
[1873] Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (n1840) 21.

violation of those standards,[1874] and has resulted in a number of prominent miscarriages of justice.[1875]

Executions resulting from confessions allegedly obtained under torture have resulted in the execution of a number of individuals in the country. Two men convicted of the terrorist attacks on a Minsk metro station in 2011 were executed despite their allegations that they were tortured for their confessions.[1876] In another example, fourteen individuals were wrongly convicted of crimes committed by a serial rapist and killer.[1877] Each of those fourteen individuals reportedly confessed under torture,[1878] and one was executed for murder in 1987.[1879]

The use of torture to ensure confessions is not limited to serious crimes such as murder.[1880] Instead, in Belarus the use of torture to extract confessions has been utilised to ensure a conviction for far more minor crimes, such as hooliganism and unlawful acquisition.[1881] The preponderance of this practice has resulted in a series of complaints before the Human Rights Committee.[1882] However, the Belarusian government has carried out a number of executions despite requests from the Human Rights Committee that those executions be stayed during the Committee's investigation of allegations that confessions were obtained through torture.[1883] In six of those cases the Human Rights Committee concluded that confessions had been forced under torture, that there was a violation of the right to be presumed innocent, and there had additionally been a violation of the right to life in each instance.[1884] In addition, in Belarus, the use of torture to extract confessions is not limited to members of the police or

[1874] Ibid 20-28.
[1875] Ibid.
[1876] Human Rights Watch 'World Report 2013: Belarus' (n1871).
[1877] Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (n1840) 20.
[1878] Ibid.
[1879] Ibid.
[1880] International Federation for Human Rights 'Death Penalty in Belarus' (n1743) 48, 52.
[1881] Ibid.
[1882] *Kovaleva and Kozyar v Belarus* Communication No 2120/2011 CCPR/C/106/D/2120/2011; *Svetlana Zhuk v Belarus* Communication No 1910/2009 CCPR/C/109/D/1910/2009; *Yuzepchuk v Belarus* (n1585); *Selyun v Belarus* Communication No 2289/2013 CCPR/C/115/D/2289/2013; *Grishkovtsov v Belarus* (n1585); *Burdyko v Belarus* Communication No 2017/2010 CCPR/C/114/D/2017/2010.
[1883] International Federation for Human Rights 'Death Penalty in Belarus' (n1743) 22.
[1884] *Kovaleva and Kozyar v Belarus* (n1882); *Zhuk v Belarus* (n1882); *Yuzepchuk v Belarus* (n1585); *Selyun v Belarus* (n1882); *Grishkovtsov v Belarus* (n1585); *Burdyko v Belarus* (n1882).

prison service.[1885] There have been a number of reports of the use of 'pressmen'[1886] in the Belarusian justice system. In these instances planted special law enforcement officer or other detainees commit torture at the instigation of members of the executive, to extract a confession from another prisoner.[1887]

In Armenia and Kyrgyzstan the practice of using torture to obtain confession has evolved, and witnesses to crimes have also alleged that they have been tortured into order to force their testimony.[1888] In Kyrgyzstan police regularly summon individuals as 'witnesses'[1889] or ask them to attend the police station for 'a conversation'.[1890] By calling in those individuals as witnesses, or for a simple conversation, the police are not required to register them in the police system, which means that the individual has no access to safeguards under domestic law.[1891] In these instances the willingness of CIS courts to accept confessions obtained under torture, and the unwillingness of judges to investigate those allegations has resulted in a system that permit the ongoing use of torture within the justice system.

b) Punishment and deterrence

Another common use for torture in CIS member states is to punish individuals and groups who have fallen out of favour with the executive.[1892] The act of torture doesn't only punish those individuals, but further acts as a deterrent for individuals who might also challenge the executive rule.[1893]

One of those groups includes protestors.[1894] In Armenia, authorities have been accused of beating participants during protests,[1895] and in 2016 Human Rights Watch noted that police violence in the country had both intensified and become more frequent against peaceful

[1885] In one instance an eighteen year old detainee alleged that he was beaten not only by police officers but also by members of the local government, *see* Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (n1840) 22-23.
[1886] International Federation for Human Rights 'International Fact-Finding Mission: Belarus' (n1698) 10.
[1887] Ibid.
[1888] Civil Society Institute and EU (n1662) 17.
[1889] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 8.
[1890] Ibid.
[1891] Ibid.
[1892] Amnesty International 'Uzbekistan: Torture plays 'Central Role'' (n1816).
[1893] *See for example A.A. v Azerbaijan* (n1460); *Avadanov v Azerbaijan* (n1455); *Valetov v Kazakhstan* (1466); *Gerasimov v Kazakhstan* (n1451).
[1894] *Tahirova v Azerbaijan* App no 47137/07 (ECtHR, 3 October 2013).
[1895] Human Rights Watch 'Armenia: Events of 2016' (*Human Rights Watch,* 30 July 2016) <https://www.hrw.org/world-report/2017/country-chapters/armenia#e7d7ad> accessed 21 September 2018.

protestors.[1896] The Netherlands Helsinki Committee supported these assertions, noting that the violence utilised by police during the protests was thoroughly disproportionate to the risk by the peaceful protestors.[1897] They further concluded that evidence demonstrated that individuals were later tortured in police custody.[1898]

Torture has also been utilised against journalists in a number of CIS member states.[1899] As recently as 2017 the Azerbaijani journalist and political, Mehman Huseynov, was tortured in police custody. Huseynov is the chairman of the Institute for Reporters' Freedom and Safety and is known in the country for hard-hitting exposes of corruption by senior Azerbaijani officials.[1900] During his time in custody Huseynov was reportedly gagged and blindfolded, before having an electroshock weapon applied to his groin. Reporters Without Borders condemned the arrest and torture of Huseynov concluding that it was 'another example of continued repression against journalists in Azerbaijan'.[1901] The precedent of torture of journalists in the country is reflected in communications to the Human Rights Committee. A number of journalists have made complaints alleging torture committed by members of the executive on the basis of their profession.[1902] Similarly in Belarus and Tajikistan a number of independent journalists critical of the respective executive branch have alleged torture at the hands of government actors.[1903]

Unsurprisingly, members of the political opposition and government critics have also faced torture at the hand of the executive. The use of torture against members of the political opposition and government critics has been reported in Armenia,[1904] Azerbaijan,[1905]

[1896] Ibid; Amnesty International 'Armenia 2017/2018' (n1818).
[1897] Netherlands Helsinki Committee (n1805).
[1898] Ibid.
[1899] Ibid.
[1900] Human Rights Watch 'Azerbaijani Journalist Mehman Huseynov' (*Human Rights Watch,* 2 May 2017) <https://www.hrw.org/news/2017/05/02/free-azerbaijani-journalist-mehman-huseynov> accessed 21 September 2018.
[1901] Reporters Without Borders 'Rights Groups Demand Justice for journalist Mehman Huseynov Tortured in Azerbaijan' (*Reporters Without Borders,* 12 January 2017) <https://rsf.org/en/news/rights-groups-demand-justice-journalist-mehman-huseynov-tortured-azerbaijan> accessed 21 September 2018.
[1902] *HajilI v Azerbaijan* (n1810); *Mammadov v Azerbaijan* (n1810); *Mehdiyev v Azerbaijan* App no 59075/09 (ECtHR 18 June 2015); *Huseynov v Azerbaijan* App no 59135/09 (ECtHR 7 May 2015)*; Jafarov v Azerbaijan* App no 54204/08 (ECtHR, 29 January 2015)*; Najafli v Azerbaijan* App no 2594/07 (ECtHR, 2 October 2012)*; Rizvanov v Azerbaijan* App no 31805/06 (ECtHR, 17 April 2012).
[1903] Human Rights Watch 'Armenia: Events of 2016' (n1900); Amnesty International 'Torture is 'routine'' (n673).
[1904] Amnesty International 'Armenia 2017/2018' (n1818).
[1905] Penal Reform International (n1839) 5.

Belarus,[1906] Tajikistan,[1907] and Uzbekistan.[1908] In 2013 the leader of the opposition in Armenia, Harutyunyan, alongside thirteen other opposition activists, was arrested and tortured during their time in police custody.[1909] More recently in 2016, opposition activist Sefilian was arrested in Armenia on allegations of illegals armed possession.[1910] The arrest prompted anti-government protests, which the police dispersed with excessive force including using stun grenades and tear gas.[1911] After protestors were detained, a number of individuals reported being severely beaten during their arrest and detention.[1912]

Similar issues have arisen in Tajikistan. In 2016, fourteen members of the Islamic Renaissance Party in Tajikistan were arrested and tortured while in detention.[1913] Other political prisoners have also claimed to be victims of torture during their time in torture, whilst their lawyers and relatives report being intimated and unlawfully detained.[1914]

In Azerbaijan the use of torture during mass politically motivated arrests has been commonplace, particularly between the years of 1993 and 2000.[1915] Over the last eighteen years the use of torture against members of opposition has become less common, but nonetheless still represents a problem in the country.[1916] In 2016, a number of activists and government critics in Azerbaijan were arrested and tortured during their time in detention.[1917] The UN Working Group on Arbitrary Detention visited a number of activists in detention, where the Working Group confirmed their allegations of torture and ill-treatment during their time in custody.[1918] As recently as 2017-18, members of the opposition Muslim Unity

[1906] Parliamentary Assembly 'The situation in Belarus' (n1870); International Federation for Human Rights 'International Fact-Finding Mission: Belarus' (n1698) 5.
[1907] Amnesty International 'Tajikistan: A Year of Secrecy, growing Fears and Deepening Injustice' (*Amnesty International,* 19 September 2016) <https://www.amnesty.org/download/Documents/EUR6048552016ENGLISH.pdf> accessed 22 September 2018; John Heathershaw and Edward Lemon 'After 25 years of independence, Tajikistan is a bastion of torture and repression' (*The Conversation,* 7 September 2016) <https://theconversation.com/after-25-years-of-independence-tajikistan-is-a-bastion-of-torture-and-repression-64945> accessed 22 September 2018; Freedom House 'Tajikistan: Nations in Transit 2016' (n1112).
[1908] Amnesty International 'Torture in Uzbekistan: The Facts' (n1768).
[1909] Amnesty International 'Armenia 2017/2018' (n1818).
[1910] Ibid.
[1911] Ibid.
[1912] Ibid.
[1913] Amnesty International Public Statement 'Tajikistan: A Year of Secrecy' (n1907).
[1914] Heathershaw and Lemon (n1907).
[1915] Penal Reform International (n1839) 15.
[1916] Ibid.
[1917] Amnesty International 'Azerbaijan 2017/2018' (n1806).
[1918] Ibid.

Movement also alleged to being tortured whilst in police custody.[1919] After their arrest on charges of attempting to overthrow the government, the members of the Muslim Unity Movement were then tortured to ensure their confessions to those crimes.[1920]

Torture has also been used against other critics of the government in Azerbaijan. In particular human rights defenders and members of human rights organisations have been detained and tortured. This practice has been criticised by the UN Committee Against Torture[1921] and Human Rights Watch,[1922] but despite significant evidence to the contrary government has consistently and categorically denied these allegations.[1923]

Another group that has been on the receiving end of torture in CIS member states are minorities, including religious, racial and LGBT+ minority groups. In Azerbaijan, Kazakhstan, Tajikistan, Uzbekistan members of respective religious minorities have all reported torture and other ill-treatment at the hands of the executive. In Azerbaijan members of the political Muslim Unity Movement and the associated minority religious Shiite Muslim community have been repeatedly arrested and subject to torture whilst in police custody.[1924] Similarly, in Kazakhstan and Tajikistan members of Islamic groups have both been targeted and tortured by members of the government.[1925] In Uzbekistan, the problem is particularly pronounced and in 2014 alone twenty-three jailed Muslims were tortured to death,[1926] as part of a broader efforts to harass and persecute individuals suspected of 'religious extremism'.[1927]

[1919] Freedom House 'Azerbaijan: Nations in Transit 2017' (n1742).
[1920] Ibid.
[1921] Human Rights Watch 'Azerbaijan: UN Criticizes Torture Record' (n1684).
[1922] Ibid.
[1923] Ibid.
[1924] Amnesty International 'Azerbaijan 2017/2018' (n1806); Diplomacy in Action 'Azerbaijan 2017' (n1788); Freedom House 'Azerbaijan: Nations in Transit 2017' (n1742).
[1925] Amnesty International *Shattered Lives* (n1757) 17; Mushfig Bayram 'Tajikistan: Protestant Pastor Jailed for three years' (*Forum 18, 18* 20 July 2017) <http://www.forum18.org/archive.php?article_id=2298> accessed 21 September 2018.
[1926] *See also* Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 62; CIVICUS (n1769) 6-8; Mansur Mirovalev 'Torture and death for Uzbek Muslims in jail' (*Al Jazeera* 7 January 2015) <http://www.aljazeera.com/indepth/features/2015/01/torture-death-uzbek-muslims-jail-201516102547473124.html> accessed 22 September 2018; Mushfig Bayram 'Uzbekistan: Torture, prison for 'illegal' religious materials' (*Forum 18,* 19 December 2016) <http://www.forum18.org/archive.php?article_id=2241> accessed 22 September 2018; Diplomacy in Action 'Uzbekistan 2016' (n1761).
[1927] Diplomacy in Action 'Uzbekistan 2016' (n1761).

In Kyrgyzstan members of the oppressed racial minority, the ethnic Uzbeks, have found themselves at particular risk of torture and ill-treatment at the hands of the executive.[1928] Finally, members of the LGBT+ community in a number of CIS member states have also been targeted and tortured by government agents. In Belarus, a number of openly gay LGBT+ activists and other members and supporters of the LGBT+ community have been arrested and beaten whilst in police custody.[1929] Similarly in both Tajikistan and Uzbekistan openly gay men are repeatedly targeted for arrest and torture at the hands of members of the police force.[1930]

7.6 Impunity in Practice

Torture continues to thrive throughout CIS member states for a myriad of reasons. In particular police often lack the technical capacity to monitor areas of detention and interrogation,[1931] legal awareness amongst members of the population is lacking,[1932] and the practice of torture is still tolerated by some members of the public.[1933] However, it is in the incidence of torture where the far-reaching effects of a failure to secure adequate and effective standards of judicial independence and impartiality can also be seen. In particular, the impact of judicial impunity for acts of torture is apparent in its ongoing use within the judicial system.

The prohibition of torture requires states not only to refrain from acts of torture, but also to conduct a 'proper, effective investigation and punish the perpetrators by appropriate penalties reflecting the gravity of the crime'.[1934] Nonetheless, across the CIS member states investigations into allegations of torture are generally inadequate and ineffectual in practice. In addition, punishments for individuals who have committed torture tend to be either non-existent or disproportionately lenient.

[1928] Canada 'Immigration and Refugee Board of Canada' (*Government of Canada,* 12 February 2015) <https://www.justice.gov/eoir/file/874501/download> accessed 22 September 2018.
[1929] Joint Submission by GayBelarus and the Sexual Rights Initiative 'Response to Universal Periodic Review of Belarus May 2015' (*GayBelarus and SRI,* May 2015) <http://www.sexualrightsinitiative.com/wp-content/uploads/Belarus-GAYBELARUS-Final.pdf> accessed 22 September 2018.
[1930] Amnesty International *Shattered Lives* (n1757) 15.
[1931] Civil Society Institute and European Union (n1662) 20.
[1932] Freedom House 'Armenia: Nations in Transit 2016' (n1280).
[1933] Civil Society Institute and European Union (n1662) 23.
[1934] Civil Society Institute and Eurpean Union (n1662) 30.

According to a CoE report in 2015 no law enforcement official has ever been convicted of torture in Armenia.[1935] This has been in a large part due to legislative gaps in the Armenia Criminal Code, which does not encompass crimes committed by public officials.[1936] Lawyers representing victims of torture in Armenia have criticised the system, noting that even in rare circumstances where a criminal case is instigated against a perpetrator of torture, the case will inevitably later be closed.[1937] A lawyer concluded that 'the judicial system [in Armenia] is not generally ready to curb mistreatment'. [1938] The Civil Society Institute and European Union reiterated this conclusion noting that that there had been little progress made with respect to combatting impunity for torture in Armenia,[1939] contributing to the lack of trust in the justice system of Armenia.[1940]

The situation is little better in Azerbaijan where authorities have also failed to secure a single conviction for allegations of torture in the country[1941] and impunity for the crime remains a significant problem.[1942] Like Armenia, Azerbaijan's government has consistently failed to secure a prompt, efficient, and impartial mechanism for investigating allegations of torture in the state despite hundreds of complaints being filed over recent years.[1943] Similarly, in Belarus the Special Rapporteur on the Situation in Belarus has consistently highlighted the prevalence of torture in the country,[1944] noting with concern that allegations of these incidents rarely lead to criminal investigations.[1945]

The situation is little better in Kazakhstan. In its concluding observations in 2014 the Committee Against Torture noted that convictions for torture were secured in less than two per cent of complaints.[1946] Despite legislative reforms that came into effect at the beginning

[1935] Commissioner for Human Rights 'Report by Nils Muižnieks: Commissioner for Human Rights of the Council of Europe' (*Council of Europe,* 10 March 2015) <https://rm.coe.int/16806db6db> accessed 22 September 2018, para 62.
[1936] Ibid para 47.
[1937] Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (n1660).
[1938] Ibid.
[1939] Civil Society Institute and EU (n1662) 77.
[1940] Ibid 77.
[1941] Human Rights Watch 'Azerbaijan: UN Criticizes Torture Record' (n1684).
[1942] Diplomacy in Action 'Azerbaijan 2016' (n1838); Reporters Without Border (n1901).
[1943] Human Rights Watch 'Azerbaijan: UN Criticizes Torture Record' (n1684).
[1944] International Federation for Human Rights 'Death Penalty in Belarus' (n1743) 22.
[1945] Civil Rights Defenders (n1745).
[1946] OHCHR 'Committee Against Torture considers the report of Kazakhstan' (*United Nations,* 18 November 2014) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15309&LangID=E> accessed 21 September 2018.

of January 2015[1947] little seems to have changed in practice.[1948] In particular many law enforcement officials in Kazakhstan simply refuse to officially register allegations of torture, and any injuries are attributed to accidents or natural causes.[1949] As a result conviction rates for torture in Kazakhstan remained so low in 2016 that Amnesty International concluded that impunity for torture remained a commonplace feature of the Kazakh legal system.[1950]

Despite Kyrgyzstan's obligations under international law[1951] impunity for torture is the norm.[1952] In 2013 the Committee Against Torture noted that there had been a 'persistent pattern of failure to conduct prompt, impartial and full investigations into the many allegations of torture and ill-treatment'.[1953] This is reflected in the statistics regarding torture complaints in the country. Of the 485 complaints of torture and other ill-treatment reported to the Prosecutor General's Office between 2013 and 2014, only 34 criminal proceedings were initiated.[1954] Between 1994 and 2015 the Human Rights Committee received seven complaints of torture and other forms of ill-treatment, and in each instance it concluded that there should be an effective investigation into the accusation, and that any and all perpetrators should be brought to justice.[1955] However NGOs working in Kyrgyzstan have concluded that, in practice, none of these rulings have been implemented.[1956]

Impunity also remains commonplace in both Tajikistan and Uzbekistan.[1957] In Tajikistan, the situation is so extreme that Amnesty International concluded that it has created an environment where police abuse goes 'virtually unchecked'.[1958] The Committee Against Torture has raised similar concerns, and expressed discontentment with the very small

[1947] See pp203-203
[1948] OHCHR 'CAT Considers the Report of Kazakhstan' (n1946).
[1949] Ibid.
[1950] Amnesty International *Dead End Justice* (n1704) 6; Amnesty International 'Old Habits: Kazakhstan' (n1823) 2; Human Rights Watch 'Kazakhstan: Events of 2016' (n208).
[1951] See pp204-204
[1952] Human Rights Watch 'Kyrgyzstan: Ensure Accountability' (n1715).
[1953] UNCAT 'Concluding Observations on the Second Periodic Report of Kyrgyzstan' (20 December 2013) UN Doc CAT/C/KGZ/CO/2, para 6; Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5.
[1954] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 12.
[1955] *Akunov v Kyrgyzstan* (27 December 2016) Communication 2127/2011 CCPR/C/118/D/2127/2011; Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 12; Amnesty International 'Torture in Uzbekistan: The Facts' (n1768).
[1956] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 13.
[1957] Amnesty International 'Torture is 'routine'' (n673); International Partnership for Human Rights '2015 OSCE Human Dimension: Endemic Torture in Uzbekistan' (n1765) 3.
[1958] Amnesty International *Shattered Lives* (n1757) 5.

number of convictions as compared to the numerous allegations of torture.[1959] Similarly in Uzbekistan torture is rarely investigated or punished.[1960] The Committee Against Torture and the Human Rights Committee have both expressed concern about impunity in the country, noting that there is a significant difference between the number of complaints of torture and the number of convictions.[1961]

The ongoing impunity for executive abuses of the right to freedom from torture is in part because of the ineffective investigative mechanisms in those states. In some CIS member states there are no specialised reporting and monitoring mechanisms in place. In Tajikistan numerous international bodies have expressed concerns about the failure of the Tajik government to establish an independent mechanism to investigate allegations of torture and mistreatment. The Special Rapporteur on Torture, the Committee Against Torture, and the Human Rights Committee have all urged the Tajik government to create an independent mechanism,[1962] but the Tajik government has consistently refused to do so.[1963] The Committee Against Torture have noted similar issues in Belarus, and criticised the failure of the Belarusian government to secure an independent and effective mechanism for investigating allegations of torture in the country.[1964] The failure of the Belarusian government has received particular condemnation given the continued use of the death penalty in the country.[1965] The Human Rights Committee has reiterated these concerns, noting that cases are not investigated by an independent body and the number of convictions is extremely small.[1966] In this vein both human rights bodies have repeatedly called on Belarus to ratify the Optional Protocol to the Convention Against Torture, and establish a National Preventative Mechanism in the country to monitor places of detention in the state.[1967] Similar calls have been made by the Human Rights Committee in Kyrgyzstan,

[1959] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan' (n1726).
[1960] Amnesty International 'Torture in Uzbekistan: The Facts' (n1768).
[1961] Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 11-12.
[1962] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan' (n1726); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 12.
[1963] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan' (n1726).
[1964] Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (n1840) 23-24.
[1965] Ibid.
[1966] International Federation for Human Rights 'International Fact-Finding Mission: Belarus' (n1698) 9.
[1967] UN Watch (n1840).

where it has implored the Kyrgyz government to take effective steps to ensure a full and impartial mechanism for investigating allegations of torture is established in the country.[1968]

Where mechanisms for investigation allegations of torture do exist in CIS member states, those mechanisms are not effectively independent and impartial.

A large part of the problem with impunity in Kazakhstan is due to the fact that preliminary screenings of allegations were handled by the Internal Investigations Department, a law enforcement agency that has been repeatedly accused of abuse.[1969] Amnesty has highlighted the 'corporate solidarity'[1970] between various law enforcement agencies, a culture of 'back scratching' and the desire to avoid conflict between departments as another reason why the Internal Investigations Department is ineffectual in this role.[1971] Instead there is an assumption amongst investigating authorities throughout the majority of investigations that the complainant is lying, and has alleged torture to avoid criminal liability for the crime that they are accused of.[1972] This assumption has resulted in a culture of investigation where prosecutors and investigators routinely ignore the testimony of the complainant and other witnesses, and disregard relevant forensic and medical evidence.[1973] Even when complaints reach the Prosecutor General's Office, the office ultimately responsible for investigating allegations of torture in Kazakhstan, there is another conflict of interest. The prosecutors' offices have a vested interest in securing convictions and put pressure on the Prosecutor General's Office to dismiss claims of torture on the basis that they were fabricated to conceal a complainant's guilt.[1974] The Kazakh government sought to rectify this problem in 2011 when it established a number of Special Prosecutor's Units as part of a distinct prosecutorial division. However, whilst Special Prosecutor's Units have on occasion been effective in investigating allegations of torture,[1975] their involvement has been haphazard, and often reliant on factors such as the public profile of the victim.[1976]

[1968] Human Rights Watch 'Kyrgyzstan: Ensure Accountability' (n1715).
[1969] Amnesty International *Dead End Justice* (n1704) 9.
[1970] Ibid 10.
[1971] Ibid.
[1972] Ibid 35.
[1973] Ibid 9; Casey Michael 'Report: Torture in Kazakhstan Persists' (n1768).
[1974] Amnesty International *Dead End Justice* (n1704) 35.
[1975] Ibid 11.
[1976] Ibid.

Similar concerns about the lack of independence and impartiality of investigating bodies in Armenia and Uzbekistan. The UN Human Rights Committee has expressed significant concerns about the absence of a genuinely independent mechanism to investigate allegations of torture in Armenia.[1977] In the rare instances where an investigation into an allegation of torture is opened, the impartiality and independence of the inquiry is compromised because the investigation will most often be led by other members of the police force.[1978] This is despite the fact that a Special Investigative Service was specifically set up to investigate abuse by individuals in public office.[1979] In Uzbekistan where there are allegations of torture there is a similar tendency to task the same law body accused of torture or mistreatment with the job of investigating the allegation.[1980] Unsurprisingly, investigations are most often poorly executed, and investigators will fail to interview witnesses, doctors, or the alleged perpetrators, [1981] and fail to collect medical and forensic evidence.[1982]

Impunity for torture has also survived in modern day CIS member states because of executive charging decisions. As a result, even in the rare instances where an investigation is completed, and a prosecution pursued, perpetrators are either charged with alternative crimes, or given inappropriately permissive sentences. In Azerbaijan, instead of charging individuals with torture, perpetrators have been convicted of lesser crimes and sentenced to disproportionately lenient sentences.[1983] In Armenia, when police officers or other public officials have committed acts of torture they have traditionally been convicted of far lesser offences.[1984] Prior to 2015, it was common practice for the Armenian government to grant a general amnesty, which covered a number of human rights abuses including the perpetration

[1977] Diplomacy in Action 'Armenia 2012' (n1827) 3.
[1978] International Federation for Human Rights 'UN Committee against Torture to examine Armenia's record on torture' (n1837).
[1979] Ibid.
[1980] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan' (n1726); Amnesty International 'Torture in Uzbekistan: The Facts' (n1768); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 11; International Partnership for Human Rights '2015 OSCE Human Dimension: Endemic Torture in Uzbekistan' (n1765) 3-4.
[1981] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan' (n1726); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 10-11.
[1982] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan' (n1726); Amnesty International *Secrets and Lies: Uzbekistan* (n1727) 68.
[1983] In one example an investigator who raped the mother of a defendant was convicted of disorderly acts rather than torture. *See* Penal Reform International (n1839) 13.
[1984] For example, 'abuse of office'; *see* Commissioner for Human Rights 'Report by Nils Muižnieks' (n1935).

of torture.[1985] A similar problem has arisen in Belarus, where incidents of torture are tried under alternative, lesser articles such as 'exceeding official authority'.[1986] Amnesty International has concluded that charging decisions are in large part due to the failure to specifically define torture in the Belarusian criminal code.[1987] This situation is exacerbated by the absence of specific procedural guidelines that dictate how the Belarusian government should deal with complaints of torture.[1988] In Tajikistan, perpetrators of torture are similarly charged with and tried under less serious criminal articles, such as negligence and abuse of authority, rather than torture.[1989] The Helsinki Foundation for Human Rights concluded that these charging decisions amounted to a 'conscious attempt to keep torture statistics low'.[1990] In the rare instances where a perpetrator is successfully tried for the crime of torture, it rarely results in an adequate sentence. In 2015 of the five convictions for torture in Kazakhstan, only one resulted in a prison sentence.[1991]

Impunity for torture has also been permitted in Armenia and Kazakhstan because historically there have been no effective mechanisms in practice to prevent reprisals against complainants. In one instance the editor in chief of a prominent Armenian news outlet made a complaint of torture by members of the police before the domestic courts. In retaliation a criminal case was opened against him for a variety of spurious charges, including providing false information and using of threatening violence against a representative of the authorities.[1992] In other examples the relatives of complainants have been detained and mistreated as a result of the victim's complaint.[1993]

[1985] Commissioner for Human Rights 'Report by Nils Muižnieks' (n1935) 18; Civil Society Institute and EU (n1662) 19.
[1986] Criminal Code of the Republic Belarus (n1690) Article 426.
[1987] Amnesty International *Ending Executions in Europe: Towards Abolition of the Death Penalty in Belarus* (n1840) 24.
[1988] Ibid 25.
[1989] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan 'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan' (n1726).
[1990] Ibid.
[1991] Amnesty International *Dead End Justice* (n1704) 8-9.
[1992] Willy Fautre 'Human Rights in Armenia, Member State of the Eurasian Economic Union: State of Play in 2015 and Perspectoves' (*Human Rights Without Frontiers International,* 2015) <http://hrwf.eu/wp-content/uploads/2015/07/Human-Rights-in-Armenia-State-of-of-Play-in-2015-and-Perspectives.pdf> accessed 22 September 2018, 24.
[1993] Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (n1660).

In Kazakhstan, the fact that police continue to investigate allegations of police abuse and torture has heightened the fear of reprisals.[1994] The European Union and the Civil Society Institute concluded that this had resulted in a vicious circle, whereby

> a police officer who beats a person summoned to police and is not brought to justice, later on continues to resort to violence. The colleagues of this police officer who witnessed his impunity follow his pattern.[1995]

7.7 Conclusion

Despite improvements in domestic legislation prohibiting torture in CIS member states, it is clear that legislative reforms alone are insufficient. In each CIS member state torture remains a clear and present issue. The incidence of torture in CIS member states is clearly effected by the standards of judicial independence and impartiality achieved in those countries. Whilst failure to secure adequate standards of judicial independence and impartiality is by no means the sole cause of torture in CIS member states, it is clear that current standards have consequences which contribute to an environment where torture can thrive.

The relationship between judicial independence and impartiality standards and torture is multifaceted, but two themes are apparent in these CIS states. In particular, it is clear that CIS regimes are still willing to engage in torture, and other acts of repression to maintain power. Where acts of torture as repressive weapon are perceived to operate to silence and punish government dissidents, and work to silence future threats to government rule, there is little incentive for governments to cease engaging in acts of torture.[1996] Unsurprisingly therefore, in members of CIS executive branches have shown to be willing to engage in acts of torture against members of society that they deem to be a particular risk to the executive rule,[1997] including against members of the political opposition,[1998] journalists,[1999] and members of religious and racial minorities.[2000]

[1994] International Federation for Human Rights 'UN Committee against Torture to examine Armenia's record on torture' (n1837).
[1995] Civil Society Institute and EU (n1662) 19-20.
[1996] Amnesty International *Amnesty Report on Torture* (n605) 175.
[1997] See pp221-225
[1998] See pp223-224
[1999] See pp222-223
[2000] See pp224-225

However, it this the failure to secure adequate judicial independence and impartiality standards that has created the opportunity for those CIS governments to utilise torture. Despite tenuous steps towards independence, one area that has continued to blight judicial independence efforts is the continued dominance of the executive branch over the judiciary. In reality, this has meant that CIS courts have been unwilling to challenge unlawful government actions, including human rights abuses. The impunity that this grants to perpetrators within those states has created opportunities for those willing regimes to engage in acts of repression, including torture.[2001]

This is in part because the impunity granted to members of the executive has drastically changed the cost/benefit calculation for perpetrators of torture within those states.[2002] The failings of judicial independence in CIS member states, particularly the continued subjugation of CIS judicial branches to their respective governments, means that acts of torture are not met with proper investigations,[2003] appropriate charges,[2004] or adequate sentences.[2005] As a result, there is little risk of cost to the perpetrator of torture in practice; and little to disincentivise the culture of torture from continuing.

Secondly, the acceptance of forced confessions by CIS courts not only permits executive torture, but encourages it. The systematic acceptance of confessions brought about as a result of torture also greatly sways the cost/benefit calculation of torture in favour of continuing.[2006] As long as forced confessions continue to be accepted by CIS judiciaries, under-funded, poorly trained, and ill-equipped police forces can keep crime statistics low, and conviction rates absurdly high. Until CIS judiciaries achieve sufficient independence to routinely challenge the validity of confessions reportedly given under torture there is little incentive for CIS police forces to discontinue this practice.

[2001] See Chapter II 'Violations and Monitoring Judicial Independence and Judicial Impartiality in Practice', pp32; Most and Starr (n268) 29.
[2002] See Chapter II 'Violations and Monitoring Judicial Independence and Judicial Impartiality in Practice', pp34; Most and Starr (n268) 34.
[2003] See pp228-231
[2004] See pp231-232
[2005] See pp232.
[2006] See pp216-221

8 Individual State Reports:
Judicial Independence and Impartiality and the Impact on Applications to Circumvent Domestic Remedies and the Incidence of Torture in CIS Member States

8.1 Introduction

Whilst the foundations of judicial independence and judicial impartiality are shared by each respective country,[2007] CIS members states have experienced varying degrees of success reforming judicial independence and impartiality standards in practice. Even in countries where reforms have experienced relatively greater degrees of success, a number of problems that undermined judicial independence and judicial impartiality in the Soviet Union continue to challenge those judiciaries. In particular, in spite of general improvements with respect to judicial pay, judicial corruption is still common across all CIS states in this study. Similarly, despite legislative reforms, in each state reports of unwarranted executive interference in judicial decision-making remain prevalent.

Unsurprisingly, given the role of the judiciary as part of domestic remedies, standards of judicial independence and impartiality in each state, and executive respect for those standards, have a significant impact on the content of applications to international human rights bodies to circumvent domestic remedies in the respective state. Similarly, the pivotal role that domestic judiciaries play in human rights protection, mean that the standards of judicial independence and judicial impartiality in each state continues to have a significant impact on the incidence of torture in CIS member states.

8.2 Armenia

Reform efforts in Armenia have experienced the most success out of all the CIS member states in this study. Whilst a number of sifnificant issues continue to undermine judicial independence and impartiality standards in the country, important improvements have been achieved. These include better judicial wages, significant improvements in judicial tenure, and greater respect for separation of powers standards within the country.

[2007] *See* Chapter IV 'Foundations of Judicial Independence and Impartiality in CIS Member States: Judicial Independence and Impartiality in the Soviet Union', p84

Judicial reforms efforts began shortly after Armenian gained independence in 1991, and have been built on throughout the 1990s[2008] and the early part of the 2000s[2009] with the support of various international organisations.[2010] The relative commitment of the Armenian government to judicial reform efforts in the country has been reflected in, and strengthened by, the ratification of a number of international human rights treaties,[2011] including the European Convention on Human Rights.[2012] These reforms have been consolidated in 2018 with the introduction and enactment of a reformed Judicial Code, which was drafted alongside the European Commission for Democracy Through Law.[2013]

Within the Armenian reform program, the legislative and policy reforms that have secured the effective exclusive authority of the Constitutional Court of Armenia,[2014] which now has complete jurisdiction over the constitutionality of Armenian law, and over civil liberties and human rights law in the country,[2015] are particularly laudable. The relative financial stability of the Armenian economy and government[2016] has also permitted financial reform within the judicial branch,[2017] and adequate financial autonomy[2018] and satisfactory wages for judges have now become a reality in the state.[2019]

[2008] Mouradian (n1072) 1197; Hon. Hovhannes Manukyan 'Judicial and Legal Reform in The Republic of Armenia: Progress, Challenges, and Lessons Learned' (*World Bank,* 12 July 2001) <http://web.worldbank.org/archive/website00504/WEB/PDF/MANUKYAN.PDF > accessed 22 September 2018.
[2009] European Union 'Armenia EU Country Roadmap for Engagement with Civil Society 2014-2017' (*European Union,* 2 July 2014) <https://eeas.europa.eu/sites/eeas/files/20141027_eu_armenia_cs_roadmap_en_0.pdf> accessed 22 September 2018.
[2010] Including the World Bank and the Council of Europe, *see* Legal Department of the World Bank 'Armenia' (n1070); European Union 'Armenia' (n2009).
[2011] OHCHR' View the ratification status: Armenia' (n1652).
[2012] European Court of Human Rights 'Armenia' (n1653).
[2013] European Commission for Democracy Through Law (Venice Commission) 'Armenia Draft Judicial Code Opinion No. 893.2017, CDL-REF(2017)030' (*Council of Europe,* 26 June 2017) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2017)030-e> accessed 22 September 2018.
[2014] Constitution of Armenia (n1068) Article 162(1) states 'In the Republic of Armenia, justice shall be administered solely by courts in accordance with the Constitution and laws'; ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 29-35.
[2015] Ibid.
[2016] World Bank 'Country Context: Armenia' (*World Bank* 17 April 2018) <http://www.worldbank.org/en/country/armenia/overview> accessed 22 September 2018.
[2017] The Armenian judicial budget has been described as 'minimal but adequate' i ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 1; Manukyan (n2008) 15.
[2018] Ibid.
[2019] Transparency International Anti-Corruption Center 'Monitoring Armenia's Anti-Corruption Commitments' (n1200) 13; Mouradian (n1072) 1249, 1178, 1261.

Other reforms however have encountered more limited success. Aspects of the judicial selection and appointment process in the country have been drastically improved since the Soviet era.[2020] In particular, under the Judicial Code of Armenia all judges are required to have a university degree, to pass a qualifying examination,[2021] undertake a psychological test,[2022] and complete an interview with the Supreme Judicial Council.[2023] Furthermore, the composition of the Supreme Judicial Council marks a significant improvement on the Congress of Soviet Deputies in the Soviet Union, which was made up solely of members of the executive branch.[2024] Instead the Supreme Judicial Council is made up of five judges and five members of the National Assembly,[2025] striking a balance between the judicial and legislative branches. This composition marks an important balance between judicial independence on the one hand, and judicial accountability on the other.[2026] Nonetheless some concerns remain, and members of the legal community and members of the public have expressed concern about the opaque nature of the selection and appointments process.[2027] Similarly, whilst on paper, the introduction of a specific retirement age for judges has been welcomed,[2028] those standards are violated, and, in practice, reports of politically motivated dismissals remain.[2029] The new Judicial Code introduced in 2018 has made an efforts to tackle concerns about political motivated dismissals, and according to Article 152, any decision to discipline a judges must be publicly published,[2030] along with significant detail about the complaint against the judges and reasons for the decision undertaken.[2031] The Code also provides a clear list of circumstances where a judicial position may be terminated.[2032]

Whilst the culture of corruption within the Armenian judiciary is not as embedded as in other CIS member states, it still remains a significant problem, and the judiciary remains one of the

[2020] *See* pp 91-92
[2021] Judicial Code of Armenia (n1068) Article 95.
[2022] Ibid.
[2023] Ibid.
[2024] See pp 91-92
[2025] Judicial Code of Armenia (n1068) Article 73(3)(2).
[2026] See pp50-51
[2027] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 17.
[2028] Constitution of the Republic of Armenia (n1068) Article 96: 'The Judge and the members of the Constitutional Court shall be irremovable. The Judge and the member of the Constitutional Court shall hold their offices until the age of 65. They may be removed from office only in the cases and in the manner prescribed by the Constitution and the law'.
[2029] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 45-46; Transparency International Anti-Corruption Center 'Monitoring Armenia's Anti-Corruption Commitments' (n1200) 9; *see also generally* Mouradian (n1072).
[2030] Judicial Code of Armenia (n1068) Article 152.
[2031] Ibid.
[2032] Ibid Article 155.

country's least trusted institutions.[2033] As part of attempts to tackle incidents of bribery in the country the Judicial Code provides that judges should make an annual disclosure of their income and assets to the Supreme Judicial Council.[2034] To consolidate these efforts, the Code further provides that judges must also disclose the assets and income of any persons related to the judge.[2035] These reforms mark a significant improvement on the previous situation in Armenia where the formal procedure for the disclosure of assets was not audited in practice.[2036] It should be acknowledged, however, that it remains to be seen how effective these reforms will be in practice. In addition, reforms efforts to tackle the legacy of judicial corruption have resulted in unforeseen consequences. In particular, judges, wishing to demonstrate that they have not been bribed, rarely find criminal defendants 'not guilty'.[2037] However, the passing of 'guilty' verdicts in attempts to demonstrate the honour and ethics of a judge have contributed to the very low rates of acquittal in the country.[2038] Acquittals rates in Armenia remain worryingly low,[2039] and in 2016 they fell at around four per cent.[2040]

Problems with judicial impartiality in Armenia also remain apparent. Like their Soviet counterparts before them,[2041] members of the Armenian judiciary continue to demonstrate significant partiality towards the prosecution,[2042] over the defence counsel during criminal trials.[2043] This has resulted in a judicial culture which routinely ignores presumption of innocence standards in practice.[2044]

The far-reaching consequences of the low acquittal rates and problems with judicial impartiality are apparent with respect to the incidence of torture in Armenia. In particular, this combination has contributed to the continued use of torture by the Armenian police

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[2033] Transparency International Anti-Corruption Center 'Monitoring Armenia's Anti-Corruption Commitments' (n1200); Transparency International 'Armenia: Nations in Transit 2018' (*Transparency International,* 2018) <https://freedomhouse.org/report/nations-transit/2018/armenia> accessed 22 September 2018.
[2034] Judicial Code of Armenia (n1068) Article 52.
[2035] Ibid.
[2036] ABA ROLI 'Judicial Reform Index for Armenia' (n354) 60.
[2037] Diplomacy in Action 'Armenia 2013' (n1294) 13; UNHRC 'Reporting of the Working Group on Arbitrary Detention: Mission to Armenia' (n1371) para 93.
[2038] Freedom House 'Freedom in the World 2018: Armenia' (*Freedom House,* 28 May 2018) <https://freedomhouse.org/report/freedom-world/2018/armenia> accessed 22 September 2018.
[2039] Ibid.
[2040] Diplomacy in Action 'Armenia 2016 Human Rights Report' (*U.S. Department of State,* 3 March 2017) <https://www.state.gov/documents/organization/265604.pdf> accessed 21 September 2018.
[2041] *See* pp104-105.
[2042] *See* pp148-149.
[2043] Diplomacy in Action 'Armenia 2010 Human Rights Report' (*U.S. Department of State,* 8 April 2011) <https://www.state.gov/documents/organization/160447.pdf> accessed 21 September 2018, 3.
[2044] Constitution of the Republic of Armenia (n1068) Article 21 and Article 41.

service.[2045] The continued use of torture is in part due to the lack of technical capacity of the Armenian police force,[2046] and other law enforcement bodies, who have limited resources and skills to aid in the investigation of crimes.[2047] This limited technical capacity means that one of the few methods by which crime can be 'solved'[2048] is through obtaining a confession.[2049] Armenian judges have shown unwilling to challenge prosecutors when defendants have alleged that their confessions were obtained under torture as part of the prosecutorial bias still demonstrated by the Armenian judiciary.[2050] Instead, judges have been willing to take confessions at face value as part of the prosecution's case.[2051] In addition, even in instances where evidence is lacking, a confession allows Armenian judges to pass a 'guilty' verdict, giving them the opportunity to demonstrate that they have not received a bribe.[2052] It is clear that the continued reliance on torture as part of the investigative and prosecutorial process has been permitted at least in part by failures to secure adequate judicial independence and impartiality in Armenia.

The consequences of problems with judicial independence standards have also been felt in the content of applications to circumvent domestic Armenian remedies before the European Court of Human Rights, the Committee Against Torture, and the Human Rights Committee. In those applications, complainants have reiterated the belief that Armenian judges still demonstrate significant prosecutorial bias. Those complaints have alleged that judges have failed to challenge illegal actions of prosecutors;[2053] that defence motions were routinely dismissed;[2054] and that Armenian courts have been unwilling to allow defence witnesses to be heard.[2055] In addition, those content of those complaints also demonstrate a belief that Armenian judges remain unwilling to challenge unlawful government actions, and that that

[2045] Diplomacy in Action 'Armenia 2012' (n1827) 1; UNCAT 'Concluding Observation on the Fourth Periodic Report of Armenia' (n1664) paras 19-24; Civil Society Institute and EU (n1662) 12.
[2046] Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (n1660).
[2047] Ibid.
[2048] Unsurprisingly, however, the use of torture to obtain confessions leads to a significant number of false confessions *see*
[2049] Institute for War and Peace Reporting 'Armenia to Tackle Police Torture' (n1660); Diplomacy in Action 'Armenia 2012' (n1827) 1; UNCAT 'Concluding Observation on the Fourth Periodic Report of Armenia' (n1664) paras 13-14; Civil Society Institute and EU (n1662) 12; Civil Society Institute and EU (n1662) 12.
[2050] Karine Ionesyan 'Judicial System is not independent enough to recognize "torture"' (*Human Rights in Armenia,* 28 June 2011) <http://hra.am/en/point-of-view/2011/06/28/torture11> accessed 22 September 2018; ABA ROLI 'Judicial Reform Index for Armenia 2008' (n354) 59.
[2051] Ibid.
[2052] Diplomacy in Action 'Armenia' (n1294) 13; UNHRC 'Reporting of the Working Group on Arbitrary Detention: Mission to Armenia' (n1371) para 78.
[2053] *Khachatryan and Others v Armenia* (n1492).
[2054] Ibid.
[2055] *Khachatrian v Armenia* (28 October 2005) Communication No 1056/2002 CCPR/C/85/D/1056/2002.

any attempts to utilise the courts to challenge the actions of the executive would be 'futile'.[2056]

Whilst in some respects judicial reforms in Armenia have demonstrated significant success, in other areas those reforms have been lacking. Importantly, in the areas where judicial independence and impartiality standards have fallen short, those failings have far reaching consequences for both the incidence of torture in Armenia, and in applications to circumvent domestic remedies in the country. In Armenia adequate legislative provisions to protect the judiciary from external influence and interference already exist.[2057] Similarly, there are already provisions in place for the presumption of innocence[2058] and to ensure that judges act impartially, without any prosecutorial bias.[2059] Finally, the Armenian Constitution provides that no one shall be subject to torture.[2060] It is the effective translation of these standards from paper to reality which is impeding judicial independence and impartiality in Armenia. Nonetheless, it is a tale of two halves, and whilst some significant problems remain, some significant improvements have been achieved. In addition, the adoption of the new Judicial Code in early 2018 will hopefully build on existing reform efforts, and continue the positive momentum in the country.[2061]

8.3 Azerbaijan

Progress towards judicial independence and judicial impartiality standards in Azerbaijan has seen less progress than in Armenia. Whilst the Azerbaijani government has pledged significant judicial reforms from its declaration of independence in 1990[2062] to as late as 2016,[2063] in reality many significant shortcomings in judicial independence and impartiality standards remain.

[2056] *Khachatryan and Others v Armenia* (n1492).
[2057] Constitution of Armenia (n1068) Article 162(1) states 'In the Republic of Armenia, justice shall be administered solely by courts in accordance with the Constitution and laws'.
[2058] Ibid Article 66 'A person accused of a crime shall be presumed innocent until his guilt is proven in the manner stipulated by law by a court judgment that has entered into legal force'.
[2059] Judicial Code of Armenia (n1068) Article 59 'With his or her activities and conduct, a judge must endeavour to ensure the independence and impartiality of the court'; Article 61(2) 'a judge shall be obliged to… be independent and impartial'; Article 61(8) 'A judge shall be obliged to… show impartiality when performing his or her duties'; Article 63 'A judge shall be obliged to recuse himself or herself… where… a judge is biased towards a person acting as a party'.
[2060] Constitution of Armenia (n1068) Article 62.
[2061] European Commission for Democracy Through Law (n2013).
[2062] Svante E. Cornell *Azerbaijan Since Independence* (Routledge 2015) 18-19.
[2063] OSCE 'Statement by the delegation of Azerbaijan' (n1054).

A number of legislative reforms specifically to secure and effect *de facto* judicial independence standards have been introduced by the Azerbaijani government in the last few years, and some significant positive steps have been made. In particular, reforms include the introduction of lifetime tenure until the age of sixty-five,[2064] and judicial appointment procedures have been revised, and now require judicial candidates to have a 'high judicial education'[2065] and at least five years of experience in the legal profession.[2066] Nonetheless, these reforms have been of limited success.

Whilst the increase in judicial tenure was welcomed, under Azerbaijani law new judges are appointed for a probationary period of three years.[2067] This practice has received criticism, and the International Bar Associated noted that

> The delegation is particularly concerned by the length of the probationary period for newly qualified judges… during which time the judge will undoubtedly be mindful of the possibility that their appointment may not be confirmed if they render a decision adverse to the government.[2068]

Similarly, concerns have been raised about the judicial selection and appointment process. The CoE and the International Bar Association both noted that the previous judicial selection body, the Judges Selection Committee, lacked institutional independence, and was completely dependent on the Ministry of Justice. This dependency granted the Ministry of Justice 'practically unlimited' influence over judicial selection in the country. The new judicial selection body, the Judicial Legal Council, has fared little better, and the majority of its members are appointed by the Ministry of Justice.[2069]

Analogous issues have arisen with respect to judicial discipline in Azerbaijan. Judicial discipline is overseen by the Judicial Legal Council, [2070] whose Chair is appointed by the

[2064] Courts and Judges Act (Bel) (n1201) Article 96.
[2065] Ibid Article 93.
[2066] Ibid.
[2067] Ibid. This was originally five years, but was recently reduced to three years in 2015, *see* Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 22.
[2068] IBA Human Rights Institute (n1082) 48.
[2069] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 6.
[2070] Ibid.

Minister of Justice.[2071] This accords the executive branch significant control over which individuals are appointed as judges, and which judges are disciplined and dismissed.[2072] The result is that members of the judiciary are unable to act as a bulwark against ultra vires government action without fear of repercussions to their career.[2073]

Unsurprisingly therefore, executive influence over the judicial branch continues to undermine judicial independence and judicial impartiality in Azerbaijan. Legislation in Azerbaijan expressly prohibits 'illegal influence, threats, or interference'[2074] in court proceedings; nonetheless, the judiciary has been described by the Helsinki Foundation for Human Rights as being completely 'subservient' to the executive.[2075] The continued influence of the government over the judiciary has been attributed in part to the hangover of the old Soviet system.[2076] This politicisation of the judiciary has permitted the illegitimate use of the courts as an instrument of repression in Azerbaijan. In this vein, the Azerbaijani judges have been utilised to persecute individuals perceived to represent a threat to government rule,[2077] and include members of the political opposition,[2078] human rights defenders,[2079] and members of civil society.[2080] In these cases individuals are routinely reported to receive disproportionately harsh sentences.[2081]

The effect of this influence is apparent in both the incidence of torture in Azerbaijan, and in the content of applications to circumvent domestic remedies in the country. Despite legislative revisions[2082] and ratification of numerous international conventions prohibiting torture,[2083] torture remains commonplace in Azerbaijan.[2084] In part, the relationship between

[2071] Ibid.
[2072] Ibid.
[2073] Ibid.
[2074] Constitution of Azerbaijan (n1081) Article 127 (iii).
[2075] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 4.
[2076] IBA Human Rights Institute (n1082) 48.
[2077] IBA Human Rights Institute (n1082) 47; Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 31.
[2078] IBA Human Rights Institute (n1082) 50.
[2078] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 33.
[2079] IBAHRI 'Freedom of Expression on Trial' (n1082) 50; UNHRC 'Compilation prepared by the OHCHR: Azerbaijan' (n1317) para 52; Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 33.
[2080] IBAHRI 'Freedom of Expression on Trial' (n1082) 50; UNHRC 'Compilation prepared by the OHCHR: Azerbaijan' (n1317) para 51.
[2080] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 36.
[2081] Ibid 7.
[2082] Human Rights Watch 'Azerbaijan: UN Criticizes Torture Record' (n1684); The Constitution of the Republic of Azerbaijan (n1081) Article 46(iii).
[2083] OHCHR 'Ratification: Azerbaijan' (n1673).
[2084] Freedom House 'Azerbaijan: 2015' (n1742); Amnesty International 'Azerbaijan 2017/2018' (n1806).

the incidence of torture and problems with judicial independence and impartiality, are because they are the result of a repressive administration. Like the abuse of the judiciary, torture is a method by which the Azerbaijani government continues to repress unruly citizens; and torture has been utilised against government critics[2085] to force them to confess to crimes as part of a move to discredit them.[2086]

The consequences of the subservience of the judiciary to the Azerbaijani executive has had consequences with respect to the culture of torture in the country, in particular during arrest[2087] and against prisoners in custody.[2088] Torture is routinely utilised to secure confessions in Azerbaijan,[2089] in particular against government critics.[2090] However, despite international criticism,[2091] the use of torture against prisoners and government critics in order to obtain confessions has gone unchallenged by the Azerbaijani judiciary.[2092] The Committee Against Torture has condemned the impotence of the Azerbaijani courts in this respect, noting that change was necessary to ensure judges should not permit evidence obtained as a result of duress.[2093] The unwillingness of Azerbaijani judges to challenge members of the police and the procuracy when faced with allegations of torture is in part as a result of accusatory bias in the state, where acquittals rates remain very low.[2094] This prosecutorial bias means that Azerbaijani judges have been unwilling to challenge allegations of torture,[2095] which has resulted in *de facto* impunity for the torture in the country,[2096] and despite numerous complaints prosecutions for torture are very rare.[2097] This has been reflected in international case law, and in various complaints before the European Court of Human

[2085] Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 4.
[2086] Ibid.
[2087] Amnesty International 'Azerbaijan 2017/2018' (n1806).
[2088] UN Working Group on Arbitrary Detention 'Statement upon the conclusion of its visit to Azerbaijan' (*OHCHR,* 16-25 May 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20021> accessed 22 September 2018.
[2089] Diplomacy in Action 'Azerbaijan' (n1838) 4; Penal Reform International (n1839) 12; Zeynalov (n1681).
[2090] *See* pp206-206; *See* Diplomacy in Action 'Azerbaijan 2016' (n1838); Freedom House 'Azerbaijan: Nations in Transit 2017' (n1742).
[2091] Ibid.
[2092] UNHRC 'Compilation prepared by the OHCHR: Azerbaijan' (n1317) 35; UNCAT 'Consideration of reports: Azerbaijan' (n1680) paras 18, 25.
[2093] Ibid.
[2094] In 2013-2014 acquittals rates fell at 13% and 15% respectively. *See* Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 45.
[2095] UNHRC 'Compilation prepared by the OHCHR: Azerbaijan' (n1317) 35; UNCAT 'Consideration of reports: Azerbaijan' (n1680) para 18.
[2096] Human Rights Watch 'Azerbaijan: UN Criticizes Torture Record' (n1684).
[2097] Ibid.

Rights, victims of torture alleged that the Azerbaijani authorities and courts have failed to carry out effective investigations.[2098] The impunity granted by the biased and subservient judiciary in Azerbaijan has contributed to a situation where the culture of torture, in particular to obtain confessions, has flourished.[2099]

Prosecutorial bias and executive influence have also had significant consequences on fair trial standards in the country and in 2014 the ECtHR found 86 violations of the right to a fair trial in Azerbaijan.[2100] As part of those applications, Azerbaijani judges have been accused of actively hampering defendant's arguments by refusing to allow defence motions[2101] and refusing to allow sufficient time for defence lawyers to examine prosecutorial evidence.[2102] This culture has had ramifications on applications to circumvent domestic remedies in Azerbaijan. In those applications, complainants have alleged that any attempt to use the Azerbaijani to challenge government actions would be futile[2103] or would put them in danger of reprisals.[2104]

One significant issue with judicial independence standards in Azerbaijan that has not been reflected in incidence of torture in the country, nor in applications to circumvent Azerbaijani domestic remedies, is judicial corruption. Problems emanating from the judicial budget,[2105] in particular the failure to secure the financial autonomy of the Azerbaijani judiciary[2106] and inadequate judicial wages,[2107] have contributed to widespread judicial corruption.[2108] Members of the judiciary in Azerbaijan have been described as the most corrupt judges in Eastern Europe,[2109] and judgments are routinely passed not on the basis of rule of law, but instead 'in favour of the highest bidder'.[2110] Efforts to tackle this phenomenon have however

[2098] *Rizvanov v Azerbaijan* (n1902); *Najafli v Azerbaijan* App (n1902); *Tahirova v Azerbaijan* (n1894)*; Huseynov v Azerbaijan* (n1902); *Mammadov v Azerbaijan* (n1810).
[2099] Freedom House 'Azerbaijan: Nations in Transit 2018' (*Freedom House* 2018) <https://freedomhouse.org/report/nations-transit/2018/azerbaijan> accessed 22 September 2018.
[2100] IBA Human Rights Institute (n1082) 48.
[2101] Ibid 58.
[2102] Ibid.
[2103] *A.A. v Azerbaijan* (n1460); *Rizvanov v Azerbaijan* (n1902); *Najafli v Azerbaijan* App (n1902); *Tahirova v Azerbaijan* (n1894)*; Huseynov v Azerbaijan* (n1902); *Mammadov v Azerbaijan* (n1810).
[2104] *Avadanov v Azerbaijan* (n1455).
[2105] The Azerbaijani is not given a guaranteed percentage of the State budget, *see* Transparency Azerbaijan 'The Azerbaijani Judiciary' (n1123).
[2106] Ibid.
[2107] Ibid.
[2108] Hardoon and Heinrich (n1353); Helsinki Foundation for Human Rights 'Azerbaijan' (n1181) 7; *see also* PACE 'Report of the Committee on Legal Affairs and Human Rights' (n1353) 1.
[2109] Ibid.
[2110] Freedom House 'Azerbaijan (2010)' (n1319).

not been forthcoming, and despite calls for procedural and legislative reforms,[2111] the government has not addressed these concerns[2112] and little action, if any, has been taken against corrupt judges.[2113]

8.4 Belarus

Judicial independence standards in Belarus have seen significantly less progress than those achieved in either Armenia or Azerbaijan. Whilst there have been a number of reform efforts since Belarusian independence,[2114] those efforts have been largely unsuccessful in practice. In part the failure of judicial reform efforts is as a result of practical limitations in Belarus. In particular, the financial deprivation of the Belarusian economy[2115] and the impact of the Chernobyl disaster on Belarusian society[2116] have hindered judicial reform initiatives in the country. However, the principal reason that judicial independence and impartiality reforms have experienced limited success is as a result of the absence of impetus from the executive branch. In fact, in practice, the Belarusian government and President have taken positive steps to undermine and curtail judicial independence in the state. These efforts include the creation of the interdepartmental commission and rumoured threats made by the President against judges of the Constitutional Court.[2117]

That is not to say that there have not been improvements in the country since independence. Under the Code on Judicial Systems and the Status of Judges, judges have been granted guaranteed tenure until the age of 70.[2118] The requirements for judicial appointment have also been reformed, and judicial candidates are required to have a higher legal education, good moral reputation, and at least two years of legal experience.[2119] In addition, problems with judicial corruption seem to be less pronounced that in other CIS member states.[2120] Freedom House concluded that Belarus is regularly regarded as one of the least corrupt CIS member

[2111] GRECO (n1375) 24; Transparency Azerbaijan 'The Azerbaijani Judiciary' (n1123) 59.
[2112] Ibid.
[2113] Transparency Azerbaijan 'The Azerbaijani Judiciary' (n1123) 58.
[2114] Beichelt (n1088) 113-117.
[2115] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 100.
[2116] Ibid.
[2117] Ibid 15.
[2118] Code of Belarus on Judicial Systems and the Status of Judges (n1203) Chapter 12: Suspension, Renewal, and Termination of Powers of Judges, Article 115.
[2119] Ibid Article 62.
[2120] Freedom House 'Belarus: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/belarus> accessed 22 September 2018.

states by various enterprise surveys,[2121] and noted that incidents of judicial bribery seem to be scant in the country.[2122] However, despite this laudable progress, and in practice the Belarusian executive continues to exert significant control over all aspects of judicial life.

Whilst reforms in the mid 1990s ostensibly introduced more objective standards of judicial selection and appointment, in reality these processes have been marred by political considerations.[2123] In practice, the President continues to have significant control over the appointment of judges to the Belarusian judiciary. According to the Constitution of Belarus the President has the power to appoint the Chairperson of the Constitutional, Supreme, and Economic Courts.[2124] The Constitution further grants President Lukashenko the power to appoint six members of the Constitutional Court, and all other judges in the Republic of Belarus.[2125] This grants the President *carte blanche* decision-making power over all judges in Belarus, bar the other six judges on the Constitutional Court.[2126] The other six members of the Constitutional Court are appointed by the Council of the Republic.[2127] As a result, decisions as to judicial selection and appointment in Belarus lie solely with the President and the legislative. Similarly, judicial wages in Belarus remain determined by the President,[2128] and other benefits, including housing, are at the discretion of members of local government.[2129] In 2005, the International Commission of Jurists concluded that the set judicial salary in Belarus was hardly enough to pay for housing and food.[2130]

The continued dominance of the President of Belarus over the Belarusian judiciary is particular apparent in respect of judicial tenure and discipline. Whilst the introduction of lifetime tenure should have had a significant impact on judicial independence in Belarus, in practice these legislative reforms have been undermined by the overarching power the President of Belarus wields over the judicial discipline and removals process. In particular

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[2121] Ibid.
[2122] Ibid.
[2123] Freedom House 'Belarus: Nations in Transit 2016' (n2120).
[2124] Constitution of the Republic of Belarus (n1090) Article 84 (8), Article 116.
[2125] Ibid Article 84(10).
[2126] Ibid Article 116.
[2127] Ibid.
[2128] Code of Belarus on Judicial Systems and the Status of Judges (n1203) Article 76; *see also* UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) paras 53-56; OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) paras 91-94; Freedom House 'Belarus 2016' (n1294).
[2129] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 58.
[2130] International Commission of Jurists 'Attacks on Justice Belarus' (*ICJ,* 11 July 2008) <http://www.refworld.org/docid/48a57efc0.html> accessed 22 September 2018.

the Judicial Code permits the President to open disciplinary proceedings[2131] and impose any disciplinary measures[2132] on members of the judicial branch. These provisions give the President complete authority to sack judges from any court in Belarus,[2133] including those judges sitting in the Constitutional Court,[2134] a right that the President has elected to exercise on a number of occasions.[2135]

Members of the Belarusian government have also engaged in more direct interference in judicial affairs, and members of the Belarusian special forces and members of the Belarusian government reportedly attend and film trials.[2136] The President is also rumoured to have tried to blackmail members of the Constitutional Court.[2137]

The result of the intimidation of, and domination over, the judicial branch by the executive has had a number of results. Despite Constitutional provisions that encompass rule of law standards,[2138] in practice those standards have been violated by the executive.[2139] In particular, where the Constitutional Court has produced decision that have frustrated the government and President, those rulings have been ignored;[2140] thereby undermining the exclusive authority of the Belarusian judiciary.

The consequences of problems surrounding the exclusive authority of the Belarusian judiciary are apparent in the content of government responses to applications to circumvent the exhaustion of domestic remedies rule. Whilst judicial independence and exclusive authority standards demand that issues of law, including issues of appeal, fall solely within the jurisdiction of the judicial branch,[2141] the Belarus government has demonstrated open

[2131] Code of Belarus on Judicial Systems and the Status of Judges (n1203) Chapter 12: Suspension, Renewal, and Termination of Powers of Judges, Article 115.
[2132] Ibid.
[2133] ODIHR 'Report Trial Monitoring in Belarus' (n1207) para 88.
[2134] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 59.
[2135] Ibid.
[2136] Ibid 38.
[2137] Ibid 15.
[2138] Constitution of Belarus (n1090) preamble '…the Republic of Belarus, desiring to maintain civic concord, firm foundations of government by the people and a state based on the rule of law…'; article 1 'The Republic of Belarus is a unitary, democratic, social state based on the rule of law'; article 7 'The Republic of Belarus shall be bound by the principle of supremacy of law'; Article 60 'Everyone shall be guaranteed protection of one's rights and liberties by a competent, independent and impartial court of law within time periods specified in law'; Article 110 'In administering justice judges shall be independent and subordinate to law alone'.
[2139] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 12.
[2140] Ibid paras 21-24.
[2141] UNGA 'Basic Principles on the Independence of the Judiciary' (n71) Article 3.

disregard for those standards. In particular, the Belarusian government has continually asserted that individual complainants to international human rights bodies have failed to exhaust domestic remedies given that they have neglected to utilise the supervisory review procedure.[2142] These assertions are in spite of significant case law of the Human Rights Committee, which has repeatedly clarified that the supervisory procedure is not a remedy that has to be engaged for the purposes of the exhaustion of domestic remedies rule.[2143] In particular, the Committee has noted that supervisory review is an extraordinary[2144] and discretionary remedy,[2145] the nature of which precludes it from being a remedy that can be considered available to the complainant. Most importantly, the Committee has noted that the supervisory review procedure undermines the exclusive authority of the domestic courts, as it permits a prosecutor to review the legality of a judgment that has already entered into force.[2146] The effect of this is to undermine the principle of *res judicata*[2147] and further precludes this as a remedy that can be considered effective.[2148]

Despite this established case precedent, the government of Belarus has continued to challenge the admissibility of complaints before the Human Rights Committee on the basis that those complainants have failed to exhaust all available and effective domestic remedies.[2149] These challenges demonstrate either a fundamental misunderstanding of, or, more probably, a fundamental disregard for the exclusive authority of the Belarusian judiciary.

[2142] *K.A. v Belarus* (n1542); *Poplavny and Sudalenko v Belarus* (n1542); *Misnikov v Belarus* (n1525); *Levinov v Belarus* (n1525); *Korol v Belarus* (n1525); *V.L. v Belarus* (n1525); *P.L. v Belarus* (n1565); *Govsha, Syritsa and Mezyak v Belarus* (n1576); *Bakur v Belarus* (n1525); *Evrezov v Belarus* (n1525); *Pugach v Belarus* (n1525); *Sudalenko v Belarus* (n1569); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus* (n1542); *Praded v Belarus* (n1542); *Kalyakin and others v Belarus* (n1542); *Stambrovsky v Belarus* (n1542); *Nepomnyaschikh v Belarus* (n1542); *Basarevsky and Rybchenko v Belarus* (n1525); *S.V. v Belarus* (n1525); *E.V. v Belarus* (n1525); *E.Z. v Kazakhstan* (n1542).
[2143] *Basarevsky and Rybchenko v Belarus* (n1525).
[2144] Ibid.
[2145] See *Gelazauskas v Lithuania* (n1565) para 7.4; *Sekerko v Belarus* (n1565) para 8.3; *Protsko and Tolchin v Belarus* (n1565) para 6.5; *Schumilin v Belarus* (n1565) para 8.3; *P.L. v Belarus* (n1565) para 6.2.
[2146] *Vardanyan and Nanushyan v Armenia* (n1567).
[2147] *See* pp174-174.
[2148] *Evzrezov v Belarus* (n1525).
[2149] *K.A. v Belarus* (n1542); *Poplavny and Sudalenko v Belarus* (n1542); *Misnikov v Belarus* (n1525); *Levinov v Belarus* (n1525); *Korol v Belarus* (n1525); *V.L. v Belarus* (n1525); *P.L. v Belarus* (n1565); *Govsha, Syritsa and Mezyak v Belarus* (n1576); *Bakur v Belarus* (n1525); *Evrezov v Belarus* (n1525); *Pugach v Belarus* (n1525); *Sudalenko v Belarus* (n1569); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus* (n1542); *Praded v Belarus* (n1542); *Kalyakin and others v Belarus* (n1542); *Stambrovsky v Belarus* (n1542); *Nepomnyaschikh v Belarus* (n1542); *Basarevsky and Rybchenko v Belarus* (n1525); *S.V. v Belarus* (n1525); *E.V. v Belarus* (n1525); *E.Z. v Kazakhstan* (n1542).

In those responses the Belarusian government has also shown a disregard for the exclusive authority of the Human Rights Committee. In its responses to applications to circumvent the exhaustion of domestic remedies rule, the Belarusian government has repeatedly refused to recognise the authority and competence of the Committee.[2150] In particular, the Belarusian government has challenged the authority of the Committee to examine communications in instances that the Belarusian government believes should be declared inadmissible, given the complainant has not engaged the supervisory review procedure in Belarus.[2151]

The effect of the executive domination of the judicial branch has consequences also seen in the incidence of torture in the state. Subjugated by the government, the judiciary in has Belarus has done little to challenge the unlawful actions of executive agents. In particular, there has been a notable failure to supervise the activities of the Presidential Guard, who have regularly used excessive force and torture against members of the political opposition and other government dissidents.[2152] Instead of acting as a bulwark against ultra vires executive action, the judicial branch in Belarus has become a means by which the government can further their agenda. As a result, the politically motivated prosecution of members of the political opposition,[2153] journalists critical of the government,[2154] and members of minority groups, including LGBT minorities,[2155] is commonplace. President Lukashenko is alleged to have admitted this reality himself; concluding that the judiciary was a useful vehicle for him through which he could pursue his political agenda.[2156] The domination of the political branch, and its use as a political weapon, mean that it is unsurprising that judges have shown themselves to be unwilling to challenge the use of torture against suspects and other individuals.

[2150] *K.A. v Belarus* (n1542); *Misnikov v Belarus* (n1525); *Sudalenko v Belarus* (n1569); *E.V. v Belarus* (n1525); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus* (n1542); *Praded v Belarus* (n1542); *Lozenko v Belarus* (n1589); *Kalyakin and others v Belarus* (n1542); *Symonik v Belarus* (n1589); *Stambrovsky v Belarus* (n1542); *Nepomnyaschikh v Belarus* (n1542); *Yuzepchuk v Belarus* (n1589); *Pinchuk v Belarus* (n1542); *Praded v Belarus* (n1542).
[2151] *K.A. v Belarus* (n1542); *Misnikov v Belarus* (n1525); *Grishkovtsov v Belarus* (n1589); *Sudalenko v Belarus* (n1569); *E.V. v Belarus* (n1525); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus* (n1542); *Praded v Belarus* (n1542); *Lozenko v Belarus* (n1589); *Kalyakin and others v Belarus* (n1542); *Symonik v Belarus* (n1589); *Stambrovsky v Belarus* (n1542); *Nepomnyaschikh v Belarus* (n1542); *Yuzepchuk v Belarus* (n1589); *Pinchuk v Belarus* (n1542); *Praded v Belarus* (n1542).
[2152] UNHCR 'Civil and Political Rights, Mission to Belarus' (n467) para 16.
[2153] Freedom House 'Belarus: Nations in Transit 2014' (n1305); Parliamentary Assembly 'The situation in Belarus Doc. 12820' (n1870); International Federation for Human Rights 'International Fact-Finding Mission: Belarus' (n1698).
[2154] Freedom House 'Belarus: Nations in Transit 2014' (n1305).
[2155] GayBelarus and the Sexual Rights Initiative (n1929).
[2156] Dung (n1255).

This unwillingness is compounded by the prosecutorial bias still evident in Belarusian courts.[2157] OSCE noted that this bias has manifested itself in an endemic unwillingness to follow up claims that confessions and other statements have been obtained under torture.[2158] As in Armenia,[2159] the use of torture to obtain confessions remains commonplace,[2160] and this practice predominantly goes unchallenged by the Belarusian courts.[2161] This readiness to take the prosecution and other law enforcement officials at face value, in spite of allegations of misconduct and torture and protestations of innocence, means that the acquittal rate in Belarus is regularly below 1%,[2162] falling to a negligible 0.26% in 2015.[2163] The far-reaching consequences of prosecutorial bias is also evident in a number of applications to circumvent the exhaustion of domestic remedies in Belarus. In particular, a number of complainants noted the 'futile'[2164] nature of the domestic courts in Belarus given their unwillingness to challenge or question the allegations of the Prosecutor. The failure by the courts to challenge and disregard confessions obtained under torture is particularly troubling in Belarus, given the continued use of the death penalty in the country. In one instance, Uladzislau Kavaliou, was sentenced to death after the police allegedly utilised both physical and psychological torture him to extract a confession.[2165] Despite Kavaliou withdrawing his confession before the court he was still executed a mere four months after the guilty verdict was passed. The Human Rights Committee has acknowledged this pattern in its jurisprudence, holding that there had been a violation of the right to life in six cases where individuals had been executed after confessing to crimes whilst under torture.[2166]

Reform efforts in Belarus have experienced very limited success. The only area that has seen any significant improve is judicial corruption. The overriding problem in Belarus is executive interference in judicial decision-making and the continued domination by the government over the judiciary. The effects of this interference and influence over the Belarusian judiciary

[2157] OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) para 14.
[2158] Ibid.
[2159] *See* pp227-227
[2160] OSCE ODIHR 'Report Trial Monitoring in Belarus' (n1207) paras 58, 249, 252-255.
[2161] Ibid.
[2162] Supreme Court of the Republic of Belarus 'Statistical Data from Belarus' (n1379).
[2163] Ibid.
[2164] *Evzrezov v Belarus* (n1525); *V.L. v Belarus* (n1525) para 5.
[2165] International Federation for Human Rights 'Death Penalty in Belarus' (n1743).
[2166] *Kovaleva and Kozyar v Belarus* (n1882); *Selyun v Belarus* (n1882); *Yuzepchuk v Belarus* (n1589); *Burdyko v Belarus* (n1882); *Grishkovtsov v Belarus* (n1589); *Zhuk v Belarus* (n1882).

are clearly manifested in both the incidence of torture in Belarus and in applications to circumvent the exhaustion of domestic remedies rule. In particular the perceived futility of engaging the Belarusian courts, in particular when confessions have been obtained through torture, is evident. In Belarus this precedent is particularly concerning given the continued use of capital punishment in the country.

8.5 Kazakhstan

Like Belarus, the overriding problem that has thwarted judicial independence reforms in Kazakhstan, is the continued dominance of the executive over the judicial branch. The executive and President have maintained this influence in a myriad of ways.

One of the ways that the executive branch has prevented demonstrable separation of powers standards in Kazakhstan, and thereby weakened the power of the judiciary, is through the disregard demonstrated for standards of exclusive authority. In part the failure to secure adequate standards of exclusive authority in Kazakhstan is due to the lack of adequate legal provisions. In Kazakhstan the power to grant search and arrest warrants and to grant extensions of custody lie with the procuracy rather than with the judiciary.[2167] These powers grant members of the procuracy the right to intervene in any court proceedings, regardless of the interest of the individual prosecutor or the state more generally, in the case.[2168] This has proven to be a problem in both theory and in practice. The American Bar Association Rule of Law Initiative has reported a number of instances where prosecutors had indeed intervened in cases where there was apparently no state interest in the outcome.[2169] When questioned regarding the motives of those prosecutors, judges concluded that the intervention was merely a way for the procuracy to assert and affirm their dominance over the judiciary.[2170]

The exclusive authority of the Kazakh courts has been further undermined by the creation of the Constitutional Council of Kazakhstan. The Constitutional Council, a quasi-executive

[2167] Criminal Procedure Code of the Republic of Kazakhstan No 231 (2014) Article 150(4).
[2168] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 15.
[2169] Ibid.
[2170] Ibid.

body, was established in 1995[2171] to replace the Constitutional Court.[2172] It is creation undermined judicial independence and exclusive authority standards in the country by removing questions of constitutionality of laws from the judiciary.[2173] Whilst the Constitutional Council is made up of some members of the judiciary, the President of Kazakhstan can veto any decision made by the Council,[2174] frustrating separation of powers and exclusive authority standards in the country.

The separation of the judiciary from the executive is further undermined by numerous legislative provisions, which grant the President and executive significant influence over the employ of judges. The judicial selection and appointment processes in Kazakhstan have been reformed, and demand that any judicial candidate has a law degree and at least two years of practice.[2175] Nonetheless, significant problems remain. In particular, the selection and appointment process has been marred by allegations of opacity and political influence.[2176] Under Kazakh law, the President has the power to nominate candidates for the Supreme Court.[2177] The result is that nominations to the highest court in the country is the 'quasi-exclusive' domain of the President.[2178] Kazakh law similarly permits unwarranted executive interference over judicial tenure and judicial wages. The introduction of tenure until the retirement age of sixty-five[2179] was widely welcomed,[2180] and demonstrated a significant improvement in judicial independence standards in the country. However, significant problems remain. According to the Constitution of Kazakhstan the President retains the power to lift the immunity of any judge.[2181] Similarly, whilst judicial wages have

[2171] Constitution of Kazakhstan (n1097) Section I: General Provisions, Article 4 (1) 'The provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaty and other commitments of the Republic as well as regulatory resolutions of Constitutional Council and the Supreme Court of the Republic shall be the functioning law in the Republic of Kazakhstan'.
[2172] Ibid.
[2173] Ibid.
[2174] European Commission for Democracy Through Law (n1096).
[2175] Constitution of Kazakhstan (n1097) Article 79(3).
[2176] European Instrument for Democracy and Human Rights (n1176) 42.
[2177] On the Judicial System and Status of Judges in the Republic of Kazakhstan N132-II (2000) Section 2: The Judicial System, Chapter 3: The Supreme Court of Kazakhstan, Article 31(1).
[2178] UNCHR 'Civil and Political Rights: Mission to Kazakhstan' (n1102) para 72(i).
[2179] On Judicial System and Status of Judges (KZ) (n2177) Article 34-1(2).
[2180] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101).
[2181] Constitution of Kazakhstan (n1097) Article 79(2). *See also* On Judicial System and Status of Judges (KZ) (n2177) 27(1).

improved,[2182] they nonetheless also remain the 'quasi-exclusive' domain of the President.[2183] In addition, other benefits including housing and housing loans, remain at the discretion of members of local government.[2184]

Alongside this indirect power that the executive has over judges in Kazakhstan, the Kazakh judiciary also faces direct interference in its judicial decision making. In particular, the Soviet tradition of *telefonnoe pravo*, or 'telephone justice',[2185] has survived reform efforts, and continues to undermine judicial independence in the country.[2186]

The domination of the judicial branch is further exacerbated by the partiality the judiciary demonstrates towards the executive branch.[2187] Like their Soviet predecessors, members of the Kazakh judiciary demonstrate significant prosecutorial bias.[2188] The conviction rate in Kazakhstan falls at around 99%.[2189] So significant is the pressure on judges to find the defendant guilty, that in instances where judges believe that they cannot find a defendant guilty they will send cases back for further investigation to avoid an acquittal.[2190]

The system of 'Presidential patronage'[2191] in the Kazakh judiciary, and the survival of accusatory bias,[2192] has allowed the executive to utilise the judiciary as part of a system of repression. Government critics, including members of the political opposition[2193] and journalist[2194] have been prosecuted before the Kazakh courts on spurious charges. Those trials have been marred by serious procedural irregularities,[2195] including allegations that

[2182] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 2, 22; Shin and others (n1115) 90.
[2183] On Judicial System and Status of Judges (KZ) (n2177) Section 3: The Status of Judges, Chapter 3: Financial Support and Social Security of Judges, Article 47(2); UNHCR 'Civil and Political Rights: Mission to Kazakhstan' (n1235) 19.
[2184] On Judicial System and Status of Judges (KZ) (n2177) Section 3: The Status of Judges, Chapter 3: Financial Support and Social Security for Judges, Article 51.
[2185] *See* pp96-97.
[2186] UNCHR 'Civil and Political Rights: Mission to Kazakhstan' (n1102) para 66; ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 34.
[2187] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 16.
[2188] Ibid 15.
[2189] In comparison conviction rates where a prosecution is brought privately are significantly lower. *See* Ibid 33.
[2190] Ibid 33-34.
[2191] Freedom House 'Kazakhstan: Nations in Transit 2012' (n1294).
[2192] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 16.
[2193] Ibid 34; Diplomacy in Action 'Kazakhstan 2005' (n1295) 7.
[2194] Ibid.
[2195] Ibid.

judges consistently refuse the motions of the defence counsel.[2196] These politically motivated trials have invariably resulted in a guilty verdict.[2197] In one example a lawyer, who had been involved in the defence of a number of striking oil workers, was prosecuted and found guilty of inciting the strike and sentenced to six years in prison.[2198] The strike had caused a number of substantial problems for the Kazakh government, including a substantial decline in oil production and significant international embarrassment after the singer Sting was persuaded to cancel his performance in the country in solidarity with the strikers.[2199] In another instance a journalist who had been critical of the President was found guilty of rape of a minor, despite serious procedural irregularities in the criminal investigation.[2200]

The content of submission to the Human Rights Committee and the Committee Against Torture requesting to circumvent domestic remedies in Kazakhstan reflect the far-reaching impact of accusatory bias and the subjugation of the judiciary. In those submissions human rights victims have alleged that any attempt to utilise the courts to challenge the unlawful actions of the executive will prove 'futile'.[2201] Other submission have made similar allegations, asserting that the Kazakh courts are unwilling or unable to protect complainants against reprisals or other forms of intimidations, including torture, should they elect to engage the courts in their complaints.[2202] Those fears are not unfounded, and in one instance after a complaint was registered before the Human Rights Committee, the state opened psychiatric proceedings against the complainant.[2203]

The deference also demonstrated by the Kazakh judiciary, and its subjugation, to the executive branch has further impacted and contributed to the culture of impunity for executive acts of torture in the Kazakhstan. As in Armenia,[2204] Azerbaijan,[2205] and

[2196] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 34.
[2197] Freedom House 'Kazakhstan: Nations in Transit 2012' (n1294).
[2198] Ibid; *See also* Bhavna Dave 'Kazakhstan' (*Freedom House,* 2011) <https://freedomhouse.org/sites/default/files/inline_images/NIT-2011-Kazakhstan.pdf> accessed 22 September 2018.
[2199] Freedom House 'Kazakhstan: Nations in Transit 2012' (n1294).
[2200] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 34.
[2201] *X v Kazakhstan* (n1484); *Kusherbaev v Kazakhstan* (25 March 2013) Communication No 2027/2011 CCPR/C/107/D/2027/2011; *Abdussamatov v Kazakhstan* (n1485).
[2202] *Valetov v Kazakhstan* (1466); *Gerasimov v Kazakhstan* (n1451).
[2203] *Gerasimov v Kazakhstan* (n1451).
[2204] *See* pp227
[2205] *See* pp232-232

Belarus,[2206] Kazakh judges have proven unwilling to challenge incidents of torture,[2207] and as a result the use of torture by government actors in the country has gone largely 'unchecked and unpunished'.[2208] The culture of impunity regarding incidents of torture in Kazakstan has remained prevalent,[2209] despite significant legislative reforms that took place between 2013[2210] and 2015,[2211] ostensibly introduced to help curb the endemic nature of torture in the country. Amnesty International has noted the complicity of various government bodies in torture in Kazakhstan and attributed the survival of this culture of impunity to the atmosphere of 'corporate solidarity'[2212] in the country.

As a result of this compromise of judicial independence, Kazakh judges have been unwilling to challenge allegations of torture during criminal trials.[2213] Instead the Kazakh judiciary routinely accepts confessions allegedly obtained under torture as sufficient 'evidence' with which they can pass guilty verdicts.[2214] This has created an environment where there are significant incentives, and few deterrents, to the continued use of torture to obtain confessions.

The existence of this corporate solidarity, and the role of the Kazakh judiciary in it, is particularly apparent in statistics relating to the prosecution of torture in the country. Despite numerous complaints of torture perpetrated by executive actors,[2215] including by members of the prison service,[2216] those complaints have gone largely unpunished.[2217] Of those complaints that were investigated by the Kazakh government in 2014 less than two per cent resulted in convictions,[2218] and in 2015 there were a mere five convictions for torture.[2219] The

[2206] *See* pp238-239
[2207] *See generally* Amnesty International *Dead End Justice* (n1704).
[2208] Ibid 7.
[2209] Ibid 6.
[2210] Diplomacy in Action 'Kazakhstan 2016' (n1751).
[2211] Human Rights Watch 'Kazakhstan: Events of 2016' (n208).
[2212] Amnesty International *Dead End Justice* (n1704) 10.
[2213] Amnesty International 'Old Habits: Kazakhstan' (n1823) 6,8; Casey Michael (n1768); Diplomacy in Action 'Kazakhstan 2016' (n1751).
[2214] Amnesty International *Dead End Justice* (n1704) 17.
[2215] In 2016 one institution received 115 allegations of torture, and concluded that this was likely the tip of the iceberg given that the majority of incidents go unreported, *see* Diplomacy in Action 'Kazakhstan 2016' (n1751).
[2216] In Kazakh prisons, prison guards have allegedly used rape as a form of punishment against unruly prisoners. In one instance the repeated gang rape of a female prisoner resulted in a pregnancy, *see* Amnesty International 'Kazakhstan 2017/2018' (n1748).
[2217] Amnesty International *Dead End Justice* (n1704) 7.
[2218] International Partnership for Human Rights, Helsinki Foundation for Human Rights 'Briefing Paper for EU-Kazakhstan Human Rights Dialogue 2016' (n1959).
[2219] Amnesty International *Dead End Justice* (n1704) 8.

deference of the Kazakh judiciary to members of the executive is further apparent in the sentences awarded to those found guilty of torture. In 2015 of the five convictions achieved, only one of those convictions resulted in a prison sentence.[2220]

The content of submissions to circumvent the exhaustion of domestic remedies rule also demonstrates the far-reaching impact of judicial independence and impartiality standards in Kazakhstan, as in Belarus, the exhaustion of domestic remedies process reflects issues with respect to the separation of powers and the exclusive authority of the Kazakh courts. In particular, the Kazakh executive have repeatedly challenged submissions to international human rights bodies for non-exhaustion of domestic remedies on the basis that those individuals have not engaged the supervisory review process.[2221] As in Belarus,[2222] these challenges to admissibility have come in spite of significant case law demonstrating that the supervisory review process is not remedy that can be considered effective for the purposes of the exhaustion of domestic remedies rule.[2223] The continued disregard for this established precedent demonstrates a fundamental disregard for the exclusive authority of the Kazakh judiciary to hear appeals on points of law in the country. Similarly disregard has been shown by the Kazakh government for its international obligations to human rights committees, and the Kazakh government has repeatedly ignored requests from the Human Rights Committee for interim measures to suspend extradition pending the investigation of communications.[2224]

Finally, whilst not reflected in the incidence of torture or in the content of applications to circumvent domestic remedies, corruption also continues to undermine judicial independence and judicial impartiality standards in Kazakhstan.[2225] Corruption in Kazakhstan is apparently so endemic that there is an unofficial price list for 'justice' in the country.[2226] The culture of corruption is purported to start at the very beginning of the careers of some judges, and rumours suggest that judgeships in the country can be bought for $100,000.[2227] This has the

[2220] Ibid 8-9.
[2221] *Mukhtar v Kazakhstan* (n1542); *Abdussamatov v Kazakhstan* (n1485); *E.Z. v Kazakhstan* (n1542); *Leven v Kazakhstan* (n1542).
[2222] *See* pp236-237
[2223] *Basarevsky and Rybchenko v Belarus* (n1525).
[2224] *Valetov v Kazakhstan* (n1466); *Israil v Kazakhstan* (n1603); *Tursunov v Kazakhstan* (n1604).
[2225] Diplomacy in Action 'Kazakhstan 2015' (n1345) 1; ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 35; Remias (n1345) 2.
[2226] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n1101) 35.
[2227] Ibid 9.

effect of embedding a culture of bribery and extortion from the very beginning of a judge's career.[2228]

Despite some reform efforts, significant problems with judicial independence and judicial impartiality standards exist in Kazakhstan. Some problems, such as the endemic culture of judicial corruption, exist in spite of some limited legislative reforms.[2229] Some of those issues, however, are as a result of incomplete legislative reforms, which have not awarded exclusive authority over legal matters to the Kazakh judiciary. This problem is reflected in the response of the Kazakh government to application to circumvent domestic remedies in Kazakhstan. In those the Kazakh government has repeatedly asserted that domestic remedies are not exhausted until an application engages with the supervisory review process, thereby ignoring the exclusive authority of the judicial branch and the established precedent of the Human Rights Committee. Another significant hurdle to judicial reform efforts in Kazakhstan has been the continued interference and influence of the executive in judicial matters. This, alongside the prosecutorial bias of the Kazakh judiciary, is reflected both in submissions to circumvent domestic remedies in Kazakhstan, and in the incidence of torture in the country. Applicants to the Human Rights Committee and the Committee Against Torture have alleged that the Kazakh courts are ineffective as gatekeepers to the unlawful actions of the Kazakh government. Similarly, this inefficacy has meant that acts of torture by the Kazakh police have gone without challenge. Instead, this acquiescence has encouraged the continued use of torture to secure confessions.

8.6 Kyrgyzstan

Judicial independence in Kyrgyzstan has faced similar setbacks to those faced by the Azerbaijani, Belarusian, and Kazakh judiciaries with respect to executive influence over judicial decision making. The pervasive nature of the executive influence over the judiciary has had consequences in both the incidence of torture in the Kyrgyz Republic, and in the content of submissions to circumvent domestic remedies before international human rights bodies.

[2228] Ibid.
[2229] On Judicial System and Status of Judges (KZ) (n2177) Section 3: The Status of Judges, Article 28(3).

Despite a number of judicial reform efforts in Kyrgyzstan,[2230] the impact of those reform on judicial independence and judicial impartiality in Kyrgyz judiciary have been very limited. The legislative reforms of 2011 coincided with the introduction of a new Kyrgyz Constitution. The impact of this new Constitution was to significantly curtail the exclusive authority of the Kyrgyz judicial branch. Like the reforms in Kazakhstan,[2231] provisions in the new Constitution had the effect of abolishing the Constitutional Court.[2232] Instead, the Constitution introduced the Constitutional Chamber of the Supreme Court.[2233] The powers of the Constitutional Chamber are, however, significantly reduced compared to those of the previous Constitutional Court.[2234] In particular, the Chamber has been deprived of the authority to examine issues of, or pass judgment on, the constitutionality of Presidential elections or of the constitutionality of impeachment proceedings involving the President.[2235] Instead, the authority of the Constitutional Chamber has been limited to addressing issues of the constitutionality of international treaties prior to their ratification in the Kyrgyz Republic.[2236]

The encroachment of the Kyrgyz government into the exclusive authority of the Constitutional Court is indicative of the far broader problem of executive interference in judicial affairs in the country.[2237] This executive overreach has significantly diminished other judicial independence and judicial impartiality reform efforts. The selection and appointment procedure of Kyrgyzstan, for example, underwent significant reform, so that now all judicial candidates must have a 'higher legal education' and at least ten years of experience in the legal profession.[2238] However these reforms have been undermined by allegations of inappropriate political influence over the selection process. This influence has been facilitated by the judicial selection body; the Council for the Selection of Judges.[2239] The

[2230] The most recent reform efforts taking place between 2007 and 2011 (World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103)) and in 2011 (via internal judicial independence efforts, *see* Freedom House 'Kyrgyzstan: Nations in Transit 2016' (n1104)).
[2231] *See* pp240-240.
[2232] OSCE Office for Democratic Institutions and Human Rights 'Selection of Judges in Kyrgyz Republic and International Standards on Judicial Independence: Final Report' (*OSCE,* 3-4 November 2011) <https://www.osce.org/odihr/89289?download=true> accessed 22 September 2018, 10.
[2233] Ibid.
[2234] Ibid.
[2235] Ibid.
[2236] Ibid.
[2237] Freedom House 'Kyrgyzstan: National Report 2016' (*Freedom House,* 2016) <https://freedomhouse.org/sites/default/files/NIT2016_Kyrgyzstan.pdf> accessed 22 September 2018.
[2238] Constitution of the Kyrgyz Republic (n1164) Section VI Judicial Power in the Kyrgyz Republic, Article 94(5).
[2239] OSCE ODIHR 'Selection of Judges in the Kyrgyz Republic' (n2232) 14.

Council is made up of members of the judiciary alongside civil society representatives.[2240] OSCE has reported that the Council has been subject to pressure from the executive branch,[2241] and this influence has been facilitated in part by the composition of the Council for the Selection of Judges which is made up in part of members who are former members of political parties, who gave up their membership on the 'eve' of their appointment to the council.[2242]

A number of members of the Council publicly expressed their concern regarding the allocation and selection of candidates after the Council's initial selection process in 2011.[2243] These concerns also garnered public attention, and there were a number of peaceful demonstrations by members of civil society, in protest of the opacity of the process.[2244] Critics particularly highlighted the clear conflict of interest of the selection and appointment of two judges to positions in higher courts, who were themselves members of the Council for the Selection of Judges.[2245]

The powers previously awarded to the Constitutional Court have been curtailed by the Constitutional reforms and compromised in favour of the executive. Therefore, whilst the Council has the right to propose candidates for selection, the ultimate authority to decide who should be nominated before Parliament lies with the President.[2246] In 2011, the President ultimately exercised her discretion and, after interviewing those proposed by the Council, only nominated a portion of the proposed individuals as candidates before Parliament.[2247] This move was met with domestic criticism from members of civil society, who expressed concern at the blatant influence possessed and exercised by the President and Parliament over the judicial selection and appointment process.[2248] These concerns were reinforced later in 2011, when proposed draft laws to limit the influence of the President and Parliament over the future judicial selection and appointment process were vetoed by the President.[2249]

[2240] Constitution of the Kyrgyz Republic (n1164) Article 95(7). The constitution excludes the possibility of members of the executive branch of power being appointed as a member of the Council for the Selection of Judges. In addition, the members of the Council who work as judges are elected by the Council of Judges.
[2241] OSCE ODIHR 'Selection of Judges in the Kyrgyz Republic' (n2232) 14.
[2242] Ibid.
[2243] Ibid 11.
[2244] Ibid.
[2245] Ibid.
[2246] Ibid.
[2247] Ibid.
[2248] Ibid.
[2249] Ibid.

Alongside these indirect influences over judicial affairs, there are also reports of direct interference in judicial decision making in the country. As in Kazakhstan,[2250] the Soviet tradition of 'telephone justice' seems to still be prevalent in Kyrgyzstan,[2251] especially in politically-motivated cases.[2252]

The influence exerted over the judiciary by the executive has allowed the executive branch to utilise the courts as a political weapon. In particular the Kyrgyz courts have been utilised to further personal and political agenda of the President and other members of the executive branch, and to stifle any government opposition.[2253] During President Akayev's rule the Constitutional Court declared that he was eligible to stand for another term as a President, despite the fact that he had already completed the two terms permitted under the constitution.[2254] In other instances, during presidential and parliamentary elections, the courts have been repeatedly utilised by the government to legitimise instance of de-registration of opposition candidates.[2255] After opposition candidates were deregistered by the Central Electoral Commission they made appeals to both the courts of first instance and to the Supreme Court.[2256] However, both courts affirmed the decision of the Electoral Commission despite significant evidence that those de-registrations were illegitimate.[2257]

Freedom House has also accused the Kyrgyz executive of utilising the judiciary to prosecute individuals deemed to be a threat to the Kyrgyz government. In those instances Freedom House allege that prosecutors have 'played' the radicalism card[2258] to selectively prosecute individuals who challenge the government or represent active community leaders.[2259] In one example, an outspoken Imam in Kyrgyzstan, Rashod Kamalov, was charged with crimes related to 'extremism' after dispersing 'extreme' religious material.[2260] Freedom House alleged that the trial at first instance was beset with serious irregularities.[2261] Later, during the

[2250] *See* pp241
[2251] International Crisis Group 'Kyrgyzstan' (n1064) 4.
[2252] Ibid.
[2253] Freedom House 'Kyrgyzstan: Nations in Transit 2016' (n1104).
[2254] International Crisis Group 'Kyrgyzstan' (n1064) 3.
[2255] Ibid 4.
[2256] Ibid.
[2257] Ibid.
[2258] Freedom House 'Kyrgyzstan: Nations in Transit 2016' (n1104).
[2259] Ibid.
[2260] Freedom House 'Kyrgyzstan: National Report 2016' (n2237) 2.
[2261] Ibid.

defence team's appeals preparation, the judge added another five years onto Kamalov's original five year sentence after a request from the procuracy.[2262] In another example, a judge was tasked with investigating the constitutionality of a government plan to collect biometric data from Kyrgyz citizens after this policy was challenged by a members of civil society.[2263] During the investigation, the judge, a member of one of the highest courts in Kyrgyzstan, the Constitutional Chamber, was suspended from the judicial branch.[2264] The suspension was reportedly in retaliation for challenging the executive position on biometric data collection.[2265] Shortly after the suspension of Judge Sooronkulova, the Constitutional Chamber declared the collection of biometric data to be constitutional.[2266]

Unsurprisingly, given the use of the courts as political weapons and the punishment of judges who have challenged the Executive position, the Kyrgyz judiciary has failed to act as an effective bulwark against government overreach. The World Bank has alleged that judges, fearing reprisals to their career, have failed to challenge the unlawful actions of the Kyrgyz government.[2267] International Crisis Group reiterated these concerns, concluding that, as a result of this fear, the judiciary has 'never served as a check on the executive branch's expansion of its powers'.[2268] The World Bank went onto conclude that despite many 'well justified'[2269] claims against the Kyrgyz government, the courts have consistently found in favour of the executive.[2270] The unwillingness of the Kyrgyz courts to challenge unlawful executive actions has meant that the Kyrgyz judiciary has had repercussions with respect ot the incidence of torture in the country.[2271]

Alongside executive interference in the Kyrgyz judiciary, judiciary corruption also continues to significantly undermine judicial independence standards.[2272] The pervasiveness of corruption has been attributed, at least in part, to the failure to awarded an adequate wage to those working in the judicial branch.[2273] In fact, the economic problems and low wages that

[2262] Freedom House 'Kyrgyzstan: Nations in Transit 2016' (n1104).
[2263] Ibid.
[2264] Ibid.
[2265] Ibid.
[2266] Ibid.
[2267] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 4.
[2268] International Crisis Group 'Kyrgyzstan' (n1064) 3.
[2269] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 23.
[2270] Ibid.
[2271] *See* pp249, 252
[2272] International Crisis Group 'Kyrgyzstan' (n1064) 1.
[2273] Ibid 1.

face many members of the Kyrgyz Republic, have made a judgeship an attractive option as it is perceived that the position affords the possibility of an alternative income stream through bribery and extortion.[2274]

Bribery is seen as part and parcel of the judicial system in the Kyrgyz Republic,[2275] and is a problem that begins in Law Schools where the Law degree has been tainted and cheapened by the fact that individuals regularly buy legal diplomas rather than earning them.[2276] This corruption extends well beyond Law Schools, and is commonplace in the Kyrgyz judiciary[2277] and in other branches of law enforcement[2278] where there sometimes exist networks of corrupt individuals working together to facilitate illegal profits.[2279] The problem of judicial corruption is so great in the country that Crisis Group reported the existence of a specialist breed of fixers who work with clients on difficult cases to ensure the 'right' outcome for a fee.[2280] Should an individual wish to win a case then the simplest way to do so is to 'buy a judge'.[2281] This reality has changed the role of the lawyer within the justice process and, instead of acting as legal representatives, they instead act as 'facilitators' between the corrupt judge and their clients.[2282] The result is a system whereby justice is bought, and verdicts of innocence in a criminal trial, or a non-custodial sentence, typically mean that a judge has been bribed.[2283] In a discussion with International Crisis Group one member of the judicial branch commented that 'If a judge is producing 40 per cent not guilty verdict that means his pockets are already bulging [with bribes]'.[2284]

However, this culture has had unexpected results. As in Armenia[2285] those judges wishing to demonstrate that they are not part of the culture of corruption and have not succumbed to bribery are more inclined to pass guilty verdicts.[2286] This distortion in the judicial process, combined with the prosecutorial bias already inherent within the Kyrgyz judicial system, has

[2274] Ibid 7.
[2275] Freedom House 'Kyrgyzstan: Nations in Transit 2016' (n1104).
[2276] World Bank and Swiss Cooperation Office 'Kyrgyz Republic' (n1103) 25.
[2277] International Crisis Group 'Kyrgyzstan' (n1064) 1.
[2278] Ibid 14.
[2279] Ibid i, 16.
[2280] Ibid 9.
[2281] Ibid 1.
[2282] Ibid i.
[2283] Ibid 9.
[2284] Ibid.
[2285] *See* pp227
[2286] International Crisis Group 'Kyrgyzstan' (n1064) i.

reinforced a conviction rate of around 98%.[2287] This culture of prosecutorial bias and desire to demonstrate a non-involvement in the culture of corruption within the judiciary has had far-reaching consequences, in particular within the context of endemic torture in the country,[2288] as it invites a system where judges don't investigate allegations of torture of defendants. Like their counterparts in Azerbaijan, Belarus, and Kazakhstan, Kyrgyz police officers habitually utilise torture to obtain confessions.[2289] In Kyrgyzstan suspects are regularly brought to the police station under the guise of being witnesses, and later tortured to obtain incriminating evidence and confessions.[2290] This practice is reflected in a number of complaints to the Human Rights Committee,[2291] and has continued in spite of legislative provisions which state that 'no one can be convicted based solely on his own confession of committing a crime'.[2292] Despite significant evidence of this practice, the Coalition Against Torture in Kyrgyzstan has alleged that it was aware of many cases where judges had refrained from ordering medical examinations where defendants had alleged that they had been subject to torture.[2293] The Coalition also alleged that judges routinely ignored allegations from defendants asserting that their confession was extracted under torture.[2294] Instead Kyrgyz judges have viewed these claims as an excuse to avoid accepting responsibility for the crime.[2295] Allegations of torture also go without investigation by the courts because, even in instances where a judge has suspicions that allegations are true, they will be disinclined to investigate given that any evidence of torture would mean that the verdict should be 'innocent', which may be interpreted as evidence that the judge in question has received bribes.[2296]

[2287] Ibid.
[2288] Amnesty International 'Kyrgyzstan 2016/2017' (n1752); Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; UNCAT 'Concluding Observations on the Second Periodic Report of Kyrgyzstan' (n1933) para 5.
[2289] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; Diplomacy in Action 'Kyrgyz Republic 2014' (n1842).
[2290] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5.
[2291] *Bazarov v Kyrgyzstan* (n1527) para 6.4; *Gunan v Kyrgyzstan* (n1604) para 2.6; *Akhadov v Kyrgyzstan* (n1527) para 3.3.
[2292] The Criminal Procedure Code of the Kyrgyz Republic (n1377) Article 12(5).
[2293] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 10.
[2294] Ibid 11.
[2295] Ibid.
[2296] International Crisis Group 'Kyrgyzstan' (n1064) 7, 9.

This has created a culture of impunity for torture in Kyrgyzstan,[2297] so that in practice incidents of torture go unchallenged and unpunished by the domestic courts.[2298] The problems with judicial independence and judicial impartiality have contributed to a situation whereby torture has become commonplace,[2299] despite it being unlawful under both the Kyrgyz Constitution[2300] and under the Kyrgyz Criminal Code.[2301] Its prevalence is reflected in a number of complaints to the Human Rights Committee alleging torture and other forms of ill-treatment at the hands of government actors.[2302]

The pervasive influence of the Kyrgyz government in judicial affairs, and the significant prosecutorial bias in the Kyrgyz judiciary; has had far-reaching consequences also apparent in applications to the Human Rights Committee to circumvent domestic remedies. Numerous complaints allege that fair trial standards were violated in favour of the procuracy. In *Askarov v Kyrgyzstan* the complainant alleged that his lawyers were not permitted to give evidence before the trial, and that the judge made no attempt to prevent threats made against the complainant during his trial.[2303] The complainant also alleged that he, along with his co-defendants, had been beaten by police officers both during the trial and at night in their jail cells.[2304] The complainant in *Torobekov v Kyrgyzstan* also raised concerns about fair trial standards, noting that both he and his lawyer were not given the opportunity to challenge the forensic medical evidence presented to the court.[2305] In other instances complainants have alleged that members of the public, including journalists and members of the political opposition, were excluded from the court.[2306] The far-reaching consequences of executive interference in judicial affairs, and the failure to adequately respect exclusive authority standards in the country, are also apparent in the responses of the Kyrgyz government to applications before the Human Rights Committee. In those responses, the Kyrgyz

[2297] Human Rights Watch 'Kyrgyzstan: Ensure Accountability in Torture Case' (n1715); Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5.
[2298] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; Amnesty International 'Kyrgyzstan 2017/2018' (n1752).
[2299] Amnesty International 'Kyrgyzstan 2017/2018' (n1752); UNCAT 'Concluding Observations on the Second Periodic Report of Kyrgyzstan' (n1933) para 5.
[2300] Constitution of the Kyrgyz Republic (n1164) Article 20 and Article 22.
[2301] Criminal Code of the Kyrgyz Republic (n1247) Article 104(2)(3) Article 111, Article 305-I.
[2302] *Ernazarov v Kyrgyzstan* (n1430); *Torobekov v Kyrgyzstan* (n1604); *Gunan v Kyrgyzstan* (n1604); *Kaldarov v Kyrgyzstan* (n1508); *Akhadov v Kyrgyzstan* (n1527).
[2303] *Askarov v Kyrgyzstan* (31 March 2016) Communication No 2231/2012 CCPR/C/116/2231/2012.
[2304] Ibid 2.8.
[2305] *Torobekov v Kyrgyzstan* (n1604).
[2306] *Kulov v Kyrgyzstan* (26 July 2010) Communication No 1369/2005 CCPR/C/99/D/1369/2005.

government has on occasion challenged the admissibility of a complaint on the grounds that the complainant has not utilised the supervisory review process in Kyrgyzstan.[2307]

The failure of judicial reform efforts in Kyrgyzstan is in part as a result of a lack of investment in those reforms. The Kyrgyz economy, whilst improving, has suffered several shocks and is heavily reliant on gold export.[2308] The limitations of the Kyrgyz spending capacity have been reflected in both the investment in reform plans, and on the judiciary itself. In particular, the financial autonomy of the Kyrgyz judiciary has not been effectively secured, and between 2006 and 2007 the judicial branch received less than 50 per cent of its allocated budget.[2309] This is also reflected in the wages awarded to judges,[2310] which, alongside other public sector employees in the health and education sectors, is very low.[2311] The lack of investment in public services has also perpetuated the use of torture as an investigative tool. The Kyrgyzstani police, lacking the means to investigate using forensic techniques or to conduct in-depth and drawn out investigations, are reliant on confessions to secure convictions. [2312]

Whilst some progress has been made in Kyrgyzstan, including some improvement to the selection and appointment processes[2313] and to standards of tenure in the country,[2314] in practice corruption and executive influence continue to thwart *de facto* judicial independence and impartiality standards. In addition, some legislative reforms may be necessary to achieve adequate judicial independence, in particular with respect to securing the exclusive authority of the judicial branch.[2315] However, the primary hurdles are financial difficulties faced by the judicial branch, the resulting culture of corruption in the country, the ongoing accusatory

[2307] *Akmatov v Kyrgyzstan* (n1542). It should be noted that complainants seem to routinely exhaust the supervisory review process, despite this not being a requirement before the Human Rights Committee. *See Zhumbaeva v Kyrgyzstan* (n1527); *Kulov v Kyrgyzstan* (n2306); *Askarov v Kyrgyzstan* (n2303); *Latifulin v Kyrgyzstan* (10 March 2010) Communication No 1312/2004 CCPR/C/98/D/1312/2004.
[2308] World Bank 'The World Bank in the Kyrgyz Republic: Overview' (*The World Bank* 2018) <http://www.worldbank.org/en/country/kyrgyzrepublic/overview#3> accessed 22 September 2018.
[2309] International Crisis Group 'Kyrgyzstan' (n1064) 9-10.
[2310] Ibid 10.
[2311] Ibid.
[2312] Open Society Foundations 'Torture in Kyrgyzstan' (n1712) 5; Diplomacy in Action 'Kyrgyz Republic 2014' (n1842).
[2313] *See* pp247-248
[2314] Lifetime tenure has been awarded to Kyrgyz judges until they reach the retirement age of 70, *see* Constitution of the Kyrgyz Republic (n1164) Article 94(5). However, a probationary period of five years remains in place, *see* Constitution of the Kyrgyz Republic (n1164) Article 94(8) which states 'Judges of local courts shall be appointed by the President upon submission of the Council of the Selection of Judges for an initial term of 5 years…'.
[2315] *See* pp246-246

bias, and the continued domination of the judiciary by the President and government. In particular, the bias and domination have permitted the practice of torture by the police to obtain confessions to continue unabated and unchallenged, and trespassed into complaints before international human rights bodies.

8.7 Tajikistan

The judiciary in Tajikistan has faced many of the same problems as the judiciaries in Azerbaijan, Belarus, Kazakhstan, and Kyrgyzstan. Judicial reform efforts in Tajikistan have been undermined by the continued domination of the judicial branch by the executive.[2316] Judicial reform efforts have been further undermined by on-going problems within Tajikistan itself. In particular, the poor economic growth in Tajikistan[2317] and the impact of a five-year civil war shortly after Tajikistan declared independence,[2318] have contributed to poor economic investment in judicial reform programmes in the country.[2319] The lack of investment is also apparent in the levels of financial autonomy and stability of the Tajik judicial branch. The failure to ensure adequate economic input into the Tajik judiciary has left it in a state of financial deprivation[2320] characterised by poor standards of infrastructure and limited technological support.[2321] The lack of spending on the judicial branch is also apparent in the wage awarded to judges, and remuneration for members of the Tajik judiciary has remained very low since independence was declared in 1992.[2322]

Alongside poor investment in the Tajik courts, judicial independence and judicial impartiality standards have suffered at the hands of executive interference in judicial affairs.[2323] The Tajik judiciary has been left vulnerable to executive interference for a number of reasons, including as a result of the selection and appointment procedure. The judicial appointment process in Tajikistan has been marred by allegations of opacity and political interference.[2324] This

[2316] Human Rights Watch 'World Report 2012: Tajikistan' (*Human Rights Watch,* 2013) <https://www.hrw.org/world-report/2012/country-chapters/tajikistan> accessed 22 September 2018.
[2317] World Bank 'Tajikistan: World View' (*World Bank,* 2018) <http://www.worldbank.org/en/country/tajikistan/overview> accessed 22 September 2018.
[2318] *See generally* Nassim Jawad and Shahrbanou Tadjbakhsh *Tajikistan: A Forgotten Civil War* (Minority Rights Report 2005).
[2319] USCRIF 'Tajikistan 2013' (n1756) 2.
[2320] According to the European Bank of Reconstruction and Development the Tajik judiciary is 'not well resourced', *see* EBRD 'Commercial Laws of Tajikistan' (n1051).
[2321] Ibid.
[2322] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 40-41.
[2323] Human Rights Watch 'World Report 2012: Tajikistan' (n2316).
[2324] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 18-19.

political interference has been permitted in part by lack of formal procedures for judicial selection and appointment to the highest three courts in Tajikistan.[2325] The judicial selection and appointment process also grants significant powers to both the legislative and executive branches of government. The Constitution of Tajikistan affords the President the sole right to propose all candidates to the Supreme Court, Constitutional Court, and Supreme Economic Court.[2326] In turn, the Majlisi Milli (one chamber of the Tajik parliament) has the right to elect those candidates proposed by the President.[2327] This process has granted the President of Tajikistan significant influence over the selection of members to the three highest courts in the country, all of which should be acting as checks and balances on executive actions. Instead those courts are reportedly staffed with 'relatives of high-level officials' who the executive can control.[2328] The President similarly wields significant power over the selection and appointment of judges to other courts in Tajikistan. Under Tajik law, the Council of Justice recommends judges to the President of Tajikistan who then appoints them.[2329] This system was meant to improve the independence of judicial selection and appointment,[2330] however members of the Council of Justice are all appointed and dismissed by the President.[2331] The result of these procedures is that significant power over selection and appointment of Tajik judges lies with the executive branch, in particular with the President of Tajikistan.

Judges have also been left vulnerable to executive interference because of the length of judicial tenure awarded to Tajik judges.[2332] Whilst the length of tenure in Tajikistan improved in 2003, doubling from its initial five year period,[2333] judges have only been granted a term of

[2325] The Constitutional Court, the Supreme Court, and the Supreme Economic Court, *see* Constitution of the Republic of Tajikistan (n1716) Chapter Eight: Courts, Article 69 (8).
[2326] Constitution of the Republic of Tajikistan (n1716) Chapter Eight: Courts, Article 69 (8) 'The President… shall nominate the Chairman, his deputies and judges of the Constitutional Court, Supreme Court, Supreme Economic Court for election and recalling by the Majlisi Mill'.
[2327] Ibid Article 56(2) 'The election and convocation of the Chairman, deputies and judges of the Constitutional Court, Supreme Court and Supreme Economic Court based on the proposal of the President'.
[2328] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 19.
[2329] Constitutional Law On Courts of the Republic of Tajikistan, Law No. 30 (2001 as amended in 2008) Article 97.
[2330] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 18.
[2331] Constitution of the Republic of Tajikistan (n1716) Article 69 (12) states 'The President shall set up the Council of Justice'; Decree of the President of the Republic of Tajikistan 'On Establishing the Council of Justice of the Republic of Tajikistan' (Decree No 48 adopted 14 December 1999 as amended 14 March 2003).
[2332] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 44.
[2333] Ibid.

tenure of ten years.[2334] After this period expires, judges are obliged to seek reappointment.[2335] This process leaves vulnerable to the reappointing authorities, the Council of Justice,[2336] whose membership is determined by the President.[2337] This vulnerability is particularly acute given that the procedures of reappointment are neither transparent nor objective.[2338]

Judges in Tajikistan have also been subject to more direct pressure from the executive branch. Judges have reported that members of the government, and members of the procuracy, who are seemingly unrelated to the case have nonetheless attended trials to ensures that judges are toeing the executive line.[2339] Where members of the executive have been dissatisfied with a judge's performance they have on occasion purportedly opened criminal proceedings against the judge in question.[2340] The continued exertion of influence by the executive branch has meant that the Tajik judiciary has been unwilling to act as a check and balance against the other branch of government. In spite of various legislative provisions which provide for the exclusive authority of the Tajik courts with respect to issues of constitutionality and law,[2341] the Tajik courts have been reticent to exercise that authority. Instead, the Tajik Supreme Court and the Tajik Constitutional Court have elected to hear only a small number of uncontroversial cases each year.[2342]

The unwillingness of the Tajik courts to engage in potentially controversial or divisive issues is also apparent in the content of submissions before the Human Rights Committee to circumvent domestic remedies. In some instances that unwillingness has manifested itself in complete inertia. In those instances various complainants have alleged that despite numerous

[2334] Constitution of the Republic of Tajikistan (n1716) Chapter Eight: Courts, Article 84 '(t)he term of authority of the judges is 10 years'.
[2335] Ibid.
[2336] Law on Courts (TJ) (n2329) Article 108.
[2337] Constitution of the Republic of Tajikistan (n1716) Article 69 (12) reads 'The President shall set up the Council of Justice'.
[2338] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 44.
[2339] Ibid 34.
[2340] Ibid.
[2341] Constitution of the Republic of Tajikistan (n1716) Article 19 'Everyone shall be guaranteed judicial protection. Everyone shall be entitled to consider his case by competent, independent, and impartial court established according the law'; Article 20 'No one shall be considered guilty of a crime except by the sentence of a court in accordance with the law'; Article 87 'Judges shall be independent in their activities and subordinate only to the Constitution and law. Interference in their activity shall be not permitted'; Article 89 (1) 'The system of the Constitutional Court shall be… to determine the conformity of laws'; Article 89 (2) 'The system of the Constitutional Court shall be… to resolve disputes between the state power on their authority'.
[2342] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 26, 28.

appeals, all of those appeals had gone unanswered.[2343] In instances where the courts have exercised their authority, they have been unwilling to challenge the executive. Instead, the courts have invariably found in favour of the state[2344] especially in cases involving issues of human rights or civil liberties violations.[2345] This practice has also been apparent with respect to allegations of torture at the hands of state actors.[2346] In these case incidents of torture have gone largely unchallenged by the judiciary.[2347]

The executive interference in the judiciary has also allowed the Tajik government to use the courts as a vehicle of repression. In this vein the Tajik courts have been utilised to prosecute various individuals and groups who have been perceived as a threat by the Tajik government. These individuals have included human rights lawyers,[2348] members of the political opposition,[2349] and members of the minority Muslim faiths.[2350] Akin to the policy in Kyrgyzstan,[2351] individuals find themselves being charged with crimes relating to extremism,[2352] despite little or no evidence to support those charges.[2353]

In 2015 an opposition political party, the Islamic Renaissance Party of Tajikistan, was banned by a Tajik court after being found to be an 'extremist' organisation.[2354] Alongside disbanding the party, the courts imprisoned around 200 leaders and prominent members of the group.[2355] Similar charges were brought against a member of the opposition movement Group 24 was sentenced to nearly eighteen years in prison on charges of extremism and insulting the President.[2356]

[2343] *Toshev v Tajikistan* (n1526); *Kirpo v Tajikistan* (n1526); *Khostikoev v Tajikistan* (n1526); *Idieva v Tajikistan* (n1526); *Dunaev v Tajikistan* (n1526); *Sattorova v Tajikistan* ((n1526); *Khuseynova and Butaeva v Tajikistan* (n1526); *Ashurov v Tajikistan* (n1526).
[2344] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 28-31.
[2345] Ibid.
[2346] Institute for War and Peace Reporting 'Fighting Against Torture in Tajikistan' (n1717); UNCAT 'Concluding Observations on the Second Periodic Report of Tajikistan' (n1719) paras 11, 13, 19.
[2347] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 30.
[2348] Freedom House 'Tajikistan: Nations in Transit 2016' (n1112).
[2349] Freedom House 'Tajikistan: Nations in Transit 2016' (n1112); USCRIF 'Tajikistan 2013' (n1756) 5.
[2350] USCRIF 'Tajikistan 2013' (n1756) 5-6.
[2351] *See* pp249-249
[2352] USCRIF 'Tajikistan 2013' (n1756) 6-7.
[2353] Ibid.
[2354] Ibid 2.
[2355] Ibid.
[2356] Belafatti 'The Judicial System of Tajikistan' (n1314) 8.

The failure of the executive branch to respect the authority and jurisdiction of the Tajik courts is echoed in its failure to acknowledge or respect the authority and jurisdiction of the Human Rights Committee. The Tajik government has failed on a number of occasions to respond to complaints made before the Committee,[2357] and has ignored requests from the Committee to implement interim measures and postpone the execution of complainants.[2358]

The continuing executive pressure on the judicial has exacerbated by the enduring prosecutorial bias demonstrated by Tajik judges.[2359] The result of this pressure and bias is that the conviction rate in Tajikistan is alarmingly high, and in the first half of 2016 it fell at 99.99%.[2360] The deep-rooted tradition of prosecutorial bias in the Tajik judicial system has resulted in a culture where judges will send back cases for reinvestigation to avoid passing an acquittal,[2361] and routinely accept evidence at trial that has been obtained illegally.[2362] The consequences of this pressure and bias has had significant consequence with respect to the incidence of torture in the country, and has encouraged the practice of the use of torture as a means to compel confessions. In practice Tajik judges routinely rely on forced confessions, rather than evidence obtained 'thorough and impartial investigations'.[2363] The unwillingness of the courts to challenge the use of torture by law enforcement officials,[2364] and the willingness of judges to accepted confessions obtained as a result of torture,[2365] has contributed to a culture of impunity for the crime.[2366] In the rare incidents where a public officials has faced trial for torturing a suspect, the procuracy has routinely charged the perpetrators with less serious criminal offences, such as negligence or abuse of authority.[2367] These charging decisions have gone unchallenged by the courts.[2368]

Finally, it is important to note the significant role that corruption continues to play in undermining judicial independence standards in Tajikistan. The commonplace nature of

[2357] *Sharifova and Burkhonov v Tajikistan* (n1542); *Kirpo v Tajikistan* (n1526).
[2358] *Idieva v Tajikistan* (n1526).
[2359] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 29-31.
[2360] Diplomacy in Action 'Tajikistan 2016' (n1830).
[2361] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 30.
[2362] Ibid.
[2363] Ibid.
[2364] Amnesty International *Shattered Lives* (n1757) 41.
[2365] Ibid.
[2366] Amnesty International 'Torture is 'routine'' (n673).
[2367] International Partnership for Human Rights, Helsinki Foundation for Human Rights, and No Torture Tajikistan *'Key Concerns and recommendations on Torture and Ill-Treatment in Tajikistan* (n1726) 2.
[2368] Ibid.

corruption in Tajikistan has been largely attributed to the low wages awarded to judges in the country.[2369] In 2016, the American Bar Association reported that, despite recent improvements in judicial salaries, wages were not sufficient to support a family or live comfortably.[2370] A 2010 study by the United Nations Development Programme interviewing members of the Tajik public, found that 55% of respondents believed that the outcome of a case would turn on who had the paid the highest bribe to the judge.[2371] This has had a significant knock on effects on the justice system in Tajikistan, and it has been reported that members of the Tajik public have been deterred from utilising the court system as a result of the belief that the informal costs of appearing before a judge were simply too high.[2372]

Like many other CIS member states, Tajikistan continues to face significant obstacles to the realisation of adequate standards of judicial independence standards in practice. One of the primary hurdles has been the financial limitations of the Tajik government and their ability to invest in the judiciary and judicial reform programmes.[2373] These limitations have had a significant impact on the prevalence of corruption in the country.[2374] Alongside corruption, the influence and interference of the executive has been a significant hurdle to judicial reforms in the country. The influence of the executive and the continued prosecutorial bias demonstrated by the Tajik judiciary has had far-reaching consequenecs for the prevalence of torture in the state,[2375] where the judicial authorities have done little to challenge its continued use as an investigative tool or as a punishment for dissidents.[2376] This is particularly apparent given the prevalence of the use of torture against opposition journalists,[2377] members of the political opposition,[2378] and members of religious minority groups.[2379] Instead of challenging this practice, by routinely accepting confessions obtained as a result of torture, Tajik judges have acquiesced to its ongoing use in the country. The effects of prosecutorial bias and executive influence are also reflected, to a lesser extent, in

[2369] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 40-41.
[2370] Ibid 41.
[2371] U4 Anti-Corruption Resources Centre and others 'U4 Expert Answer' (n1357) 5.
[2372] Ibid.
[2373] Human Rights Watch 'World Report 2012: Tajikistan' (n2316).
[2374] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 40-41.
[2375] Amnesty International *Shattered Lives* (n1757) 5; Diplomacy in Action 'Tajikistan 2016' (n2360).
[2376] ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 30; Amnesty International *Shattered Lives* (n1757) 41.
[2377] Amnesty International 'Torture is 'routine'' (n673).
[2378] Amnesty International Public Statement 'Tajikistan: A Year of Secrecy' (n1907); Heathershaw and Lemon (n1907); Freedom House 'Tajikistan: Nations in Transit 2016' (n1112).
[2379] Amnesty International *Shattered Lives* (n1757) 17-18; Bayrum 'Tajikistan: Protestant Pastor' (n1115).

the substance of submissions to exhaust domestic remedies. These submissions reflect concerns about the willingness and ability of the Tajik courts to protect them from executive reprisals for challenging the executive.[2380]

8.8. Uzbekistan

Judicial reform efforts in Uzbekistan have experienced some limited success. The Judicial Reform Programme initiated in 2000 included a number of important legislative reforms, which should have helped to secure effective judicial independence,[2381] including extending the jurisdiction of the Constitutional Court.[2382] Whilst those reforms helped to solidify judicial independence and judicial standards on paper, in practice they have had limited effect and the judicial branch still faces significant problems with respect to independence and impartiality standards.

Like the judiciaries in Tajikistan and Kyrgyzstan the Uzbek judiciary has faced significant issues related to its financing. The Uzbek judiciary has very little influence over the judicial budget,[2383] and this has contributed to very low government spending on the court system.[2384] Wages are similarly meagre.[2385] Members of the judicial branch in Uzbekistan have found themselves unable to challenge the allocation of the court budget as the state budget is a secret,[2386] and members of the executive can lawfully refuse any access to that information.[2387]

Inadequate investment in the judicial budget has contributed to the culture of corruption in the Uzbek judiciary. Corruption in Uzbekistan is particularly pronounced, and in 2017 Transparency International rated Uzbekistan as one of the twenty-five most corrupt countries in the World.[2388] Alongside inadequate investment, another factor that has contributed to the endemic nature of corruption in the Uzbek judiciary is the pervasiveness of corruption across

[2380] *M.N. and others v Tajikistan* (n1478).
[2381] Shin and others (n1115) 88.
[2382] Constitution of Uzbekistan (n1114) Article 108.
[2383] ABA Rule of Law Initiative 'Uzbekistan' (n1124) 17-18.
[2384] Ibid.
[2385] Ibid 18.
[2386] Uzbek Bureau for Human Rights and Rule of Law 'Uzbekistan's Implementation of the CAT' (n1270) 12.
[2387] Ibid.
[2388] Transparency International rated Uzbekistan as the 157th most corrupt country, out of the 180 countries ranked, *see* Transparency International 'Uzbekistan: Corruption Perception Index' (*Transparency International,* 2017) <https://www.transparency.org/country/UZB> accessed 22 September 2018.

the legal sphere. Corruption is reportedly apparent from the very beginnings of the careers of some judges and lawyers, and some candidates have reportedly paid bribes for entry to law schools as well for the grades they received whilst they were there.[2389] Corruption is similarly apparent in the legal profession, and it has been alleged that a number of candidates have paid for judgeships in Uzbekistan.[2390] This foundation of corruption has contributed to a culture of bribe taking in the judiciary, and despite the meagre judicial wage, many judges reportedly own very expensive and lavish homes.[2391] This culture was reflected in a World Bank study in 2011, where nearly 25% of the respondent companies admitted to either 'frequently', 'usually', or 'always' giving unofficial gifts when dealing with the Uzbek courts;[2392] a higher percentage than in any of the other 28 countries surveyed.[2393] Finally, corruption has been allowed to continue unabated in the Uzbek judiciary because there remains no formal procedure for asset disclosure in the country.[2394] The failure of the Uzbekistan government to introduce a compulsory asset disclosure system, despite its accession to the Convention Against Torture in 2008,[2395] has permitted bribery and extortion in the judicial branch to continue without adequate oversight.

Despite both the pervasive nature of corruption in the Uzbek judiciary, and the problems associated with inadequate investment, it is the unwarranted influence and interference of the executive branch in judicial affairs which continues to undermine judicial independence and judicial impartiality more than any other factor. Under the Uzbek Constitution any interference in judicial decision making is prohibited, and is punishable by law.[2396] Under the

[2389] ABA Rule of Law Initiative 'Uzbekistan' (n1124) 27.
[2390] Ibid 7
[2391] Ibid 27.
[2392] The World Bank Trends in Corruption and Regulatory Burden in Eastern Europe and Central Asia (The World Bank 2011) 50.
[2393] Ibid.
[2394] Uzbek Bureau for Human Rights and Rule of Law 'Uzbekistan's Implementation of the CAT' (n1270) 12; Ivana Rossi, Laura Pop, Francesco Clementucci, and Lina Sawaqed *Using Asset Disclosure for Identifying Politically Exposed Persons* (World Bank 2012) 43; Open Society Foundations 'Policy Report: Tackling Corruption in Uzbekistan 2016, A White Paper' (*Open Society Foundations,* 2016) <https://www.opensocietyfoundations.org/sites/default/files/tackling-corruption-uzbekistan-20160524.pdf> accessed 22 September 2018, 38.
[2395] The Convention Against Corruption states 'Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials, *see* Convention Against Corruption (n1340) Article 52(5); United Nations Office on Drugs and Crime (n1339).
[2396] Constitution of the Republic of Uzbekistan (n1114) Article 112; *see also* Article 11 which states 'The principle of separation of powers into the legislative, executive and judicial shall underlie the system of state authority of the Republic of Uzbekistan'; Article 106 'The judicial authority in the Republic of Uzbekistan shall function independently from the legislative and executive authorities, political parties, other public association'; Article 108 'Judges of the Constitutional Court shall be independent in their work and subordinate solely to the Constitution of the Republic of Uzbekistan'.

reform programme of 2000 these provisions were supplemented by various measures expressly aimed at diminishing the influence of the executive in judicial affairs.[2397] Those new laws restricted the power of the Procuracy to unilaterally suspend any judgment that it disagreed with.[2398] However, in spite of these provisions, executive interference in judicial decision-making is commonplace,[2399] especially from the Procuracy and President. [2400] In practice, Open Society Foundations asserted that judge would either rule as result of a bribe, or as the result of pressure.[2401] In those instances, it concluded 'judges have little choice but to comply with whatever decision is demanded'.[2402]

The subjugation of the judicial branch under the Procuracy has been facilitated by ongoing influence over judicial selection and appointment. Reforms were introduced to help secure a more objective selection and appointment process, requiring that judicial candidates have a law degree and experience in the legal profession.[2403] Nonetheless, concerns about its subjective nature remain,[2404] and during the Human Rights Committee's consideration of Uzbekistan's report the delegate from Sweden expressed concerns that the judicial branch was apparently 'stuffed' by friends and acquaintances of prominent government officials.[2405] Problems with the judicial selection and appointment process were officially acknowledged in 2017, and a Presidential Decree issued a number of reforms.[2406] As part of those reforms a new judicial selection and appointment body was created, the Supreme Judicial Council, with the express intention of increasing the independence of the judicial branch.[2407] However, those reforms were limited in practice, and Supreme Judicial Council still affords the executive branch significant influence over judicial selection and appointment, as it is comprised of members of law enforcement agencies.[2408] This also has significant

[2397] Shin and others (n1115) 88.
[2398] Law of the Republic of Uzbekistan On Procuracy No 746-XII (1992), Article 41, repealed by Law of the Republic of Uzbekistan On Procuracy No 257-II (2001), Article 13.
[2399] Uzbek Bureau for Human Rights and Rule of Law 'Uzbekistan's Implementation of the CAT' (n1270) 11.
[2400] Shin and others (n1115) 88.
[2401] Open Society Foundations 'Tackling Corruption in Uzbekistan' (n2394) 38-39.
[2402] Ibid.
[2403] Law of the Republic of Uzbekistan On the Constitutional Court of the Republic of Uzbekistan No 446-ZRU (1995 as amended in 2014) Article 12.
[2404] UN Human Rights Committee 'Concludes Consideration of Uzbekistan's Third Report' (n1425).
[2405] Ibid.
[2406] Presidential Decree 'On Measures on Further Reforming the Judiciary, and on Enhancing Guarantees for Solid Protection of Rights and Freedom of Citizens' (*Ambassade De La Republique D'Ouzbekistan En France,* 2017) <https://ouzbekistan.fr/en/information-digest-of-press-of-uzbekistan-december-11-2017/> accessed 22 September 2018.
[2407] Ibid.
[2408] Amnesty International 'Uzbekistan: Effective Reforms Need to Address Accountability for Past Abuses' (*Amnesty International,* May 2018)

ramifications for judicial discipline and dismissal in Uzbekistan; effectively granting members of law enforcement a say in which judges should receive reprimand.[2409]

The length of tenure in Uzbekistan has amplified the power awarded to the executive. Tenure in Uzbekistan remains temporal, and is awarded for a mere five years,[2410] leaving judges reliant on the executive branch for reappointment.[2411] The tenure of five years for judges also represents a reduction from the tenure awarded to Soviet judges before the fall of the Soviet Union.[2412]

The executive also exerts more direct influence over the judiciary. Representatives of the President regularly attend judicial meetings, ostensibly to observe how instructions to lower courts are developed.[2413] This attendance has however had a 'chilling effect' on judicial independence.[2414] In addition, despite legislative reforms, in practice judges are still dismissed if a number of their decisions are reversed.[2415]

As a result the Uzbek judiciary has remained beholden to the Procuracy,[2416] and has failed to adjudicate cases impartially.[2417] In instances where Prosecutor's appeal a decision, they are successful around eighty per cent of the time.[2418] Similarly, in Habeas Corpus hearings judges consistently rule with the Prosecutor,[2419] and will sometimes pass judgments that exactly replicates the notes of the Prosecutor in the case.[2420] As part of recent Presidential reforms the presumption of innocence has been encouraged in Uzbek courts,[2421] however in 2017, over a ten month period across the entire country, only 191 acquittals were passed.[2422]

<https://www.amnesty.org/download/Documents/EUR6278372018ENGLISH.PDF> accessed 22 September 2018.

[2409] Ibid.

[2410] Constitution of the Republic of Uzbekistan (n1114) Article 107.

[2411] UN Human Rights Committee 'Concludes Consideration of Uzbekistan's Third Report' (n1425); Freedom House 'Uzbekistan 2018' (n1550).

[2412] *See* pp92

[2413] ABA Rule of Law Initiative 'Uzbekistan' (n1124) 26.

[2414] Ibid.

[2415] Ibid 14.

[2416] Ibid.

[2417] Ibid.

[2418] Ibid.

[2419] Human Rights Watch 'No One Left to Witness' (n1265).

[2420] Ibid.

[2421] Presidential Decree 'On Measures Further Reforming the Judiciary' (n2406).

[2422] Ibid.

Given the significant influence the executive has over the judiciary, the judicial branch has been understandably reticent to challenge unlawful government actions. Despite being awarded jurisdiction over the constitutionality of a number of legal issues,[2423] the Constitutional Court has repeatedly declined to make decisions on a number of politically controversial legal issues.[2424] In 2016, after the death of the President, the Prime Minister of Uzbekistan took the office of interim President, in violation of the Constitution.[2425] In that instance, the Constitutional Court exercised its right to decline jurisdiction and refused to pass judgment.[2426]

The Soviet legacy of prosecutorial bias demonstrated in criminal cases alongside the continued executive dominance over the judicial branch, has resulted in a situation whereby the courts have been unwilling to challenge incidents of torture.[2427] Courts in Uzbekistan regularly accept confessions obtained under torture,[2428] and instead attribute allegations made before them to an attempt by defendants to excuse their guilt.[2429] In these situations judges have consistently concluded that these allegations of torture are unfounded,[2430] even when faced with compelling evidence otherwise.[2431] The pervasive nature of torture within the justice system was acknowledged by the Human Rights Committee, which urged the Uzbek judiciary and government to ensure that the prohibition on confessions obtained under torture and other 'torture-tainted evidence'[2432] is effectively enforced in practice.[2433] Applications to

[2423] Constitution of the Republic of Uzbekistan (n1114), Article 108 states 'The Constitutional Court of the Republic of Uzbekistan shall hear cases relating to the constitutionality of acts of the legislative and executive authorities'.
[2424] Freedom House 'Uzbekistan' (n1119).
[2425] Ibid
[2426] Ibid.
[2427] Amnesty International 'The State of the World's Human Rights 2016/2017' (*Amnesty International* 2017) <https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF> accessed 22 September 2018, 391-392.
[2428] Ibid.
[2429] Ibid.
[2430] Ibid.
[2431] Ibid.
[2432] UNHRC 'Concluding observations on the fourth periodic report of Uzbekistan' (n1864) para 14(c).
[2433] Ibid.

the Human Rights Committee also reflect the practice of torture to obtain confessions,[2434] and its use to punish dissidents and opposition members.[2435]

Despite various reform efforts in the country, the Uzbek judiciary continues to face significant challenges with respect to its *de facto* standards of judicial independence and impartiality. The Soviet tradition of executive influence and interference in judicial decision-making remains a significant problem in Uzbekistan, and has undermined the role that the Uzbek judiciary should play in the protection of human rights and civil liberties. The commonplace nature of torture in Uzbekistan can be attributed, at least in part, to a combination of unwillingness of the Uzbek judiciary to challenge incidents of torture and the readiness of the courts to accept confessions allegedly made as a result of torture. The result is that torture plays such a central role in the Uzbek justice that purpose-built torture cells, adjacent to or part of police stations in Uzbekistan, are not uncommon in the country.[2436]

Judicial independence standards have also been compromised by the culture of corruption in the Uzbek judiciaries, which has gone without adequate oversight and accountability. As a result, there is little public confidence in the judiciary, and instead there is an underlying belief that judicial decisions are reached as a result of bribery or leverage.

[2434] *Ortikov v Uzbekistan* (26 October 2016) Communication No 2317/2013 CCPR/C/118/D/2317/2013; *Musaev v Uzbekistan* (6 June 2012) Communication Nos 1914, 1915, and 1916/2009 CCPR/C/104/D/1914/1915&1916/2009; *Allaberdiev v Uzbekistan* (18 May 2017) Communication No 2555/2015 CCPR/C/119/D/2555/2015; *Kashtanova and Slukina v Uzbekistan* (28 October 2016) Communication No 2106/2011 CCPR/C/118/D/2106/2011; *Lyashkevick v Uzbekistan* (n1542)
[2435] *M.T. v Uzbekistan* (23 July 2015) Communication No 2234/2013 CCPR/C/114/D/2234/2013; *Umarov v Uzbekistan* (n1542); *Eshonov v Uzbekistan* (22 July 2010) Communication No 1225/2003 CCPR/C/99/D/1225/2003.
[2436] Amnesty International 'Secrets and Lies: Forced Confessions under Torture in Uzbekistan' (n1727).

Conclusions

The experiences of CIS member states have varied significantly. At one end of the spectrum Armenia has made significant progress with respect to judicial reforms. These reforms have included significant legislative amendments since the Soviet era, including efforts to secure adequate judicial wages, the exclusive authority of the judicial branch over legal issues and human rights, and lengthy tenure to help insulate judges from external influences.[2437] At the other end of the spectrum, countries including Belarus, Kyrgyzstan, Tajikistan, and Uzbekistan have struggled to achieve judicial independence and impartiality standards in practice. The hurdles to those judicial reform efforts in each country have been different. In Uzbekistan, the continued exertion of overt influence by the executive branch has dissuaded the judicial branch from fulfilling its role as a check and balance on the Uzbek government.[2438] In Tajikistan, the courts are routinely utilised as a weapon to act as instruments of repression.[2439] In those instances, the Tajik government has misused judicial authority as both a deterrent and sanction against perceived threats, including against members of the political opposition and journalists in the country.[2440] In Belarus, the unwillingness of the courts to challenge police and members of the procuracy when defendants have alleged that their confessions were obtained under torture is particularly concerning, given the continued use of the death penalty in the country.[2441] However across all states in the study a number of themes are apparent. Primarily, judicial corruption continues to represent a significant issue in the majority of CIS member states, despite improvements in judicial wages in those countries.[2442] In addition, CIS governments continue to exert significant influence over judicial decision-making, in spite of legislative reforms in many of those countries.[2443]

There are a number of factors that have contributed to the failure to secure *de facto* judicial independence and impartiality in CIS member states. The traditions of democracy, separation

[2437] *See* pp
[2438] *See* pp
[2439] *See* pp
[2440] *See* pp
[2441] *See* pp
[2442] *See* pp ; It is worth acknowledging that in Belarus the culture of judicial corruption seems to be far less prevalent, *see* pp.
[2443] *See* pp

of powers, and judicial independence in these states are comparatively young.[2444] There is no strong foundation on which to build these principles, and they are not ingrained in judicial or executive behaviour. Instead these judiciaries are built on, and have inherited, the legacy of the USSR.[2445] Many aspects of the Soviet mentality are still visible as undercurrents in modern CIS judicial thinking. In particular vestiges of deference to the procuracy[2446] and executive,[2447] and the idea that judges are 'public officials' of the government remain apparent.[2448]

In addition, the continued executive control over CIS judiciaries bestows CIS governments with significant power. It assures those executive branches that the judicial branch will not act as a challenge or hurdle to the unconstitutional actions of the government; thereby insulating them from unwanted consequences and costs. Furthermore, it allows CIS governments to utilise the judiciary as a weapon of repression. Not only does this bestow the government with another method of repression, but it cloaks that repression with an air of legal legitimacy.

The culture of secrecy that surrounded Soviet incidents of non-independence and non-impartiality, remains apparent in CIS states to this day. The executive branch of the USSR went to great pains to illustrate judicial independence, making statements regarding its implementation,[2449] and enacting legislation that should have effectively protected that standard.[2450] Similarly in CIS states there has been comprehensive enactment of legislation purportedly protecting judicial independence.[2451] Members of various CIS governments have also made various statements emphasising their respect for judicial independence,[2452] and members of affected judiciaries deny the existence of problems undermining judicial

[2444] Adam Bodnar and Eva Katinka Schmidt 'Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia' in Institute for Peace Research and Security (ed) *Yearbook of the Organization for Security and Co-Operation in Europe 2011* (Baden-Baden, 2012) 291.
[2445] USAID 'Kazakhstan Judicial Assistance Project' (n1034) 29; *see* pp
[2446] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) 59.
[2447] USAID 'Kazakhstan Judicial Assistance Project' (n1034) 29.
[2448] Shin and others (n1115) 95.
[2449] Boylan (n699) 1330.
[2450] Constitution of the Union of Soviet Socialist Republics (n1211) Article 153; *also* Fundamental Principles on Court Organization of the USSR (n710) Articles 4, 5, 10; Law of the USSR: On the Status of Judges (n711) Article 5(2).
[2451] See pp122-128.
[2452] Bodnar and Schmidt (n699), 292-293; see also the statements of Mr Rakhmonov in UN Human Rights Committee 'Concludes Consideration of Uzbekistan's Third Report' (n1425) para 10.

independence.[2453] With these legacies still haunting CIS judiciaries, it is unsurprising that many of the problems that afflicted the Soviet judiciary continue to impact judiciaries built upon that foundation.

Alongside these issues, efforts to undermine judicial independence and judicial impartiality in CIS states have benefitted from the ambiguities of those standards. For external organisations like the UN, the American Bar Association, and OSCE seeking to quantify and measure the progress of standards of judicial independence and impartiality in CIS member states the task is a difficult one. Measures of *de facto* progress a state makes towards judicial reform is an inherently imperfect science.[2454] Difficulties arise from the fact that in 'different legal cultures certain issues are more or less relevant',[2455] current measures inevitably rely on formal indicators that do not match reality,[2456] and the relative scarcity of information available in developing countries.[2457] All of these factors allow governments to disguise and conceal inadequacies in, and deliberate attempts to thwart, judicial independence and impartiality standards.

The requirements for change are similarly multifaceted. For judicial independence measures to be truly respected and implemented in CIS countries there must first be recognition from both the executive and the judiciary of the indispensable role the judicial branch plays as the gatekeeper to ultra vires executive or legislative action.[2458] This shift in attitude, both amongst members of the government and amongst members of the judiciary, will inevitably take some time. As Bodnar and Schmidt concluded, 'rule of law and judicial independence are features of a democratic state that cannot be achieved all at once'.[2459]

Long-term shifts in attitude will need to occur 'from the ground up'. This demands investment in the judicial branch. In several CIS member states some judges still live in relative poverty,[2460] and others are paid less than members of the procuracy and police.[2461] Until judicial salaries and judicial buildings reflect the prestige of the judicial position, there

[2453] See ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n677) 55.
[2454] Larkins (n26) 605, 611.
[2455] ABA Rule of Law Initiative 'Judicial Reform Index for Armenia' (n354) i.
[2456] Ibid.
[2457] Ibid ii.
[2458] Forsyth (n235) 122-140.
[2459] Bodnar and Schmidt (n699) 291.
[2460] Shin and others (n1115) 94.
[2461] Ibid.

will not be a culture that condemns behaviour that brings the judiciary into disrepute.[2462] Additional investment in judicial education,[2463] in particular ensuring that judges are effectively educated as to their role in the separation of powers and their responsibility to operate as an objective forum, will help to erode ingrained attitudes.

There is room for the amendment and improvement of legislation providing for judicial independence and impartiality in a number of CIS states,[2464] including the provision of blanket lifetime tenure, adequate protection from executive dismissal or discipline, and true transparency in selection and appointment of judges.[2465] However, the experience of the Soviet judiciary and CIS judiciaries today clearly demonstrates that *de jure* provisions are insufficient on their own to secure *de facto* judicial independence. To this end, delegates at the Human Rights Committee have concluded that that priority should be given to enforcing laws, not just writing them.[2466]

Despite the various challenges faced by CIS countries, there have been some improvements with respect to both judicial independence and impartiality standards. However, there are significant chasms in practice that need addressing. This is reflected in the Freedom House scores assigned to these states for the respective judicial independence standards in those countries. Those scores range from between 6.25[2467] and 7.00[2468] (7.00 representing the lowest level of judicial independence possible).[2469] It is also apparent in the public levels of trust felt in the judiciary in those countries, which tends to be very low.[2470] Importantly however, the effects of problems securing judicial independence and impartiality standards are not left at the door of judiciary. Instead the ramifications are felt by citizens of CIS member states in a variety of ways; including in their complaints to international human rights bodies and in the incidence of torture in those countries. Where there is inadequate

[2462] Robertson (n882) 107-110.
[2463] Bodnar and Schmidt (n699) 293.
[2464] Ibid 289.
[2465] Shin and others (n1115) 95.
[2466] UN Human Rights Committee 'Human Rights Committee Concludes Consideration of Uzbekistan's Third Report' (n1199).
[2467] Kyrgyzstan scored 6.25, see Freedom House 'Kyrgyzstan: Nations in Transit 2016' (n1104); Kazakhstan scored 6.50, see Freedom House 'Kyrgyzstan: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/kazakhstan> accessed 28 June 2017.
[2468] *See* Freedom House 'Belarus (2016)' (n1294); Freedom House 'Azerbaijan: Nations in Transit 2016' (*Freedom House,* 2016) <https://freedomhouse.org/report/nations-transit/2016/azerbaijan> accessed 28 June 2017; Tajikistan scores 6.75 see Freedom House 'Tajikistan: Nations in Transit 2016' (n1112).
[2469] *See* ibid.
[2470] Freedom House 'Azerbaijan: Nations in Transit 2014' (n1291).

judicial independence and impartiality complainants will not be able to exhaust judicial remedies. Similarly, until the exclusive authority of the courts are properly respected, the exhaustion of domestic remedies process will be plagued by responses from the respondent States demanding that complainants utilise the supervisory review process. Similarly, where continued prosecutorial bias and deference to the executive branch prevent CIS judicial branches challenging executive overreach, then torture as a punishment for dissidents or as a means bt which to extract confessions, will continue unchallenged.

This thesis has explored judicial reform efforts in CIS member states, and the impact that the success of those reforms has had on applications to circumvent domestic remedies and the incidence of torture in those countries. In Part I of the doctorate, the theories of this thesis are explored. Part I includes a comprehensive introduction to judicial independence and impartiality, and a detailed discussion of both the exhaustion of domestic remedies rule and torture. It operates to explore the relationship between the three pillars of this study: judicial independence and impartiality, the exhaustion of domestic remedies rule, and torture.

The first chapter explores the rich and long history of judicial independence and impartiality, in particularly acknowledging the renewed interest in those standards after both the Second World War and more recently after the Cold War. It then goes on to examine the theories of judicial independence and impartiality. Various theories are explored, including the separation of powers theory and the rule of law theory, acknowledging the integral role of the judiciary as both an essential check and balance on the executive and legislative branches, and as the institution necessary to ensure the rule of law. The merits and demerits of both open impartiality and closed impartiality were also discussed, and it was acknowledged that neither iteration can truly account for the inherent bias of all persons and all judges. The chapter then addressed the enduring nature of judicial independence and judicial impartiality and attempted to dissect the reasons why the international community continues to attach such importance to those standards. The chapter finally acknowledged the importance of the right to appear before an independent and impartial tribunal as both a right unto itself, and as an integral mechanism to ensure the adequate protection of other human rights standards.

The second chapter went on to explore the complexities and problems associated with judicial independence and impartiality standards in practice. The chapter first acknowledged the difficulty enforcing human rights standards more generally. The chapter concluded that

problems with enforcement were in part due to the horizontal nature of human rights under international law. In addition, it was acknowledged that violations of human rights standards are often beneficial to members of the executive and legislative branches. In particular, human rights violations as acts of political repression allow governments to unlawfully sanction acts of opposition and deter any further acts of resistance. The chapter then went on explore the reasons why judicial independence and impartiality standards are specifically violated by regimes. It was first acknowledged that an independent and impartial judiciary represents a significant threat to a rights-abusing government, given its role as a supervisory body holding the government to account for overreach and abuse of power. It was acknowledged that judicial independence is particularly vulnerable in semi-consolidated regimes like those in CIS member states, where the dominant position of the executive branch has negated the possibility of neutral body to hold the government to account. The chapter then went on to explore the difficulties associated with monitoring judicial independence and impartiality standards in practice; noting that difficulties in monitoring were in part because of the complexity of those standards and the various preconditions necessary for them to be achieved in reality. The chapter explored the dual aspects of institutional independence and individual independence, and broke down individual independence into decisional independence and judicial corruption to further understand the various necessary preconditions. It then went on to explore judicial impartiality and discussed the subjective and objective qualities of that standard. The chapter concluded by examining the inherent tensions between judicial accountability for judicial impartiality and judicial corruption on one hand and the need for judicial independence on the other. It also acknowledged the difficulties associated with exposing problems with those standards, in part because of the imprecise nature of judicial independence and impartiality, and in part because of the culture of secrecy and embarrassment surrounding incidents where those standards have been undermined.

The third chapter explored the extensive and far-reaching effects that judicial independence and impartiality standards have in practice. The first part of the chapter explored the exhaustion of domestic remedies rule, and the impact that inadequate standards of judicial independence and impartiality can have on this process. The chapter introduced the exhaustion of domestic remedies rule and sought to rationalise its transposition to the international human rights sphere. The merits of that transposition were explored, and the necessity of judicial independence and impartiality to rationalisations of the exhaustion rule

were acknowledged. The various exceptions to the exhaustion of domestic remedies rule were then explored, and the relationship between those exceptions and judicial independence and impartiality were examined. The chapter particularly highlighted the far-reaching effect that ineffective remedies and judicial independence and impartiality have in the context of remedies that are deemed to be ineffective; noting that in instances where judicial independence and impartiality are not present in a state, judicial remedies will not offer the complainant a reasonable prospect of success. The chapter then explored the far-reaching impact judicial independence and impartiality standards can have on the incidence of torture in the state. This section began by analysing the long history of torture, acknowledging its use across centuries and across the globe. The section then turned to the consequences of standards of judicial independence and impartiality on the incidence of torture in a state. It then concluded that inadequate standards of judicial independence and impartiality would result in a failure to secure a neutral mechanism to hold the executive and legislative branches of government to account. The chapter determined that in countries where adequate standards of judicial independence and impartiality have not been secured, torture may continue unchallenged, unchecked, and without cost to the executive, allowing its use to become endemic. It particularly noted that without effective judicial independence and impartiality there is serious risk that there will be a culture of impunity for acts of torture in the state. The chapter concluded by examining the various research methods which would be utilised to analyse the content of submissions to circumvent the exhaustion of domestic remedies in the respondent CIS state and the methods that would be used to understand the prevalence of torture in those countries.

Part II of this thesis moved onto the case studies, examining these theories with respect to the data gather from the experience of judiciaries in CIS member states. The third chapter reported on judicial independence and impartiality standards in the Soviet Union, recognising this as the foundation and starting point of judicial independence and impartiality standards in CIS member states today. The chapter found that in practice, judicial independence and impartiality standards were routinely undermined, and that the Soviet judiciary was not fit for purpose with respect to either the separation of powers, or as an enforcement mechanism for the rule of law. The chapter explored the effects of Marxist-Leninist theory on the Soviet judiciary noting that, despite proclamations of change from the previous poor standards under the Romanovs, the Communist ideology did not allow for a body independent from the totalitarian government. It then examined the *Perestroika* reforms, noting the limited effects

of those reforms in reality. The chapter concluded that both institutional and individual independence were routinely compromised in the USSR. In particular, it was concluded that the Soviet judiciary was not provided with financial autonomy nor with exclusive authority over legal matters. The chapter then went onto examine individual independence in the Soviet Union, and it was determined that various aspects of decisional independence were undermined by both the Communist party and by members of local government. The section attributed this to compromised selection and appointment procedures, inadequate tenure, poor judicial wages, and rampant interference from members of the executive in judicial decision making. The chapter went onto conclude that there were also significant problems with judicial corruption in the country. It was noted that judicial bribe-taking was common, and there was not a culture in place that could challenge corrupt activity. The chapter finally addressed the issue of judicial impartiality in the USSR, noting that this to was fundamentally inadequate. It particularly highlighted the astonishingly high conviction rates, the blurred role between the prosecutor and the judge, and the culture of 'favours' which compromised judicial bias. The chapter concluded by reiterating the many failings of judicial independence and impartiality standards in the country and acknowledging the precarious foundations on which judicial reforms in CIS states were based.

The fifth chapter examined the extent of change in modern day CIS member states. The chapter began by acknowledging the international pressure on those states to reform both democratic and human rights standards. It then tracked the legislative reforms and judicial reform programmes in each country in this study, noting that there had been both legislative reforms and judicial reform programmes in each state. It then went on to examine the success of those reforms. The section began by examining the standards of institutional independence in CIS member states, noting that in some states significant financial investment had been introduced to the judicial branches whilst in others the financing of the judiciary was far less adequate. Similarly, it was concluded that in some CIS states legislative reform had provided for the exclusive authority of the respective judicial branch, whilst in others significant legal reforms were still required. The chapter acknowledged similar problems in the individual independence of CIS judges. Whilst it was noted that reforms to the judicial selection and appointment processes in CIS member states were generally an improvement on the Soviet model, there were still issues with respect to transparency, subjectivity, and the composition of judicial selection bodies in many states. It also noted that in some CIS states the respective President have been awarded significant input into the appointment of judges. Similarly, it

was concluded that, whilst the award of tenure has generally been greatly improved, issues of temporal tenure and probationary tenure were apparent in a number of CIS states. It was also noted that, despite reforms with respect to tenure, in some states judicial disciplinary and dismissal proceedings were still abused by executive branches to remove judges for political reasons. The chapter did conclude however, that judicial wages had seen improvement across all of the states in this study. It noted that generally wages were commensurate with the status of a judge but noted that in some states further reforms would be welcomed. However, the chapter concluded that in all states in the study there continued to be significant interference in judicial matters from the respective executive branches. This section acknowledged that executive interference was a product of both legislative inadequacies, and as a result of adequate legislative provisions being undermined in practice. It was particularly noted that this had resulted in the abuse of the judiciary in all CIS states to prosecute individuals deemed to be a threat to the rule of the executive, including journalists, politicians, and members of religious and racial minorities. The chapter also acknowledged significant problems with respect to judicial corruption in CIS member states. The chapter noted the varies experiences of CIS states in this respect, concluding that Armenia and Belarus had seen significant improvement, whereas other judiciaries have been described as being 'pervasively corrupt'. The chapter finally went on to acknowledge judicial impartiality standards in CIS member states. It noted across all the states in the study the phenomenon of accusatory bias remained, resulting in extremely low acquittal rates. It did however note significant improvement in legislative standards which provided for the singular role of judges in those countries.

The sixth chapter went on to explore the effect that judicial reforms had had on the content of applications to circumvent domestic remedies in CIS member states. It acknowledged the various human rights bodies where an individual could make an individual complaint and analysed the three-way dialogue that takes place between the individual, the respondent state, and the human rights body in instances where the individual applies to circumvent domestic remedies. It noted that in a number of CIS states complainants had alleged that domestic remedies had been unreasonably prolonged, and this was attributed in part to the relative immaturity of judicial remedies in those countries. The chapter then went on to explore the impact on inadequate judicial independence and impartiality standards on applications to circumvent domestic remedies on the basis that those remedies were ineffective. It noted that in a number of complaints, it was alleged that the respondent judiciaries would be ineffective

at protecting the complainant or their family from reprisals. The section also explored submissions where the remedies were ineffective because they offered no reasonable prospect of success as a result of a culture of ruling in favour of the respondent state, or a lack of willingness to investigate claims. The section then went onto examine submissions which had alleged that remedies were unavailable, and noted that those reasons varies from financial unavailability, and temporal unavailability. The chapter again concluded that the unavailability of judicial remedies in those instances may well be indicative of an immature system of justice in the respective state. The chapter went on to examine the response of the respondent state to submissions to circumvent domestic remedies. This section shed particular light on a number of issues. Firstly, it showed that some CIS governments were very disingenuous in the interpretation of exhaustion. Secondly, however, it showed a trend in Belarus, Kazakhstan, Kyrgyzstan, and Uzbekistan to challenge admissibility on the basis that the complainant had not utilised the supervisory review process in that state. The chapter acknowledged that this flew in the face of the jurisprudence of international human bodies and demonstrated an unwillingness to recognise the exclusive authority of the respective judicial branch, and the *res judicata* nature of a judicial decision. The chapter particularly highlighted the concerning attitude of the Belarusian government, which had routinely challenged on the basis of the supervisory review process, and then refused to acknowledge the competence of the Human Rights Committee when it examined the merits of the complaint. The chapter concluded that both the submission of the individual and the response of the states had provided a useful insight into the far-reaching impact of judicial independence and impartiality standards in the respondent state. It also concluded that those submissions and responses demonstrated the wide-reaching effects that those standards have in practice, given the tension that those standards have caused on the international stage.

The seventh chapter went on to explore the extent of judicial independence and impartiality reforms with respect to the incidence of torture in CIS member states. The chapter first acknowledged and documented the pervasive nature of torture in the Soviet Union, noting its use as a weapon of both deterrence and punishment for acts of dissent. The chapter then explored the various legislative reforms which sought to prohibit torture and other cruel, inhuman, and degrading treatment in CIS member states, noting that some significant legislative gaps remain in place in some states. The chapter then went onto examine the incidence of torture in CIS member states, noting that reports of torture were present in all countries in the study. However, the chapter acknowledged that experiences had varies

immensely, and in some countries incidents of torture were isolated, whereas in others torture was described as being endemic. The chapter then explored the acts of torture in those states, noting that it was used as both a punitive measure against individuals in police custody, and that it took place in the absence of effective oversight. The section particularly noted the use of torture by members of CIS police forces, in CIS prisons, and in the armed forces of some CIS member states. The chapter then identified a number of themes with respect to the effects of standards of judicial independence and impartiality on the incidence of torture in those countries. Firstly, it noted that torture was regularly utilised to extract confessions that, as a result of prosecutorial bias, were routinely accepted by CIS courts. Secondly, the chapter noted that torture is routinely utilised to punish and deter groups and individuals deemed to be a threat to the executive. In this instance, the inability of the courts, given their continued subjugation to the executive branch, to challenge this practice. It concluded that this unwillingness had resulted in a culture of impunity for torturers in those countries. The chapter noted that the routine acceptance of confessions allegedly obtained as a result of torture by CIS judiciaries has both allowed and encouraged members of CIS police forces to continue using torture as an investigative tool.

The final chapter reported on the experiences of each country in more detail, dealing with each state in turn. With respect to Armenia, the chapter concluded there had been moderate success, but noted that improvements with respect to judicial corruption and executive interference were still necessary, in particular with respect to ending incidents of torture in the country. With respect to Azerbaijan, the chapter noted that there were still concerns about the probationary system for new judges, and with the continued and pervasive interference of the executive in judicial matters. It noted that this interference was facilitated in part by the influence of the Ministry of Justice in both judicial selection and appointment, and in judicial discipline and dismissal proceedings. The chapter expressed particular concern about the situation in Belarus. It noted that in practice, reforms have had very limited success and that executive interference in the judiciary was particularly commonplace. The section particularly criticised legislative provisions which granted the President significant influence over judicial selection, judicial discipline, and the implementation of judicial decisions, thereby undermining the exclusive authority of the judicial branch. It noted that that these problems were reflected in the response of the Belarusian government to applications to circumvent domestic remedies in Belarus, which openly disregarded the exclusive authority of the courts to examine legal matters. The chapter also expressed concern about ongoing

interference of the President and executive in the Kazak judiciary, in particular highlighting the establishment of the Constitutional Council and the power of the President with respect to judicial appointments and judicial discipline. It noted that the dominant position of the executive over the Kazakh judiciary was apparent in the unwillingness of the judicial branch to challenge allegations of torture. In Kyrgyzstan, similarly issues with respect to the Constitutional Chamber, and the power awarded to the President were also raised. The chapter particularly raised concerns about the abuse of the judiciary to prosecute 'enemies' of the Kyrgyz government, the failure of the courts to challenge human rights abuses including torture, the endemic nature of judicial corruption, and the accusatory bias in the country. The chapter then addressed Tajikistan, noting that legislative reforms had been inadequate and granted the executive and President far too much influence over judicial matters. It particularly highlighted the ten-year term of tenure for Tajik judges, noting that this was inadequate to secure judicial independence in practice. The analysis particular highlighted the ongoing subjugation of the judiciary and its ongoing prosecutorial bias as having consequences with respect to the use of the courts as weapons, alarmingly high conviction rates, and impunity for torture in practice. Finally, the chapter addressed reforms in Uzbekistan, noting some limited success. It noted however, that there had not been adequate investment in the judiciary, which had in part contributed to the pervasive nature of corruption in the Uzbek courts. The chapter noted that executive interference was commonplace, and in part as a result of legislative inadequacies, including deficient standards of judicial tenure and the presence of the Uzbek government at trials.

This thesis has highlighted the crucial nature of judicial independence and impartiality, the complexity of those standards, and the far-reaching effects that those standards have in practice. The thesis has particularly endeavoured to try and demonstrate the myriad of ways in which judicial independence and impartiality can be undermined, and the significant gaps between legislative provisions and the standards realised in practice. It has traced reforms from the Soviet era and sought to understand the impact of the success of those reforms by looking at the impact that they have had on submissions to circumvent domestic remedies, and on the incidence of torture in a state. There are various conclusions. It is clear that judicial independence and impartiality play a crucial role in the protection of human rights standards, and that the importance attached to them throughout history has not been unwarranted. It is similarly clear that, whilst some reforms have experienced success, in practice, many elements of judicial independence and impartiality have not been realised in

CIS member states. Finally, the ramifications of those failings are felt far beyond the courts, and those effects have leaked into the jurisprudence of international human rights bodies and into the incidence of torture in those countries.

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